CHAPTER 3

Retrospection and contempt

3.1 In August 2007, there was a successful challenge to an examiner's interpretation of subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* (the Act). 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.[1]

3.2 According to the Australian Crime Commission (ACC), the Justice Smith decision had "potentially extensive prejudicial implications" for its work because "until that time the examiners had routinely recorded reasons after issuing summonses and notices."[2]

> In principle, the judge's comments raise a doubt about the validity of substantially all of the 5,000 summonses and notices issued by the ACC since its establishment in 2003. This poses a significant threat to the enforcement of summonses and notices that had already been issued and to continued use by the ACC and other law enforcement and prosecution agencies of information and material obtained directly or indirectly by means of the coercive powers. Past experience indicated that the ACC targets would make extensive use of Smith J's decision as a precedent if it was allowed to stand.[3]

3.3 This led to the amendment of the Act by the *Australian Crime Commission Amendment Bill 2007* (the Amending Act). The parliamentary process associated with that legislation is discussed in chapter 1 of this report.

Extent of the affectation

Summonses and notices

3.4 Upon introduction of the Amending Act, the Parliament had been told that as many as 600 summonses/notices and 30 prosecutions could have been affected by the Justice Smith decision.[4] An exact figure was not then available, and to date, the

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1 *ACC v Magistrates' Court of Victoria (at Melbourne) and Michael Richard Brereton* [2007] VSC 297 (23 August 2007)

2 Australian Crime Commission, *Submission 9*, p. 6.

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

4 The Hon. SenatorDavid Johnston, *Senate Hansard*, 18 September 2007, p. 102.

Commonwealth Director of Public Prosecutions is not able to provide a more precise figure.[5]

3.5 The Parliamentary Joint Committee on the Australian Crime Commission (PJC/Committee) cannot say whether all of the 600 summonses/notices were crucial to special ACC operations and investigations.

Derivative information

3.6 More significantly, as indicated in paragraph 3.2, Justice Smith's decision may have had an impact on derivative information and material obtained at ACC examinations. Ms Sashi Maharaj QC, Counsel Assisting the ACC, explained:

> The Justice Smith view would have led to some extremely serious and adverse implications for virtually all of the investigative work of the ACC…Namely, it opened up the potential for, first, the legality of a substantial amount of evidence collected and disseminated by the ACC…to be challenged in all manner of court proceedings. Second, there is the stultifying of virtually all ACC operations by injunctions so as to prevent it from proceeding any further in respect of such evidence in all current special investigations and intelligence operations. Third, it jeopardises the prosecutions under section 30 dealing with the failure of witnesses to attend and answer questions.[6]

3.7 There are no restrictions within the Act on the use of derivative information and material. Indeed, the examination process is an investigative tool, designed to gather information for the purposes of advancing special ACC investigations and operations.

3.8 The committee expects that the ACC, and its partner agencies, were making full use of derivative information and material, as permitted under the Act. And the Justice Smith decision might therefore have had "potential and adverse practical impacts" upon these law enforcement bodies and their outcomes.[7] The PJC accepts that this was a genuine concern for the ACC, the government, and the Parliament upon introduction of the Amending Act.

3.9 However, information and material obtained through a summons/notice, which had not been issued in strict compliance with the Act, would not necessarily have been affected by the Justice Smith decision.

3.10 According to Mr Robert Richter QC from the Law Council of Australia:

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5 Commonwealth Director of Public Prosecutions, *Submission 6*, pp 2-3.

6 Ms Sashi Maharaj QC, Counsel Assisting, *Committee Hansard*, Canberra, 17 June 2008, p. 10. Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

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

> Judges are very loath to throw out evidence where it is unlawfully obtained because of an honest mistake, because of somebody saying, 'Well, I honestly didn't think I was required to put in reasons,' or whatever. If that is honest, the evidence will not be excluded. I say that from experience. A court moved to exclude unlawfully obtained evidence will be so moved if it is faced with a prosecution or with an investigatory body that has set its face against the law deliberately, and it operates as a sort of punishment. A law enforcement agency, of all agencies, cannot set its face against the law deliberately. It is a cost too high to pay for this democratic community.[8]

3.11 Mr Robert Richter QC added:

> We have…two categories. One is a refusal to give evidence, reissue and do it properly. The second is that the evidence has been obtained but the legality of the obtaining is questionable and you go to a court. If the obtaining has been done bona fide through some mistake or misunderstanding or whatever, the evidence will go in. **If the evidence was obtained through a deliberate abuse of power, the evidence will go out and this committee should applaud that in encouraging the rule of law—because convictions obtained by the use of evidence that has been deliberately obtained unlawfully is too high a price to pay for our system**.[9]

3.12 The PJC agrees with the Law Council of Australia that:

> The amendment goes beyond [what is necessary]. The reason that the amendment goes beyond that is that it removes the law and it does not need to. We should trust the law. There is a bulwark of law that has been created for these sorts of situations.[10]

3.13 But the PJC believes that the ACC examiners were acting upon a reasonable interpretation of subsections 28(1A) and 29(1A), and there is no reason to believe that all the summonses/notices, for which reasons were not recorded prior to issuing, would not have withstood judicial scrutiny.

Necessity for parliamentary intervention

3.14 At the time, members of both chambers were not entirely comfortable with what they were being asked to do. These concerns are described in chapter 1 of this report. But the PJC notes the Hon. Duncan Kerr SC MP's particular concern:

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8 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 6. Also see Ms Sashi Maharaj QC, Counsel Assisting, *Committee Hansard*, Canberra, 17 June 2008, p. 19. Also, see *Bunning v Cross* (1978) 141 CLR 54 and *Ridgeway v R* (1995) 184 CLR 19.

9 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, pp 8-9.

10 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 8.

> We do not know how many instances there are of examiners under this legislation, where they have a statutory obligation to set down their reasons, who have failed entirely to do that. We do not know what we are approving. We do not know the circumstances. We do not know how many cases there might be. We do not know whether we are being asked to approve something that really is in a sense innocent error or a complete disregard of the parliament's instructions.[11]

3.15 The committee reiterates that the Amending Act was intended to address immediate ACC operational difficulties. And the PJC notes that it was on this basis and with the information available, that the Amending Act was introduced by the government and passed by the Parliament.

3.16 It would not be acceptable for any law enforcement agency to disregard its statutory obligations, blatantly or otherwise. But the PJC does not believe that the examiners have wilfully failed to comply with their obligations under subsections 28(1A) and 29(1A) to record reasons for decision. The issue is more precisely a question of when those statutory obligations must be observed. And it is in this regard that the committee finds the ACC examiners to have acted outside the spirit of the law.

3.17 The ACC has never agreed with the Justice Smith decision, describing it as "based on wrong reasoning…not supported either by the terms of the [Act] or by the policy behind sections 28 and 29."[12] And this is the fundamental problem.

3.18 Sections 28 and 29 of the Act are open to interpretation, and can be read as:

- before issuing a summons/notice, the examiner must be satisfied that it is reasonable in all the circumstances to issue the summons/notice. A written record of reasons for the decision must also be created (*at some point in time*); or
- before issuing a summons/notice, the examiner must be satisfied that it is reasonable in all the circumstances to issue the summons/notice and (*at that time*) a written record of reasons for the decision must also be created.[13]

3.19 The ACC has always adopted and acted on the first interpretation, whereas the existence of safeguards within the legislation, including subsections 28(1A) and 29(1A), and the Parliament's fundamental concern for individual rights, leads the PJC to conclude that the second interpretation is correct.

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11 The Hon Duncan Kerr MP, *House of Representatives Hansard*, 20 September 2007, p. 128.

12 Australian Crime Commission, *Submission 9*, p. 7.

13 Emphases added

3.20 The ruling by Justice Smith exposed the interpretive ambiguity of the legislation. The committee is concerned that this ambiguity was not exposed and rectified much earlier.

3.21 Mr Robert Richter QC from the Law Council of Australia was scathing of the ACC's apparent inability to discern and deal with any ambiguity.

> If there was ambiguity, they should have got advice about it. I don't believe they did. If anyone had thought about it, they would have said, 'By the way, what does this require?' and they would have got advice about it…If they had got advice about it, at the very least they would have said, 'There's a possibility that a court is going to say that you need the reason beforehand, so be careful and do it.' So why don't they seek advice on these things?...It is in the ACC's interest to find out at the earliest opportunity whether or not it has acted validly. If there is a challenge to the validity of its actions, it is in its interests to find out whether or not it acted validly rather than to wait for a possible denouement that occurs at trial when it is too late to fix it.[14]

3.22 Nonetheless, the Justice Smith decision and the Amending Act have highlighted the existence of the ambiguity, allowing Parliament the opportunity to amend the legislation. The Amending Act has also effectively addressed the ACC operational difficulties which were the catalyst for the legislation. Yet the PJC remains concerned as to whether the Amending Act was appropriate.

The retrospective provisions

The legislative provisions

3.23 Sections 10 and 12 of the Amending Act provided that summonses or notices issued prior to the commencement of these sections, and which would be invalid because the record required by subsections 28(1A) and 29(1A) of the Act was made after the issue of the summonses and notices, are nonetheless valid and taken to always have been valid.

3.24 The PJC has been told that this phrasing is reasonably unique.

3.25 But the Attorney-General's Department assured the committee that:

> There are a number of pieces of legislation around that have this sort of dual character. The obligation exists, so parliament is telling the executive that things must be done in a certain way—for example, reasons must be recorded—but then specifies that it is not a consequence of failing to follow that that the resulting decision or action is invalid. In terms of the overarching question about whether these amendments are the appropriate place to draw the line, that is very much a question that will be an

14 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, pp 4 & 7-8.

> opportunity for the current minister to review in light of the findings of this committee and the evidence before this committee.[15]

3.26 The PJC is not convinced by the logic of this argument, and notes that there could be a significant number of summonses and notices which are captured by these retrospective provisions.

3.27 The number of prosecutions affected by the Justice Smith decision is unclear, but it appears to be diminishing. In September 2007, the Parliament was informed that there were as many as 30 prosecutions affected by the Justice Smith decision but seven months later, the Commonwealth Director of Public Prosecutions informed the PJC that it was conducting approximately 11 prosecutions which may have been affected by Justice Smith's decision.[16] The number of prosecutions appears to have decreased. But the committee notes that prosecution figures are directly related to the number of summonses/notices issued.

3.28 In September 2007, the Parliament was informed that there were as many as 600 summonses and notices affected by the Justice Smith decision. Nine months later, this committee was informed that as many as 3 000 summonses and 2 000 notices may have been affected without the retrospective provisions of the Amending Act.[17]

3.29 Mr Robert Richter QC from the Law Council of Australia told the PJC:

> There was this ridiculous notion…that the legislation was necessary because the sky would fall in on 3,000 or 800 summonses—or however many other summonses—and that prosecutions would fail. That is complete and absolute nonsense. The reason I say it is complete and absolute nonsense is that for any evidence that was obtained and had been obtained in pursuance of those notices, whilst, if the notices are shown to be invalid and in nullity, they could be said to have been obtained unlawfully, the ordinary rules of admissibility of evidence would still operate…So the kind of panic reaction that was taken was wrong.[18]

3.30 The PJC is concerned that the ACC does not appear to be well aware of its own affairs: there is a notable lack of precision in the data. And the committee suggests that this is far from satisfactory. Among other things, it does not assist the PJC or the Parliament to assess the ACC's performance, nor the correct manner in which to deal with the ACC and its legislation. Moreover, in this specific instance, it lends credence to the Law Council of Australia's assertions that:

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15 Dr Karl Anderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 13.

16 Commonwealth Director of Public Prosecutions, *Submission 6*, pp 2-3.

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

18 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 3.

> There was a massive overreaction to [the Justice Smith decision]. It was an unnecessary overreaction and it was a reaction which diluted the kinds of safeguards that existed prior to the amending act…The reason…this committee would never have had any evidence that the sky might have fallen in is that, in all the summonses that they issued, which were issued irregularly, according to Justice Smith anyway, if that judgement applied there was never, I would say, an irremediable aspect of urgency that could not have been remedied by proper notices. **These agencies love to operate in secrecy and they have to, to some extent, but there are some areas where that secrecy should be tested**. [19]

3.31 In any event, and as indicated in preceding paragraphs, the PJC does not believe that all summonses/notices issued by ACC examiners prove crucial to special ACC operations and investigations. The committee believes that those summonses/notices, which continued to have a high importance, should have been reissued immediately the Justice Smith decision was announced and on a priority basis.

3.32 The Law Council of Australia supports this view, telling the PJC that:

> If those summonses are invalid, they can be reissued validly and then the information obtained. That is for the people who refuse to answer them or to give evidence. I would say that, out of the 800 or 3,000 no more than a handful had refused on that basis...If there is a claim of invalidity of the notice, the ACC can have a look at it and say, 'Okay, we'll give you another one.' There are no cases of urgency that I am aware of where that could not have happened.[20]

3.33 The PJC notes that, with the introduction of the Amending Act, the ACC examiners may have continued their old practices regarding the recording of reasons for decision. That is, the reasons are not recorded prior to the issuing of a summons/notice.[21] Not only would this be contrary to the spirit of the Act, but it would therefore also be possible that there were a substantial number of summonses/notices affected by this report.

3.34 The PJC suggests that, upon the tabling of this report in the Parliament, if it has not already done so, the ACC should immediately review its practices in regard to the issuing of summonses/notices and ensure that the reasons for issue are recorded prior to the issuing of summonses/notices.

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19 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 2.

20 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 6. Also, see ACC, Additional Information, Answer to Question on Notice, No. 1 (received 11 August 2008).

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

3.35 While it is difficult, if not impossible, to determine how many summonses and notices were truly affected by the Justice Smith decision, the PJC is reasonably assured that, given the application of the retrospective provisions to summonses and notices issued under subsections 28(1) and 29(1) of the Act, respectively, and before the commencement of sections 10 and 12 of the Amending Act, the number of summonses and notices affected by the retrospective provisions will now never increase.

Rationale

3.36 Proponents of the Amending Act have argued that the amendments to subsections 28(1A) and 29(1A) were justified on the basis of legislative ambiguity. More precisely:

> The ACC Amendment Act 2007 provides clear guidelines to ACC examiners as to when they are to record their reasons. The Act further clarifies the impact of any failure to comply with the provisions on the validity of a summons.[22]

3.37 The PJC agrees that there was ambiguity within the Act, requiring clarification.[23] But the committee does not believe that the Amending Act provided 'clear guidelines', or that the Amending Act provided the correct type of clarification.

3.38 The PJC strongly disagrees with the statement that:

> The amending legislation merely provided legislative confirmation that an Examiner may record reasons in writing before, at the time of, or as soon as practicable after the issue of a Summons or Notice.[24]

3.39 The committee's views on the appropriate time for an examiner to record reasons for a decision to issue a summons or notice are stated in chapter 2 of this report. And the PJC notes that in the proceedings before His Honour Justice Smith, counsel for the ACC conceded:

> That the existence of a document recording the reasons of the examiner for issuing the examination summons was a condition precedent to the valid exercise of the power to issue the examination summons.[25]

3.40 **The ACC cannot have it both ways. At best, this concession supports the argument that the legislation is ambiguous. At worst, this concession indicates a**

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22 Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

23 See Appendix 4.

24 ACC, Additional Information, Answer to Question on Notice, No. 2 (received 21 May 2008). Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 5; Attorney-General's Department, *Submission 2*, p. 4; and Crime and Misconduct Commission Queensland, *Submission 7*, p. 5.

25 *ACC v Magistrates' Court of Victoria (at Melbourne) and Michael Richard Brereton* [2007] VSC 297 (23 August 2007) Smith J at para 9.

willingness to interpret the legislation according to the ACC's requirements alone. The committee notes that this latter proposition was the view of several submitters.

'Technicality'

3.41 Ultimately, the ambiguity in sections 28(1A) and 29(1A) could have been, and was, used by persons served with a summons or notice to challenge the examiner's exercise of the coercive powers.

3.42 The government's position was explained by the then Attorney-General, the Hon. Philip Ruddock MP:

> We believe that trials for criminal offences should turn on the facts and the evidence—the issues of substance. Some of these offences involve the most significant and severe issues of law breach, and I think the community would see a failure to pursue those matters…as being a real concern if it were only because of a technical reason. If a summons or notice yielding probative evidence were seen to be struck down simply because reasons were not recorded before a summons or notice were issued, but only afterwards, I think the public would see it in that light.[26]

3.43 And similar comments were voiced in the Senate:

> I understand that the retrospective application of these provisions could be detrimental to persons who might otherwise have had scope to challenge the validity of a summons or notice to produce. The Government considers, however, that this is a just and appropriate outcome. It does not consider that a failure to record reasons for issuing a summons or notice prior to issue of the summons or notice should give a person who would otherwise have been convicted of an offence technical grounds to challenge the admissibility of evidence and escape conviction.[27]

3.44 **The PJC agrees that prosecutions should be based on sound and probative evidence. But the committee strongly resists the assertion that a failure to record reasons for the issue of a summons/notice is a technicality, and therefore of little significance**.

3.45 Any legislation which can compel an individual to attend an ACC examination is more than a 'technicality'. And the exercise of such coercive powers is more than procedural or administrative in nature. It is a power which must be exercised in strict compliance with the Act, and with due consideration to the individuals concerned.

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26 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 20 September 2007, p. 134.

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

3.46 Legal experts submitting to the inquiry were equally forthright in their assessment of the 'technical amendments'.

3.47 Emeritus Professor Jim Davis submitted that there is no such thing as 'technical grounds' for being acquitted of an offence.

> If the prosecution is unable to prove that an accused has committed an offence of which he or she is charged, then the accused is entitled to be found not guilty, and to say that someone has "escaped conviction on a technicality" is a misuse of language.[28]

3.48 And Mr Robert Richter QC from the Law Council of Australia agreed, adding:

> **No-one has got off on a technicality. It does not happen in serious crime. That has been my experience. You cannot call self-defence a technicality, obviously, and that was the one acquittal I can think of**.[29]

3.49 Emeritus Professor Jim Davis further observed:

> Any requirement imposed on an examiner, I suggest, is not simply a technical requirement that can be ignored if it all gets a bit too difficult if there are too many people. Requirements are put in the legislation for a purpose; they ought not to be dispensed with simply for what appears, as I say, to be administrative convenience.[30]

3.50 The Law Council of Australia concurred:

> It is not for the ACC or the Government to declare any…failure to adhere to the law as a mere technicality.[31]

Right to certainty and retrospective criminal sanction

3.51 An important practical effect of sections 10 and 12 of the Amending Act is that persons who have previously failed to comply with an invalid summons are retrospectively liable to serious criminal sanctions.[32]

3.52 This common objection was plainly stated by Civil Liberties Australia:

> A citizen goes about business and life with the confidence and understanding of what the law is and not what at some time in the future a Parliament may consider it should have been. Citizens and the courts are

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28 Emeritus Professor Jim Davis, *Submission 7*, p. 2.

29 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 11.

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

31 Law Council of Australia, *Submission 5*, p. 7. Also see Civil Liberties Australia, *Submission 3*, p. 1.

32 Subsections 30(6)-(8) of the *Australian Crime Commission Act 2002*

> expected to apply and observe the laws of the land as they are known at the time an action, agreement etc is undertaken. It is unconscionable to change the law retrospectively so an action considered legal at the time is in the future illegal.[33]

3.53 And the Law Council of Australia more specifically told the committee:

> The fact is that, if there were an invalid summons, it is not a procedural nicety as to whether or not there was a crime committed. If there were an invalid summons…it is not a question of loopholes; it is a question of the foundations of power to require the taking of the oath or to require the giving of evidence. If there is no lawful requirement, there is no crime in refusing…There are crimes that are not retrospective—they are not crimes at the time and they are made into crimes. There was a crime at the time of disobeying a lawful command, as it were. If the command is not lawful, there was no crime…This act says, 'The command was lawful; therefore, there is a crime.' I cannot think of an easier or simpler example of making something retrospective. At the time the person acted, they did so lawfully because there was no proper compulsion of law.[34]

3.54 The PJC agrees that it is every citizen's right to test the lawful exercise of statutory powers, such as the examiners' issuing of summonses and notices under subsections 28(1) and 29(1) of the Act.

3.55 As noted by Mr Robert Richter QC:

> Some people see a reliance on rights as pettifogging, as looking for loopholes and the rest of it. The Law Council of Australia regards adherence to the rule of law as paramount and, if a citizen says, 'You want to use coercive powers on me, show me why I should abide. Show me that you are behaving lawfully.'[35]

3.56 Sections 10 and 12 of the Amending Act have validated summonses and notices, which would have been invalid. As a result, individuals have not only been deny the right to challenge the lawful exercise of the ACC's coercive powers, but it is now a crime to do so. In addition, any evidence obtained from what was an unlawful summons/notice can now be used to prosecute and convict an individual, who was not necessarily obliged to provide the evidence in the first place.

3.57 In relation to persons who failed to co-operate with the ACC examiners, the committee notes that there is a statutory obligation to co-operate at an examination. The PJC considers this obligation to arise upon service of a valid summons.

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

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

35 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 3.

3.58 The committee considers Sections 10 and 12 of the Amending Act to comprise retrospective legislation, which is inappropriate in all but the most exceptional of circumstances. In relation to substantive offences, the PJC is mindful of the need to prosecute serious and organised crime, and consequently the committee concedes that those summonses and notices validated by the *Australian Crime Commission Amendment Act 2007* should not be jeopardised and should be allowed to stand. However, in line with Recommendation 2 that, before the issue of a summons or a notice, the reasons for issue must be recorded in writing, the committee believes that there is no need for the continuation of Sections 10 and 12 into the future.

Recommendation 5

3.59 The committee notes that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* deems certain summonses and notices valid thereby protecting any prosecution based on those summonses and notices. The committee recommends that:

- **the same practice be adopted in relation to summonses and notices issued subsequent to the *Australian Crime Commission Amendment Act 2007* until now;**
- **but that henceforth, in line with Recommendation 2, the practice of retrospectively recording reasons for the issue of summonses and notices be immediately discontinued and that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* be repealed.**

International treaty obligations

3.60 The issue of retrospectivity was also raised in relation to Article 15 of the International Covenant on Civil and Political Rights (ICCPR) which states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.[36]

3.61 The ICCPR is a United Nations treaty, which was ratified by Australia on 13 November 1980. As a State Party, Australia is bound by the terms of the Covenant.

3.62 Emeritus Professor Jim Davis considered that Sections 10 and 12 of the Amending Act must contravene this covenant but:

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36 International Covenant on Civil and Political Rights, Article 15(1). This is similar to Article 7(1) of the European Convention on Human Rights: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

> I am not sure that the ramifications would be all that great…It is a matter in which national governments feel that the protection of the national order is greater than their obligations to international bodies and international covenants.[37]

3.63 The PJC noted the Attorney-General's Department argument:

> There is certainly a number of precedents in Commonwealth law for either …actual retrospective criminal offences…or, more commonly, retrospective validation of administrative action…there is an important distinction.[38]

3.64 And later:

> The ACC Amendment Act responds to jurisprudence on a specific procedural matter relating to the issuing of a valid summons or notice to appear or produce material in criminal proceedings. The United Nations Human Rights Committee has consistently determined that changes in rules of procedure relating to offences will only be relevant to Article 15 where they affect the nature of the offence in question.
>
> Under section 30 of the ACC Act an offence already existed with respect to a person who fails to comply with a summons or notice. The ACC Amendment Act does not alter the nature of this offence or the constituent elements necessary to prove the existence of an offence in these circumstances.
>
> The effect of a summons or notice under the ACC Act was and remains the creation of an obligation on the person receiving the summons to respond appropriately or risk being charged with an offence.[39]

3.65 The PJC accepts that subsection 30(6) of the Act does not contravene Article 15 of the ICCPR. This provision makes it an offence for persons properly served with a summons/notice to fail to attend an examination, take an oath/affirmation, refuse/fail to answer a question or produce a document. But this provision was not affected by the Amending Act, and it is not this provision that is at issue: at issue are subsections 28(1A) and 29(1A) of the Act, and sections 10 and 12 of the Amending Act.

3.66 Further, the committee considers the Amending Act to have done more than simply respond to "jurisprudence on a specific *procedural* matter."[40] As indicated in preceding paragraphs, the PJC considers the provisions in question to have been more properly classified as "actual retrospective criminal offences" rather than "retrospective validation of an administrative action."

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

38 Dr Karl Alderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 24.

39 Attorney-General's Department, Additional Information, Answer to Question on Notice, No. 2. (received 15 July 2008)

40 Emphasis added

3.67 The PJC therefore disagrees with the Attorney-General's Department, and agrees with the Law Council of Australia that sections 10 and 12 of the Amending Act contravene Australia's international treaty obligations.

> The Law Council considers this retrospectively creating criminal conduct when no criminal conduct occurred…and that is contrary to the covenant.[41]

3.68 In amending the Act, the Attorney-General's Department has ignored Australia's obligations in regard to Article 15 of the ICCPR. The PJC strongly believes that the Attorney-General's Department must be more vigilant in regard to Australia's international and human rights obligations when considering legislative change. The committee does not condone any contravention of international obligations, except in the most exceptional circumstances. The circumstances of the Justice Smith decision do not meet this threshold.

Special coercive powers

3.69 Over the past five years one matter in particular has been intermittently raised by the ACC and its examiners as a concern to special ACC operations and investigations: lack of cooperation with the ACC examiners and the ACC hearing process.

Table 1: ACC coercive powers statistics 2003-2007

	2003-04	2004-05	2005-06	2006-07
People charged	203	294	218	176
Charges laid	626	1,665	894	429
Examinations conducted	355	629	605	703
Notices to produce documents issued	453	516	480	604
Summonses issued			705	856

Source: Australian Crime Commission, *Annual Report 2006-07*, pp 8 & 33.

3.70 Undeniably, the number of examinations being conducted by ACC examiners is significant. And while there is a little fluctuation in the statistics, it is apparent that the number of examinations being conducted is on the increase.

3.71 The PJC is aware that the number of examiners appointed under the Act has remained fairly stagnant since the inception of the ACC. However, the CEO of the ACC, Mr Alastair Milroy assured the committee that the examiners encounter no difficulties with the heavy workload.

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41 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 16.

> There has been a period of time on a weekly basis that the examiners have been required to travel to record their reasons and to ensure that they have sufficient time to read the submissions they are receiving for summonses and to attend pre-examination meetings with the relevant case officers. So I do not believe that they are overutilised because all of them are fairly experienced judicial officers in their own right. We also take into consideration a lot of planning in terms of their use. I have regular meetings with them and look at their current workload. I monitor officially through their coordinator, who keeps statistical records of the number of summonses and the number of notices issued and their travel. Mr Outram is responsible for the programs division, which looks at the intelligence and investigative activities. A weekly or monthly timetable comes forward where he knows exactly which examiner is on which case in which location around the country and what spare capacity they have to be able to do multiple examinations on a matter and the ability to cancel matters and prioritise them. So I would doubt very much that even the current four examiners would indicate that they do not have sufficient time to carry out their duties. [42]

3.72 But a notable factor adversely affecting and impacting upon the ACC in the performance of its functions is the failure of some witnesses to co-operate at ACC examinations.

Lack of cooperation at ACC examinations

3.73 For the past two financial years, the ACC has reported that:

- In 2005-06, 11 persons were charged on 16 counts: seven for failing to answer questions; two for failing to produce documents; one for failing to take an oath/affirmation; one for failing to attend; and five for giving false/misleading evidence.[43]
- In 2006-07, three persons were charged on seven counts: six for failing to answer questions; and one for giving false/misleading information.[44]

3.74 The PJC observes that these are not large figures, particularly in view of the number of examinations conducted each year. And the committee notes the advice of ACC Chief Executive Officer, Mr Alastair Milroy:

> At the present time, something like 39 persons have been convicted and sentenced for offences under the act—that is, for failing to comply with the

42 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 23.

43 Australian Crime Commission, *Annual Report 2005-06,* Appendix C.

44 Australian Crime Commission, *Annual Report 2006*-07, p. 38.

> act in terms of being called before examinations. Twenty-six are facing trial or have been convicted and are awaiting sentencing.[45]

3.75 While the committee considers the volume of uncooperative examinees to be relatively small, there are clearly a number of people who are not cooperating at an ACC examination.

The Trowell Report

3.76 In 2006, the then Minister for Justice and Customs, Senator the Hon. Chris Ellison commissioned an independent review and report on the operation of certain provisions in the *National Crime Authority Act 1984* and the Act (the Trowell Report).[46]

3.77 The terms of reference included the specific issue of whether the Act should be amended to provide the ACC with a 'contempt power' for witnesses not fulfilling their obligations under the Act, namely: refusing to appear; answer questions; and produce documents at an ACC examination.[47]

3.78 The Trowell Report concluded that the Act should be amended to provide that "the ACC be given the power to certify persons for contempt for not fulfilling their obligations under the legislation."[48]

Parliamentary consideration in 2000/2001

3.79 The Parliament has also previously considered this specific response. In 2000, the government proposed to create a contempt regime for the National Crime Authority (NCA) to encourage cooperation and compliance with the Authority's hearing process.[49]

> The [*National Crime Authority Legislation Amendment Bill 2000*] would…introduce a contempt regime to enable a court to deal promptly with conduct that interferes with or obstructs the Authority's hearing process. As the Authority does not exercise judicial power, it is not proposed that the Authority would deal with the contempt as if it were a

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45 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 12. Also, see ACC, Additional Information, Answer to Question on Notice, Nos. 2 & 3 (received 11 August 2008).

46 The Trowell Report was presented in the House of Representatives on 21 February 2008, and was tabled in the Senate on 11 March 2008.

47 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 3.

48 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 4.

49 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 9 quoting the Attorney-General's Department, *Submission 13*, p. 3.

> court. However, the provisions would enable the Authority to apply to the Supreme Court of the State or Territory in which it is holding the hearing for the court to deal with the conduct as if it were contempt of that court.[50]

3.80 The then committee resolved to support the *National Crime Authority Legislation Amendment Bill 2000* (the bill) because to do otherwise would have left a "substantial hole in the range of alternative strategies that the NCA would have available to it to deal with an errant witness."[51]

3.81 However, the Senate did not support the proposed contempt regime, and an amendment was passed to strip the relevant provisions from the bill.

> Let us make it clear that the NCA is not a judicial body; it is an investigative agency of the federal executive. In our view it is therefore a seriously flawed breach of the separation of powers concept to imply that hindering or obstructing an investigatory body can be equated to contempt of court. On these grounds we reject the inclusion of a contempt regime for the NCA. We believe that it would be prudent to monitor the success of the other provisions, and if the need is still there in, say, five years time then the parliament can revisit the matter.[52]

3.82 The amended bill, renamed the *National Crime Authority Legislation Amendment Bill 2001*, came into operation on 1 October 2001. It provided increased penalties for persons who did not co-operate with the ACC examiners.[53]

3.83 However, according to Mr Mark Trowell QC:

> The failure to enact the proposed contempt power provision in 2001, has deprived the ACC of what should have been the adjunct to the increase of penalties for not complying with the coercive powers, all of which was intended as a comprehensive strategy to deal with uncooperative witnesses.[54]

Impact of non-cooperation on ACC effectiveness

3.84 The PJC understands that persons who do not comply with a summons/notice, or an ACC examination, create difficulties for the ACC in the performance of its functions. An ACC examiner, Mr William Boulton told the committee:

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50 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 9 quoting the Attorney-General's Department, *Submission 13*, p. 2.

51 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 13.

52 Senator Nick Bolkus, *Senate Hansard*, 8 August 2001, p. 25835.

53 Subsections 29(3A) & (3C), 30(6) & (8) and 35(2) & (4) of the *Australian Crime Commission Act 2002*

54 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 58.

> The problem posed by those who commit contempt of the commission is delay. It has been said in the past to the committee that a year or more was elapsing between contempts being committed and the disposal of those cases in the courts. I can tell you now that it is more like 18 months.[55]

3.85 Mr Mark Trowell QC observes that in such circumstances:

> The witness has no immediate fear of punishment because it is known that may not happen until 12-18 months later. By that time, the investigation may well have been abandoned…The very reason for imposing a deterrent sentence may well have been diminished or even lost.[56]

3.86 The real problem therefore appears to be, not the number of persons failing to co-operate, but the delay caused by these 'process challenges'. And these delays potentially affect the conduct of a special ACC operation or investigation.

> When a witness refuses to submit to an ACC examination it has every potential to result in a derailment of the whole investigative process. The examination will usually occur at an early or critical stage of an investigation where it is designed to be an essential tool in gathering information to further the inquiry.[57]

3.87 The *National Crime Authority Legislation Amendment Bill 2001* does not appear to have addressed these issues. And perhaps Mr Mark Trowell QC's comments in that respect were accurate.

3.88 The PJC does not believe that it is in the interests of justice for 'process delays' to be allowed to continue: it is important for the ACC and its examiners to be able to conduct special investigations and operations without unreasonable hindrance.

An emerging trend

3.89 The PJC notes anecdotal advice from the ACC that certain types of crime group, and the counsel who represent them, are increasingly refusing to co-operate at an ACC examination as part of a deliberate and calculated strategy.

> The examiners are increasingly concerned that, over time, that will undermine the effectiveness of the powers in dealing with serious and

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55 Mr William Boulton, Examiner, ACC, *Committee Hansard*, Canberra, 6 July 2007, p. 41.

56 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 47. Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 30 March 2007, p. 8; and Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 12.

57 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 47. There are other effects of delayed judicial proceedings, such as a lack of interest in prosecution, reorganisation of criminal affairs, etc: see Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 19.

> organised crime. I am particularly talking about criminals with access to good legal counsel who operate with a degree of sophistication.[58]

3.90 Again, the committee has not been provided with any firm data. But the PJC would be very concerned if the ACC examination process were being challenged with the specific intent to derail an operation or investigation.

3.91 The PJC acknowledges that not all 'process delays' are designed for that purpose, and that some persons challenging the ACC examination process are merely insisting upon their rights.

Support for a 'contempt power'

3.92 Precisely what is reasonably required to enable the ACC and its examiners to effectively perform their functions is the question.

3.93 Law enforcement agencies submitting to the Trowell Report appear to have unanimously supported some form of 'contempt power' for the ACC.

3.94 And Mr Mark Trowell QC argued:

> The existing process fails to give sufficient weight to the need, when circumstances require, of an immediate or at least proximate response to a contempt committed against the ACC.[59]
>
> If you have something that you can invoke quickly and effectively and say, 'Right, if you're not going to cooperate, if you're going to take this view, I'm going to cite you for contempt. I'm going to refer it to a judge and you can explain it to the judge,' then the people see that something is actually being done—that the examiner has some power to deal with the matter in a proximate way and efficiently rather than just saying, 'Well, I can worry about this in 12 to 18 months time.' By then the sting has gone.[60]

3.95 The Trowell Report concluded that the Act should be amended to include the relevant provisions of the *National Crime Authority Legislation Amendment Bill 2000*:

> 34A Contempt of the Authority
>
> A person is in contempt of the Authority if he or she:
>
> (a) obstructs or hinders the Authority or a member in the performance of the functions of the Authority; or
>
> (b) disrupts a hearing before the Authority; or

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58 Mr Michael Outram, Executive Director, ACC, *Committee Hansard*, Canberra, 9 April 2008, p.13. Also, see Mr Robert Cornall AO, Secretary, Attorney-General's Department, *Estimates Hansard*, 25 May 2006, p. 107.

59 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 54.

60 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 20.

(c) when appearing as a witness at a hearing before the Authority:

(i) refuses or fails to take on oath or make an affirmation; or

(ii) refuses or fails to answer a question;

when required to do so.

34B Supreme Court to deal with contempt

(1) If the Authority is of the opinion that, during a hearing before the Authority, a person is in contempt of the Authority, the Authority may apply to the **relevant Supreme Court** for the person to be dealt with in respect of the contempt.

(2) The application must be accompanied by an affidavit that sets out:

(a) the grounds for making the application; and

(b) evidence in support of the application.

(3) If, after:

(a) considering the affidavit; and

(b) hearing or receiving any evidence or statements by or in support of the Authority; and

(c) hearing or receiving any evidence or statements by or in support of the person;

the Court finds that the person:

(d) was in contempt of the Authority; and

(e) did not have a reasonable excuse for being in contempt of the Authority;

the Court may deal with the person as if the acts or omissions involved constituted a contempt of that Court.

(4) In this section:

relevant Supreme Court, in relation to a hearing before the Authority, means the Supreme Court of the State or Territory where the hearing is held.[61]

3.96 The PJC notes the proposed statutory definition of 'contempt', and the proposed ACC statutory power of referral to the courts. These kinds of proposals were specifically considered by the committee in 2005 when it reviewed the operation of the Act.

61 Part 15 Clause 67 of the *National Crime Authority Legislation Amendment Bill 2000*

Parliamentary consideration in 2005

3.97 At that time, the PJC examined the effectiveness of the ACC's coercive powers, and was told that persons failing to co-operate with ACC examiners and the ACC examination process were continuing to cause problems.[62]

3.98 The committee considered four possible solutions, notably quoting the Hon. Jerrold Cripps QC, a Commissioner for the Independent Commission Against Corruption (ICAC). Mr Cripps QC told the PJC that ICAC's contempt powers had been removed because:

> It was thought those contempt proceedings are appropriate to courts of law but they should not be very readily transposed to administrative tribunals.[63]

3.99 The PJC agreed, and continues to agree, with this sentiment. The committee does note that what was proposed in the *National Crime Authority Legislation Amendment Bill 2000* was quite different to the contempt powers which were then available to ICAC.

3.100 In view of the ACC's function to combat serious and organised crime, the PJC considers that the ACC examiners should be given assistance to enable them to overcome the difficulties presented by persons who deliberately obstruct the ACC examination process with a view to frustrating special ACC operations and investigations.

3.101 The committee is persuaded that a limited statutory definition of contempt and a statutory power of referral would be appropriate. The PJC notes that such referrals are not without precedent: there are already provisions within the Act for applications to be made to a judge of the Federal Court of Australia.[64]

Recommendation 6

3.102 The committee recommends that the *Australian Crime Commission Act 2002* be amended to include the statutory definition of contempt and the statutory power of referral, plus ancillary provisions, proposed as clauses 34A and 34B in the *National Crime Authority Legislation Amendment Bill 2000* (except that the referral be to the Federal Magistrates Court) for matters arising under Section 30 of the *Australian Crime Commission Act 2002*.

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62 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pp 37- 41.

63 The Hon. Jerrold Cripps QC, Commissioner, ICAC, *Committee Hansard*, Sydney, 9 September 2005, p. 5.

64 For example, for search warrants, the surrender of passports, and warrants for the arrest of a witness. See sections 22, 24 and subsection 31(1) of the *Australian Crime Commission Act 2002*, respectively.

3.103 The PJC acknowledges that, in 2005, the committee favoured retention of significant legislative penalties, coupled with an expedited judicial process.[65] The committee recognises that this is an alternative solution to the operational difficulties presented to the ACC by persons refusing to co-operate with the examination process.

An expedited judicial process

3.104 However, either option will require the development and implementation of an expedited judicial process.

3.105 The PJC was told that, in Victoria:

> There is an established liaison between the courts and the Office of Police Integrity, where the chief justice there has been persuaded to give priority to any contempt proceedings issuing from the OPI and appoints a judge who is familiar with the legislation and understands the purpose and the reason for it. That is expedited.[66]

3.106 The committee believes that an expedited judicial process would encourage compliance with ACC examiners at ACC examinations as uncooperative persons would be liable to immediately or proximately suffer the consequences of their actions.

3.107 The PJC considers contempt proceedings to be preferable to a criminal prosecution. The former is more likely to be dealt with expeditiously, and achieve the desired outcome. The committee also considers contempt proceedings to have less impact on individual rights, with the vigilance and dedication of the courts providing a valuable means of checks and balances.

3.108 In this regard, the committee notes the comments of Mr Mark Trowell QC:

> Judges generally seem to be reluctant to accept that there should be bodies other than established courts exercising [coercive] powers—that is, powers that the courts themselves do not have—and they are very suspect about the use of these powers.[67]

3.109 The PJC also believes that involving the judiciary in the work of the ACC will promote relations between the two, and invest both bodies with a greater appreciation for the other's role and responsibilities.[68]

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65 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pp 37-41.

66 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 20.

67 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 19.

68 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 25.

Recommendation 7

3.110 As a corollary of Recommendation 6, or as an alternative thereto, the committee urges the Commonwealth Attorney-General to negotiate with the judiciary an expedited judicial process for matters referred by the Australian Crime Commission under Part II Division 2 Section 30 of the *Australian Crime Commission Act 2002*.

3.111 In making this recommendation, the PJC is aware that the Trowell Report, and its recommendations, is still being considered by the government.[69] The committee looks forward to receiving the government's considered response.

69 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 17.