

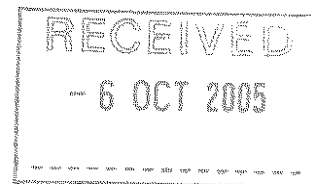
PARLIAMENTARY JOINT COMMITTEE ON
THE AUSTRALIAN CRIME COMMISSION

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Law Council
OF AUSTRALIA

REVIEW OF THE AUSTRALIAN CRIME COMMISSION ACT 2002

Parliamentary Joint Committee on the Australian Crime
Commission

7 October 2005

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Table of Contents

Executive Summary.....	3
Introduction.....	4
Background	5
Investigative, Management and Accountability Structures of the Australian Crime Commission	5
Examiners	6
Members and Staff	7
The Governance Framework.....	7
CEO.....	8
The Australian Crime Commission Board.....	8
The Inter-Governmental Committee	10
The Parliamentary Joint Committee	11
The Commonwealth Ombudsman.....	11
Roles, Powers and Structure Of The Australian Crime Commission.....	12
Powers of ACC.....	12
Attachment A.....	17
Profile – Law Council of Australia.....	17

EXECUTIVE SUMMARY

1. The Law Council of Australia ("Law Council") welcomes the opportunity to make a submission to the Parliamentary Joint Committee on the Australian Crime Commission ("PJC") in relation to its review of the *Australian Crime Commission Act 2002* ("ACC Act").
2. The Law Council supports the establishment and regulation of law enforcement agencies within a legislative framework. The Law Council believes that providing a legislative framework promotes consistency, transparency and accountability in the exercise of law enforcement powers and safeguards the rule of law and the principles of open and democratic institutions. In particular, the Law Council supports the approach of defining and delimiting key powers and responsibilities through legislation, as this allows external scrutiny through Parliamentary oversight, judicial supervision and public scrutiny.¹
3. This submission draws upon the Law Council's past submission made to the Parliamentary Joint Committee on the National Crime Authority on the Australian Crime Commission Establishment Bill 2002.² The Law Council continues to be concerned in relation to the organisational structure of the ACC Board and believes that further improvements in the management and accountability regime governing the ACC's operations are both necessary and practicable. This submission makes a number of recommendations in relation to the supervisory regime and indicates those areas in which legislative amendment may be warranted.
4. The Law Council generally supports:
 - a. the establishment of the ACC under the ACC Act as a national law enforcement agency with a focus on intelligence gathering in relation to organised crime;
5. The Law Council continues to have concerns about the:
 - a. Predominance of police representatives on the ACC Board and the consequences for decision-making in regard to ACC determinations;
 - b. Wide discretion provided in relation to the conduct of examinations;
 - c. Lack of clear demarcation between mainstream policing activities and the 'special operations' and 'special investigations' specifically provided for under the ACC Act;
 - d. Limitation of access to legal representation; and
 - e. Abrogation or limitation of the privilege against self-incrimination and legal professional privilege, to affect the usual legal protections afforded to a witness in our legal system.

¹ Recent cases which have clarified the extent of the ACC's powers are discussed below.

² Law Council, *Submission to Parliamentary Joint Committee on the National Crime Authority on the Australian Crime Commission Establishment Bill 2002* (14 October 2002).

INTRODUCTION

6. The Law Council of Australia ("Law Council") welcomes the opportunity to make a submission to the Parliamentary Joint Committee on the Australian Crime Commission in its review of the *Australian Crime Commission Act 2002* ('the ACC Act').
7. The terms of reference of the review include, the:
 - a. effectiveness of the investigative, management and accountability structures established under the ACC Act; and
 - b. roles, powers and structure granted to the Australian Crime Commission (ACC) under the ACC Act and associated legislation.
8. In this submission, the Law Council will address the above terms of reference and in particular express its views and raise concerns specifically in relation to the:
 - a. Composition of the ACC Board;
 - b. Role and powers of the CEO;
 - c. Extensive powers of the ACC to investigate matters and its consequent impact on the:
 - i. Privilege against self incrimination;
 - ii. Legal Professional Privilege;
 - iii. Right to legal representation;
 - iv. Use of evidence obtained from examinations.
9. This submission draws upon the Law Council's earlier submission which was made to the Parliamentary Joint Committee on the National Crime Authority in relation to the Australian Crime Commission Establishment Bill 2002.³
10. The Law Council supports the establishment and regulation of law enforcement agencies within a legislated framework. The legislative framework promotes transparency, consistency and accountability in the exercise of law enforcement powers which provides greater safeguards to the rule of law and the principles of open and democratic institutions.
11. In particular, the Law Council supports the approach of defining and delimiting key powers and responsibilities through legislation, as this allows external scrutiny through Parliamentary oversight, judicial supervision and public scrutiny.⁴
12. In this submission, all legislative references are to the ACC Act unless stated otherwise.

³ Law Council, *Submission to Parliamentary Joint Committee on the National Crime Authority on the Australian Crime Commission Establishment Bill 2002* (14 October 2002).

⁴ Recent cases which have clarified the extent of the ACC's powers are discussed below.

BACKGROUND

13. The ACC's role is broadly described in the organisation's *Corporate Plan 2004-07* as:

"To better position Australia to meet the threats posed by nationally significant crime ..."⁵

14. Specific functions identified as contributing to this goal include:
- the collection, correlation, analysis and dissemination of criminal information and intelligence;
 - the maintenance of a national database of information and intelligence
 - undertaking criminal intelligence operations;
 - the investigation of matters relating to federally relevant criminal activity;
 - the provision of strategic criminal intelligence assessments and other criminal information and intelligence;
 - the effective utilisation of our unique powers to support investigations and operations; and
 - the provision of advice to the ACC Board on national criminal intelligence priorities.⁶
15. The performance outputs of the ACC are assessed within two broad categories:
- criminal intelligence services; and
 - investigations and intelligence operations into federally relevant criminal activity.⁷
16. The Law Council notes that ACC operations described in the organisation's Annual Reports have mostly been directed against illicit drugs and firearms trafficking, identity fraud and cybercrime, money laundering and tax fraud, and other serious offences under Australian law. The Law Council recognises the importance of effective law enforcement in these areas, which depends on significant co-operation between Federal, State and Territory law enforcement agencies.

INVESTIGATIVE, MANAGEMENT AND ACCOUNTABILITY STRUCTURES OF THE AUSTRALIAN CRIME COMMISSION

17. The ACC is established under s 7 of the ACC Act and consists of the:
- (a) Chief Executive Officer ("CEO");
 - (b) Examiners; and
 - (c) Members and Staff of the ACC.
18. The issues relating to examiners and staff of the ACC are discussed below. The issues and concerns relating to the CEO are discussed later.

⁵ Australian Crime Commission, *Corporate Plan 2004-07*:
<http://www.crimecommission.gov.au/content/about/acc-plan-corporate-2004-07.pdf>

⁶ *Ibid.*

⁷ *Ibid.*

Examiners

Conduct of Examinations

19. Examiners have a particularly important role under the ACC Act in relation to special ACC operations and investigations.⁸
20. According to s 25A an examiner may regulate the conduct of an examination as he or she thinks fit. However, there are some important constraints on this discretion. The manner in which information is gathered and examinations are conducted are reviewable under the *Administrative Decision (Judicial Review) Act 1977*⁹ and also will impact on the admissibility of evidence should the matter proceed to trial.
21. The Law Council strongly believes that examinations should be conducted in accordance with rules of evidence. This recommendation, should it be adopted will safeguard the admissibility of evidence should the investigation lead to prosecution and manage the risks associated with subsequent administrative reviews. This is discussed further in relation to the powers of the ACC.

Abrogation of the Right against Self Incrimination

22. The role of the examiner is critical in the conduct of the special examinations allowed under the ACC Act. The Law Council notes that coercive examination abrogates the privilege against self-incrimination, though if the privilege is claimed before any question is answered or document is produced, limits on the use to which the evidence may be put apply (s 30). However, such limitations do not apply to subsequent use of the answers given or documents produced under a claim of privilege in confiscation proceedings (s 30(5)).
23. The Law Council continues to be concerned in relation to the strong coercive powers of examiners and the abrogation or limitation of traditional rights and protections afforded those suspected of criminal offences. This is discussed further in relation to the powers of the ACC.

Right to Legal Representation

24. The Law Council notes the following features:
 - a. Witness may be summoned to appear and answer questions (s28) or be required to produce documents (s29) or both;
 - b. Witness who fails to appear, answer questions or produce documents as directed, is guilty of a criminal offence punishable by a fine of 200 penalty units or imprisonment for a period not exceeding 5 years;
 - c. The abrogation of the privilege against self incrimination in certain circumstances including in confiscation proceedings;
25. The Law Council believes that where a person is faced with potentially harsh consequences such as giving evidence that may be self incriminating, or the risk

⁸ Section 24A

⁹ Section 57

of imprisonment or significant penalties for failing to for instance, produce documents, the need to be given access to legal representation becomes particularly acute.

26. The Law Council has strong concerns in relation to the wide discretion provided to examiners to regulate the conduct of proceedings at an examination pursuant to s 25A(1). The Law Council believes that an examiner may apply the wide discretion to erode the rights of witnesses. For instance, there may be occasions where it is appropriate and fair for the examiner to caution the witness or advise the witness that he or she may wish to seek legal representation but this is not done. The Law Council notes a recent case in which the examiner attempted to restrict the presence of a legal representative. The examiner's ruling under s 25A was successfully challenged in the Federal Court of Australia.¹⁰
27. The Law Council recommends that the ACC prescribe detailed rules and procedures governing examinations and ensure that they conform to the accepted legal rules including the rules of evidence (refer to paragraph 21), procedural fairness and due process.

Members and Staff

28. The Law Council notes that the total staff of the ACC was reported to be 478 in the organisation's *Annual Report 2002-03* and 518 in the *Annual Report 2003-04*.¹¹ Particular responsibilities in relation to management and accountability attach to the positions of the CEO and the ACC's examiners.
29. The Law Council observes that the ACC appears to be well resourced with similar (or greater) staff numbers to the National Crime Authority which had greater responsibilities than the ACC. The Law Council recommends that the PJC query the application of its resources. In particular, the Law Council queries whether ACC staff engage in work of other law enforcement agencies, such as the AFP.

THE GOVERNANCE FRAMEWORK

30. The governance of the ACC consists of an internal and an external framework as identified in the ACC's *Corporate Plan 2004-07*. The internal governance framework includes the CEO and the external governance regime includes the ACC Board and Inter-Governmental Committee of the ACC.
31. Although not mentioned in the Corporate Plan, a further element of external oversight is provided by the Commonwealth Ombudsman, who has a statutory obligation under the ACC Act to provide a briefing to the Parliamentary Joint Committee on the ACC's role in controlled operations under Part 1AB of the Crimes Act 1914.¹²
32. The Law Council has serious concerns in relation to some of the attributes of the internal and external governance framework, which are discussed below.

¹⁰ *Hogan v Australian Crime Commission* [2005] FCA 913 (7 July 2005), discussed further below.

¹¹ Available at: http://www.crimecommission.gov.au/html/pg_publications.html

¹² *Australian Crime Commission Act 2002* (Cth), s 55AA.

CEO

33. The CEO has a number of key roles in the operational aspects of the ACC, which are in part set out in the ACC Act and includes:
- assembling evidence of any breaches of Australian criminal law obtained during ACC operations or investigations and giving this evidence, where it would be admissible in any prosecution or confiscation proceedings, to the relevant Commonwealth or State Attorney-General and law enforcement agency or person in authority (s 12);
 - obtaining information from any body or person (other than a State or State authority) information or intelligence relating to relevant criminal activities, as arranged by the ACC Board (s 21);
 - managing and administering the ACC, including determining the head of any intelligence operations or investigations authorised by the ACC Board and any examiners in relation to special ACC operations; investigations (s 46A)
 - engaging appropriately qualified consultants (s 48);
 - appointing legal practitioners to assist the ACC as counsel (s 50);
 - disseminating information in specified circumstances to law enforcement agencies and other bodies (s 59); and
 - delegating powers to senior ACC officers (s 59A).
34. 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. The Law Council believes that the inability to vote hinders the CEO's role in oversight and governance of the ACC's activities.
35. The Law Council believes that the CEO's position on the ACC Board should be upgraded. The CEO has leadership of the operational aspects of the ACC and maintains the national focus at the ACC. Police commissioners from the various states and territories who have voting rights on the ACC Board represent their own jurisdictions and are likely to have parochial views and focus. The other representatives on the Board are full time members of other law enforcement agencies and are unlikely to be able to give the due consideration to the activities and directions of the ACC that is required. Accordingly, the Law Council considers it entirely appropriate for the CEO to have voting rights on the ACC Board.

The Australian Crime Commission Board

36. Pursuant to s 7B, the ACC Board consists of the Commissioner of the Australian Federal Police ("AFP"), the Secretary of the Department, the CEO of the Australian Customs Service ("ACS"), the Chairperson of the Australian Securities and Investments Commission ("ASIC"), the Director-General of Security ("ASIO");

the Commissioner or head of the police force of each State and the Territories; and the CEO of the ACC. The Commissioner of the AFP is the Chair of the Board.

37. The Law Council acknowledges that the representation on the ACC Board by law enforcement agencies from each jurisdiction is important in ensuring a co-ordinated approach with a high level of interaction between Australia's leading law enforcement agencies.
38. That said, the Law Council believes that the structure of the Board is defective in a number of respects. The perceived defects include:
 - a. The CEO plays a key leadership role in the ACC and does not have voting rights (as discussed earlier);
 - b. The dominance of the police membership undermines the independence of the ACC and is likely to create an imbalance in decision making;
 - c. Absence of the Director of AUSTRAC on the Board is inexplicable;
 - d. The impotence of the Inter-Governmental Committee undermines accountability (discussed later).

Some of these issues are discussed below.

The Dominance of the Police Membership on the Board

39. The Law Council has previously expressed its concern that 9 of the 13 voting members of the Board (as well as the Chair, who may exercise a casting vote) are police officers (s 7B and s 7G). The Law Council believes that police commissioners are unlikely to criticise each other and are reluctant to intervene in someone else's patch.
40. This dominance of police membership is concerning as according to s 7C, the Board has the important decision-making functions of:
 - (a) Determining national criminal intelligence priorities;
 - (b) Providing strategic direction and priorities for the ACC;
 - (c) Authorising intelligence operations and/or investigations into federally relevant matters;
 - (d) Determining whether such an operation or investigation is a 'special' operation or investigation;
 - (e) Determining who shall head such operations or investigations;
 - (f) Establishing task forces;
 - (g) Disseminating criminal intelligence assessments; and
 - (h) Reporting to the Inter-Governmental Committee on the ACC's performance.
41. The potential for police interest to dominate key decisions may undermine public and governmental confidence in the ACC.

42. The Law Council's concern with the dominance of police is heightened by the availability to the ACC of extraordinary coercive powers. These powers subvert some of the traditional constraints that have been placed upon the exercise of police powers. In particular, the Act sets up a regime of 'special operations' and 'special investigations' (s 4 and s 7C) which differ from traditional police operations and investigations in incorporating coercive powers that effectively remove the right against self-incrimination and criminalise failure to attend an examination and answer questions (s 30).
43. The Law Council maintains its view that the power to designate an operation or investigation as 'special' and thus beyond the scope of ordinary police capabilities is not appropriately vested in a Board which is dominated by state and territory police representatives.
44. The Law Council recommends some reform of the ACC Board including permitting the CEO to have voting rights on the Board.

Absence of the Director of Australian Transaction Reports and Analysis Centre ("AUSTRAC") from the Board

45. The absence of the Director of AUSTRAC from the Board is inexplicable. AUSTRAC is Australia's anti-money laundering regulator and specialist financial intelligence unit. In its regulatory role, AUSTRAC oversees compliance with the reporting requirements of the *Financial Transaction Reports Act 1988* by a wide range of financial services providers, the gambling industry and others. In its intelligence role, AUSTRAC provide financial transaction reports information to State, Territory and Australian law enforcement and revenue agencies. Through AUSTRACs compilation and analysis functions, it monitors and identifies money laundering related to serious crime and major tax evasion.
46. The Law Council also reminds the PJC that in the past, AUSTRAC was an agency with which the National Crime Authority ("NCA") worked very closely.
47. The Law Council suggests that the PJC consider the inclusion of the Director of AUSTRAC on the ACC Board and make appropriate recommendations in its review.

The Inter-Governmental Committee

48. The Inter-Governmental Committee (IGC) predates the establishment of the Australian Crime Commission (ACC), having played a supervisory role also in relation to the ACC's predecessor, the NCA. However, the Law Council believes that the IGC's role under Subdivision C of Part II of the Act is attenuated with the removal of the power to refer investigations to the ACC.
49. The IGC consists of ministers from the Commonwealth, State and Territory governments or their delegates (s 8), and the functions of the IGC are to monitor the work and oversee the strategic direction of the ACC and its Board, and to receive reports from the Board for transmission to the Governments represented on the Committee (s 9).
50. There is a specific power vested in the IGC under subsection 9(7) to revoke a special determination (i.e. a determination made by the ACC Board under s 7C that an intelligence operation or investigation is a special operation or investigation, thus attracting the special ACC powers). However, the Law

Council is not aware that any such revocation has been made or even considered in relation to a special determination since the commencement of the Act.

51. The Law Council believes that the IGC needs to play a more active role in the activities of the ACC (as they did in the NCA). The IGC in the NCA had power or role in referring or approving matters to the NCA.
52. The IGC with its presence of duly elected Commonwealth and State and Territory Ministers is accountable to the public (as compared with commissioners) and will help maintain the focus on the high level issues and be in a better position to determine issues of significance for the ACC. Ministers are likely to be able to recognise national and cross jurisdictional issues while police commissioners provide a more parochial focus.
53. The Law Council believes that expanding the role of the IGC in the ACC may address, to some extent, the police dominance on the Board. It is not appropriate that the police commissioners control the exercise of powers which no Australian government has yet given to any Australian police service.

The Parliamentary Joint Committee

54. The PJC has the role of monitoring and reviewing the performance of the ACC and reporting to both Houses of the Commonwealth Parliament on any matter relevant to the ACC or the performance of its functions. The Committee also examines the annual reports of the ACC and reports to the Parliament on any matter arising out of such reports, and is also required to examine trends and changes in criminal activities, practices and methods and to report on any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC (s55).
55. The Law Council commends the work of the PJC including its recent inquiries into the cybercrime environment (2003) and trafficking in women for sexual servitude (2003-2004). The Law Council notes that the ACC made extensive and detailed submissions to both of these inquiries. The Law Council does not have specific comment in relation to the PJC nor to any aspect of the ACC's functions, structure, powers and procedures arising from consideration of the ACC submissions.

The Commonwealth Ombudsman

56. The Law Council acknowledges that the Commonwealth Ombudsman has a statutory obligation under the ACC Act to provide a briefing to the Parliamentary Joint Committee on the ACC's role in controlled operations under Part 1AB of the *Crimes Act 1914*. There is also a role created under the *Telecommunications (Interception) Act 1979* to monitor compliance with record-keeping requirements under that Act. The Ombudsman also has power to receive and investigate complaints against the ACC as a Commonwealth statutory authority.¹³
57. The most recent available annual report from the Commonwealth Ombudsman indicates that six complaints were received in relation to the ACC in 2003-04, with

¹³ *Ombudsman Act 1976* (Cth).

two complaints carried over from the previous year.¹⁴ Of the seven matters finalised, four were dismissed as being trivial or otherwise not meriting further investigation. A fifth complaint, relating to return of seized property, was quickly remedied after the Ombudsman's referral. A sixth and more serious complaint was found to have been adequately raised and reviewed before a court, and hence no further role for the Ombudsman existed. Finally, a complaint described by the Ombudsman as a serious allegation was forwarded to the ACC for investigation under the Ombudsman's supervision, but the complaint could not be substantiated due to a lack of evidence.

58. In addition, the Ombudsman conducted an own motion investigation into a review of the operational and corporate implications for the ACC arising from allegations of corrupt activities by two former secondees. The recommendations made by the Ombudsman as a result of this investigation have been accepted by the ACC.
59. The Law Council considers that the Ombudsman has exercised an appropriate level of oversight in relation to complaints against the ACC, within the parameters of the Ombudsman's limited statutory powers, and is unable to comment further without detailed knowledge of the substance of those complaints.
60. In relation to telecommunications interception and controlled operations, the Ombudsman's 2003-04 report indicates two inspections of records in relation to each of these activities carried out by the ACC during 2003-04 were carried out, with Ombudsman being satisfied that the ACC was generally complying with applicable statutory requirements and providing comprehensive and accurate information in reports. Further detail and some recommendations regarding the ACC's conduct of controlled operations is contained in the separate reports of the Ombudsman on this area of law enforcement operations.¹⁵ The Law Council has no additional comment on these aspects of the Commonwealth Ombudsman's oversight of the ACC.

ROLES, POWERS AND STRUCTURE OF THE AUSTRALIAN CRIME COMMISSION

Powers of the ACC

61. The ACC Act confers a number of extraordinary coercive powers on the ACC in order to fulfil its role, including powers to:
 - obtain search warrants authorising members of the Australian Federal Police (AFP) or State police, or any other person, enter premises and search and seize things connected with a special ACC operation / investigation (s 22)
 - obtain an order for the delivery to an ACC examiner of the passport of an actual or potential witness in an ACC examination (s 24)
 - conduct examinations (s 25A) at which it is an offence for a person summoned to fail to appear or answer questions (s 30)
 - summon witnesses and take evidence (s 28)

¹⁴ Commonwealth Ombudsman, *Annual Report 2003-04*:
http://www.comb.gov.au/publications_information/Annual_Reports/ar2003-04/index.html

¹⁵ Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations (2003-04)*:
http://www.comb.gov.au/publications_information/Annual_Reports/monitoring_ops/2003-04-controlled_ops.pdf

- obtain documents (s 29), and
 - obtain arrest warrants for failure to comply with specified provisions of the Act (s 31).
62. The special coercive powers vested in the ACC raise some concerns for the Law Council. In particular, the Law Council is dissatisfied with the way in which the abrogation of the privilege against self-incrimination in ACC special examinations can be used to undermine the traditional right to silence afforded to witnesses in the Australian legal system.¹⁶
63. The above coercive powers are supplemented by a range of criminal offences. These criminal offences apply where:
- a person is present at an examination in contravention of an examiner's direction or the person makes a publication in contravention of a non-publication direction by an examiner – punishable by a fine of 20 penalty units or imprisonment for a period not exceeding 12 months (s 25A);
 - a person refuses or fails to comply with a document production notice – punishable by 200 penalty units or 5 years (s 29A);
 - a person who discloses the existence of an ACC summons notice or any information about it or any information about any official matter connected to the summons (except to a legal practitioner or legal aid officer for the purpose of obtaining legal assistance etc.) – punishable by 20 penalty units or imprisonment for 12 months (s 29B);
 - a person summoned to appear at an examination fails to attend or to answer questions (s 30);
 - a legal practitioner refuses to answer a question that would disclose a privileged communication and then does not comply with an examiner's request for the legal practitioner to give the name and address of the person to whom or by whom the communication was made – punishable by 200 penalty units or 5 years (s 30);
 - a person gives false or misleading evidence at an examination – punishable by 200 penalty units or 5 years (s 33), and
 - a person obstructs or hinders the ACC in the performance of its functions or an examiner in the performance of his or her functions – punishable by 200 penalty units or 5 years (s 35).
64. These criminal offences appear to be out of step with state and territory criminal laws and the work currently undertaken by the ACC. According to the Court results provided in the Annual Report, the matters which have led to prosecutions in 2003-2004 relate to operations against the supply of illicit drugs and possession of firearms. The Law Council views the levels at which these penalties are set as unjustifiably high.

Privilege Against Self Incrimination

65. The Law Council is opposed in principle to the provisions that unduly abrogate or restrict the privilege against self-incrimination and legal professional privilege. In particular, the Law Council is concerned that the provisions surrounding the abrogation of the privilege against self-incrimination in s 30 are overly broad and

¹⁶ See *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 for a discussion in the High Court of the importance of protecting the right to silence in investigations into serious crime.

can operate to undermine the usual protection afforded to witness in legal proceedings.

66. The operation of subsections 30(4) and (5) is that a person who is being questioned at an ACC examination may, before answering a question or producing a document, claim that the answer or the production of the document might tend to incriminate the person. Notwithstanding this provision, the person is still compelled to answer the question or produce the document under the threat of fines or imprisonment. The only effect of making the claim of privilege is that a partial use immunity then operates, making the answer or document not admissible in subsequent criminal proceedings or proceedings for the imposition of a penalty (other than confiscation proceedings).
67. Thus, the right against self-incrimination is effectively abrogated for ACC examinations, and unless the privilege is nonetheless claimed although abrogated, the evidence obtained during the examination is potentially admissible in criminal proceedings.
68. Recent cases have affirmed that s 30 does abrogate the privilege against self-incrimination, in relation to both Australian offences and foreign offences.¹⁷ Indeed, the abrogation has been held to extend to spousal incrimination.¹⁸ While the Law Council recognises that some measure of coercive power is necessary for the investigation of serious offences, particularly where organised crime is involved, the extent to which the right to silence is undermined by these provisions is concerning.
69. There is no requirement in the ACC Act or regulations that a person summoned before an examination be cautioned as to the abrogation of the privilege against self-incrimination in s 30 and the fact that, notwithstanding the criminal penalties that apply to a failure to answer questions or produce documents, this (abrogated) privilege must be claimed in advance in order to attract the limited use immunity under that s 30(5). Section 28 describes the information that is required to accompany a summons to appear before an examiner, but no statement of rights and obligations is required.
70. Presumably the requirement of a general caution as described in the *Evidence Act 1995 (Cth)* ("Evidence Act") in relation to 'official questioning' applies, but this only requires that the person be told before questioning commences "that the person does not have to say or do anything but that anything the person does say or do may be used in evidence".¹⁹

¹⁷ See *A v Boulton* [2004] FCA 56 (6 February 2004); on appeal to Full Federal Court, *A Boulton* [2004] FCAFC 101 (30 June 2004); *X v Australian Crime Commission* [2004] FCA 1475 (17 November 2004); *Loprete v Australian Crime Commission* [2004] FCA 1476 (17 November 2004).

¹⁸ See *S v Boulton* [2005] FCA 821 (22 June 2005); *Stoten v Sage (Examiner, Australian Crime Commission)* [2005] FCA 935 (8 July 2005).

¹⁹ See s139 of the *Evidence Act 1995 (Cth)*, with failure to caution when required constituting a ground for exercising the discretion to exclude improperly or illegally obtained evidence in s138(1). The term 'official questioning' is defined in the Dictionary to the Evidence Act as "questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence".

71. The Law Council believes that what is clearly lacking in the ACC Act is an obligation to caution in relation to the application of the use immunity where the privilege is claimed pursuant to s 30 (4) and (5).
72. By contrast, s132 of the Evidence Act imposes a statutory duty on courts to inform a witness that he or she may have grounds for claiming a privilege (including self-incrimination and client legal privilege), and conduct a *voire dire* if necessary to ensure that the witness is aware of these rights. The provisions in the Evidence Act highlights the safeguards available in the criminal justice system to ensure standards of fairness to witnesses and those involved in criminal proceedings.
73. The Law Council strongly recommends that the same standards as provided in the Evidence Act be embodied in the ACC Act in relation to the conduct of examinations and the exercise of special coercive powers by the ACC.

Legal Professional Privilege

74. According to s 30(3) and (6), a legal practitioner who does not disclose the name and address of a client upon demand by an ACC examiner is exposed to serious criminal penalties.²⁰ The ACC Act purports to preserve legal professional privilege. Subsection 30(9) states that "subsection (3) does not affect the law relating to legal professional privilege".
75. The Law Council does not accept this assertion, as there is no obligation under the common law of legal professional privilege imposed on lawyers to give the names and addresses of their clients on pain of criminal penalties including imprisonment.

Right to Legal Representation

76. The Law Council believes that legal practitioners should be able to be present at ACC examinations and to represent their clients without hindrance. Subsection 25A(2) of the ACC Act purports to allow representation by a legal practitioner for persons giving evidence and, at the discretion of the examiner in special circumstances, for persons not giving evidence. Clearly, a right to legal representation is intended.
77. However, in a recent case an ACC examiner sought to exclude a legal representative from an examination on the ground that the same counsel had represented and been present at questioning of other persons and might inadvertently disclose information). Fortunately, this blatant interference in the right to legal representation was set aside as unlawful by the Federal Court.²¹

Use of Evidence Obtained from Examinations

78. The Law Council raises concerns in relation to the use to which evidence obtained by the ACC during examinations may be put in subsequent criminal investigations and prosecutions. For example, the ACC is able to disclose information obtained in its investigations to the Australian Taxation Office (ATO)

²⁰ *Mansfield v Australian Crime Commission* [2003] FCA 1059 (3 October 2003)

²¹ *Hogan v Australian Crime Commission* [2005] FCA 913 (7 July 2005)

for use in its investigations and prosecutions.²² In one recent Queensland case, a jury was allowed to hear tape-recordings of an ACC examination after two of the witnesses in the proceeding were declared to be hostile witnesses.²³ These cases illustrate the degree to which ACC investigations can influence and interact with prosecutions, with the consequence that the abrogation of the privilege against self-incrimination effectively subverts the same rights under general criminal law.

79. It should also be noted that courts have not recognised the fact that an ACC investigation or examination is being conducted as a basis for suspending civil or criminal proceedings, or granting an injunction to terminate the ACC investigation.²⁴
80. As discussed at paragraph 21, the Law Council strongly recommends that legislative changes be made to the conduct examinations to ensure that the examiner does not have such wide discretion and that accepted rules of evidence apply to them.

²² *AA Pty Ltd v Australian Crime Commission* [2005] FCA 1178 (25 August 2005)

²³ *R v Cannon* [2004] QCA 440 (19 November 2004)

²⁴ *Hak Song Ra v Australian Crime Commission* [2004] FCA 416 (8 April 2004); *Watt v Australian Crime Commission* [2004] FCA 1669 (15 December 2004); *CC v Australian Crime Commission* [2005] FCA 754 (2 June 2005).

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.