CHAPTER 2

Administrative and procedural issues

2.1 As early as November 2002, the Parliamentary Joint Committee on the Australian Crime Commission (PJC/committee) expressed its concern with the exercise of coercive powers, acknowledging that such powers are a potent weapon that can significantly affect individuals.[1]

2.2 In relation to the Australian Crime Commission (ACC), the committee concluded:

> Appropriate safeguards to ensure the proper use (ie to further a special operation/investigation) therefore are required. These safeguards should operate both at the point of authorisation and in the exercise of them.[2]

2.3 The *Australian Crime Commission Act 2002* (the Act) contains some safeguards. But it was not until 2007 that an issue arose as to whether the ACC and its examiners were complying with those provisions of the Act.

2.4 The PJC therefore resolved on behalf of the Parliament to inquire into the administrative and procedural arrangements of the ACC and its examiners in regard to the issuing of summonses and notices under the Act.

Issuing summonses and notices

The legal requirements

2.5 Subsection 28(1A) of the Act provided that, before issuing a summons, 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. An identical provision existed in respect of a notice: subsection 29(1A).

2.6 In September 2007, Parliament enacted the *Australian Crime Commission Amendment Act 2007* (the Amending Act). Subsections 28(1A) and 29(1A) were amended to allow the examiner to make the written record before, at the same time, or as soon as practicable after the issue of the summons or notice.

2.7 Upon examination, the Senate Scrutiny of Bills Committee expressed the view that these amendments might trespass on personal rights and liberties.[3] But it

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1 Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p. 23.

2 Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p. 23.

was not until the PJC conducted its inquiry that the Amending Act that this concern was more thoroughly scrutinised.

The rationale

2.8 In his second reading speech, the then Manager of Government Business in the Senate stated that:

> The amendments proposed by the Bill will address situations where summonses or notices need to be issued in urgent situations, or where large numbers need to be issued simultaneously.[4]

2.9 Neither urgency nor volume were sufficient to convince Emeritus Professor Jim Davis that the amendments were justifiable:

> To my mind, administrative convenience ought not to be the sort of factor that, in my view, severely limits civil liberties and human rights.[5]

2.10 And the Law Council of Australia questioned the true extent of the alleged problem:

> The information provided by the ACC in other forums would suggest that ACC special investigations or operations are for the most part highly structured and methodically planned exercises. The impression is given that, because of the sophisticated and organized nature of the criminal activity under investigation, careful and strategic decisions are made about where and how to obtain information, from whom and in what order.[6]

2.11 In addition, and more significantly:

> Even in an urgent case, the Law Council would expect an examiner to require a requesting officer to provide reasons and make a case before the examiner decided to issue a summons. In those circumstances, the obligation to record reasons prior to issuing the warrant should not be unduly onerous because material should already be before the examiner.[7]

2.12 However, the Commonwealth Ombudsman in its report '*Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*', found that:

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3 Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 3 of 2008, 14 May 2008, p. 9.

4 Senator Eric Abetz, *Senate Hansard*, 18 September 2007, p. 13.

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

6 Law Council of Australia, *Submission 5*, p. 4.

7 Law Council of Australia, *Submission 5*, p. 5. Also, see Liberty Victoria, *Submission 1*, p. 2.

in respect of both summonses and notices, the majority of reasons were recorded after the issuing of the summons or notice.[8]

2.13 The Commonwealth Ombudsman found that, subsequent to the enactment of the Amending Act, 53 per cent of summonses and 57 per cent of notices were having their reasons recorded *post facto*. The Ombudsman noted that, in these instances, the recording of reasons often did not occur 'as soon as practicable': 15 per cent of summonses and 18 per cent of notices had their reasons recorded more than seven days after the issue of the summons or notice.[9]

2.14 The Crime and Misconduct Commission Queensland, relying upon its own experience, queried the difficulty of making a written record before or at the same time as the issue of a summons/notice:

> Inquiries made of CMC officers involved in the issuing process, as issuers of or applicants for, notices reveal that no instances have occurred involving the issue of notices without the generation of the record before or contemporaneously with the issue of the notices. Even in urgent circumstances, which arose on a Sunday in the context of a investigation [sic] into suspected terrorist activity, the appropriate record was created before the approval of the Supreme Court was obtained for the issue of an immediate attendance notice.[10]

2.15 The Crime and Misconduct Commission Queensland has a simple certification process, but could not envisage what circumstances might lead an agency like the ACC, or its examiners, to have to delay the generation of a record of decision.[11]

2.16 Nonetheless, and with reference to its own legislation, the Crime and Misconduct Commission Queensland supported the validity of notices issued without a 'record of decision'.

> Whilst such an occasion has not arisen in the history of the CMC, the possibility of especially urgent circumstances or some other impediment to usual practice arising cannot be totally excluded.[12]

2.17 The PJC does not believe that it is too difficult to make a simple or basic record of reasons for decision upon issue of a summons/notice, particularly if the material upon which a decision is based is readily available.

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8 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, p. 6.

9 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, pp 5-7.

10 Crime and Misconduct Commission Queensland, *Submission 7*, p. 2.

11 Crime and Misconduct Commission Queensland, *Submission 7*, p. 4.

12 Crime and Misconduct Commission Queensland, *Submission 7*, p. 3.

2.18 On this point, Liberty Victoria observed:

> If there is time to attend to the paperwork of issuing a summons it is scarcely credible that there will not be time to record the reasons for it.[13]

2.19 But the Attorney-General's Department indicated that the problem was not temporal: examiners cannot always access the ACC's secure network.[14] Implicit in this argument is the notion that examiners cannot find any other means by which to record their reasons for decision, or are not permitted to do so. The PJC does not accept this argument.

2.20 The ACC has told the committee that, prior to the Justice Smith decision:

> Operational pressures would have made it impracticable to record more than a brief note as to the reasons before issuing a summons or notice and that would not have adequately served the audit function of written reasons.[15]

2.21 The CEO of the ACC, Mr Alastair Milroy also stated that:

> It is impractical to record more than a brief note. That is mainly to do with the fact of the cases that they have. Being expected to make notes and write reasons at the time of receiving a notice or even before issuing a notice is impractical. I think that is one of the reasons why the changes to the act were requested.[16]

2.22 The PJC acknowledges that it might be inconvenient and disruptive to examiners, and the examination process, to make a detailed written record of reasons for decision prior to issue of a summons/notice. But on this point, the committee agrees with Emeritus Professor Jim Davis. More importantly, the ACC concedes that the making of a 'brief note' is feasible, and this is all that the Act requires.

2.23 In this regard, the committee notes the comments of the Commonwealth Ombudsman arising from its inspection of the ACC's summonses/notices records:

> The recording of those reasons need not be a time consuming task. Although there may at times be reasons that warrant more lengthy delays before reasons are recorded, in general it is difficult for this office to accept that delays of the extent found during this inspection could reasonably be considered to meet the legislative standard.[17]

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13 Liberty Victoria, *Submission 1*, p. 2.

14 Attorney-General's Department, *Submission 2*, p. 3.

15 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

16 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, pp 23-24.

17 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, p. 6.

2.24 The PJC believes that it is not too impractical or onerous for the examiners to make some form of written record prior to the issue of a summons/notice. This would appear to be best practice for any federal executive agency exercising coercive powers. And the committee is not convinced that urgency was, or is, a significant factor in the issuing of summonses/notices. The issue of volume is further discussed in chapter 3.

2.25 The PJC recognises that the recording of reasons for decision upon issue of a summons/notice would be greatly facilitated by the existence of an appropriate template. And if examiners wished to expand upon that record, and more fully record their reasons for decision for audit purposes, then this can be undertaken subsequent to the issue of the summons/notice.

2.26 The CEO of the ACC, Mr Alastair Milroy, has told the committee that:

> I am developing with the Commonwealth Ombudsman a compliance model applicable to the examiner's processing, allowing the Ombudsman to conduct an audit and inspection program.[18]

2.27 **The PJC commends this initiative, adding that the compliance model should include a template for recording reasons for decision upon issue of a summons/notice. The committee cautions that the compliance model is not an administrative exercise, but an important accountability mechanism. It should therefore comprise carefully considered procedures which minimise the risk of challenge**.

2.28 The committee supports recommendations 2, 3, and 4 of the Commonwealth Ombudsman contained in the *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002* report in regard to the recording, and the electronic storage and management of documents accompanying summonses and notices.

Recommendation 1

2.29 The committee recommends that the Australian Crime Commission be required to, without delay, develop and implement a consistent and reliable method for its examiners to promptly and securely record their reasons for decision as required by Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002*.

Recommendation 2

2.30 The committee recommends that the amendment made to Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* by the *Australian Crime Commission Amendment Act 2007* be repealed

18 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9. Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 4.

but that those subsections be amended to ensure that the reasons for the decision must be recorded in writing before the issuing of a summons or notice.

2.31 The committee's proposed amendments to Part II Division 2 Subsection 28(1A) and 29(1A) can be found at Appendix 4.

The statutory safeguards

2.32 Subsections 28(1A) and 29(1A) of the Act stipulate two safeguards in the examiners' exercise of the ACC's coercive powers: first, that the examiner must record in writing the reasons for issuing a summons or notice; and second, that before issuing a summons or notice, the examiner must be satisfied that it is reasonable in all the circumstances to do so.

A written record

2.33 The ACC is not the only executive body invested with coercive powers. But the Attorney-General's Department submitted:

> Sections 28 and 29 of the ACC Act are more prescriptive than other provisions in relation to the formal requirements and procedural safeguards applicable to the issuing of examination summons and notices to produce by comparable bodies.[19]

2.34 The Attorney-General's Department added:

> The requirement to record reasons is only present in the legislation applying to the Victorian Chief Examiner…Section 15 of the Major Crime (Investigative Powers) Act 2004 (Vic) provides that the Chief Examiner, in issuing a summons to attend an examination and/or to produce documents is obliged to record reasons for doing so. However, those provisions do not stipulate when the Chief Examiner should record reasons, nor do they specify any consequences for non-compliance with this or any other formal requirement set out under those arrangements.[20]

2.35 The *Crime and Misconduct Act 2002* (Qld) is another example provided by the Attorney-General's Department. Under that legislation, officers of the Crime and Misconduct Commission Queensland are not required to record reasons for the decision to issue notices (attendance and production). And, unlike a production notice, an issuer is not even required to hold a reasonable belief or suspicion in connection with what is sought under an attendance notice.[21]

2.36 However, this line of reasoning does not persuade the PJC that the ACC is overly prescribed. **The committee believes that a body invested with intrusive**

19 Attorney-General's Department, *Submission 2*, pp 6-7.

20 Attorney-General's Department, *Submission 2*, p. 7.

21 Crime and Misconduct Commission Queensland, *Submission 7*, p. 2.

coercive powers should not be permitted to exercise those powers without appropriate audit and record mechanisms. Some form of checks and balances is required, and this is what is envisaged and supplied in subsections 28(1A) and 29(1A) of the Act.

2.37 As indicated in preceding paragraphs, the PJC believes that the making of a written record is crucial in the process of issuing either a summons or a notice: the requirement to record reasons in writing evidences the examiners' compliance with subsections 28(1A) and 29(1A) of the Act.

> The requirement to make a record of the reasons for the issue of a summons or notice is…an essential element in the safeguards that are required for due process in the exercise of coercive powers. The process of recording reasons assists in forming a proper rationale for the issue of the summons or notice. It is also important in view of the multitude of consequences which can flow from that decision.[22]

2.38 The Crime and Misconduct Commission Queensland concurred, telling the committee:

> The CMC considers it imperative that there be a record created, at or before the time of the issuing of a coercive notice, which has the effect of demonstrating what material was considered by the issuer and what was the issuer's state of mind at the time the decision to issue was made.[23]

2.39 But the Law Council of Australia argued that the safeguard has been diminished by granting examiners such a wide latitude in the time for recording of reasons:

> If examiners are permitted to record reasons after the issue of the summons, and more particularly after the conduct of the examination or the production of documents, the value of the safeguard is significantly diminished. The perception will arise, and will be difficult to counter, that summonses have been retrospectively justified by what was revealed in the course of an examination, rather than information which was available at the time of issue. **In short, there will be no effective safeguard against fishing expeditions**.[24]

2.40 Liberty Victoria similarly argued that there should be no doubt about whether a proper basis existed for the issue of a summons at the time it is issued:

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22 The Hon. Duncan Kerr MP, *House of Representatives Hansard*, 20 September 2007, p. 126.

23 Crime and Misconduct Commission Queensland, *Submission 7*, pp 2-3.

24 Law Council of Australia, *Submission 5*, p. 4.

> The amendment permits the ACC to "fudge" that by issuing summonses when there is no proper basis and later manufacturing one. It thus opens the door to abuses of power by the issue of summonses with no proper basis.[25]

2.41 More worrisome, as Emeritus Professor Jim Davis observed:

> In the simple reading of the words of this amendment act there is no time within which an examiner must necessarily make a written record of the reasons for the issue of a summons.[26]

2.42 The PJC agrees that the Amending Act has diminished the safeguard, thus increasing the risk of summonses/notices being issued without the proper justification. The PJC does not condone such a risk, and anticipates that Recommendation 2 will alleviate the concern.

Reasonable circumstances

2.43 The requirement for an examiner to be satisfied that it is reasonable in all the circumstances to issue a summons or notice is intended to ensure that this occurs only if:

- there is a reasonable basis for believing that the person who is the subject of the summons or notice has information which will assist the relevant ACC investigation or operation; and
- it is necessary to have recourse to the ACC's coercive powers in order to obtain that information.[27]

2.44 In the context of coercive powers, this requirement is often referred to as if it were the examiners' only substantive procedural obligation. Indeed, upon introduction of the Amending Act in the Senate, Senator Eric Abetz cited this obligation as evidence of the legislation's due regard for individual rights.[28]

2.45 And the Attorney-General's Department maintained this view, telling the PJC that the requirement for an examiner to have reasonable grounds for issuing a summons remains challengeable in a court of law.[29]

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25 Liberty Victoria, *Submission 1*, p. 2. Also, see Civil Liberties Australia, *Submission 3*, p. 3. The Commonwealth Ombudsman may have had similar concerns in mind when he recommended that records of reason, once finalised, be retained in an electronic format that cannot subsequently be changed. See: Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, p. 8.

26 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 2.

27 Law Council of Australia, *Submission 5*, p. 4.

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

29 Dr Karl Anderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 12.

> The ACC Amendment Act preserves important procedural safeguards that ensure the integrity and fairness of examinations conducted under the ACC Act, and of convictions secured as a result of evidence obtained through those means.[30]

2.46 The PJC notes that it is not examinations and convictions under review, but the method by which the ACC examination process is commenced. And for this purpose, the Act specifies two procedural safeguards. Having due regard to one safeguard does not excuse the elimination of the second safeguard.[31]

Effectiveness of the safeguards

2.47 The PJC received submissions which argued that examiners have misused or overused the ACC's coercive powers. These submissions were also critical of the Parliament's perceived complicity.

2.48 The Law Council of Australia submitted that the real rationale for the amendments was to rectify problems arising from the examiners' non-compliance with the Act:

> It is not open to the examiners to adopt a liberal interpretation of the Act any more than it is open to them to simply disregard the requirements of the Act…**The Amendment Act sent a dangerous message that agencies which ignore the requirements of the law will be shielded from the consequences of their actions through the use of retrospective legislation, and may in fact even be rewarded for their non-compliance with legislation that reduces the safeguards they must comply with in the future**.[32]

2.49 And Civil Liberties Australia submitted that:

> It appears the Commonwealth has set itself above the law in that it has failed in a substantive way to observe the requirements of Section 28 and then used its privileged position as law maker to rectify its wrong. The Commonwealth failed in its duty to properly exercise the specific safeguards already built into a somewhat draconian piece of legislation. It needs to be remembered that the powers given to this specific Commonwealth agency are sweeping, and set aside some of the most fundamental principles underpinning Australia's jurisprudence.[33]

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30 Attorney-General's Department, *Submission 2*, p. 6.

31 Also see Senator Natasha Stott Despoja, *Senate Hansard*, 18 September 2007, p. 97.

32 Law Council of Australia, *Submission 5*, pp 7-8.

33 Civil Liberties Australia, *Submission 3*, p. 2.

2.50 Civil Liberties Australia went on to describe the amendments as "ill conceived and inappropriate" and asserted that they would "set a precedent for Commonwealth agencies to rectify their failure to abide by the law."[34]

2.51 Liberty Victoria was also scathing of the "bad policy" amendments:

> A body invested with the far-reaching coercive powers of the ACC should be held to the strictest procedural standards. At a time when sloppy law enforcement has been exposed in cases such as those of Dr Haneef, Vivian Alvarez Solon and Cornelia Rau, it seems extraordinary for the Parliament to relax law enforcement standards in this fashion.[35]

2.52 The PJC does not believe that the Amending Act was intended to do anything other than address immediate ACC operational difficulties. In particular, the amendments to subsections 28(1A) and 29(1A) were not intended to relax procedural standards, which the committee agrees are appropriate as an accountability mechanism.

2.53 The safeguards which the Parliament incorporated within the Act were initially thought sufficient to protect individual rights. That this might not be the case has only recently become apparent. And the PJC does not condone the whittling away of these safeguards.

2.54 Much of what takes place within the ACC quite properly occurs without the need for transparency. But in law, justice needs to be seen to be done, and the committee believes that this maxim applies equally to the administrative and procedural processes of the ACC, Australia's premier intelligence body into serious and organised crime.

2.55 The requirement to record reasons in writing provides a means for testing whether the examiners have properly exercised the ACC's coercive powers, including having had due regard to statutory safeguards. The PJC strongly cautions the examiners to have recourse to the spirit of the law. And the committee's recommendations will clarify and strengthen the intention and expectations of the Parliament.

2.56 The committee will monitor the appropriateness and effectiveness of the statutory safeguards, with the assistance of the Commonwealth Ombudsman, and hopes that the assessment of Mr Mark Trowell QC is accurate:

> My impression is that the ACC is very conscious of the limitations that operate upon it…But I think for the most part they accept—and the examiners really demonstrate this—that they do have those limitations, they

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34 Civil Liberties Australia, *Submission 3*, p. 3.

35 Liberty Victoria, *Submission 1*, p. 2.

> do attempt to exercise them carefully and with due regard for the process of law.[36]

Failure to comply

Effect on safeguards

2.57 A third major criticism of the amendments to sections 28 and 29 of the Act concerned the effect of new subsections 28(8) and 29(5). These subparagraphs provide that an examiner's failure to comply with the record making requirements does not affect the validity of a summons or notice.

2.58 The committee notes that these provisions are somewhat unique, with the legislation for most other comparable bodies not specifying consequences for examiners' non-compliance with formal requirements.

> Section 82 of the Crime and Misconduct Act 2001 (Qld) provides that failure to give reasons for issuing a notice to attend a hearing does not prevent the Commission from questioning a person about any matter which relates to an investigation or any matter for which the notice was issued. This is the only provision that bears any similarity to the corresponding ACC Act provision.[37]

2.59 Mr Michael Brereton told the PJC:

> The Examiners should not…be allowed to have their failure to comply with the Act to be retrospectively validated, particularly when such failure was crucial to enlivening the jurisdictional basis to issue a Section 28 summons.[38]

2.60 And the Law Council of Australia argued that it was crucial for examiners to record reasons for issuing a summons/notice.

> There is an inherent link between the requirement that an examiner only issue a summons if he or she is satisfied that it is necessary to do so and the requirement that he or she record his reasons in writing. The former is not a substantive requirement and the later a technicality, as was suggested at the time the Amendment Act was passed. These obligations operate together as a safeguard against misuse of the coercive powers and to deliver a degree of tangible accountability – not just in a systemic sense but in the context of each individual case.[39]

2.61 Emeritus Professor Jim Davis concurred in relation to the effect of subparagraphs 28(8)(a) and 29(5)(a).

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36 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, pp 22-23.

37 Attorney-General's Department, *Submission 2*, p. 7.

38 Mr Michael Brereton, *Submission 11*, p. 5.

39 Law Council of Australia, *Submission 5*, p. 6.

> The new paragraph would go much further than merely limiting the effect of [the Justice Smith] decision, and would render ineffective the second sentence of subsection 28(1A), which provides that an examiner must record in writing the reasons for the issue of a summons or notice.[40]

2.62 The PJC is persuaded that subsections 28(8) and 29(5) could negate the safeguards contained in subsections 28(1A) and 29(1A), as well as eliminate a means of accountability. Clearly, the Amending Act was not intended to sanction or authorise the examiners to act with impunity.

Recommendation 3

2.63 The committee recommends that Part II Division 2 Subsections 28(8) and 29(5) of the *Australian Crime Commission Act 2002* be repealed.

Accountability

2.64 The Law Council of Australia told the PJC:

> One way in which our criminal justice system guarantees compliance with rules of procedure is by making the admissibility of evidence contingent, at least in part, on it having been obtained in compliance with law…it means that compliance with procedural requirements set out in the law is not only monitored at an overarching, systemic level by bodies such as the Commonwealth Ombudsman. Rather, compliance is also monitored and enforced in each and every case by the very individual effected [sic] by the exercise of the power, that is, the person who has the greatest interest in ensuring that procedural safeguards are adhered to.[41]

2.65 The essence of this argument was that subparagraphs 28(8)(a) and 29(5)(a) of the Amending Act, by removing the imperative for examiners to record reasons, also removed a level of scrutiny and accountability.

2.66 This was a crucial concern for Mr Robert Richter QC from the Law Council of Australia:

> **We need safeguards to the exercise of coercive power. The more safeguards the better, especially if they are reasonable safeguards. It seems to me that the safeguards that were contained in the Act did not go as far as we would have liked originally in the sense that there was no outside supervision, as it were, by the courts as to the reasonability of the reasons…We want real accountability so that the notion of accountability is enforced rather than compliance with the law produced by the removal of the accountability. The amendment said,**

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40 Emeritus Professor Jim Davis, *Submission 8*, p. 1.

41 Law Council of Australia, *Submission 5*, p. 6.

> **‘Listen, you’re not complying with the law, so we will make it easier for you; we will remove the law.’ That just seems wrong.**[42]

2.67 The ACT Attorney-General, The Hon. Simon Corbell MLA made a similar comment:

> Given that the ACC is immune from providing reasons for its decisions under the Administrative Decisions (Judicial Review) Act 1977 (Cth), the practical effect of new sections 28(8) and 29(5) will be to deny a suspect or accused person the means of effectively challenging the lawfulness of a summons issued against them. [43]

2.68 The PJC notes that two ideas are intertwined in these submissions: first, the non-existence of reasons for decision; and second, the lack of availability of reasons for decision. An examiner's reasons for decision are normally available to a court in judicial proceedings challenging the issue of a summons/notice. Whereas if those reasons have never been created, then they cannot be challenged. The committee shares the Law Council of Australia's concerns, particularly as there are few means by which the examiners' conduct in issuing summonses and notices can be scrutinised.

2.69 The Attorney-General's Department told the PJC that subparagraphs 28(8) and 29(5) are meant to ensure that ACC operations and investigations are not undermined by reason of an examiner's failure to comply with 'technical' requirements.

> The amendments do not circumvent substantive procedural obligations, such as the requirements under subsection 28(1A) that the examiner must be satisfied that it is reasonable in all the circumstances to issue the summons and under subsection 28(3) that the summons should, other than in limited circumstances, set out the general nature of the matters in relation to which the examiner intends to question the person.[44]

2.70 If the record making requirements are 'technical', then subclauses 28(8) and 29(5) are primarily inconsequential. But the PJC, for the reasons already indicated and further discussed in chapter 3, strongly rejects this interpretation.

2.71 The committee concurs with the views of the South Australian Attorney-General, The Hon. Michael Atkinson:

> …that if a defendant is to be subjected to the rigours of compulsory examination (and all that entails), the prospective examiner should be obliged to record reasons for issuing the process as a measure of accountability to the due process of the law.

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42 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 7.

43 The Hon. Simon Corbell MLA, Attorney-General, Australian Capital Territory, *Submission 10*, p. 2.

44 Attorney-General's Department, *Submission 2*, pp 4-5.

> The *Australian Crime Commission Amendment Bill 2007* seeks to overthrow this comparatively minimal formal protection. It is no technicality to be discarded on a whim.[45]

2.72 The PJC strongly believes that there must be reasons for decision available for review by those authorities empowered to scrutinise the actions of the examiners in issuing summonses and notices.

Disclosure of summonses/notices

2.73 A related matter which concerned the PJC was the statutory prohibition on the disclosure of information about a summons/notice, or any official matter connected with it.[46] Subsection 29A(2) allows an examiner to determine whether the necessary notation is included on a summons/notice.

2.74 The committee understands that it might not always be prudent, or desirable, for a person summonsed, or issued with a notice, to be able to disclose that fact. This prohibition extends to a legal practitioner providing legal advice or representation relating to the summons notice or matter.[47] The PJC understands that there might be sound operational reasons for this extended prohibition.

2.75 But there are two exceptions to the statutory prohibition: first, to communicate with a legal representative; and second, if the 'person' is a body corporate, to an officer or agent of the body corporate. The exceptions do not include other professionals, such as accountants, who might have a detailed knowledge of the matters falling within the scope of the summons/notice. The practical effect of the non-disclosure prohibition is that a person's private matters can be examined by the ACC without that person's knowledge.

2.76 A non-disclosure prohibition is effective until an ACC operation or investigation is concluded and, in certain circumstances, is automatically cancelled by the operation of subsection 29A(4) of the Act. Upon cancellation, the CEO of the ACC is required to notify each person affected by the prohibition. Otherwise, it ceases to be a criminal offence to disclose the service or receipt of a summons/notice five years after issue of that summons/notice.[48]

2.77 The committee has been told that the ACC rarely, if ever, provides the compulsory notification of cancellation required under subsection 29A(5) of the Act. If true, then the committee is concerned with the apparent disregard that the ACC has for this statutory obligation. It is not acceptable to simply allow the prohibition to

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45 The Hon. Michael Atkinson MP, Attorney-General, Government of South Australia, *Submission 12*, p. 1.

46 Section 29A of the *Australian Crime Commission Act 2002*

47 Subsections 29B(2) and 29B(3) of the *Australian Crime Commission Act 2002*

48 Subsection 29B(5) of the *Australian Crime Commission Act 2002*

lapse after five years as envisaged by subsection 29B(5) of the Act.[49] The PJC is very much aware that this approach allows people to continue to believe that they are still subject to a non-disclosure prohibition. The PJC condemns this practice, and recommends that the ACC review its relevant procedures.

2.78 When questioned, the ACC told the committee that:

> [Section 29A(1)] guides you before you get to the examination. At the end of the examination, the examiner would have made a non-publication direction under section 25A(9). That would be tailored to suit the matter. They are varied from time to time, but largely that continues. There is a mechanism…where those non-publication directions then link in with the role of a court and the court can effectively set those aside for the purposes of a particular matter. That very rarely happens because we would normally vary the terms of the non-publication direction to facilitate disclosure on subpoena or under disclosure requirements.[50]

2.79 The PJC acknowledges that there are two distinct provisions operating here: sections 29A and 25A. One relates to a summons/notice, the other relates to an examination. And each has a method for protecting confidentiality. One is a prohibition against disclosure of the existence of the summons/notice, the other is a non-publication direction relating to evidence given, or about to be given, to an examiner. The two provisions are not to be confused.

> A non-publication direction may, in writing, be varied or revoked, except if to do so would prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.[51]

2.80 The CEO of the ACC, Mr Milroy told the committee:

> There are requests made for such considerations. And then the paperwork comes to me for consideration whether to lift the non-disclosure order.[52]

2.81 The committee notes that it is at the CEO's discretion whether to vary or revoke a non-publication direction. And the committee expects such requests to be given due consideration and not dismissed out of hand.

2.82 The committee fully supports the legislative provisions terminating non-disclosure orders, and their associated offences, as well as the interim mechanisms by which persons aggrieved by the issue of a summons/notice can voice a complaint.[53]

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49 This subsection provides that the offence provisions, subsections 29B(1) and 29B(3) of the Act, lapse upon cancellation of a non-disclosure order or five years after issue of the summons/notice, which ever is the sooner.

50 Mr Peter Brady, Legal Adviser, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 20.

51 Subsections 25A(9) - 25A(11) of the *Australian Crime Commission Act 2002*

52 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, pp 20-21.

53 This is primarily by way of judicial review, including under the *Administrative Decisions (Judicial Review) Act (1977)* and the *Judiciary Act 1903*.

2.83 The Commonwealth Ombudsman (Ombudsman) has some oversight of the ACC and its examiners. But the committee suggests that there is some confusion regarding whether the Ombudsman can receive a complaint without the complainant being in breach of a non-disclosure order.

Recommendation 4

2.84 The committee recommends that Part II Division 2 Subsection 29B(4) of the *Australian Crime Commission Act 2002* be amended to include the Commonwealth Ombudsman.

Reimbursement of expenses

2.85 One further matter on which the PJC wishes to comment is that of witness expenses.

2.86 Under section 26 of the Act, a witness appearing before an examiner must be paid the expenses of his or her attendance. The amount payable is determined in accordance with the scale prescribed by Regulation 5 of the *Australian Crime Commission Regulations 2002* (Regulations), and is referenced to the High Court Rules.[54]

2.87 However, this is not the case in relation to witnesses complying with a notice. For a witness producing a document or thing, the CEO of the ACC "may direct" that the witness "shall be paid by the Commonwealth in respect of the expenses of his or her attendance an amount ascertained in accordance with the prescribed scale."[55]

2.88 The PJC observes that a person complying with a section 29(1) notice will be paid only if the CEO makes a direction, or that person applies to the Commonwealth Attorney-General for assistance (legal or financial) in respect of the appearance before the examiner.[56] The committee notes that applications to the Attorney-General are not guaranteed to be successful, and, as a document or thing can be produced to a member of the ACC staff, this option might not be available.

2.89 The PJC particularly notes that the prescribed scale covers only 'appearance costs', whereas, with a notice, the real imposition occurs prior to delivery of the requested material. It might take considerable time and expense to collect, collate and copy the requested material, and it might impact upon work commitments and wages.

2.90 The PJC is unclear as to why, in relation to expenses, there should be any distinction between persons served with a summons as opposed to a notice. Both persons are equally compelled to assist the ACC with the conduct of its special investigation or operation.

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54 Schedule 2 of the *Australian Crime Commission Regulations 2002*

55 Subsection 26(2) of the *Australian Crime Commission Act 2002*

56 Section 27 of the *Australian Crime Commission Act 2002*

2.91 The committee therefore considers that the High Court Rules relating to summonses should also apply to persons complying with a notice issued under subsection 29(1) of the Act, as they do witnesses appearing before an examiner.

2.92 The PJC suggests that when the Minister next commissions an independent review of the operation of the Act, this issue be examined as one of concern to the Parliament and the broader community.

The coercive powers – a balancing act

2.93 The ACC has been invested with coercive powers, which, aside from Australia's anti-terrorism laws, are unique in allowing an unprecedented level of intrusion into individuals' personal lives.

2.94 The ACC told the PJC:

> These powers are critical to the successful disruption of organised criminal activity, dismantling of organised criminal entities and the provision of strategic intelligence based on a unique information collection capability of examinations to scope the involvement of organised crime in infrastructure or industry sectors.[57]

2.95 And the coercive powers have been effective, according to the CEO of the ACC, Mr Alastair Milroy:

> What we have seen in the use of the powers is the significant intelligence that you are able to derive from the use of the powers, both from friendly and unfriendly sources or witnesses. The use of the powers in special investigations, be it the homicides that have occurred in Victoria or the drug operations, has been instrumental in getting some significant results, not only for the ACC but for our partners, which has led to a significant number of criminal operations being disrupted and prosecuted.[58]

2.96 The need to gather intelligence and investigate crime on the one hand, and the need to preserve individual rights on the other, is central to the issue of the exercise of coercive powers. Balancing these competing interests is a task which must always be undertaken with caution.

2.97 This inquiry has led the PJC to believe that the Amending Act did not have sufficient regard to the preservation of individual rights, and the safeguards developed by successive parliaments and courts.

2.98 **And because the ACC exercises special and intrusive coercive powers in an highly secretive environment, it is vital for these rights and safeguards to be preserved with clear and effective accountability mechanisms**.

57 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 8.

58 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 19.

2.99 **The PJC believes, as a matter of sound governance and accountability, it is highly appropriate for the ACC, in a timely fashion, to create and maintain comprehensive records of the circumstances in which it exercises the coercive powers vested in it by the Parliament, and the reasons for that exercise**.

2.100 A vital corollary is that the ACC and its records must be open to such independent and external review and audits as are determined by the Parliament.

2.101 It is through such mechanisms that the ACC maintains credibility, and the confidence of those who repose faith in the ACC.