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JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

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JOINT STATUTORY COMMITTEE ON THE

AUSTRALIAN CRIME COMMISSION

Friday, 30 March 2007

Members: Senator Ian Macdonald *(Chair)*, Mr Kerr *(Deputy Chair)*, Senators Bartlett, Mark Bishop, Ferris and Polley and Mrs Gash, Mr Hayes, Mr Richardson and Mr Wood

Members in attendance: Senators Mark Bishop and Ian Macdonald and Mr Kerr

Terms of reference for the inquiry:

To inquire into and report on:

Examination of the annual report 2005-2006 of the Australian Crime Commission

WITNESSES

Subcommittee met at 9.03 am

CHAIR (Senator Ian Macdonald)—I declare today's meeting open. This is a subcommittee of the Parliamentary Joint Committee on the Australian Crime Commission. The hearing today is for the examination of the 2005-06 annual report of the commission, as required by section 55(1)(c) of the Australian Crime Commission Act. The statutory requirement for the committee is to examine the ACC's annual reports, and that is a component of its duties to monitor and review the ACC's performance of its functions, to examine trends in criminal activities and to report on the suitability of the ACC's function, structure, powers and procedures.

The committee acknowledges that the Australian Crime Commission, along with producing its annual report, regularly provides the committee with activity and output reports and with private briefings—one of which we had yesterday—which greatly contribute to the committee's awareness and understanding of the ACC's function and the environment in which it operates.

I advise witnesses that although the committee prefers all evidence to be given in public it will consider a witness's request to give all or part of their evidence in camera. Evidence taken in camera may, however, subsequently be made public by order of the Senate or this committee. Because of the nature of some of the things that we have indicated we want to discuss, I understand that we might be going in camera sometime during the day.

I remind all witnesses that the evidence given to the committee is protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of the evidence given to a committee, and such action will be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee.

The Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions they have been asked to a superior officer or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how the policies were adopted. If a witness objects to answering a question the witness should state the ground on which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the grounds on which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera.

[9.06 am]

KITSON, Mr Kevin, Executive Director, Intelligence Strategies, Australian Crime Commission

MILROY, Mr Alastair, Chief Executive Officer, Australian Crime Commission

NEWMAN, Mr Lionel, Executive Director, Strategy and Governance, Australian Crime Commission

OUTRAM, Mr Michael, Executive Director, Operational Strategies, Australian Crime Commission

CHAIR—I welcome the witnesses from the ACC. Thank you for coming two days in a row. We know how busy you all are but we appreciate you coming along to talk about your annual report. Mr Milroy, would you or any of your colleagues like to make an opening statement?

Mr Milroy—Thank you. In 2005-06 the Australian Crime Commission continued to make significant positive steps to achieve a more unified Australian law enforcement effort to counter the impact of serious organised crime in Australia. The 2005-06 annual report is a reflection of the agency's success in delivering effective and actionable criminal intelligence services and in bringing a multidisciplinary, multijurisdictional focus to investigations into federally relevant criminal activity.

More enhancements to the Australian Criminal Intelligence Database, ACID, have significantly increased jurisdictional engagement with the system. ACID recorded a 20 per cent increase in searches, and over 8,000 more documents were uploaded by law enforcement nationally, an increase of 13 per cent. I can advise the committee that the increases have continued into the current financial year. Criminal information intelligence shared through ACID arms law enforcement nationally with the means to combat and dismantle the activities of serious and organised crime groups. The ACC has continued its focus in the area of over the horizon estimative intelligence, as that is a crucial component of the commission's intelligence function because it informs law enforcement decision making and priority setting nationally.

The menu of work undertaken by the commission is closely dependent on the changing nature of the criminal environment and the priorities determined by the Australian Crime Commission board. To combat serious organised crime activity, the board during 2005-06 approved an intelligence operation, special intelligence operations, special investigations and a task force to address a broad range of criminal activity. Underpinned by proactive criminal intelligence and the strategic use of coercive powers, the majority of the commission's operational activities were conducted in collaboration with Commonwealth, state and territory police services and other government agencies.

I will expand on some of the key activities and achievements. There were 79 strategic intelligence products—which consist of strategic criminal intelligence assessments and national criminal threat assessments—produced; 1,077 operational intelligence disseminations; 964

strategic intelligence product disseminations; 22 serious and organised crime entities—which includes criminal networks, syndicates and groups—disrupted; and 28 significant individuals disrupted in relation to their criminal activities. That trend is continuing this year. The ACC continued to progress investigations and prosecutions in Operation Wickenby, the investigation of significant tax avoidance schemes; and in relation to the same investigation the ACC has been successful in over 20 legal cases challenging the validity of the ACC-led investigation.

With respect to the use of the coercive powers, we have conducted 605 examinations and issued 420 production notices. In relation to proceeds of crime, we have restrained $20.7 million in proceeds of crime, with $1.6 million forfeited; issued tax assessments for $6.3 million; and recouped $20.8 million in tax recovery. This is a significant increase from previous years. There were 106 drug seizures, to the street value of $4.9 million. Additionally, let me emphasise, the dissemination of ACC intelligence has been integral to many further seizures made by jurisdictions. There were 1,300 firearms and their components seized, which is an increase of 350 per cent from the previous reporting period, and 218 persons were arrested and prosecuted on 894 charges. Complex and protracted operations and investigations have produced outstanding results, again reinforcing the effectiveness of the ACC's intelligence and operations model, and I am confident that similar results will be realised in 2006-07.

The ACC has 697 staff across eight offices. We have recently opened offices in Alice Springs and Darwin to support the national Indigenous taskforce activities. Our emphasis on developing a highly skilled and dynamic workforce has been a significant contributor to the many successes the agency has achieved, and that work is continuing in the current financial year. Through the year, considerable resources and effort were devoted to building organisational capability, including staff training, workforce planning and developing our leadership capacity. As a consequence of its intelligence and investigative activities, the ACC has been involved in a range of legal, regulatory and administrative reforms to assist government and private sector agencies to minimise the impact of serious and organised crime. This has included providing advice and comment on several draft bills.

The committee raised a number of concerns with respect to the 2004-05 annual report. These included the refinement of the ACC's performance measures and reporting on information and intelligence sharing. Where possible, the commission, in producing the 2005-06 report, has addressed these concerns and the report reflects the ACC's commitment to continuous improvement. The ACC has an ongoing commitment to maintain the same high level of governance, management and accounting mechanisms in this financial year, and I look forward to receiving the committee's report on our 2005-06 annual report. Thank you.

CHAIR—Thank you very much for that. Before we start the questions, can I congratulate the commission on the work it has done in the past year. I think that your successes are listed and known to those who follow these things. One of the good things about the commission is that a lot of Australians do not know you exist, which means you are never on the front page for the wrong reasons, and that is a good way to operate as well. A lot of good work has been done, so on behalf of the committee I congratulate you and your team and all of those many people behind you who do produce very good work. Well done.

You indicated that you had a number of court cases where your authority was challenged. I am sorry, I did not catch the number. How many was that again?

Mr Milroy—Twenty. That was in relation to the Operation Wickenby investigations.

CHAIR—There were 20 separate court cases?

Mr Milroy—That is correct, and some of them are still the subject of further legal cases.

Mr KERR—None have been successful to date, as I understand it.

Mr Milroy—That is correct.

CHAIR—Have there ever been any successful challenges in past years? Have you ever been successfully challenged?

Mr Milroy—I think that we would have to qualify that. My colleague may be able to comment.

Mr Outram—There was one matter but I would need to provide some more detail. It was not necessarily a successful challenge where something had to change, but I will have to come back to you with more detail.

Mr KERR—It was a question of the law of privilege, I think.

Mr Outram—That is correct.

Mr KERR—It was a clarification of an issue, I think, about spousal privilege or legal privilege. I cannot remember the detail. As far as I understand, there has been no decision of a court which would interfere with the intended operation of the ACC in its operations.

Mr Outram—That is correct.

Mr Milroy—That is correct.

CHAIR—Could you point me to the list of the criminal entities that have been disrupted. Where would I find that?

Mr Milroy—I think that it is on page 39 of the annual report. A lot of these disruptions were as a result of the excellent collaboration and partnership that we have been able to establish with other agencies. Over 82 per cent of our current operations are in partnership with either one or more jurisdictions. I think it is the strength of the partnership, the intelligence that has been collected and the knowledge gained about a particular syndicate or a significant individual. Based on that, we have been able to take appropriate tactical options to disrupt either the individual or the syndicate's criminal activities. We can use that methodology and, of course, draw on the combined weight of ASIC, the tax department and other agencies to apply the necessary strategies, tactics or skills to attack a particular area of vulnerability that has been identified within a syndicate in order to disrupt their activities—in particular, going after their assets to effectively put them out of business.

CHAIR—Excellent. Again as a preliminary question, are the figures on key results repeated by other agencies? Do they incorporate similar statistics in the state police forces or the other enforcement agencies—particularly with drug seizures? Would this incorporate drug seizures that, for example, the Queensland police might be reporting on?

Mr Milroy—I am aware that the relevant jurisdictions acknowledge where they have received intelligence from the ACC and that they have been successful. We would probably have to check all of their annual reports to see whether they refer to the intelligence that was derived from the ACC that led to that success. But I can advise that we regularly provide the heads of the relevant agencies with a detailed list of all disseminations, and we encourage as much feedback as possible so that we can use that as part of our performance measures. Only this week, actually, I wrote to all board members and advised them of the details of all the disseminations that have been made to their agencies, which the respective heads of agencies are interested in. We also try to ensure that we get sufficient advice on the results of activities that are based on that received intelligence.

Mr Kitson—All of the aggregated drug seizure data is contained in the ACC's *Illicit drug data report*, IDDR, which is produced every year. The report shows the seizures at the border and in state and territory jurisdictions. It also provides the most accurate and comprehensive guide to law enforcement seizures.

Senator MARK BISHOP—Mr Milroy, can you just explain to me the significance of the work that you are doing with the national Indigenous task force. You have opened two new offices in Alice Springs and Darwin. The Indigenous population up there, in the scheme of things, is minimal, as it is in the north of Western Australia and the north of the rest of Australia. What is the significance there? There is an apparently large workload and, at first glance, a significant allocation of funds for what are minor population areas with, I would presume, not significant high-level criminal involvement.

Mr Milroy—I will ask Kevin shortly to provide more detail. The task force was established to look at the incidence of child sex abuse, fraud and other forms of violence in Indigenous communities nationally. It was on the basis that there were identified gaps in intelligence, particularly in remote and urban areas, across all of Australia.

Senator MARK BISHOP—So it is remote and urban?

Mr Milroy—That is right, and rural as well of course. So, in other words, to get a better understanding of the types of crimes that may or may not have been committed and then gather all this intelligence nationally, not just in the remote areas of Western Australia, South Australia or northern Australia.

Senator MARK BISHOP—Can I stop you there. I would have presumed that the serious allegations of child sex abuse, paedophilia and the like are dominated by cultural processes internal to the local communities, as opposed to criminal-type or profit-type motivation. Is that thinking incorrect?

Mr Milroy—I do not think that we have been able to gather enough intelligence at this stage to be able to make comments on the issue of paedophilia. I think that our job is to look at this

from a national intelligence collection process to establish if there are instances of these types of crimes occurring across all Indigenous communities in Australia. This is necessary because there is a clear indication that there is a gap in intelligence and knowledge of these sorts of crimes. In that process, we will eventually see certain trends and we will probably identify areas where there are matters that need to be pursued by the relevant authorities. But I think it is in phase 1 of the project, so we would not be able to make any comments at this stage in relation to paedophilia or the causes of it within Indigenous communities.

Senator MARK BISHOP—But you have not as yet identified any—I am trying to choose my words carefully—commercial or profit motivation in paedophilia type behaviour or child exploitation type behaviour in any of the Indigenous communities?

Mr Kitson—As the CEO mentioned, we have a four-phased approach over nearly three and a half to four years with the task force. We have recently moved into phase 2, which is the active intelligence collection. Phase 1—a protracted period in our terms of around six to seven months—was about establishment, making the contacts and getting the infrastructure in place so that we can reach remote Aboriginal communities. We are therefore not in a position to comment on the mass of data that is out there. I think that it is fair to say that profit motive is probably a dubious concept in this particular domain, but we do not at this point have the information to clarify that one way or the other.

Senator MARK BISHOP—No. The reports that are regularly in the press relate essentially to male violence, male exploitation and male manipulation in unacceptable forms both of females and, progressively in more recent years, of children, within their own families and clan groupings. I have never seen any suggestion of untoward motivation in a financial sense—that is, buying or selling of children or women, or buying or selling of unacceptable products and literature in this context. That is why I am a little bit intrigued as to why your organisation is taking such an interest.

Mr KERR—Because they were told to.

CHAIR—Can I perhaps ask the dorothy dixer, which is that this was a decision of the Australasian Police Ministers Council—

Mr Milroy—That is correct.

CHAIR—In fact they promoted it. On page 37, you indicated that the task force was set up at the direction more or less of the police ministers' council and then approved by your board and also by COAG.. Is that correct?

Mr Milroy—That is correct.

CHAIR—At the time, we discussed the fact that it did not seem to fit into the serious and organised crime categories.

Senator MARK BISHOP—No. As offensive as it might be, it is not major drugs or something like that.

Mr Milroy—I think it is an interesting point. The ACC's role is to collect criminal information and criminal intelligence, and it was identified that there is a gap of knowledge in relation to child abuse, substance abuse, drugs and violence in remote and urban areas of Indigenous communities across Australia. So this is an area that needs our expertise. I think it was recognised by the governments and the IGC that the ACC can bring the agencies together in a collaborative approach and go about collecting intelligence to get a better understanding of a particular market.

Senator MARK BISHOP—Thank you, Mr Milroy. I understand what is driving you and I probably should not have got distracted on that.

CHAIR—No, it is a good point and it is one that the committee did question at the time that this was initially set up.

Senator MARK BISHOP—Mr Milroy, I think you said that you are attempting to recover proceeds of crime in the order of over $20 million—

Mr Milroy—That is correct.

Senator MARK BISHOP—and that $1.6 million had been forfeited. So the Crown has recovered that. Is the difference still under a process that is attempting to recover it?

Mr Milroy—That is correct.

Senator MARK BISHOP—Through the courts?

Mr Milroy—Yes.

Mr KERR—I want to go to some other matters, but just on the reporting itself: firstly, on page 39, you define the terms that you use in the report—criminal syndicate, criminal network and criminal group—but then, I suppose almost to show the futility of this process or at least the difficulty of it, the case study that immediately follows actually uses the terms quite interchangeably. It speaks of the disruption of an organised criminal group and then refers to it in the last sentence as a syndicate. Can we try to get some greater consistency of language? If we are defining terms and then the example that immediately follows does not match the definitions, it makes it very difficult.

Mr Milroy—Yes. It is a matter that has also been raised with the Australian Crime Commission board. Defining what we mean by some of these comments will be rectified in the report to the board on organised crime in Australia.

Mr KERR—In our previous considerations of the reports there has been some discussion about the effectiveness of the court processes regarding refusal to answer questions, failing to produce documents or giving misleading evidence. I note that in appendix C there is now a history of some quite substantial sentences being handed down. There was some urgency pressed upon us to introduce something in the nature of a contempt power because of a suggestion that the courts were not addressing these matters with sufficient seriousness. But if you look at, for example, the illicit firearms market matter, there was a sentence of 18 months imprisonment for

giving false or misleading evidence. In the AOSD Queensland matter, there was a 15-month imprisonment and two 12-month imprisonments. So the sentences do seem to now match the significance of the offence.

Mr Milroy—That is correct. But in relation to the time that it takes for the matters to be dealt with by a court, that does impact significantly on our operational strategy when we use the coercive powers.

Mr KERR—I understand, but in terms of the actual outcomes?

Mr Milroy—The actual sentences—yes, that is correct.

CHAIR—Is work being done on that, do you know?

Mr Milroy—A review has been commissioned by the government which is referred to as the Trowell review. Mark Trowell QC is looking at a matter which was the last of the reviews into the former NCA and the ACC. That is currently a review in progress, commissioned by the government.

CHAIR—There was a suggestion that these should be dealt with in the same way as contempt of court, which is dealt with almost immediately by the presiding judge, rather than having it as a separate offence that takes months to go on the lists.

Mr Milroy—That is correct. That is a matter which is under review at the present moment.

CHAIR—When do you expect the review to be completed?

Mr Newman—The report is due to go to the minister on 16 April.

Mr KERR—I note in the report—and of course it is the law—that in a special intelligence report you can use your coercive powers, the hearing powers, but you cannot access the surveillance or interception powers. Does this present any effectiveness issues? Also, I wonder if there are reasons that we ought to look at the definition of 'special investigation', bearing in mind that we do not want to expand this thing too widely. Are there any logical reasons why, if you were given the coercive powers, you could not also have access to other covert forms of information collection?

Mr Milroy—Yes, that matter is the subject of discussion in a number of reviews that have been commissioned by the Attorney-General's Department into the use of telephone intercepts for intelligence purposes. It is being discussed in a review that is being undertaken at the present moment.

Mr KERR—That issue is under current consideration?

Mr Milroy—It is under consideration. The process by which the board approves coercive powers is a stepped approach. For example, where we have a new matter, we might do a probe in an area that we identify as being of possible concern. The intelligence thus gathered justifies us going to the board and saying that there should be an intelligence operation. The board will give

us a determination on that. Depending on the results of that intelligence operation—and where one establishes that traditional police methods have not been effective—the coercive powers are then added to address that issue. Then there is the issue that, if it is deserving of an investigation, you will have the full use of the powers in an investigation. So there is a process, and at different stages you can use all of the above. In a special intelligence operation where we are using coercive powers and we are working with a partner agency, that agency will have its own powers to gather evidence by telephone intercepts. So there are a number of processes we have to look at. At the present moment, the matter is being looked at as to whether there is a need or not—

Mr KERR—There may not be a need. I just wanted to raise that issue.

Mr Milroy—That is right.

Mr KERR—The other issue which I have been very concerned about in relation to the work of the ACC is your 'Picture of criminality' report—I think that is correct. The original intention more than a decade ago was to produce a public version of your Picture of Criminality report which would go to government for policy setting. It could operate—much as the defence white papers do—to enable an informed public debate around the issues of incidence of crime; to focus resources, debate and discussion on the areas of greatest importance; and to be an antidote to knee-jerk reaction policy making. It would also give the community a sense of where over-the-horizon investment needs to be made in law enforcement and why it is important to do that. Can you give us an update on where we stand with those policy issues?

Mr Milroy—As I recall, the committee raised this last year. The 2007 report referred to as a 'Picture of criminality in Australia'—that is, the highly protected version—will be presented to the board in June. In addition, we will provide the board with a public report for their consideration and for release to the public. We are taking action to release it and will settle on whether or not the title will be *An overview of serious organised crime in Australia*.

The highly protected report is used by the relevant jurisdictions to assist in developing their own strategies, in consultation with their respective ministers, about what to do with organised crime in their jurisdictions. So it is used at the decision-making level. We are hoping that we will pick up the committee's views on this and hopefully one will be released this year, subject to the board's agreement.

Mr KERR—I join the chair in generally welcoming the effectiveness of the organisation. There are two matters I want to take you to where the ACC has been the subject of very critical remarks. To put this into context, we are examining these matters against a background where the committee has good reason to believe that the organisation is playing an important and significant part in the law enforcement architecture of the country. With regard to the first matter, in our private discussions yesterday—without revealing precisely what you said—you suggested that you felt the reporting of it had been incorrect. I take you to the article in the *Financial Review* of 22 March 2007 in which it is alleged:

The Australian Crime Commission has been forced into an embarrassing admission that it misled Swiss authorities during its investigation into suspected tax fraud by a Perth businessman ...

It further implies that the effective workings of operation Wickenby might be damaged by this admission.

Mr Milroy—I can advise the committee that the relevant article is a misrepresentation of the facts. The ACC did not mislead the Swiss authorities, as claimed in the article. The ACC has not made any admissions, as claimed in the article. The article also mentions an issue of misfeasance. We can advise that the mention of misfeasance concerning the investigation is also inaccurate, as their statement of claim had been struck out. Of course, the subject matter is still before the courts. In relation to affecting the ongoing ACC investigations into a number of cases, this has no bearing whatsoever in the progress of those investigations.

Mr KERR—I take it that that answer is an assertion that, in its dealings with the Swiss authorities, the ACC has, in its view, always accurately represented the facts of the circumstances of the matters for which it was pursuing information?

Mr Milroy—I am advised that is correct.

Mr KERR—What about the further allegation of accessing information that was produced in a sealed envelope? A claim for privilege was asserted to have been revealed in circumstances where to have done so would have contravened that process. Is that also wrong?

Mr Outram—Which incident are you referring to?

Mr KERR—This is in the same article referring to Mr Dunn:

The businessman wants to know how legal advice from his solicitor ended up in Mr Considine's letter to Switzerland. The ACC obtained the written advice during an examination of his lawyer and agreed it would not be read until Mr Dunn had tested his claim for privilege in court. The advice was placed in a sealed envelope pending the outcome of a court case, which never went to trial because the ACC eventually agreed it was privileged.

The inference from that is that, notwithstanding its privilege, it was used by the ACC.

Mr Outram—My understanding is that this has been litigated through the current matter that is before the court as part of the Dunn and Misty Mountain litigation, and I am not aware of any finding or suggestion of wrongdoing on the part of the ACC. These are matters that are before the court at the moment.

Mr KERR—I appreciate that the ACC does not get involved in a nitpicking or 'you said, I said' process all the time. But the *Financial Review*, perhaps while not matching the status of the *Times* of London, is still an important newspaper of record. I wanted to give the ACC a chance to respond to those kinds of assertions.

Mr Outram—What I should say is that we do follow all the media in relation to any of our matters, including in relation to Wickenby, and we follow up if there are allegations made of any impropriety on the part of the ACC or any of our staff or suggestions that there have been any problems. We do that to assure ourselves that we are on solid ground in relation to the investigation and in relation to the litigation, which is significant and ongoing. At this time I

have no information that suggests that there has been any impropriety on the part of any of our staff or any of the investigators. But these are matters that are before the court at the moment.

Mr KERR—They were the two points, and I raised them in the private hearing yesterday with a view to giving you an opportunity. At least with respect to the Swiss representations, that is clear. As to access to the document that is asserted to have been received in a privileged form, I imagine we will just leave that. But it would help to have a note if—

Mr Milroy—In relation to that second matter, we will ensure that if our answer today is not a full one then we will rectify that.

CHAIR—There have been suggestions, through this committee and through some submissions that have been made to us in the inquiry that we are currently undertaking, that the tax commissioner should be on the board of the commission. Do you have a view on that? Is it appropriate to ask you?

Mr Milroy—I believe that that was one of the recommendations from your inquiry. That is currently a matter for government.

CHAIR—Okay. We did discuss this before. It is, I guess, asking you for an opinion on a policy matter. You have indicated in the past that it would be useful to have closer involvement with the tax office.

Mr Milroy—We have an excellent working relationship with the tax office. We have tax investigators permanently working in most of our offices to pursue some of the strategies against organised crime. Even the board at one stage invited the Commissioner of Taxation along to one of the meetings as an invited guest. As I indicated, that recommendation that you made in your previous review is currently under consideration by the government.

Mr KERR—I should give you a good opportunity to have a free kick. You have indicated in your report that you have had a significant increase in the allocation within your budget for intelligence operations. I presume that much of that may have something to do with Wickenby, and I do not want you to go into precisely where you are spending your intelligence resources. How are you managing budgetarily? Is there anything that you would like to put on the record about difficulties that you have or strengths that you need to have reinforced that we should take up with government following the examination of your report?

Mr Milroy—As far as the current budget is concerned, as you would appreciate, we had additional funding following the Wheeler review. That has led to a significant increase in the intelligence flowing from the jurisdictions into our database, which strengthens our position and improves our knowledge on organised crime and assists in providing more actionable intelligence back to the jurisdictions. That work is continuing in this financial year. That is Commonwealth funding to improve the systems and processes within the other jurisdictions.

In relation to the areas of crime and looking to the future, we have in consultation with the department made submissions, as all agencies do, with respect to new policy proposals. They are currently the subject of consideration by the various government committees. At some stage, probably in a few months, we may be in a position to comment as to whether additional funding

will be allocated to the ACC. We see a greater level of commitment by the jurisdictions to fund their staff into the ACC to work on projects so that has always been a significant extra resource which is funded. It increases our overall capability across the country. There are now three task forces where previously we had one. Under the task force model, the jurisdictions commit their resources at their cost. So that model is actually showing a greater level of commitment to this partnership arrangement. I think all in all—and everybody could do with more money and more people—at the present moment we are relatively comfortable with what we have and the progress we believe will be made in the future.

Mr KERR—What about the issues of career advancement and job satisfaction within the ACC? I think it is fair to say that, at different stages, the former NCA had periods where career advancement and job satisfaction were high and other periods where there was a considerable sense that morale had slumped. That sometimes is tied to the opportunity for progression, being able to return to other agencies without loss of career advancement. Sometimes it relates to salary within the organisation, sometimes it relates to the respect that the organisation has in the general community. Where do we stand at the moment?

Mr Milroy—We have spent a considerable amount of time improving our capability. We are looking at things like succession planning and a lot of courses to improve the capability of the organisation and to develop the skills of the staff and make more effective leaders. We have currently put nearly 40 people through leadership enhancement training and we have also increased some of the senior positions in our structure, which allows greater opportunities for advancement. I might call on Lionel to expand on what we are doing in relation to some of those key areas.

Mr Newman—I think in every organisation there are always opportunities and we are always trying to generate opportunities. The nature of the report indicates that we are undertaking a wider scope of work. So what we believe we provide and will continue to provide are greater opportunities for people to do a diversity of types of work and get involved in different areas. As a result that leads to opportunities to develop new skills and new expertise and to take on senior positions on a short- or long-term basis. The ACC has, over its four-year period, undertaken a number of reorganisations, which have provided opportunities for staff to take up positions. As indicated, we are also establishing offices which require senior positions to support those in different jurisdictions.

The scope of work, as I indicated, has been enhanced both by authorisation of the board and from work given to us by the IGC. Once again, they all impact on the opportunities provided to our staff. Satisfaction levels will vary, naturally. We have a turnover rate that we would like to reduce, but the consequence is that obviously we have gone through a significant transition over the last three years. We have been setting an organisation up for the future and recruiting extensively.

Mr KERR—With the tight labour market now, recruitment in some areas is possibly more difficult. One of the issues that was drawn to our attention in the Parliamentary Joint Committee on Intelligence and Security was the understandable difficulty in recruiting. One of the issues there is the time delay that sometimes happens between identifying possible recruits and then going through all the clearance processes. How do you deal with the security clearance processes

with recruitment of your staff and does that involve delay and loss of recruitment opportunities as a result?

Mr Newman—There is naturally some attrition in that process, but we have well-established security guidelines that we have to adhere to. We have made some modifications to the security vetting process to ensure that we can minimise the attrition in that waiting period, which involves some emergency clearances. But of course we still carry out the same probity and security vetting checks that are required before you become engaged by this agency. So your ongoing employment at the agency is dependent on positive results from those checks. Even though we might fast-track some people into the organisation, that is on the basis of their completing the full security clearance.

Mr KERR—What is the process for renewing clearances? This agency is now an established part of the architecture, but at some stages the focus might not have been on making certain that people had current clearances, and their life circumstances may have changed. What is the process for making certain that an employee does not just get a clearance but maintains it, so you have confidence that that clearance is maintained at an active, positive level through the life of the organisation and the employment of that person?

Mr Newman—I do not have the full details here with me, but we do have a process every three years, I believe, where we review and validate security clearances. And some, of course, are changed as a consequence of the need for increased access—a higher security classification level.

Mr Milroy—We are also trying to develop what you might call the ACC officer of the future. We have started a graduate program and the intake occurs this financial year. That is looking to bring in people to be developed as intelligence officers, legal officers and financial investigators, those key skill areas for which we realise we always have difficulty recruiting in the marketplace—although, because we have been seen this financial year as an agency of choice, over 2,000 people applied for the recent positions advertised. We also are an agency that is targeted because we have such a high-skill workforce and people will move to other agencies for promotion, and that is always going to be a problem. But we are working through a new process this year in terms of succession planning, recruitment and skill training across all areas of the organisation so that people have a career. We are also encouraging this cross-directorate operational work so people will work across different directorates. So managers at general manager level and EL2 level have all been encouraged to do this, and some have been put into positions where they were operating in an area that they were not previously operating in. They have developed their management skills and now they can move either from intelligence or into operations a lot more freely. It broadens their skills, so we develop a more skilled workforce from the ground up right through to management level.

Mr KERR—Just looking at your advertising expenses at page 72, there is one figure there that stands out. Everything else is quite minor, but HMA Blaze Pty Ltd—I assume that is recruitment, is it?

Mr Newman—That is recruitment; that is the actual advertising. You may have noticed over the last 12 months that the ACC have advertised extensively and, as the CEO has indicated, we

have had over 2,000 applicants now. We are in a competitive market, we need to advertise for these positions and we have advertised a lot more than we have in the past.

Mr KERR—So HMA Blaze is a recruitment company?

Mr Newman—Yes, it is our recruitment/advertising firm. So we use those people to draft our ads and place our ads.

CHAIR—I am advertising for a staff member and I have found that one ad for one staff member for me is upwards of $3,000.

Mr KERR—I was not drawing attention to that sum because it was exceptional.

Mr Newman—We would like to see it—

Mr KERR—It is actually quite modest.

CHAIR—Well, I was just going to say that, on the basis of my one experience—

Mr KERR—It just stood out.

Mr KERR—Each of the state police forces obviously has its own intelligence-gathering agencies. How does what you do enhance the activities of the state law enforcement agencies in intelligence gathering? And what distinguishes your intelligence gathering activities from those of the states?

Mr Kitson—I will take your last point first. I think the most distinctive feature of the ACC's intelligence gathering is that it is national. We do not focus solely on an individual state or territory, and therefore the information that we collect and the intelligence that we develop from that information has a national perspective. Whilst it might have strong implications for a single jurisdiction or a small number of jurisdictions, it really has that broader national scope and deals much more with the longer-term implications of that information.

But it is necessary, to reach that point, to have a detailed understanding of what each of the states and territories is doing in their respective information and intelligence-gathering processes. So significant work is being done under the SIEF, Standard Informational Exchange Format, project, which is designed to deliver, pretty much automatically, all of the information held by states' and territories' policing agencies into the ACID database. We also have a very intensive system of local engagement and national engagements with them to promulgate the national criminal intelligence priorities, to translate those to what one might characterise as state criminal intelligence priorities, so that we harness the national intelligence-gathering capability, so that we are not replicating or duplicating and so that we properly address where the true information gaps exist. Those gaps will always exist; the challenge is to identify them and to narrow them.

CHAIR—Thanks for that. How do you assess the value of the intelligence disseminations to other agencies? What sort of process of assessment do you use?

Mr Kitson—We have a significant enterprise, with a tertiary institution and one of our partner agencies, to measure the true effectiveness and value of intelligence information. I would defer to Lionel, who has major carriage of that, if you were looking for more detail. But we have, again, a very broad engagement with all of our partners, which essentially involves us going to them and saying: 'So what did you do with that? What benefit did it bring to you?' And we have to recognise that it is in the nature of intelligence that a piece of intelligence delivered today may have no downstream impact for 12 or 18 months or longer. So it is an enormously challenging process to understand the true impact.

We go through some intensive evaluation processes every time we disseminate an intelligence product, asking: 'What difference did this make to your understanding? What will you do with this information?' and 'Who has it gone to?' We are able to refine our processes from there. That has made a significant difference over the last two years to the way in which we have shaped our information, particularly to the points of distribution. We have been much more wide ranging in making sure it gets to the right people within the right agencies.

CHAIR—Mr Newman, do you want to add to that?

Mr Newman—I think Mr Kitson has covered it very well. But we are looking not just at the quantitative outcomes from our intelligence but often at the qualitative outcomes that are not manifested in the number of drugs seizures or arrests but may well be policy changes that are undertaken by the various jurisdictions in response to the intelligence, including their policy settings with regard to organised crime that may come from readings of the picture of criminality, the protected version that we provide to them, or the number of strategic intelligence products that are provided throughout the year that, as I said, may influence the policy setting, may have some impact on the administrative arrangements within those jurisdictions and may contribute to law reform in those areas as well. It is a challenge, given that our benchmarking has indicated that no-one is doing this particularly well, if at all, in law enforcement through the world. We would like to think that we are doing some leading edge research in this area. We aim, I think within the next 12 months, to have a reasonably cohesive, what we call 'effectiveness and efficiency framework', which looks at both the investigative outcomes and the intelligence outputs from our agency, and how they are actually contributing value to the Australian community.

CHAIR—Do you assess that yourselves or did you say you had some independent—

Mr Kitson—We do.

CHAIR—Who is that?

Mr Kitson—Macquarie University.

CHAIR—And they are on a long-term arrangement to—

Mr Kitson—We have, I suppose, a research partnership with them, with one of the state jurisdictions. So we are bringing some significant expertise on measures of economic and social wellbeing into our evaluation of the effectiveness of our reporting. As Lionel illustrated, we are looking not simply at weights and measures, if you like, but at some of those intangible

measures that ultimately are best characterised as wellbeing. For that we are looking at various metrics that are perhaps more commonly applied in social and economic environments.

CHAIR—So internally you look at your effectiveness and efficiency, timeliness and quality and how you use your special powers, but also Macquarie University provides a bit of a—

Mr Newman—We have been working with Macquarie to set up the framework and look at the metrics and mechanisms by which we will assess. Longer term, it is to build it in and to be able to do this internally. Naturally that involves our interface with the various jurisdictions, but the idea is to build that into a systematic evaluation of our effectiveness and efficiency within our own agency so that, for example, the output and activity reports we produce for the committee on a monthly basis will be refined over time to reflect and pick up the value of that intelligence. There has been a significant commitment by the organisation to developing that capability within the ACC which will manifest itself, as I said, in some enhanced reporting over the next year or two.

Mr Milroy—That evolved initially under this project at Macquarie University. Victoria Police joined as an example of a jurisdiction, but the benchmark involved all police forces in Australia as well as overseas looking at what is currently used around the world and then an acknowledgement by the Canadians and the British that they do not have models like this and they are very interested. The Home Office in the UK and the SOCA see us as an agency for doing some benchmarking. Of course, this is an issue that was raised by the intergovernmental committee, and the board undertook that we would do this work, so in due course this will be tabled before the board, as it already has been, and eventually the board will report to the IGC on this process, which may or may not at some stage and in a varied form be used by other jurisdictions.

CHAIR—At page 22 you talk about a two-stage project that:

... aims to refine the performance measurement framework to enable a more accurate measurement and estimation of the costs of serious and organised crime, the effects of ACC activity in mitigating and reducing these costs, and the associated return on investment.

How is that project going? Has it started, finished?

Mr Newman—That is actually the Macquarie project. It was done in two stages. Firstly, we looked at the investigative outcomes, and currently we are in the process of looking at the intelligence outcomes. The intent is to complete activities by the end of this year. I would make the point that, while we are producing some leading edge material, we are also taking advantage of some of the excellent work that has been done by the other jurisdictions and the AFP in looking at the drug harm index and work in measurement in fraud and other areas. That is incorporated.

Mr Milroy—We have applied some of these measures. The first part that has been completed will be reflected in the next annual report.

Mr KERR—I think the committee has forewarned you that we want to examine some very critical remarks of Her Honour Judge Morrish in The Queen v Theophanous matter. The

judgement contains passages which, if accurate, suggest that wrong and unfair procedures were pursued against a former member of this parliament. This in itself is a troubling matter, but it also makes suggestions that there is a continuing problem with document management within the agency as it now exists.

I think it is correct to say that Judge Morrish is not unknown to the agency—she was a former prosecutor who often took briefs for the NCA—so her criticisms are not coming from a person who has, in a sense, a background you would think was anything other than entirely robust in terms of these matters. So could I pursue them. I understand there may be some matters that we need to go in camera on, but the judgement itself is a public document, the criticisms are public. To the extent that we can avoid it, I think it would be useful in terms of public confidence to have your response on the record in relation to those matters. There may be instances where proper operational reasons mean that you do not want to disclose matters that might suggest how you manage particular circumstances. I understand that.

If you go to the judgement itself, you will discover that, for example, at page 68 the judge says that the NCA had had many years of opportunities to provide information which had been sought by Mr Theophanous and his legal advisers. She says she gave the organisation an opportunity to explain why it had not done so and had 'not been given any satisfactory explanation for this gross breach'. She says she forewarned the ACC's legal representatives of the possibility that she would draw an adverse inference in the absence of an explanation and she still had no explanation and describes what occurred as 'a gross breach of protocol calculated to undermine the integrity of the process at every level'. Those kinds of remarks are not remarks which I would have thought could pass without a response.

Mr Milroy—We received your letter on 28 March which set out six questions and we have prepared a written response. So whether we table that response now for you to consider—

Mr KERR—Are there any elements in that response—

Mr Milroy—I think the response answers those questions.

Mr KERR—I understand. I was just asking if there are any matters in the letters that you wish to table which contain matters which we should receive in private—in other words, should we distinguish between the public parts of the letters and any matters that we should receive subject to confidentiality?

Mr Milroy—My understanding is that this can be tabled.

CHAIR—We might table that, and have a short coffee break for everyone.

Mr Milroy—The answers are classified as in-confidence because we are sending a response to a letter to the PJC. But if we were asked this is the answer we would provide.

CHAIR—Perhaps we should not table it or incorporate it.

Mr KERR—We were uncertain how to manage this process, but my preference is to deal with it openly. The criticisms are open criticisms articulated by a judge in reasons which are

published. It is best that we deal with as much as we can. We wrote to you on an in-confidence basis. It may be necessary to deal with both the letter and your response on an in-confidence basis. But insofar as is possible, I would prefer it not to be.

Senator MARK BISHOP—Within the defence community there are intelligence restrictions on what may be made available to different levels of officer, to different persons and, indeed, to members of parliament. You have to have certain level of security clearance to have access to particular information. Are there any restrictions within your organisation on the information you might provide to us?

Mr Milroy—Yes, there are.

Senator MARK BISHOP—Operational matters?

Mr Milroy—That is correct. When we provide the PJC with a monthly report, the monthly report which goes to the board contains more operational information. Then a slightly sanitised report comes to the PJC which removes any reference to any targets by name or anything that would normally not be going on the public record that relates to operational activity.

Senator MARK BISHOP—Is that the only restriction?

Mr Milroy—There may be other parts that we might consider are highly protected because they themselves contain sensitive intelligence and they may be provided to a law enforcement agency or an overseas agency that we consider would not be appropriate.

Senator MARK BISHOP—Understood. Thank you.

Mr Milroy—So it is not unlike the military process.

Senator MARK BISHOP—A similar type of system.

Mr Milroy—That is correct.

Senator MARK BISHOP—Understood.

CHAIR—We will not table this today or deal with it in the course of this inquiry; we will treat it as correspondence in reply to our letter. But when we have read the correspondence we may want to elaborate on it.

Proceedings suspended from 10.10 am to 10.14 am

CHAIR—I note from the correspondence that the committee received in relation to the final issue raised by the committee in its letter about reviewing of protocols and policies that you indicate that there has been a review. Would you like to elaborate on that? I assume that review follows this particular judgement.

Mr Milroy—Yes, following the judgement by Judge Morrish we reviewed the case in consultation with the Commonwealth DPP. I will ask Michael Outram to provide a brief in relation to that review.

Mr Outram—Following the judgement we obviously did read it and we sought an urgent consultation with the DPP. I can inform the committee that, as a result of that—whilst I cannot give you the advice that they received—the DPP did seek further legal advice in relation to what should occur.

I will outline our position at the moment in relation to some of the aspects within the judgement. For example, Judge Morrish stated that the Crown case should not succeed if it cannot establish that the registered informant was a co-conspirator. The prosecution case, as stated in the counter-conspiracy on the indictment, was such that a number of people, including the registered informant, were later to be conspirators with Dr Theophanous. The prosecution then was that, even if the registered informant were determined not to be a conspirator, the conspiracy still existed between the other persons alleged to be conspirators, namely Dr Theophanous, Chen Qing and Peter Yau. Yau in fact pleaded guilty to that charge and was sentenced to imprisonment as a result.

Secondly, Judge Morrish decided there was a failure to provide adequate disclosure of the registered informant's travel applications and associated intentions. But both Arnold, the NCA investigator at the time, and the registered informant did give evidence at the contested committal hearing in 2000 and at the first trial in 2002 of the letter of referral provided by Arnold to the Attorney-General's Department in support of the registered informant's travel to China in 1998. It is important to note that the time of that letter predated this investigation in relation to Dr Theophanous.

The general nature of the assistance provided was well known to the defence from 2000. The documents relevant to that assistance were not requested by the defence until 2006. It should also be noted that the assistance occurred in 1998, as I have said, at a time prior to the commencement of the investigation. We have looked at relevant excerpts of the transcript from the evidence given by Arnold in the committal in relation to that. So the testimony clearly disclosed the substance of the NCA dealings with the registered informant's travel plans and the NCA's knowledge of his intentions long before the first trial commenced.

In 2000 the defence was aware of the letter from Mr Arnold to the Attorney-General's Department and had an opportunity to request a copy. If the defence had considered the issue important, they could have issued a subpoena seeking production of the documents. At the first trial there was no serious attempt to suggest that the registered informant was not a party to the conspiracy. The defence was run on different lines, and Dr Theophanous's legal representatives did not consider the material to be significant to the case until a hearing before Judge Morrish was well underway. Judge Morrish makes no reference to the viva voce evidence previously given on the topic.

The evidence about Chen Qing's existence and his status and conduct was wholly unsatisfactory. This was another statement made by Judge Morrish. There was no criticism of the nature of the evidence as to Ms Qing's existence at the first trial. Even if Judge Morrish determined that she was not a conspirator, there was still material upon which a jury could have

been satisfied that Dr Theophanous conspired with Peter Yau. Peter Yau had earlier pleaded guilty to conspiring with Dr Theophanous and was sentenced to imprisonment. There is a suggestion on page 93 that it was necessary to overhaul the Crown case. Even if the registered informant was not a co-conspirator, as I have stated, but only a pretence conspirator, there was still no need in our view to overhaul the Crown case. The Crown case remained that at least one of the named persons had conspired with Dr Theophanous.

There was also objective evidence in the form of electronic recordings that the Crown relied upon to establish that the registered informant was a party to the conspiracy and deception. At page 70, Her Honour stated that documents reveal the potential that a number of NCA witnesses knowingly gave false testimony at the first trial: for example, that effectively no assistance was given to the registered informant regarding the travel application; that the registered informant's request for Theophanous's help came virtually out of the blue; and that the NCA had no intention of letting Chen Qing travel to China.

The evidence of NCA witnesses needs to be seen in context. An NCA witness, Arnold, and the registered informant had already given evidence in relation to the letter of referral to assist the registered informant to travel to China to marry Ms Qing. That assistance was well known to the defence from 2000. The evidence given at the first voir dire was that the registered informant, on 4 July 1998, and without instructions from his controller or other officers of the NCA, sought out of the blue Theophanous's assistance to bring Ms Qing to Australia. The NCA then made an operational decision to run with it. This was all litigated through the voir dire and the trial. I think it was also discussed in the original Court of Appeal judgement.

NCA witnesses at the first voir dire gave unequivocal evidence that not only did they not give assistance to Ms Qing to enter Australia but they had informed DIMA of the likelihood that a false visa application was to be lodged and accordingly ensured that Ms Qing would not enter Australia. Any prior assistance given by NCA officer Arnold to enable the registered informant to travel to China is fundamentally different to any later assistance or, more precisely, lack of assistance given to Ms Qing to enter Australia. The evidence given by NCA witnesses in the first voir dire that no assistance was given to the registered informant regarding the travel application clearly referred to the travel application of Ms Qing. This evidence did not relate to the earlier request of the registered informant that the defendant and the defence knew about in 2000—namely, that he would be permitted to travel to China to marry Ms Qing.

At the committal hearing shortly after Arnold gave evidence as to the letter of support he wrote on behalf of the registered informant, the following question was put to Arnold: 'So it would be unfair to suggest, Sergeant, that the registered informant would have every reason to think that another year down the track, having worked with you for another year, that just maybe if, through your assistance and the assistance of others, he could get Chen Qing here, maybe the NCA would also be prepared to assist him with some further representations once she was here—is that possible?' Arnold answered: 'It was discussed with Mr Laing, who made it quite clear to the informant that this was not going to occur.' Then there were some more questions following up on that.

Her Honour did not hear evidence at the voir dire from those witnesses she criticised. Those witnesses gave evidence and were cross-examined at the trial. Their evidence was not criticised by the trial judge presiding in the first trial and the voir dire held prior to the first trial to

determine the Ridgeway application—there was a very lengthy Ridgeway application prior to the trial. Counsel for Dr Theophanous at the first trial did not cross-examine those witnesses as to any alleged inconsistency between (a) prior assistance given by the NCA in May 1998 to the registered informant to travel to China and (b) nonassistance given to Ms Qing to travel to Australia.

The evidence of the NCA witnesses at the voir dire—in particular that of Mr Laing, the manager of investigations—was that the investigation commenced as a result of a chance remark by the registered informant at a meeting with Dr Theophanous on 4 July 1998. That the NCA made the decision that Ms Qing not be permitted to travel to Australia and that that decision not be conveyed to the registered informant was not challenged. On the contrary, the defence at the voir dire and the trial appeared to accept the evidence of Mr Laing that the investigation arose as a result of a chance remark or out-of-the-blue comment of the registered informant.

At the voir dire held prior to the first trial to determine the Ridgeway application, the trial judge put the following question to Mr Laing: 'Did the registered informant ask for your assistance or did you offer it? When I say 'you', I mean the investigating authority.' The answer was: 'Your Honour, we never offered the registered informant any assistance to get his girlfriend out.' Counsel for Dr Theophanous then stated: 'No, it was his idea. I accept that, so I accept that you are not part of that.' On page 101, Her Honour stated—

Mr KERR—Perhaps you could table that. Can I take you to a fundamental issue here, which is the nondisclosure. What the law is or is not is a matter that could or could not have been argued on appeal.

CHAIR—How much longer is the statement that you are reading?

Mr Outram—Not very long.

CHAIR—How long?

Mr Outram—Two minutes.

CHAIR—A page?

Mr Outram—Yes.

CHAIR—Please continue.

Mr Outram—Similarly, the evidence of Arnold at the voir dire that the registered informant raised the question of assistance for his girlfriend to travel to Australia out of the blue was not challenged. On page 101 Her Honour stated:

That conduct seriously calls into question the integrity of all previous proceedings.

Our position with the DPP is that we do not agree with this comment. Legal advice has been sought, but there is legal professional privilege around that so I cannot go into what that advice is.

In relation to disclosure, I think there were 14 subpoenas for disclosure. Each one was dealt with. The earlier requests for disclosure were in fact objected to on the grounds that they were too wide and nonspecific. From our examination of all the material, every request for disclosure was complied with as it arose. In cases where material was not disclosed, it was on the basis of the PIR application or because the subpoena itself was too wide. There were several discussions, I am told, going way back to 2000 and before the trial, between the DPP, counsel for Dr Theophanous and the NCA about identifying specifically which documents they required. A number of documents were identified by Judge Morrish in 2006 that had not previously been identified that were then the subject of some discussion, but certainly some of those documents had been the subject of previous subpoenas for discovery.

Mr KERR—I understand that there may be an argument about the law of co-conspirators. But in terms of the fundamental starting point, can I take you to the judgement of Her Honour at page 38, where Her Honour says:

> It is important to note, from the very outset of the matter in 1999, Dr Theophanous, through his legal representatives and on his own behalf, has steadfastly maintained that there has been inadequate disclosure. He has issued subpoena after subpoena, he has written letters and made requests in open court. All parties—the prosecution, the defence, the NCA and later the ACC—have had the finest legal representation. A number of eminent silks and well respected juniors have appeared in the various proceedings. No-one has ever doubted the obligation of the Crown to produce full and frank disclosure.

It is said—and you refer to a letter being noted to have occurred—and then you criticise the defence for not questioning the surrounding circumstances because they did not seek more information. It takes me to Rumsfeld's observation, which is true in this area, that there are known knowns where defence, if they fail to pursue a matter, are properly to be criticised. There are known unknowns where you know that a document or some circumstance exists that you ought to explore, and failure to do that. And there are what Rumsfeld describes as unknown unknowns. The law obliges the prosecution to make full and frank disclosure so that people are not in the circumstances of dealing with unknown unknowns.

In this instance there is a litany described by Her Honour of instances where information was sought. To say that they were the subject of discussions on particular subpoenas goes nowhere in relation to the ethical obligations of disclosure. That is just completely missing the point. Secondly, it goes nowhere to deal with the structural issue about the maintenance of records within the ACC which, when they were sought, had been destroyed or were missing whilst a live proceeding was still on foot. Essentially, in relation to the two key issues, everything you have said by way of response misses the point.

Mr Outram—As I said, we have reviewed this judgement with the DPP and our advice is that, with the 14 subpoenas to produce documents that were served on the NCA on behalf of the accused and a further two on the ACC on behalf of the accused, each subpoena was complied with or its validity challenged on various grounds, including the grounds of its width, that it was oppressive or that the requested documents had been provided.

Mr KERR—But it is not a matter of responding to subpoenas. Without a single subpoena being issued, the ACC still has the obligation of disclosure. The defence can issue subpoenas and they can be objected to for a whole range of reasons, quite properly. But without the single issue

of a subpoena, without the single issue of a request, there is an obligation of disclosure. What Her Honour points to is a failure, notwithstanding constant requests and constant articulation by the defence—that they have not had proper disclosure. The issue of these subpoenas is only one indication of their disquiet about the failure to disclose.

CHAIR—I do not think the witnesses can do more than, with respect, gently say they completely disagree with Judge Morrish, as I interpret it. I do not ask them to say that. They may be—

Mr KERR—Well, do they dispute that the information that was ultimately disclosed was material to the prosecution?

Mr Outram—We would have to look at that in more detail with the DPP and take legal advice on that. But we have reviewed it with the DPP, and the position I am putting now is the result of a collaboration on an analysis of the case. Of course, we do not have people who were involved in the case at the time. We had to review that. But certainly, when you look back on it, the letter is an important one, but the letter pre-dated this investigation. It was actually in relation to a different investigation.

Mr KERR—It is not the letter. It is all of the circumstances, all the facts in relation to the way in which this was managed; the file notes that were later disclosed which do not exist in the ACC's files because they were apparently disclosed and the need to reconstruct records because of their loss. There is a list of documents that are set out by Her Honour that ought to have been available and responded to but which were never responded to.

Mr Outram—There were a number of issues that were raised by Her Honour that had not been previously raised in either the committal, the trial or the appeal.

Mr KERR—This is the Rumsfeld defence. You are presenting a defence with an unknown unknown. You are presenting a case on version A. You now say, 'Our case should be sustained even if the facts were different than those we presented, because the law of conspiracy would still extend on version B; but we did not disclose those materials.' I have been both a prosecutor for a significant period of time and a defence lawyer. I have been the Attorney of this country. I understand that the prosecution, irrespective of a single request, must make full material disclosure. In this instance, the judge hearing this has made the most savage of critiques. What she said is that the Crown's case was presented on this basis. Not surprisingly, the defence case was presented on the same basis, because what Her Honour is observing is that in this instance there was an unknown unknown. There was a whole set of materials that was not disclosed.

Mr Outram—My advice is that we have complied with the DPP policy on disclosure and discovery all the way through this case. We have also been through the judgement in great detail. My advice is that we have complied with all the requirements through the case. The reason I point to the letter is that there was no deliberate attempt to hide information or material relating to unknown unknowns. We referred to the letter in the cross-examination at the committal. That is the reason that I referred to that letter. We have spoken to the DPP because they had carriage of the case all the way through. They are independent. They were also present through the case in front of Judge Morrish. We have sought their view as to whether or not there have been systemic failures or if the criticisms against the named people or the organisation can be

sustained in any way or if there are systemic problems that we need to go and fix et cetera. Our current position is based on the outcome of those discussions with the DPP.

Mr KERR—But what about the physical material? This is perhaps a question for the chairman. What about the physical holding and maintenance of substantive records where live proceedings are still on foot and where significant document retention failures have occurred? I notice that you say that you have disposed of certain documents in accordance with various provisions, but that does not go to any of the ethical or professional obligations of an investigating agency. Statutory compliance with the Archives Act goes nowhere in relation to—

Mr Outram—There are other issues that I would point to. For example, the documentation held by the Attorney-General's Department that is referred to—in particular, file notes of Alexander Downer—were never in the possession of the NCA and so were not covered by the subpoenas relating to the documents in the possession or custody of the NCA.

Mr KERR—But that could have been easily disclosed: 'We don't have them; they're somewhere else.' What are we trying to do? In the end, if we are to have prosecutions they depend on fairness; they depend on prosecutorial fairness. I am not willing to entertain an argument that says, 'The defence failed to be clever enough to identify the weakness in our failure to disclose.'

Mr Outram—We do accept our obligation. I agree with you, Mr Kerr, and the ACC takes the position very robustly that we must comply with the obligations—and not just the written law, but the spirit—of discovery in order to ensure fair trials and to ensure that we do not get any miscarriages of justice. But in this case the involvement of the Attorney-General's Department was not a secret. We are all going back to 1998 when none of us were there, but it was not a secret that there had been some involvement with the Attorney-General's Department. In fact, subpoenas were served on DIMA as well as the NCA. I am trying to put myself in the minds of the NCA officers of the time as to whether or not they would have been aware of what did or did not exist in the Attorney-General's Department at the time. But they certainly alerted the defence to the involvement of the Attorney-General's Department and the existence of a letter that had been sent to them at the first contested committal.

CHAIR—So some of these documents that the judge accuses the NCA over were never in the NCA's possession—

Mr Outram—That is correct.

CHAIR—and perhaps not even known to NCA officers.

Mr Outram—That is correct.

Mr KERR—That is not possible. If you go to page 67, Her Honour says, 'In light of these documents I asked' for 'further searches' and that, following the protocols that the ACC follows, there should have been records of at least the following:

(1) the contact that was made with Ms Downie;

(2) the various discussions between Cheung and Arnold;

(3) notes of the action that Arnold told Ms Downie he would take;

(4) the actions that Arnold did take;

(5) the actions taken to assist Cheung with his application;

(6) records regarding whether Cheung was ... in fact requested to travel to China on NCA or other business and;

(7) whether or not there were discussions correcting the apparent "misapprehensions" that Cheung had.

No such records are available.

How can this be so?

Mr Outram—There was an error there as well, because the letter itself was provided by the NCA. That was not alerted to in the judgement, but it was provided from the informant file. It was disseminated to the DPP. So that letter came from the NCA records. It may well be that at the time the NCA—

CHAIR—So Judge Morrish misdirected herself on that particular issue of fact.

Mr Outram—That is my advice, yes.

CHAIR—That is the trouble with judges who do not hear the witnesses and are not involved in an issue that is going over many years.

Mr Milroy—When the ACC commenced I know that, with all cases that we drew on from the former agencies and current cases, we spent a considerable amount of time ensuring that our policies and procedures to do with all investigations had proper case files, and they are audited and audited to ensure that this organisation's record keeping in particular—

Mr KERR—But it did not happen here, did it?

Mr Milroy—We would have had whatever documents we inherited when the merger took place, in terms of the case files and—

Mr KERR—I understand that. Are you saying that what happened here could not happen now?

Mr Milroy—Based on the policies and procedures that we currently use, my advice is that, subject to human error, the policies and procedures are sound and have been reviewed and reviewed. It is constantly commented on that we use national and international standards.

Mr KERR—I understand that. I will go to a civil example. There is a document retention policy that cigarette companies operate, as I understand it, which has been critiqued as basically

designed to destroy any document that might be used in legal proceedings adverse to the interests of cigarette companies. The truth or otherwise of that I will let pass. For any agency that is involved in Commonwealth prosecutorial functions, a very different approach is required. It is not possible or legitimate in any way to have an arrangement for document retention that does not make those documents available on proper request, and I would say without subpoena, to those that are subject to legal proceedings brought in the criminal jurisdiction.

In this instance it is plain—whether or not a particular document was described in one way or how it got into the hands of or became the subject of later controversy—that large numbers of documents which should have been available, or should been made available by notes and the like, were not on the files of the ACC. No criticism is made of what then happened when this was identified: the ACC officers went ahead and reconstructed a whole range of things from an unedited flow chart or some background information and were eventually able to put it together. This was described by Her Honour as being made possible because of the work of working tirelessly to find those documents and putting them together overnight. Her Honour then says:

If they could produce these documents overnight, when requested by me, why has it taken over 20 subpoenas and multiple requests in the last seven and a half years to get to this point?

Prior to that it points out all the things that were not in the places where they should have been if the protocols were being followed. This troubles me. The fault could have been in the past; it could have been at any stage up to the time at which this issue arose before Judge Morrish. We do not know whether it was at the time of the NCA that there was a destruction of these documents, whether they came into effect and were destroyed, whether they were deliberately never brought into existence or placed on file or whether in the emergence of the new proceedings they were destroyed. We have no understanding of those circumstances. They are not explained in this because perhaps they cannot be. You may be in a position of an unknown unknown. You know that there should be documents on file but there are not and you are not in a position to explain. Nonetheless, what we need is an assurance that in the future we will have a document retention process that is robust and a disclosure process that is robust and that does not rely on people having to guess what are the material matters that should be disclosed.

CHAIR—I think, with respect to Mr Kerr, that the officers have said that they are happy that the procedures are now in place. As I understood the statement that was read out, prepared in conjunction with the DPP if not by the DPP, all of those documents were there to be discovered and would have been produced had they been requested. I accept your superior legal knowledge that there is an obligation on the prosecution to make them available. But if you did that you would have to have three pantechnicons of paper sitting outside and say: 'You might want this, you might want that. You might think this is relevant, we don't think it is relevant. But there's three pantechnicons of documents if you want to go through them.'

Mr Outram—Could I please interject?

CHAIR—Before you do, Mr Outram, could you remind me of your credentials and your background—are you a lawyer?

Mr Outram—No. I have been in the field of criminal investigation for some nearly 25 years. I have worked previously with the Independent Commission Against Corruption, the New South Wales police and the Metropolitan Police Service in London.

CHAIR—I am just not wanting my very learned friend of senior counsel to enter into a legal debate with people who are not trained to the extent that Mr Kerr is. Perhaps some of the things Mr Kerr is saying are unfairly being put to nonlawyers whereas perhaps they should be put to the DPP. I am not sure that this inquiry into the annual report of the ACC is the right forum. That statement you read: is it appropriate for me to ask who the author is or who the people at the DPP are, or is it from a committee?

Mr Outram—The authors are legal officers of the ACC who have been collating information. I would like to say that I agree entirely with what Mr Kerr says about our obligations. There is no dispute about our obligations with respect to discovery or disclosure. It is important to note, though, that previously, before the trial even, whilst the subpoenas were wide and therefore unable to be complied with there were meetings and that documents were provided to the defence that in fact were not the subject of subpoena. Those discussions were actually to canvass with the defence what they actually wanted and required from the NCA and other agencies, so those did occur.

In relation to existing systems, if we were to accept that all the criticisms in the judgement were accurate then my answer is, yes, we have significantly enhanced systems now. We now have a case management system and business rules and processes where all key, critical decisions have to be recorded in electronic format. We now have an informant management system, which is routinely audited every quarter and randomly audited as well, with centralised management and record keeping. We have a TRIM system, which is an electronic document scanning system, so all documents coming into major investigations and other things are scanned onto a system and retained electronically and indexed and all those things. Yes, I understand your concerns, Mr Kerr, and we have significantly more robust systems in place now than were in existence in 1998.

Mr Milroy—It is a policy that we review constantly. As a matter of fact, our policies and procedures have been reviewed annually since we commenced. We have compared our policies and procedures with the former agencies that were merged and with other like agencies both here and overseas and we have improved our standards to such an extent that even other agencies have borrowed some of our policies and procedures for implementation in their own organisation. We take pride in full compliance with all legal and operational guidelines, and we assure the committee that that will continue.

Mr KERR—I have one question to ask and two points to make. My question arises out of the judgement's observation—and, Chair, it is not only a matter of misdisclosure to the defence. The judge's criticism is that this information was never disclosed to the DPP. It is not that it was never disclosed to the defence; the criticism is that was never disclosed to the DPP. Do you think a judgement about whether it was material or appropriate for disclosure to the defence could be made?

CHAIR—I think that has been denied.

Mr Outram—I would not want to speak for the DPP. Obviously the position we have come to is as a result of various meetings and discussions that have occurred. The DPP will probably need to provide their own view on that, but we have consulted as well in relation to compiling our position that I read out to you.

Mr KERR—My first point is that I have no idea of the merits or otherwise of the substance of this matter. My concern in relation to this is piqued by the fact that the subject of it is a former member of parliament—you would expect that, and I suppose that is a legitimate and natural response that anyone would have to those circumstances. The reason I raise it is that those remarks were made in a judgement by a judge who carried the prosecution responsibilities for the former agency before her appointment and who is a member of the bench held in high regard, and had those kinds of remarks been made in any instance—in, say, the trial of someone who had no such background—it would be a matter that I would be as anxious to pursue in this forum. We have your answers on the record, and I welcome the assurances that the document retention system is other than it was at that time.

My last point is that I also do not have any reason to believe that the conduct undertaken by any person was necessarily motivated by wrong motive or whatever. People can make mistakes in judgement, and in fact some of the people named by Her Honour as having conduct that raises questions are people whom I know personally and have high regard for. Nonetheless, I do not back away from going in hard to try and find out, because if they make a mistake, friend or otherwise, there is no reason to not follow that duty through. We do not escape our responsibilities as an oversight organisation because a couple of the people who are named in those critical terms are actually people whose ethical propriety I would never have experienced a doubt about. I just wanted to put that in context.

Mr Milroy—I fully understand.

CHAIR—With respect, Deputy Chair, you have certain views on the record, which is appropriate, but they are not views necessarily shared by other members of the committee—namely, me. I take your statement—and it is difficult for you to agree with this—as a respectful disagreement with much of what the judge to whom Mr Kerr has referred said. This leads me to my final question—and I am going to ask for a legal opinion, which I know I have encouraged others not to ask for. As I read it—and it is a long time since I have had to read a judgement of any sort, particularly one as complicated as this—the judge said she could order a retrial or she might, in the interests of justice without determining guilt or otherwise, say that it has gone on so long, it has been so difficult to keep and maintain lawyers et cetera that he should not go to retrial.

Is that decision appealable? And was any assessment made? You, quite clearly, and the DPP, to a degree, would be offended by Judge Morrish's remarks. And, of course, the way the law is, you cannot get on a soapbox, as we can politically, and criticise each other about your views; you cannot do that in the law. But is there any way you can respond to Judge Morrish? I assume the only way you could do that is by appeal. Is her decision in this appealable? And is anyone thinking of that, or is it too late now—has the time passed?

Mr Outram—We certainly were deeply concerned by the judgement when it came out, and that is why we sought urgent instructions from the DPP, including in relation to whether or not

we should seek to review or appeal the decision. The DPP considered that and took advice, and the decision ultimately was not to take the matter any further. In terms of the technical legal issue as to whether or not we could have taken it any further and what the process was, I would have to take advice on that.

Mr KERR—It is appellable; but, to be fair, my understanding is that if it were determined that in the overall circumstances a fresh proceeding would not be issued, for a whole range of reasons—the sorts of issues that the judge refers to—it would not be—

CHAIR—As I see it, it has gone on for so long, he has served time on various things, and I think there was just a humanitarian thought that nothing was going to be achieved by going back to court yet again. The judge has—

Mr Milroy—Of course, the final decision has to come from the DPP.

CHAIR—Yes, of course. And that is not perhaps germane to the ACC.

Mr KERR—I am reassured by the seriousness with which you address these matters. Obviously, I cannot verify or dispute the factual statements of the judge. They seem to be accepted in large measure—at least, the absence of the documents. Then the judgement about whether they should have been provided is a matter that can be the subject of further discussions. But what reassures me is, firstly, your commitment to a document retention policy that is more active and robust, and, secondly, your acknowledgement of the obligation of disclosure. If it failed in that particular instance—as it appears from the judgement—and was not, I think, effectively responded to, those were not matters that you were in control of necessarily at the time, as this agency. Those are matters that now are open for submission between Dr Theophanous and the agencies that would now be considering any further proceedings that he might wish to take.

CHAIR—I thank Mr Kerr for raising that, if for no other reason than that it has allowed for the ACC and, through the ACC, the DPP, to put on some sort of record—admittedly, not a judicial record, but on some sort of record—some response to what clearly the DPP and the NCA think was, in parts, an inaccurate assessment by the judge. So it has allowed Mr Kerr to have a view, and it has allowed—

Mr KERR—I am actually not trying to put a view; I am trying to ask questions and trying to avoid putting a view—very carefully trying to avoid putting a view—other than as to the principles that are acknowledged and that we share.

CHAIR—And you have been satisfied with the responses as regards the principles, which is a very good outcome. There being no further questions, I thank Mr Milroy and his senior officers for their time and effort in attending today's hearing. By and large, we are very happy with your report. Well done. Thank you again, and we will see you in the future.

Mr Milroy—Thank you very much.

Subcommittee adjourned at 10.53 am