

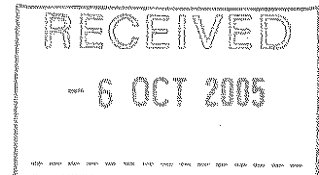


Australian Government
Attorney-General's Department

Deputy Secretary
National Security and
Criminal Justice

05/13801

6 October 2005



Mr Jonathan Curtis
Committee Secretary
Parliamentary Joint Committee on the Australian
Crime Commission
Parliament House
CANBERRA ACT 2600

Dear Mr Curtis

**Review of the *Australian Crime Commission Act 2002* - Attorney-General's Department
submission to the Parliamentary Joint Committee on the Australian Crime Commission**

Please find attached a copy of the Attorney-General's Department submission to the Review of the *Australian Crime Commission Act 2002*.

The Department will be happy to provide clarification or further information to the Committee, either in writing or at the Canberra hearing on 7 October 2005.

The action officer for this matter is Michael Manning who can be contacted on 02 6250 6795.

Yours sincerely

Miles Jordana

PARLIAMENTARY JOINT COMMITTEE ON
THE AUSTRALIAN CRIME COMMISSION

REC'D: 6 OCT 05 -

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SECRETARY:

Review of the *Australian Crime Commission Act 2002* -

Submission from the Attorney-General's Department to the
Parliamentary Joint Committee on the
Australian Crime Commission

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Introduction

1. The Attorney-General's Department (the Department) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on the Australian Crime Commission (the Committee) under the Committee's Review of the *Australian Crime Commission Act 2002* (the Act).
2. The Australian Government proposed establishment of the Australian Crime Commission (ACC) 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 coordination of investigative and intelligence taskforces as approved by the ACC Board. The Department considers that the ACC is meeting these objectives.
3. The ACC has made a significant contribution to the national coordination of criminal intelligence and the investigation of nationally relevant organised crime in Australia. In the nearly three years that it has been in operation, the ACC has provided a unique flow of intelligence and other valuable inputs that have enhanced policy formulation on several major national criminal threats the Australian Government has worked to address.
4. The Department considers that the Act has enabled the development of positive and productive relationships between the Department and the ACC. Effective liaison and consultation arrangements have been established at all levels between the two agencies. We look forward to continuing and building on our good relationship with the ACC.
5. The Department's detailed comments are set out below against each of the issues raised by the Review's Terms of Reference.

The effectiveness of the investigative, management and accountability structures established under the Act, including:

Australian Crime Commission

6. The most obvious issue in relation to the effectiveness of the ACC's investigative functions is what impact they have on organised crime in Australia in terms of the investigation and prosecution of members of organised criminal groups, whether directly by the ACC and ACC task forces, or indirectly by the provision of intelligence that feeds into the operational work of other law enforcement agencies. This is an issue on which the operational agencies will be in a better position to comment than the Department.
7. The ACC's investigative functions also generate 'big picture' intelligence that helps develop an understanding of the way in which aspects of organised crime operate. This type of intelligence is needed to develop broad policies and whole-of-government approaches to major criminal challenges, including enhancement of the effectiveness of

operational law enforcement measures. This is the area in which the Department is best able to comment on the effectiveness of the ACC's investigative performance.

ACC's Contribution to National Policy Development

8. The ACC, through its criminal intelligence function, is fulfilling an important role of supporting and informing Government policies and decision-making on nationally significant criminal threats.

9. The decision to make the coercive examination powers available for use in ACC intelligence operations has been fully justified. The conduct of examinations to develop strategic intelligence on matters such as Amphetamines and Other Synthetic Drugs (AOSD) and the illicit trade in firearms has enabled the development of a strategic understanding of these areas of criminal activity to enable Australian governments to develop policy more effectively.

10. The following are some examples of the contribution the ACC has made to whole-of-government responses to criminal threats through its intelligence function.

Firearms

11. The ACC has supported the development of Government policy and processes on firearms through the contribution of various intelligence reports which have highlighted areas of potential risk. A number of these have resulted in consideration of specific issues by the Australasian Police Ministers' Council (APMC) Senior Officers' Group and the Firearms Policy Working Group. The ACC has also provided assistance to the Australian Institute of Criminology through the provision of expert advice on firearms matters and has provided input into the development of policies on the illicit trafficking of firearms in Australia.

People Trafficking for Sexual Exploitation

12. The ACC Board has approved a Special Intelligence Operation, using coercive powers, to support law enforcement investigations and prosecutions into people trafficking for sexual exploitation. This operation complements the Government's \$20m package to combat people trafficking, and the intelligence gathered assists in assessing the effectiveness of the package as well as informing future policy development in this important field.

Illicit Drugs

13. The ACC has played an active role as a member of both the National Working Group on the Prevention of the Diversion of Precursor Chemicals into Illicit Drug Manufacture (the Working Group) and the Intergovernmental Committee on Drugs (IGCD) Scheduling Working Party on Controlled Substances (the Scheduling Working Party).

14. The Scheduling Working Party was appointed in February 2005 to develop model lists of controlled drugs, plants and precursors and relevant quantities, to accompany the model serious drug offences developed by the Model Criminal Code Officers' Committee. The ACC has played a role in developing a model list of controlled

precursors for consideration by the IGCD and the Ministerial Council on Drug Strategy (MCDS).

15. The ACC also contributed to the development and introduction of the Law and Justice (Serious Drug Offences and Other Measures) Bill 2005 (Cth). Amongst other offences, the Bill will provide for Commonwealth offences focusing specifically on the trade in precursor chemicals. The ACC provided valuable assistance in developing an offence of possessing equipment (including a tablet press) for manufacturing a controlled drug, which carries a presumption of intent to manufacture a controlled drug.

16. The ACC has recently facilitated a call by the National Industrial Chemicals Notification and Assessment Scheme to ascertain the nature and extent of legitimate use of approximately 38 precursor chemicals. This information will provide evidence to justify inclusion of additional precursor chemicals in the model schedule of substances being developed by the Scheduling Working Party, which will underpin the Bill.

17. The ACC has also participated in an evaluation of options for the National Clandestine Laboratory Database, and is being considered as a potential host for the database. The database will store and integrate information on seized clandestine laboratories from all jurisdictional police and forensic agencies and enable the analysis of national trends in the manufacture of illicit drugs.

Measuring the ACC's Performance

18. In its report on the ACC's Annual Report 2003–2004 the Committee noted the difficulties of the ACC measuring its performance but requested the ACC to continue refining these measures. The ACC has demonstrated a clear willingness to explore and develop improved performance measures to gauge the effectiveness of the ACC in what is inherently a difficult area to assess. There are no published crime statistics on organised crime against which to measure the ACC's outcomes. Equally, there are difficulties in attributing outcomes of a general character, such as reductions in availability of a particular drug on the Australian market, to the ACC as distinct from the overall national policing and regulatory response to organised crime. The ACC's *Picture of Criminality in Australia* is an indication of the scale of the problem of serious and organised crime in Australia and highlights the constant changes that make judgement difficult.

Chief Executive Officer

19. A significant innovation in the structure of the ACC, compared with the National Crime Authority (NCA), has been the separation of the roles of Chief Executive Officer (CEO) and examiner. This change reflected the Government's view that the two functions—managing an intelligence-processing and investigative body with some 400 staff and taking evidence in formal hearings with many of the characteristics of proceedings before a court—require quite different skill-sets. Placing these functions in different hands was the strategy best calculated to ensure optimal performance of both. The Department considers that this strategy has proved successful.

20. Since the inception of the ACC the demands of the management function have been considerable. These have included the melding of the three predecessor organisations into a coherent new structure and addressing associated anomalies on employment

conditions, establishing effective internal governance arrangements for the new body and overseeing the development of a range of policies, practices and procedures to ensure the effective operation of the ACC and its Board.

21. The presence of the CEO as a non-voting member of the ACC Board has also been an important and successful innovation under the Act. It has meant that, in all its decision-making processes, the Board has had the advantage of being able to seek immediate additional advice from the ACC on any concerns raised by other Board members. A good working relationship has developed between the Board and the CEO, so that the Board has been able to influence the priorities and strategic directions of the ACC without relying on the power to determine policies and give directions in writing conferred on it by section 46A of the Act. The CEO's involvement in Board meetings and the overall relationship that has developed has also enhanced the Board's capacity to perform effectively its function of reporting to the Intergovernmental Committee (IGC) on the performance of the ACC.

Examiners

Independence

22. The role of the examiners provides an important guarantee against the abuse of the ACC's coercive powers.

23. The Board requires a special majority to determine that an investigation or intelligence operation is a special investigation or a special intelligence operation (subsection 7G(4) of the Act). Even though this determination has been made, an examiner must conclude that it is reasonable to issue each summons for examination for the purposes of that special investigation/operation and record the reasons for that decision (subsection 28(1A)). This means that two independent decisions are required before anyone is compelled to give evidence at an ACC examination.

24. Moreover, it is the examiner, and not the person leading the special investigation/operation, who controls the process of questioning at an examination. This means that decisions are not being made by someone who has a competing responsibility for the success of the investigation/operation to which the examination relates or for managing the resources of the ACC as a whole.

25. The separation of roles has not resulted in the emergence of tensions between examiners and the other elements of the ACC. The working relationship that has developed is constructive and has seen a very high level of examination activity.

Workload

26. ACC statistics indicate that the current three examiners are fully occupied exercising their coercive powers and conducting examinations. One issue the Committee may wish to explore is whether additional capacity is needed to avoid delays in meeting the examination needs of current ACC investigations/operations and, if so, how additional capacity might be provided.

27. The current provisions of the Act limit examiners to a maximum term of five years and do not envisage part-time appointments. This situation in part reflects concerns expressed before the Committee in 2002 about risks of compromising the independence

of examiners. The Committee may wish to consider whether arrangements might be put in place that would preserve the independence of examiners while providing for a wider range of employment options.

Use of Examinations to Obtain Intelligence

28. The use of examinations to obtain intelligence has been innovative and successful. Further examples of the importance and success of examinations are provided below.

29. The findings of the ACC's AOSD examinations have provided an evidence base to inform targeted measures to reduce the diversion of precursor chemicals being implemented under the National Strategy to Prevent the Diversion of Precursor Chemicals into Illicit Drug Manufacture. For example, the ACC AOSD unit obtained valuable information on the incidence of 'rogue' pharmacists and 'pseudo runners' to inform the Working Group's submission to the National Drugs and Poisons Schedule Committee (NDPSC) on rescheduling pseudoephedrine, the key precursor to methamphetamine. The NDPSC has subsequently resolved to list all consumer-sized pseudoephedrine preparations in Schedule 3 of the Standard for the Uniform Scheduling of Drugs and Poisons.

30. In addition, information from AOSD examinations has been used to inform the development of a discussion paper about the uses and controls of tablet presses at the border and within Australia. This will assist the Working Group to agree on a strategy to address tablet press diversion for consideration by the APMC in October 2005.

Australian Crime Commission Board

Membership

31. The Board's membership is prescribed by section 7B of the ACC Act. It comprises heads of all Australian police forces together with the heads of the principal Australian Government agencies with responsibilities for law enforcement. In addition, the CEO of the ACC is a non-voting member. There is no provision for members to nominate a delegate to attend in their place.

32. A number of agencies with significant law enforcement interests, both at the Commonwealth and State/Territory levels, are not included. However, the Department considers that the current range of membership has allowed the Board to operate effectively.

33. During the Committee's consideration of the Australian Crime Commission Establishment Bill 2002 there was some discussion of the composition of the Board. 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.

34. The Department understands that, on the basis of their experience since January 2003, some Board agencies may now raise with the Committee the possibility of

including the Commissioner of Taxation on the Board, because of the frequency with which tax related issues arise in the investigation of organised crime. The Department sees some advantage in this proposal and would support it if there were general agreement among all jurisdictions that it was desirable, and that this would not serve as a precedent for further expansion of the Board.

35. In considering any such proposal, the Committee should bear in mind that non-Board agencies have been successfully involved in a range of ACC intelligence operations and investigations and that it is open to the Board to invite the head of another agency to participate as an observer in parts of a Board meeting that relate to that agency's responsibilities.

36. The presence of the CEO at Board meetings is an important means by which the Board is able to ensure the accountability of the CEO and of the ACC more generally to the Board and, through the Board, to the IGC.

Functions

37. The Board's core functions are set out in section 7C of the Act. These functions combine a broad responsibility for determining the National Criminal Intelligence Priorities (NCIPs) with more specific responsibilities for overseeing the operation of the ACC.

38. The Department considers that this combination of functions has been effective in bringing law enforcement in Australia together in a more collegiate environment. It enables the collective experience of the heads of the principal agencies with responsibilities for law enforcement to be brought to bear in identifying and responding to the major national criminal challenges.

Determining National Criminal Intelligence Priorities

39. The Board's role in determining the NCIPs is central to the process of identifying and responding to these challenges. In support of the NCIP process the Board has commissioned the ACC to produce an annual *Picture of Criminality in Australia*. Our understanding is that the NCIPs and the POCA are proving increasingly significant in developing a shared understanding among Australian law enforcement agencies, and the Ministers responsible for them, on the nature and extent of the challenges they face from organised crime.

40. The development of NCIPs has also served an important purpose in confirming that the Government has correctly identified the priority national law enforcement issues requiring a national response and ensuring that the matters that are the subject of ACC special operations or investigations correspond to those issues.

Strategic Direction and Priority Setting for the ACC

41. The Board has played an increasingly active role in overseeing the strategic directions and priorities of the ACC. This has contributed to ensuring that the ACC's work is focussed on the main issues of national significance and that it has been able to address issues of current public concern, such as the question of organised criminal activity at airports, in a way that optimises benefits for law enforcement nationally.

Special ACC Investigations and Intelligence Operations

42. Under the *National Crime Authority Act 1984* (the NCA Act) the authority to refer special investigations to the NCA lay with the Intergovernmental Committee on the NCA (the IGC-NCA), comprising State and Commonwealth Ministers. This arrangement reflected the traditional position under which the decision to establish a royal commission or commission of inquiry with special coercive powers to compel witnesses to provide sworn evidence has been made at Ministerial level. In practice this procedure for referring matters to the NCA proved cumbersome and was widely criticised.

43. A major change under the Act has been conferral on the ACC Board of the authority to determine that an investigation/operation is a special investigation/operation. The transfer of this authority to the new Board raised concerns that the power to authorise the use of coercive powers was being downgraded from Ministers to senior officials, and in particular that it would, to a significant extent, be placed in the hands of the nation's Police Commissioners.

44. In response to these concerns significant safeguards were built into the new system. As noted above, the members of the Board are not permitted to substitute a delegate to attend in their place, so decisions are being made at agency head level. A special majority of nine of the thirteen voting members is required for a determination that an investigation/operation is a 'special' investigation/operation (subsection 7G(4)). Any such 'special determination' must be promptly reported to the IGC, which may seek additional information and/or revoke the decision within 30 days (section 9). Moreover, the ultimate exercise of the coercive powers is at the discretion of the independent examiner.

45. The Board has chosen to impose time-limits of not more than 12 months on all ACC investigations and intelligence operations it has authorised. This is a desirable practice, as it provides a mechanism for the Board to review fairly frequently the continuing appropriateness of its original decision and of any special determination it may have made in connection with that decision.

46. In accordance with subsection 7C(5) of the Act, the Chair of the Board has regularly advised the IGC of special determinations within the prescribed three-day deadline. The IGC has not resolved to request more information about any special determination made by the Board, nor has the IGC revoked a special determination. This outcome is consistent with the Department's assessment that the Board has not made inappropriate use of the special determination power. The special determinations the Board has made have all related to criminal activity that the Department sees as intractable in character and of national significance.

Board Meetings

47. The requirements for Board meetings are set out in sections 7D to 7H of the Act. The Board has met more frequently than required by the Act. It met five times in 2003, four times in 2004 and has met three times this year, with a fourth meeting scheduled.

48. Section 7J provides for the Board to pass resolutions out of session. The Board has made extensive use of this provision to ensure that urgent matters are addressed quickly and that routine matters that do not require extensive discussion are kept off the agenda for scheduled meetings.

Relationship with the Minister

49. Section 59 of the Act provides for the Chair of the Board to keep the Minister and the IGC informed of the general conduct of the ACC in the performance of its functions. The Department understands that the Chair has met with the Minister regularly to keep him informed of developments in the ACC.

50. Under section 18 of the Act, the Minister may give directions and guidelines to the Board on the performance of its functions. The Minister has not had occasion to exercise this power. The Department considers this reflects the effective performance of the Board.

Intergovernmental Committee on the Australian Crime Commission

51. The general functions of the IGC under the Act are to provide broad oversight of the work of the ACC and the Board and to serve as a link for reporting purposes between these entities and the governments represented on the IGC. The IGC also has a review function in relation to individual special determinations made by the Board.

52. Like the IGC-NCA, the IGC has met twice each year, in conjunction with meetings of the APMC, which has substantially the same membership, and to perform its general functions under the Act. The IGC regularly receives and discusses reports from the Board and has sought information on specific issues where it thought it appropriate.

53. The IGC has not had occasion to request more information about, or to revoke, any special determination made by the Board.

54. The relationship between the IGC and the Board has developed in much the way envisaged, with the IGC maintaining general oversight of the ACC and the Board from a broad strategic viewpoint and intervening only on issues of significant public concern, while the Board oversees ACC activities.

Parliamentary Joint Committee on the Australian Crime Commission

55. The Department proposes to make a separate submission under this Term of Reference to the independent assessor conducting the review of the Committee.

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 challenges of organised crime in the 21st century

56. The ACC is well placed to meet the challenges of organised crime in the 21st century. It combines effective and flexible investigative capacity with an intelligence capacity that is increasingly able to provide a relevant and timely contribution not only to policing work but also to whole-of-government responses to law enforcement challenges with wider social implications.

Challenges of Organised Crime in the 21st Century

57. Broadly, the main challenges posed by organised crime as currently understood can be summarised as fluidity, low visibility and high responsiveness to opportunity. Examples include the use of increasingly flexible structures, diversification over a range of crime-types while 'contracting out' specialised functions, exploitation of the latest technological developments, disregard of interstate and international boundaries and potential convergence of criminal and terrorist activities.

58. These challenges will increasingly call for proactive, intelligence-led policing responses that use flexible structures bringing together appropriate combinations of skills and powers for particular operations, seeking to understand and address criminal activity at a national, and even international, level and forming part of broad government responses designed to change the environment that allows particular crime-types and criminal methodologies to flourish.

Roles of the ACC

59. The roles of the ACC are tailored to address these needs in a way that enhances the work of other law enforcement agencies and of government generally. Its functions emphasise and support the growing role of intelligence in policing, by providing a mechanism for the development of a coherent national view of the challenges posed by organised crime and for the exploitation on a national basis of the collective intelligence holdings of Australian law enforcement. The development of the NCIPs and the POCA have given Australian governments and law enforcement agencies valuable new insights into the nature and extent of organised crime in Australia. While no one should underestimate the difficulties inherent in national coordination of criminal intelligence in Australia, the ACC has worked hard to address this issue and, as a result, it is probably fair to say that we now have a better national criminal intelligence base than ever before from which to address the problems posed by organised crime. The Department anticipates that, over time, the value of the intelligence products of the ACC will continue to be enhanced, as the underlying processes are further refined.

60. The ACC's functions also provide for an approach to the investigation of, and gathering intelligence on, organised crime that simultaneously takes a national view and makes available special coercive powers to tackle criminal enterprises that are beyond the capacity of any single police force using traditional policing methods. The special

intelligence operation has proved to be a particularly valuable innovation and has generated intelligence that has helped to inform some major whole of government responses to priority crime-types such as firearms trafficking, amphetamines and other synthetic drugs, and people trafficking for sexual exploitation.

Powers

61. The powers granted to the ACC under the Act are broadly appropriate for dealing with organised crime in Australia. In addition to the coercive questioning powers exercised by the examiners, the ACC has access to the full range of police investigative functions and capabilities, including surveillance device and telecommunications interception (TI) powers. While there is no access to TI powers for pure intelligence purposes, the ACC is free to use TI product obtained in the investigation of particular offences for its intelligence purposes.

Structures

62. The current structure of the ACC enables the ACC to remain flexible and respond quickly to emerging issues. The Board can authorise new investigations or intelligence operations at any time. Issues can come to its attention through the intelligence work of the ACC, the work of Board agencies, or through concerns raised by the IGC. The facility for establishing task forces means that an appropriate range of skills and powers can be brought to bear on a problem from a national perspective in a fairly short time frame and without the need to establish a permanent structure.

Issues for Discussion

63. Although the roles, powers and structures of the ACC and the Board are generally effective, there are some specific areas that have presented difficulties. The Department is currently considering whether further legislative action could be appropriate and would welcome any views or recommendations on these issues (in paragraphs 64 to 79) that the Committee might have as a result of the current review.

Examinations and Criminal or Associated Proceedings

64. It is unclear whether an examiner is entitled under section 28 of the Act to summon as a witness a person who has been charged with a criminal offence or against whom asset confiscation proceedings have commenced, if it is proposed to question the witness on matters relevant to those proceedings. Earlier authorities, particularly *Hammond v the Commonwealth* (1982) 152 CLR 188 and *Mansfield v ACC* (2003) 132 FCR 251, suggest that a person may not be summoned in these circumstances. In some more recent cases there have been judicial comments that suggest the contrary, without deciding the matter.

65. Although ACC examiners have recently taken a robust view of the extent of their powers, the uncertain legal position has given rise to a good deal of litigation that has significantly delayed the progress of ACC examinations. By contrast, the position under section 21 of the *Police Integrity Commission Act 1996* (NSW) and section 18 of the *Independent Commission Against Corruption Act 1988* (NSW) is much clearer. 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 that the investigation does not prejudice the fair trial of a person for an indictable offence. This may be an area of ACC activity where clarifying legislation could be useful, but any such legislation would need to be carefully crafted to avoid interfering with the proper exercise of the judicial power.

Powers and Immunities of ACC Staff Members

66. The ACC, like the NCA before it, was envisaged as a body which would access investigative capacity and the requisite police powers through secondees from the Australian Federal Police and State and Territory police forces. However, there are a number of situations in which the ACC has identified a need to employ or contract staff with some police attributes.

67. For example, the Department understands that the ACC has recruited a number of former police officers with extensive criminal investigation experience as in-house investigators, largely to ensure continuity for long term investigations and prosecutions in an environment where other investigative staff only serve on rotation. In 1998 the PJC-NCA recommended that the NCA employ such a group of in-house investigators—see recommendation 30 of the Third Evaluation of the NCA. In addition, the ACC directly employs a range of surveillance, technical and covert intelligence officers.

68. This situation gives rise to a need for access to certain police type powers and immunities if officers are to perform their functions safely and effectively. For example, ACC staff investigators may need to obtain warrants that may only be issued to a constable, and surveillance or undercover officers need to be able to carry firearms for self-protection and to be trained in their use.

69. Until now the ACC has addressed these needs by having these staff members appointed special constables of the AFP or of a State police force. This is not a satisfactory long term arrangement. Special constables ought in principle to be under a degree of control by the police force from which they derive their authority and which is responsible for their use of police powers, but that is not the case here.

70. A possible legislative solution would be creating a class of authorised ACC officers who could exercise some or all of the powers of a constable. However, it would be important that any such arrangement was developed in such a way as to allay any concerns that it might result in the ACC usurping the roles and functions of any existing police force. Other types of legislative amendment, perhaps focussing on particular powers and immunities, might also be considered as alternative ways of addressing this problem.

Non-compliance at examination

71. There are a number of ways in which people summoned as ACC witnesses can seek to frustrate the examination process. These include the vigorous exercise of rights to seek review of particular decisions of the Board and examiners as well as direct non-compliance with the examination process. Such challenges to the legality of ACC actions have rarely been successful (they are dealt with in more detail in the ACC's submission to the Committee) but they often result in significant delay to the examination process, which can in itself be an advantage to a recalcitrant witness. There are difficult judgments to be made about the extent to which some of the avenues abused in this way could be closed off without unreasonably restricting the rights of other ACC witnesses.

72. One issue that has been of continuing concern to both the NCA and the ACC is failure to attend and answer questions. These omissions are offences under section 30 of the Act and are currently punishable by up to five years imprisonment and/or a fine of up to 200 penalty units. The current penalties were introduced by the *National Crime*

Authority Legislation Amendment Act 2001, replacing earlier penalties of up to six months imprisonment and a fine of up to \$1,000. The higher penalties were provided in response to a perception that, for many people associated with organised crime, the previous penalties were too low to operate as an effective deterrent. These higher penalties are consistent with Commonwealth criminal law policy but are at the high end of the scale for offences of this type. Their introduction was controversial and, as noted below, they are subject to a statutory expert review after five years of operation.

73. Within the past year there have been further expressions of concern that some people associated with organised crime are still refusing to cooperate with examinations, despite the increased penalties. It has been suggested that the process of prosecution for these offences is too slow and difficult to be effective and that we need some form of contempt procedure that will result in a more or less immediate custodial response, perhaps coupled with substantially higher penalties.

74. There is clearly a problem about compliance in the case of some criminal groups but it is less clear how this problem can be effectively addressed. 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 courts to make full use of the available penalties. Our understanding is that prosecutions are often impracticable because of the difficulty of establishing intent (eg when a witness claims not to remember events) and that, if convictions are obtained, courts have not generally imposed severe sentences. It is likely that a rapid response to non-compliance would cause some recalcitrant witnesses to cooperate with the examination process, but others may well be prepared to accept a lengthy term of imprisonment rather than risk being perceived by their criminal associates as cooperating with the ACC. People in this last group are unlikely to respond to an increased penalty but may in some cases be encouraged to cooperate by enhanced guarantees against their cooperation being exposed.

Dissemination of Criminal Information and Intelligence

75. A key function of the ACC is to disseminate criminal information and intelligence to appropriate bodies. A body with the special investigative powers of the ACC has control of a great deal of highly sensitive information and needs to avoid inappropriate disclosure of that information. Conversely, it is vital to the effectiveness of Australian law enforcement as a whole that criminal information and intelligence is available to all investigators to whose work it is relevant.

76. Section 59 of the Act provides a range of powers to support the dissemination of ACC information to Commonwealth, State, Territory and foreign government agencies. Section 7C(g) provides that it is a function of the Board to disseminate strategic criminal intelligence assessments to much the same range of government agencies. These provisions were intended to have a fairly wide scope, but they give rise to some difficulties. In particular, they rely in part on the definition of 'law enforcement agency'. What this definition includes apart from police forces is unclear, and a recent judgment in the Federal Court of Australia (*AA v ACC* (2005), unpublished) suggests that it may not cover bodies that only have responsibility for enforcing a part of the laws of a jurisdiction. This decision may mean that the ACC can only disseminate information and strategic criminal intelligence assessments to Australian agencies other than police forces if they are prescribed by regulations. This would be practicable for the agencies with

which the ACC deals regularly but could result in substantial delays to dissemination of relevant material to an agency with which the ACC does not normally deal.

77. Further, there is no provision in the Act for the dissemination of information or intelligence to the private sector. The ACC's work on fraud, particularly financial and identity fraud, has increasingly required close cooperation with the private sector, particularly the telecommunications and financial services industries. These private sector industries are actively contributing to the ACC's development of information and intelligence holdings on fraud. This information and intelligence cannot be disseminated to the private sector, even though the private sector has contributed to its development and could use it to prevent and respond to further attempts at fraud. This restriction operates in a situation where it is believed that fraud is a major source of criminal profits but goes largely unreported. Moreover, the one-sided nature of the ACC's criminal intelligence relationship with the private sector tends to discourage corporations from cooperating because there is little discernible benefit for them in developing the relationship.

78. These examples suggest that there may be a need to provide greater flexibility in the dissemination regime established by the Act. This could be achieved, for example, by giving the Board and the CEO a general discretion to disseminate intelligence and information where appropriate, by providing some fairly broad criteria to govern such dissemination, or by prescribing an expanded range of entities to which the Board and the CEO may disseminate intelligence and information. In any case there would need to be safeguards against inappropriate disclosure of sensitive information.

79. Any relaxation of the current restrictions, and particularly any provision for dissemination of information or intelligence to the private sector, is likely to generate a degree of public concern. The Committee may wish to consider what degree of relaxation might be reasonable and how this issue might best be addressed in such a way as to address legitimate concerns.

The need for amendment of the ACC Act

80. The Department and the ACC are continually reviewing the effectiveness of the Act and the operations of the ACC with a view to improvement. The issues mentioned at paragraphs 64 to 79 on the appropriateness of the current powers of the ACC are all under current consideration. The Department would welcome the views of the Committee on these issues and any other law reform proposals brought to the Committee's attention during this review. The Department will advise the Committee of any proposals for amendment of the Act that are approved in-principle by the Government while the Committee's review is in progress.

Any other related matter

Operation of State Laws under section 55A

81. The Act confers duties, functions and powers on the ACC for 'federally relevant criminal activity'. This term is intended to give the ACC the broadest possible coverage it can have under Commonwealth legislative power. It can broadly be described as activity involving serious and organised criminal offences under Commonwealth and

Territory law and, where the offence has a 'federal aspect', under State law. The concept of a State offence with a federal aspect is defined to cover any conduct that constitutes a State offence but could have been the subject of a valid Commonwealth law and any conduct the investigation of which is incidental to an investigation of a Commonwealth or Territory offence.

82. This range of offences provides the ACC with extensive coverage of criminal conduct but not all relevant State offences are covered. For this reason, the States (including for this purpose the Australian Capital Territory and the Northern Territory) undertook to enact complementary legislation to provide the ACC with coverage of all relevant State offences. This process was completed with the commencement of the *Australian Crime Commission (Northern Territory) Act 2005* on 18 May 2005.

83. The State legislation confers duties, functions and powers on the ACC in respect of all relevant State offences. The New South Wales legislation does so by providing that the Commonwealth legislation is to be taken to apply to the New South Wales offences. The legislation of the other States replicates the provisions of the Act with the necessary amendments. Commonwealth legislative consent to the conferral of these powers, which is required under the doctrine enunciated by the High Court in *The Queen v Hughes* [2000] HCA 22, is given by section 55A of the Act.

84. Subsection 55A(3) of the Act provides that the ACC cannot conduct an investigation or intelligence operation under a State law unless the Board has consented to it doing so. To date the Board has consented to only one investigation under this provision, a special investigation into established criminal networks in Victoria.

85. In addition to conferring duties, functions and powers corresponding to those conferred by the Act, the States have amended a range of law enforcement related legislation to confer other duties, functions and powers relevant to the conduct of investigations and intelligence operations on the ACC, the Chair of the Board, the CEO, an examiner, a member of the staff of the ACC, a Judge of the Federal Court or a Federal Magistrate. Consent to these additional conferrals is provided by or under section 55A of the Act. For this purpose, regulations have been made under the Act accepting conferrals by New South Wales and Victoria and the Department is developing regulations accepting conferrals by the remaining States.

Other Reviews

86. In considering its approach to this review and any recommendations arising from it, the Committee should bear in mind that there are a number of other reviews either current or planned for the near future affecting the ACC. Details of these reviews are provided below.

Review of the Regulation of Access to Communications

87. The Committee may be aware that a review of the *Telecommunications Interception Act 1979* has recently been undertaken. Its purpose was to review the policy options for the regulation of access to telecommunications, with particular emphasis on new and emerging telecommunications technologies such as email, voice over Internet protocol, short messaging services and developing means of telecommunication. The review report has recently been provided to Government for consideration.

IGC Review of ACC In-house Investigative Capacity

88. The agreement on the establishment of the ACC, reached by Commonwealth, State and Territory Police Ministers at their meeting on 9 August 2002, provided that 'after three years of operation a review will be conducted into the balance and mix of the in-house investigative capacity by the IGC'. This provision occurs in the context of undertakings that the ACC would continue to maintain its existing in-house investigative capacity and that the States and Territories would contribute secondees to additional ACC task forces.

89. The Department anticipates that the IGC will initiate this review either late this year or early in 2006.

Expert Review of the Operation of the NCA and ACC Acts as Affected by Certain Amendments Concerning Examinations

90. Section 4 of the *National Crime Authority Legislation Amendment Act 2001*, as amended by the ACC Establishment Act, requires the Minister for Justice and Customs to cause a suitably qualified person to review and report on the operation of the NCA Act and the Act as affected by the provisions of the NCALE Act that removed the defence of reasonable excuse, removed the derivative-use immunity and that increased the penalties for non-compliance.

91. The period to be reviewed is between 12 October 2001 and 12 October 2006. A written report on this review is required to be provided to the IGC no later than 6 months after 12 October 2006.

92. Section 4 includes detailed provisions to ensure that the reviewer will have access to all relevant information and will be able to make a properly informed assessment of the effect of the amended parts of the NCA/ACC Act but will not be able to disclose sensitive operational information.