

# CHAPTER 1

## Background to the inquiry into the *Australian Crime Commission Amendment Act 2007*

1.1 The Australian Crime Commission (ACC) is established under the *Australian Crime Commission Act 2002* (the Act) to combat serious and organised crime. The ACC's role centres on intelligence collection and dissemination, and on criminal investigation.<sup>1</sup> To undertake these functions, the ACC can draw upon coercive powers which enable it to source information which cannot be accessed through traditional policing methods. These coercive powers are similar to those of a Royal Commission.<sup>2</sup>

1.2 The ACC has four independent examiners who are authorised to use these coercive powers. The coercive powers available to examiners are considerable. A person summonsed before an examiner is compelled to answer questions under oath/affirmation at an examination, and to provide potentially incriminating evidence or documents. A person who fails or refuses to attend an examination, take an oath/affirmation, or answer questions is guilty of an indictable offence, attracting a fine of up to 200 penalty units or imprisonment for a period of up to five years.<sup>3</sup>

### **Power to summons witnesses and obtain documents**

1.3 Part II Division 2 of the Act allows an examiner to conduct an examination for the purposes of a special ACC operation or investigation.

1.4 Section 28 empowers examiners to summons witnesses to appear before an examiner at an examination to give evidence, and to produce such documents or other things (if any) as are referred to in the summons. That provision also enables an examiner to take evidence on oath or affirmation.

1.5 Section 29 empowers examiners, by notice in writing, to require persons to attend before a specified person, and produce a document or thing that is relevant to a special ACC operation or investigation.

1.6 Section 28 of the Act sets out the procedure by which a summons is issued. In particular, subsection 28(1A) stipulates:

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1 Australian Crime Commission, *Annual Report 2006-07*, p. 10.

2 Australian Crime Commission, *Annual Report 2006-07*, p. 11.

3 Section 30 of the *Australian Crime Commission Act 2002*

Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons.<sup>4</sup>

1.7 Similarly, section 29(1) sets out the procedure by which an examiner issues a notice. Subsection 29(1A) states:

Before issuing a notice under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the notice.<sup>5</sup>

### **Recording reasons in writing**

1.8 In August 2007, there was a successful challenge to an examiner's interpretation of subsections 28(1A) and 29(1A).

1.9 In the Supreme Court of Victoria, Justice Smith held that for a summons to be valid, the reasons for its issue must have been recorded in writing prior to the issue of the summons.

It was plain that [the accused] chose to put in issue the question of whether that pre-condition had been satisfied. While the Act significantly qualifies the right to silence there is nothing in the Act which:

- prevents a person charged with the offence in question putting in issue the validity of the examination summons; or
- limits the ways in which that validity may be challenged.

The pre-conditions are no doubt specified because of the significant inroads made to the right to silence and the need to ensure that the power is properly exercised.<sup>6</sup>

1.10 The decision of His Honour Justice Smith called into question the previously established practices of ACC examiners in the issuing of summonses and notices.

1.11 But the government and the Attorney-General's Department took a different view of the judicial decision, describing the requirement to record reasons in writing as 'technical'. And stating that a failure to comply with a 'technical requirement' should not be allowed to jeopardise special ACC operations and investigations.<sup>7</sup>

1.12 This led to the amendment of the Act by the *Australian Crime Commission Amendment Bill 2007* (the Amending Act).

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4 Subsection 28(1A) of the *Australian Crime Commission Act 2002*

5 Subsection 29(1A) of the *Australian Crime Commission Act 2002*

6 *ACC v Brereton* [2007] VSC 297 (23 August 2007) at 10.

7 *Australian Crime Commission Amendment Bill 2007*, Explanatory Memorandum, p. 4.

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## The Australian Crime Commission Amendment Bill 2007

1.13 Although the Amending Act resulted from the Justice Smith decision, the bill had several objectives. In introducing the legislation, Senator Eric Abetz stated that the bill was intended to:

...clarify that an Australian Crime Commission (ACC) examiner can record their reasons for issuing a summons or notice to produce before, at the same times as, or as soon as practicable after, the summons or notice has been issued. The bill will also provide that summonses or notices issued after the commencement of the ACC Act, but prior to the commencement of the bill, are not invalid where reasons were recorded subsequent to their issue. Further, the bill will provide that a summons or notice will not be invalid merely because it fails to comply with technical requirements set out in the Act.<sup>8</sup>

1.14 Two of the primary amendments sought to amend subsections 28(1A) and 29(1A) of the Act to expressly allow an examiner to record reasons for issuing a summons or notice:

- (a) before the issuing of the summons; or
- (b) at the same time as the issue of the summons; or
- (c) as soon as practicable after the issue of the summons.<sup>9</sup>

1.15 Another two primary amendments sought to retrospectively apply the bill to all summonses and notices issued under subsections 28(1) and 29(1), and which would otherwise be invalid because the record referred to in subsections 28(1A) and 29(1A) was made after the summons or notice was issued.<sup>10</sup>

The summons [or notice] is as valid, and is taken always to have been as valid, as it would have been if [the] Act had provided that the record could be made after the issue of the summons [or notice].<sup>11</sup>

1.16 The total effect of the Amending Act was succinctly summarised by the Law Council of Australia as follows:

It removed the requirement for ACC examiners to record in writing their reasons for issuing a summons to appear at an examination or for issuing a notice to produce documents before issuing the summons or notice. Instead the ACC Act now allows examiners to record their reasons:

- (a) before the issue of the summons; or
- (b) at the same time as the issue of the summons; or

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8 Senator Eric Abetz, *Senate Hansard*, 18 September 2007, p. 14.

9 Clauses 2 and 7 of the *Australian Crime Commission Amendment Bill 2007*

10 Clauses 10 and 12 of the *Australian Crime Commission Amendment Bill 2007*

11 Subclauses 10(2) and 12(2) of the *Australian Crime Commission Amendment Bill 2007*

(c) as soon as practicable after the issue of the summons.

It inserted a validation provision which provides that even where an examiner has not recorded his or her reasons for issuing a summons, either as soon as practicable after issuing the summons or at all, the summons is nonetheless valid.

It inserted a provision which gives the validation provision retrospective effect. The result is that previously invalid summonses issued prior to the Amendment Act are rendered valid, despite a failure to record written reasons in compliance with the terms of the ACC Act.

It amended sections 28 and 29 of the ACC Act to allow examiners to substitute for each other in the performance of their functions, for example, to allow a person summonsed to appear before a particular examiner to in fact appear before a different examiner, where the first examiner may be on leave or otherwise unavailable.<sup>12</sup>

## **The parliamentary process to amend the Australian Crime Commission Act 2002**

1.17 On 18 September 2007, the Amending Act was introduced into the Senate. The urgency with which this bill was to be considered by the Parliament was evident in the suspension of Standing Orders of the Senate. These require that the initiation of a bill:

is first introduced in the Senate by a Minister in a period of sitting...

and a motion is moved for the second reading of the bill, debate on that motion shall be adjourned at the conclusion of the speech of the senator moving the motion and resumption of the debate shall be made an order of the day for the first day of sitting in the next period of sittings without any questions being put.<sup>13</sup>

1.18 In essence, the suspension of Standing Order 111 ensured that the debate on the bill was not subject to the usual time for consideration before the second reading debate.

1.19 During the first reading debate, Senator Natasha Stott Despoja highlighted concerns in regard to this 'cut-off', and the speed at which the legislation was progressing through the Senate:

This morning the office of the Attorney-General kindly organised and offered my office a briefing. That is still relatively short notice, because we are dealing with a piece of legislation that is being introduced and exempted from the cut-off and that will probably be debated today. The first that my office was aware of this legislation was this morning...I believe that a statement of reasons was tabled in this place yesterday, and I acknowledge

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12 Law Council of Australia, *Submission 5*, p. 2.

13 The Senate, *Standing Orders and other orders of the Senate*, September 2006, 111 (5), p. 63.

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that, but, regardless of this timeframe, I think the chamber can agree that this is a very fast process.<sup>14</sup>

1.20 The government argued that the bill's exemption from the 'cut-off' was justifiable as the legislation dealt with matters of urgency.

The findings of Justice Smith...have significant implications for current investigations/operations of the ACC, including matters that are currently before the courts. The bill ensures that summonses and notices that are being relied upon for current investigations/operations and prosecutions are not invalidated simply because reasons were issued after they were issued. If this is not addressed, it could call into jeopardy evidence taken in a substantial number of matters, including evidence being used in current prosecutions. It is important that this issue is resolved as soon as possible so that matters before the courts are not unduly affected.<sup>15</sup>

1.21 The opposition accepted the government's argument, and decided also to support the bill's exemption from the cut-off based on the need to deal with the legislation in the current week.<sup>16</sup> It transpired that this was to be the last sitting week of the federal parliament before the Parliament was prorogued for the 2007 federal election.

1.22 In the House of Representatives, similar concerns were raised regarding the speed of the legislative process:

The Australian Crime Commission Amendment Bill 2007 has been brought on in great haste. This is not the parliament at its best. This is not the government at its best. We as an opposition were first advised of the government's desire to bring this matter before the parliament only on Monday night—late on Monday night, I might add. It was then rushed through the Senate the next day, and here we are on what is probably the last day of sitting of the House of Representatives before the election, facilitating its passage here in the Main Committee rather than in the House of Representatives itself.<sup>17</sup>

### *Passage in the Senate*

1.23 The bill was first read in the Senate on 18 September 2007, and was read for a second and third time later that day. Concerns over the speed with which the legislation was introduced and debated are briefly discussed in preceding paragraphs: specific concerns raised during the debates are discussed in subsequent chapters of this report.

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14 Senator Natasha Stott Despoja, *Senate Hansard*, 18 September 2007, p. 10.

15 Minister for Justice and Customs, Statement of reasons for introduction and passage in the 2007 Spring Sittings, Australian Crime Commission Amendment Bill, Tabled 17 September 2007.

16 Senator Joe Ludwig, *Senate Hansard*, 18 September 2007, p. 12.

17 Mr Archibald Bevis MP, *House Hansard, Main Committee*, 20 September 2007, p. 120.

1.24 The Amending Act passed with Government and Opposition support. But the debates on the merits of the bill illustrate that the parliamentarians' support was largely pragmatic, the legislation being a direct response to the Justice Smith decision.

1.25 The minor parties did not support the legislation, and more clearly articulated a concern that the government was, to a degree, attempting to rectify errors and inadequacies in the examiners' exercise of the ACC's coercive powers.

1.26 Senator Natasha Stott Despoja displayed some sympathy for the government's position:

The government was caught between a rock and a hard place. It is apparent that for some reason the ACC decided that it did not need to record its reasons—at least prior to any summonses or notices to produce being issued. This was despite the wording of section 28(1A) as it stands, which I think pretty clearly states that written reasons should be recorded...But what does the government do? It attempts to legislate retrospectively to remedy the ACC's problems and incompetence.<sup>18</sup>

1.27 And the Australian Greens evinced similar sentiments, with Senator Kerry Nettle declaring:

It is not and should not be the role of this parliament to rush through special legislation to make up for the shortcomings or failings of investigators in particular tax evasion cases.<sup>19</sup>

1.28 But Senator Kerry Nettle also took issue with the government's fundamental classification of the record making provisions of subsections 28(1A) and 29(1A) as 'technical requirements':

The recording of reasons is not, as the government says, merely technical but one of the few mechanisms of accountability that there is over the Crime Commission's coercive powers.<sup>20</sup>

1.29 The Senate Scrutiny of Bills Committee normally comments on every bill introduced into the Parliament. That committee did not have the opportunity to consider and publish a commentary on the Amending Act during the life of the 41<sup>st</sup> Parliament. In May 2008, the Scrutiny of Bills Committee published its commentary, and where relevant, its comments are referred to in this report.

### ***Passage through the House of Representatives***

1.30 The Attorney-General, the Hon. Phillip Ruddock MP, introduced the bill in the House of Representatives for its second reading on 20 September 2007. As in the

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18 Senator Natasha Stott Despoja, *Senate Hansard*, 18 September 2007, p. 96.

19 Senator Kerry Nettle, *Senate Hansard*, 18 September 2007, p. 99.

20 Senator Kerry Nettle, *Senate Hansard*, 18 September 2007, p. 99.

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Senate, Members of the House took a pragmatic approach toward the bill, and it was debated and passed that same day.

1.31 Emeritus Professor Jim Davis subsequently reflected:

This particular bill had passed through both houses of parliament with what may be regarded in some quarters as commendable speed and in other quarters may be regarded on this particular occasion as distressing speed.<sup>21</sup>

1.32 The ACT Attorney-General, Simon Corbell MLA was clearly in the latter category, telling the Parliamentary Joint Committee on the Australian Crime Commission (PJC/committee):

I cannot accept [potential judicial challenge] as a legitimate rationale for either the amendments themselves, or the haste at which they were rushed through the Parliament, as it implies that the ACC should not be held to account by the Courts for the unlawful use of its powers. Such a proposition offends fundamental principles of the rule of law, which would hold that, if the ACC has acted contrary to law in the exercise of its powers; those actions should be amenable to judicial review.<sup>22</sup>

### *The Parliamentary Joint Committee on the Australian Crime Commission*

1.33 Notwithstanding its passage, members of both chambers felt that a parliamentary inquiry into the Amending Act was appropriate and should be held when time permitted in the new parliament.

1.34 Mr Duncan Kerr MP gave voice to the common sentiment:

These measures will pass in this form. I think they do demand the attention of the parliament in the next sitting, whether the government is returned or the opposition becomes the government, because as they are currently framed I do not think they satisfy anybody.<sup>23</sup>

1.35 And Mr Archibald Bevis MP foreshadowed:

After the election, should Labor form government, we will be reviewing these provisions and we will be reviewing their implementation and operation within the Australian Crime Commission.<sup>24</sup>

1.36 In responding to the concerns of the Parliament, the then Minister for Justice, the Hon. David Johnston, agreed that the PJC examine the legislation:

The government does support, as I support, having the maximum degree of parliamentary review of amendments of this kind that is possible. I will

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21 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 3.

22 Mr Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 2.

23 Mr Duncan Kerr MP, *House Hansard*, 20 September 2007, p. 128.

24 Mr Archibald Bevis MP, *House Hansard*, 20 September 2007, p. 125.

therefore write to the chair of the Parliamentary Joint Committee on the Australian Crime Commission to invite the committee to review these amendments, albeit after the event. If deficiency is found or the degree of protection, safeguards, checks and balances is not found to be sufficient, the government will then consider those findings and seek to address those points raised, whilst seeking to preserve the integrity of the intent of the legislation.<sup>25</sup>

1.37 The Minister subsequently wrote to the then committee chair, the Hon. Senator Ian Macdonald, referring to his undertaking, and proposing that the PJC consider an inquiry into the Amending Act. However, the PJC was not able to undertake the Minister's request as the 41<sup>st</sup> Parliament was prorogued shortly after.

### **The 42<sup>nd</sup> Parliament**

1.38 Shortly after its establishment, the PJC for the 42<sup>nd</sup> Parliament considered the unattended work of the committee in the previous Parliament. The committee felt that there was a need to undertake the inquiry which had been proposed into the Amending Act.

**1.39 The PJC was concerned not only with the substance and expeditious passage of the legislation, but also with the fact that throughout August-September 2007, the committee was neither advised by the ACC of the Justice Smith decision, nor the imminent introduction of the bill. This matter is further discussed in chapter 4 of this report.**

1.40 At its private meeting on 17 March 2008, the PJC adopted terms of reference to hold an inquiry into the Amending Act. The terms of reference are provided at Appendix 1.

### **Conduct of the inquiry**

1.41 The committee invited submissions from a wide range of governments, organisations and individuals. Due to the very specific nature of the amendments, only a small number of submissions were received. These are listed at Appendix 2.

1.42 The committee held hearings on 1 May 2008, 17 June 2008 and 29 July 2008.

1.43 The hearing of 1 May 2008 was organised to occur in two sections. The first section occurred in the morning where the committee heard evidence in-camera. This hearing was not open to the public.

1.44 The second section of the hearing was to occur in the afternoon, during which time the committee was to hear evidence in public from a range of organisations and departments. However, due to correspondence which the committee received late that

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25 Senator the Hon. David Johnston, Minister for Justice and Customs, *Senate Hansard*, 18 September 2007, pp 99-100.



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morning, the PJC felt it prudent not to proceed with the afternoon hearing. The correspondence in question was disclosed the next day in contravention of the Standing Orders of the Senate and the *Parliamentary Privileges Act 1987*, and became the subject of a potential contempt of the Senate. This matter is dealt with later in this report. The adjourned hearing of 1 May 2008 was rescheduled for 17 June 2008.

1.45 A further hearing was held on 29 July 2008 to allow all interested parties an opportunity to participate in the inquiry.

1.46 A list of all witnesses who provided evidence at the public hearings is provided at Appendix 3.

### **Acknowledgments**

1.47 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information, or appearing before it to give evidence.

1.48 The committee especially thanks the Commonwealth Ombudsman, Professor John McMillan and his staff for expeditiously undertaking and reporting on its investigation into the ACC's use of examination powers. The committee found this report to be of assistance to its own investigation.