COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

Reference: Australian Crime Commission Amendment Act 2007

TUESDAY, 17 JUNE 2008

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JOINT STATUTORY

COMMITTEE ON AUSTRALIAN CRIME COMMISSION

Tuesday, 17 June 2008

Members: Senator Hutchins *(Chair)*, Mr Wood *(Deputy Chair)*, Senators Barnett, Parry and Polley and Mr Champion, Mr Gibbons, Mr Hayes and Mr Pyne

Members in attendance: Senators Barnett and Hutchins and Mr Gibbons and Mr Wood

Terms of reference for the inquiry:

To inquire into and report on:

Australian Crime Commission Amendment Act 2007

WITNESSES

Committee met at 4.47 pm

CHAIR (Senator Hutchins)—This is a public hearing for the Parliamentary Joint Committee on the Australian Crime Commission and its inquiry into the Australian Crime Commission Amendment Act 2007. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but, under the Senate resolution, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground 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. Such a request may, of course, be made at any other time. I ask people in the hearing room to ensure that their mobile phones are switched off or turned to silent. I would ask witnesses to remain behind for a few minutes at the conclusion of their evidence in case the Hansard staff need to clarify any terms or references.

DAVIS, Professor Jim, Private capacity

CHAIR—Welcome. I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Prof. Davis—Thank you, Senator. Let me say right from the outset that one of my part-time jobs, both before I retired and now that I am retired, is legal adviser to the Senate Standing Committee for the Scrutiny of Bills, a fact of which Senator Barnett is well aware. It was in that role as legal adviser to that Senate committee that I first saw what was then the Australian Crime Commission Amendment Bill 2007. It struck me then as raising some matters in which the scrutiny of bills committee may be interested. I made a report to the scrutiny of bills committee. I will come back to that report in due course. However, earlier this year, the secretary of this committee got in touch with both the secretariat of the scrutiny of bills committee and with me individually. I was asked if I could make some comments about the act, which I was very happy to do. I make these comments solely in my individual capacity as an emeritus professor of law.

I have two major objections to this 2007 amendment. First of all, in my view, it gives examiners far too much power. On one interpretation it enables an examiner to issue a summons to either examine a witness or call for a document and never in fact give reasons for having called the witness or provided the document. I will come to the reasons for my coming to that conclusion shortly, but that is one objection. The other objection is that, because of the application provisions, these amendments are retrospective back to the time when what was then the National Crime Authority was first founded—that is, they are retrospective to 1 July 1984. I can only assume that if George Orwell were looking down on these proceedings, he would at least give a wry smile of satisfaction that some of his predictions had possibly come true.

The principal problem that I see with the legislation is that it starts off, in item 2 of schedule 1, requiring an examiner, in relation to the giving of evidence, to make a record of the reasons for the examination:

> (a) before the issue of the summons; or
> (b) at the same time as the issue of the summons; or
> (c) as soon as practicable after the issue of the summons.

In the simple reading of the words of this amendment act there is no time within which an examiner must necessarily make a written record of the reasons for the issue of a summons. That may be bad enough itself, but it is compounded by the further provision in item 5 of schedule 1:

> A failure to comply with any of the following provisions does not affect the validity of a summons under subsection (1) …

And one of those provisions is subsection (1A) of section 28. In other words: as I read the section, as it is now in force, an examiner may issue a summons seeking to examine a person; does not have to give written reasons for issuing that summons at the time of issuing the summons; must give written reasons as soon as practicable thereafter, but no time is specified; and the new subsection 8 says that even if the examiner never gives reasons, that does not affect the validity of the summons.

It appears that examiners can call witnesses and never give reasons for having issued the summons. I hasten to say that I am looking at this legislation without any idea of the difficulties that the Australian Crime Commission may face in getting evidence from people who are not all that keen on giving it. I am simply looking at it as a lawyer and, I might add, not as one who specialises in public law. I am certainly interested in those parts of the law to do with civil liberties and human rights because that is what I have been involved in in my role as legal adviser to the scrutiny of bills committee. It is in that role entirely that I make these comments.

I suppose the other comment I would make in relation to those provisions—and there are parallel provisions added to section 29 in relation to examiners seeking the production of a document from a witness—is that when one looks at the explanatory memorandum, one reason for this power of examiners not to have to give written reasons at the time they issue a summons is that they may need to be issued urgently or where a large number of summonses or notices are being issued at the same time. To my mind, administrative convenience ought not to be the sort of factor that, in my view, severely limits civil liberties and human rights. Equally, in relation to item 5—the item in the schedule which, to my way of thinking, excuses an examiner from ever having to give written reasons—the explanatory memorandum says:

> The purpose of this amendment is to ensure that ACC operations/investigations are not undermined by reason of an examiner's failure to comply with these technical requirements.

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. To complete my comments: to have these provisions retrospective to 1 July 1984 has a certain irony to it but merely compounds the problems.

While I have the floor, I might just add in relation to the scrutiny of bills committee, the reason for the scrutiny of bills committee not commenting on this bill when it came before the parliament was that it was introduced in the second last week of the last government. I read the bill and prepared a report on it on the last weekend of the last government. I sent that report to the scrutiny of bills committee, but in the following week parliament was prorogued. Both I and the secretariat of the scrutiny of bills committee assumed that all of the legislation that had been introduced in those last two weeks would have disappeared and nothing would have been done about it. It was only in March of this year that we discovered that in fact this particular bill had passed through both houses of parliament with what may be regarded in some quarters as commendable speed and in other quarters may be regarded on this particular occasion as distressing speed. When it came to the attention of the scrutiny of bills committee that this had happened, since the terms of reference of the scrutiny of bills committee entitle it to consider acts as well as bills, it was at the meeting of 14 May that what was then the Australian Crime Commission Amendment Act 2007 was one of the pieces of legislation that the committee looked at.

To add a somewhat personal note, the whole discussion became somewhat bizarre because—if I may reveal what goes on in the scrutiny of bills committee—I recommended to the committee that the committee seek the minister's advice as to the reason for this apparent ability of an examiner never to have to make written records of his or her—

CHAIR—You may just wish to refer to your report rather than the discussions.

Prof. Davis—Indeed, yes. It is the Alert Digest No. 3 2008. The matters that are brought up there are quite similar to the matters that I have already mentioned. One particular point concerned item 5 in schedule 1, which apparently allowed an examiner never to have to make a written report. The committee said that it would seek the minister's advice on whether the interpretation which the committee put on this provision was indeed the intended interpretation and, if so, whether this may trespass unduly on personal rights or liberties. So far as I am aware, the minister has not responded. I might add that that is perfectly understandable because the minister who in fact introduced this bill into the parliament is Senator Ellison, who is currently the chair of the scrutiny of bills committee. This is rather reminiscent of Senator Ray asking one of the members of the budget examination committee about whether Senator Ray was going to be appointed to a diplomatic position. As I say, the minister has not responded, but the committee certainly felt that it was necessary for it to deal with this. By putting those comments in Alert Digest No. 3 2008, those matters are also on the public record.

CHAIR—So that is this document, the Alert Digest No. 3 of 2008?

Prof. Davis—Yes.

CHAIR—And that is where the committee seeks the minister's advice whether that is the intended effect of these proposed amendments and, if so, whether they trespass unduly on personal rights and liberties?

Prof. Davis—Yes. So far as the other matters in the bill were concerned, the committee recognised that the requirement that an examiner need not make a written record at the time was clearly a matter of policy. The scrutiny of bills committee, in those sorts of circumstances, feels it best to leave it to the Senate as a whole to decide whether that intrudes unduly on personal rights and liberties. Equally, the retrospective application was a matter that it was felt best to leave to the Senate as a whole.

CHAIR—Fair enough. Thank you, Professor Davis. As I understand this legislation, if you do not answer questions or summonses et cetera, you can be jailed and/or heavily fined. In your experience, which is fairly long, have you ever seen legislation before that says that on that basis of technical grounds? Have you ever heard that reference before—technical grounds?

Prof. Davis—Yes. It may be so occasionally. I cannot—

CHAIR—You cannot recall?

Prof. Davis—I cannot recall any precise examples. After 25 years, it all tends to blur into a lot of corporate knowledge.

CHAIR—Article 15 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, 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.

In your opinion, does this legislation contravene this covenant?

Prof. Davis—Yes. I think it must. I have not thought of that aspect of the legislation. But in light of the fact that, as you say, it is a criminal offence not to answer a question, if someone should refuse to answer a question on what are said to be technical grounds, yes.

CHAIR—What do you think the implications are of us contravening that international covenant?

Prof. Davis—I am not sure that the ramifications would be all that great. There are times when governments in this country and other Western democracies feel it necessary to act contrary to provisions such as the international covenant on human rights. I am sure that there have been occasions in my work as legal adviser to the scrutiny of bills committee where there has been occasionally retrospective criminal legislation. I cannot think of any examples at the moment. But 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.

CHAIR—What is your view on retrospective legislation?

Prof. Davis—I do not like it, because a person should be entitled to know at the time that they do something. They should be able to find out whether it is a criminal offence or not. Sure, there is retrospective tax legislation, for instance. I and the scrutiny of bills committee accept that some tax legislation must be retrospective simply for the purpose of preserving the revenue. But to make criminal offences retrospective is certainly anathema to me as a private individual.

CHAIR—In your submission, you argue that the new paragraph 28(1A)(c) would render ineffective the second sentence of subsection 28(1A). Can you please discuss this argument and the implications of this interpretation.

Prof. Davis—I am sorry. I did not catch the question. This is in—

CHAIR—In your submission, you say that one paragraph—28(1A)(c)—would render ineffective the second sentence of subsection 28(1A).

Prof. Davis—Yes.

CHAIR—I was wondering if you would like to expand on what you might mean by that.

Prof. Davis—It is simply that if one looks at 28(1A), it appears that an examiner must make a written record of the reasons for the question at some stage. But then when subsection 8 says that the failure to make a record does not affect the validity of the summons, then apparently that just completely denies the apparent effectiveness of subsection 1A and leaves the examiner free never to make a written record of the reasons for the examination. I suppose not only by making this retrospective there is the contravention of the UN covenant on civil and political rights but also, although I cannot give you chapter and verse authority, I feel that it is a common law right that everyone has the right to know why they are being examined. Under this legislation, on the interpretation that I have put upon it, apparently an examiner is free to say, ‘Yes, you’ll find out

the reasons in due course, but I'd like to carry out the examination first.' I suppose that is one of the aspects of the legislation that concerns me most particularly.

Once again, this is an interpretation drawn from the words of the legislation. It may be an extreme one and it may well be that in the light of the needs of the Crime Commission something like this is regarded as necessary. As I said right at the outset, I have no idea what problems the Crime Commission faces. It is just that on this interpretation—and this is simply my interpretation; I gather that it has not yet come before a court—it may well be that other people take a different view of the way the various provisions lock together.

CHAIR—Are you aware of the sort of legislation, or elsewhere, the term 'examiner' is used? We have had a bit of evidence on the role of examiners. They look like sort of quasi-judicial officers. They do not seem to ask questions. They seem to sit in a Commonwealth building and listen to arguments.

Prof. Davis—I am not aware of other legislation. I might say that I am not a criminal lawyer. With this sort of legislation and other possibly similar legislation, if it is included in a Commonwealth bill, I would have seen it if it was in the last 25 years. But nothing strikes me. I suppose there may well be provisions not dissimilar to this in the amendments to the Crimes Act that were passed last year and the year before in relation to the attempts to prevent terrorism. But I cannot recall chapter and verse any of those provisions.

Senator BARNETT—Thank you, Professor. It is nice to see you again in a different room in this Parliament House. As a former member of the Scrutiny of Bills Committee of some long standing, we have always appreciated your insightful deliberations and advice to our committee. I want to refer to the *Alert Digest* No. 3 of 14 May 2008. I want to clarify that you had previously provided advice at the end of 2007 with respect to this legislation. Is that correct?

Prof. Davis—Yes. I provided advice to the committee in 2007 at the start of what turned out to be the last week of the last parliament. That advice essentially lay in the archives of the Scrutiny of Bills Committee. I think it was amended very slightly indeed for the purpose of the meeting of the Scrutiny of Bills Committee on 14 May. That resulted in those comments in that *Alert Digest*.

Senator BARNETT—Sure. And you have set out at page 10 of that *Alert Digest* that the committee seeks the minister's advice. You have set out the reasons why and the concerns about retrospectivity, which you have outlined to the committee. Could we ask you whether advice has been received?

Prof. Davis—No. As far as I am aware, it has not. I did my best to check with the Scrutiny of Bills Committee this afternoon but they have a lot on their plate.

Senator BARNETT—I understand. So your submission is consistent with the views of the Law Council of Australia in terms of retrospectivity?

Prof. Davis—I must confess I have not read the other submissions that have been made to the committee. One could say it was in order to leave my mind clear of other thoughts. It may be

simply a matter of laziness and I have my own views. But, no, I have not seen the other submissions from other people.

Senator BARNETT—Thank you.

CHAIR—Thank you very much, Professor Davis.

Prof. Davis—Thank you.

[5.15 pm]

ALDERSON, Dr Karl John Richard, Assistant Secretary, Criminal Law Branch, Commonwealth Attorney-General's Department

SENGSTOCK, Ms Elsa, Principal Legal Officer, Criminal Law Branch, Commonwealth Attorney-General's Department

BRADY, Mr Peter, Senior Legal Adviser, Australian Crime Commission

KITSON, Mr Kevin, Executive Director, Strategic Outlook and Policy, Australian Crime Commission

MAHARAJ, Ms Sashi, QC, Counsel Assisting, Australian Crime Commission

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

OUTRAM, Mr Michael, Executive Director, Criminal Intelligence and Investigation Strategies, Programs Division, Australian Crime Commission

CHAIR—I welcome witnesses from the Australian Crime Commission and Attorney-General's Department. Would witnesses from either the Australian Crime Commission or Attorney-General's Department like to make an opening statement? At the end of that, committee members will ask questions.

Mr Milroy—Chairman and members of the committee, I would like to make an opening address but it is in two parts. First of all, I would like to make some comments, followed by Sashi Maharaj, the ACC's QC, who is appointed under section 50 of the ACC Act. Thank you for the opportunity to appear before the committee during its deliberations into the Australian Crime Commission Amendment Act 2007. Coercive powers enable an ACC examiner to summon and examine a witness and to require a person to produce documents or related material for the purposes of a special ACC intelligence operation or investigation. These powers are critical to the successful disruption of organised criminal activity, dismantling of organised criminal entities and the provision of strategic intelligence based on a unique information collection capability of examinations to scope the involvement of organised crime in infrastructure or industry sectors.

Many subjects of ACC operations and investigations vigorously resist the exercise of the powers or subsequent use of information and evidence acquired by means of the powers. The ACC's and the then government's response to the judgement in ACC v Brereton needs to be seen against this backdrop.

Before issuing a summons or notice, an examiner must be satisfied that it is reasonable in all circumstances to do so. The examiner must make a written record of the reasons for issuing the summons or notice. It is also important to note that examiners act independently in making decisions in relation to the use of the coercive powers. In the Brereton matter, Mr Justice Smith

of the Supreme Court of Victoria expressed the view that under section 28 of the ACC Act, a summons to attend an examination would only have been validly issued if, before issue, the examiner made a written record of the reasons for issue. This comment would have applied equally to the issue of notices to produce under section 29 of the ACC Act. ACC examiners since 2003 had routinely recorded reasons after issuing summons and notices. They and the ACC understood that sections 28 and 29 of the ACC Act permitted this course of action. In many cases, operational pressures would have made it impracticable to record more than a brief note as to the reasons before issuing a summons or notice and that would not have adequately served the audit function of written reasons.

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 the continuing 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 ACC targets would make extensive use of Smith J's decision as a precedent if it was allowed to stand. It is important to emphasise that the amendments were intended to clarify or remove any element of doubt about what was already the law. The ACC did not consider that the judge's comments correctly reflected the applicable law. Extensive reliance on Smith J's precedent could have brought much of the ACC's operational work to a halt and put much of its accumulated intelligence holdings off limits for investigators in law enforcement around the country pending resolution of relevant litigation.

In view of the above potential and adverse practical impacts, the ACC considered it was highly desirable to legislate immediately to ensure that summonses and notices would not be found invalid solely because the examiners had not recorded the reasons for their issue until they were issued. In relation to the specific terms of reference of this inquiry, the ACC's position in summary is as follows. The administrative and procedural arrangements for the issue of summonses and notices were developed to take full account of the requirements of the ACC Act and, as we understand them, allow for the recording of an examiner's reason after the issue of a summons or notice. In light of the issues raised by Smith J's judgement, I am developing with the Commonwealth Ombudsman a compliance model applicable to the examiner's processing, allowing the Ombudsman to conduct an audit and inspection program.

The amendments introduced by the Australian Crime Commission Act 2007 were appropriate in that they were designed specifically to address the problems that would have arisen for the ACC if Smith J's view that reasons should be recorded before issue of a summons or notice had been generally accepted by the courts. Unless a court finds in effect that the amendments fail to address some aspect of these problems, we consider them to be effective.

The retrospective operation of the amendment act may affect as many as 3,000 summonses and over 2,000 notices to produce. Allowing the validity of so many summonses and notices to remain in doubt indefinitely could have frustrated a large part of the work of the ACC. The ACC does not at present see a need for further amendment of the ACC Act in relation to the issue of summonses and notices and does not wish to raise any related matters before this inquiry. It is to the important points of law that I would like to refer to the ACC senior counsel assisting the ACC, Ms Sashi Maharaj QC, for further clarification.

Ms Maharaj—Members of the committee, the amendments we effected put beyond doubt the fact that a section 28 summons was valid even if the examiner had not issued reasons for the issue of the summons prior to or at the time of the issue of the summons. These comments apply equally to a notice to produce issued under section 29, which is in similar terms to section 28. Sections 28 and 29 are critical investigative tools for the ACC and other Commonwealth and state law enforcement agencies working with it in the investigation of serious and organised crime. The ACC position at all times, including the time before the amendments came into force, has been that a summons was valid even if the examiner had not recorded his reasons prior to or at the time of the issue of the summons.

The ACC view was that the Brereton reasoning that makes the existence of the record of reasons for the issue of the summons at the time of or prior to the issue of the summons a condition precedent for the validity of the summons is wrong in law. It follows that on the ACC view, the amendments need only be resorted to in the event that a court were to reject the ACC contention that a summons was valid irrespective of the amendments. Leaving to one side the correctness of the Brereton reasoning, what is important is that the Justice Smith view would have led to some extremely serious and adverse implications for virtually all of the investigative work of the ACC since the inception of the ACC in 2003. Namely, it opened up the potential for, first, the legality of a substantial amount of evidence collected and disseminated by the ACC pursuant to some 2,000 notices and 3,000 summonses 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. All of the above have the potential to set at nought or put in jeopardy the ACC investigations, including major fraud and taxation investigations, including the Wickenby investigations, and drug trafficking investigations. It was critical, therefore, that urgent action was taken to alleviate these serious risks.

An appeal against the Brereton judgement was not a practical solution for the following reasons. First, for the complete appellate processes in Brereton to have been exhausted by the parties or for the test cases raising the Brereton point to have worked through the court system would have taken some 12 to 19 months. In the interim, there would have been great uncertainty about the ACC's complete operations. Even if the ACC's views were ultimately vindicated in the courts, its work would have suffered a major setback in the interim. In this context, it is noted that at the time of the Brereton judgement there were 25 pending prosecutions under section 30 and four significant proceedings before the Federal Court in which the Brereton judgement could have been relevant.

Second, it was contemplated that without the amendments there would be a flurry of litigation based on Brereton challenging the operations of the ACC. This would have in turn embroiled the Commonwealth in expensive and time consuming litigation and stultified the ACC investigations. It became evident rather quickly in pending court proceedings that this anticipation of the ACC was soundly based. Third, the confidentiality concerns of the ACC in Brereton regarding the reasons were accommodated by a public interest immunity claim without an appeal. In light of the above concerns, amendments were effected by parliament to put beyond doubt the validity of summonses, to avoid uncertainty about the legality of the evidence

collected and to avoid costly and time consuming litigation on several fronts raising the Brereton issue.

It is important to note in this regard, first, the recording of reasons is required as mentioned by Justice Finn in Barnes v Boulton in order to provide an audit trail for the PJC, which is this committee, to scrutinise when supervising the ACC under section 59. Second, if an examiner fails to record reasons in the requisite time, he may be the subject of scrutiny by the courts. Third, as Justice Finn pointed out in Barnes v Boulton, the legislature made a deliberate judgement for sound policy reasons that a person the subject of a summons does not have an entitlement to the examiner's reasons as a right under the Administrative Decisions (Judicial Review) Act. It follows that it is not correct to say that the examiner, by virtue of the amendments, is under no obligation to record reasons at all. Given the risks and uncertainties created by the Brereton judgement, an urgent amendment to the ACC Act was required. I understand the Attorney-General's Department is present here, the department that effected the actual amendments, to take any questions about the terms of the amendment.

CHAIR—Thank you. Does anybody else want to comment? Dr Alderson?

Dr Alderson—No. I had not proposed to provide any opening statement from the department.

CHAIR—Can you explain to me, Mr Milroy, how someone gets to the attention of an examiner?

Mr Milroy—The process is that the ACC makes a submission to the board following board consultation in areas where traditional police methods have not been effective. Based on a submission to the board seeking the use of coercive powers, the board then considers a statement in support. If the board agrees, the board approves the use of coercive powers either in a special intelligence operation or a special investigation. After that occurs, I then conduct, through the senior legal officer, Peter Brady, the process to advise the examiners that a determination has been made by the board for the exercise of powers in that specific matter. The examiners then advise me that they have acknowledged or read the decision and are then in a position to exercise their powers subject to a submission that is put forward from within the relevant team in the ACC that is seeking to use the coercive powers. I believe I have provided the committee with a flowchart that shows the extensive process that is carried out to actually make a submission to an examiner.

The examiners in general terms are able to exercise the powers across all determinations, although I have an arrangement at the present moment with one examiner who is specialising in the Indigenous taskforce environment because of experience in dealing with such culturally sensitive matters. One of the other examiners, although they also can use their powers across all determinations, has from time to time spent more time engaged in using the powers in the Wickenby matter. But, generally speaking, all examiners are available to exercise their powers across all determinations. The submissions that they receive are considered by the examiners very detailed. The submissions are not much different to what an officer in any jurisdiction would be putting together to seek a telephone intercept warrant or a listening device warrant. The examiners have expressed the view to me that the submissions are very comprehensive. Some of them range up to 70 pages. So then they receive the request for the issue of a summons. The examiners in their independent role then review this material and may seek further

information or they then form an opinion to approve the issue of a summons or a notice based on the significant material that they have submitted to them, which has been cleared, of course, by legal officers within each of the teams that are set up to exercise the role of the determination.

CHAIR—You may wish to do this in camera. With the whole Wickenby inquiry, once the board has made a decision to use coercive powers on, say, that issue, does that mean that on each occasion when there is a need for coercive powers to be used it has to go back to the board, or is that in effect a blank cheque to continue their inquiry into that matter or any other matter?

Mr Milroy—Once the board has approved that the coercive powers should be used in that determination, in the statement in support there are certain objectives and key result areas that are identified and clarified in the document. The board spends some considerable time ensuring that these objectives and the key result areas are what is required for the ACC to report back to the board. The board meets four times a year. That determination and the use of those powers are available to be used by the examiner on the specified period that is set by the board. In most instances it is 12 months. But at each board meeting, or at the strategic direction committee of the board, I provide briefings in relation to the exercise of these powers within that determination—the number of times the powers have been used, the number of notices, number of summonses and what has been able to be obtained from the powers. The board reviews that on each board meeting, or at the annual review date of the determination, and decides whether to no longer approve the continuation of the powers or it may decide that the powers should be used in a special investigation—go from a special intelligence operation to a special investigation just because of the intelligence that has been gathered and the evidence using the powers. Or the board may, as it has on numerous occasions, decide that the work of the ACC has been completed and there is no further use of coercive powers in that area of crime. The board would then close the determination and the powers would no longer be allowed to be used in that specific area.

CHAIR—When someone has to be brought before an examiner, where is that generally conducted?

Mr Milroy—Normally people are summonsed to hearing rooms that we have at some of our premises. In other instances we use available courtrooms in certain locations. We have actually conducted hearings offsite. We have carried out hearings in certain remote facilities, depending on the circumstances. But, in the main, the hearings are carried out either at hearing rooms in ACC facilities or in courtrooms that have been booked for that purpose.

CHAIR—This is a question that the Attorney-General's Department might wish to comment on. We have had evidence through the conduct of the inquiry, written and verbal, that in fact the powers in the amendment act give the examiners too much power. In fact, the way some people read it is that they never have to provide reasons why they are requiring people to provide documents or attend hearings.

Dr Alderson—There are two things I can say. The first is that what clearly remains and what remains as something that can be challenged in the courts is the existence of the reasonable grounds for issuing a summons. So the requirements that are no longer subject to challenge and that do not affect validity are those concerned with recording the reasons rather than the existence of the reasons. The second is that it is true that the 2007 amendments provide that the

validity of summons is not affected by the failure to record reasons. It does carve that out, so I think that is a correct characterisation. 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 opportunity for the current minister to review in light of the findings of this committee and the evidence before this committee.

CHAIR—So in essence you may not be required in the legislation to publish your reasons?

Dr Alderson—The failure to record reasons would not affect the validity. So it has this dual character. There is a requirement to record reasons but failure to do so does not affect the validity.

Mr WOOD—Just with that, how much information is required in the summons for the reason? Is it an affidavit—is it a lot of information or very little?

Dr Alderson—The legislation itself is not prescriptive about that. It has this general phrase that there is a requirement to record in writing the reasons. As to what is done in practice, I think the ACC have given some evidence on that and could add to that.

Mr WOOD—Could you give us an example. If you are looking at a drug investigation, would you just say 'regarding a drug investigation' or 'importation' between dates? How much information would you actually give, bearing in mind you obviously do not want to give too much information away to prejudice the investigation? I am just interested to find out how much you give.

Mr Outram—The information that is given to the examiner from the investigation team is very detailed.

Mr WOOD—Is that an affidavit of information, a signed affidavit, or a statement?

Mr Outram—It is like a statement that is signed. They are scrutinised by an in-house lawyer who works as part of a multidisciplinary team. It has to be authorised by the head of the determination that is looking into the specific matter before they even present it to the examiner.

Mr WOOD—Do the investigations actually give the examiner a series of questions they would like answered, or is it up to the examiner to determine that themselves?

Mr Outram—The purpose of an examination will be outlined by the investigation team. They would have specific objectives in mind to fill a particular intelligence gap or to address a particular issue to get information about. That would be outlined in the application to the examiner so that everyone is clear about what the purpose of a particular examination is.

Mr WOOD—With the recording of the reasoning for the summons, I assume the defendant would get that summons with that information and how much information has been supplied. I

know this is the whole basis of this. Has no information been supplied in the past at all? Is that what we are saying?

Mr Outram—The examiner's reasons generally are not made public because they contain what is generally highly sensitive information about an ongoing investigation. So if in the court process there was an argument about whether or not we should provide the reasons through the discovery process for example, we would have to make a decision with the DPP about whether or not we make a public interest immunity claim and so forth. They are legal matters. Obviously we have people that talk with us.

Mr Brady—Perhaps I could just make a supplementary comment. Whilst the act does not require the examiner's reasons to be given to the witness, it does provide in section 28(3) the opportunity other than in prescribed circumstances for the general nature of the matters, in relation to which the person will be asked questions, to be set out. So that is what you might describe as short particulars. That would not be provided in some circumstances, but usually it would be. We are required to attach to the summons when served a copy of the board's approval document—the instrument. So in that it sets out a fairly broad scope for the ACC investigation or operation, and then the summons has some specific particulars on it. It might be the financial circumstances relating to certain company activities. So the person can come along focused on, 'That's the area that I'm likely to be asked most of the questions on.' They may be asked additional questions. As I say, there may be some circumstances where we do not provide particulars.

Mr WOOD—That is section 28(3)?

Mr Brady—Section 28(3).

Mr WOOD—And 28(1A) is to the effect that when the examiner issues a summons, he actually has his own notes about why he has issued that. Is that correct?

Mr Milroy—Yes.

Mr Outram—Yes.

Mr Brady—Yes. I will add some comments to what Michael Outram mentioned. The material that goes to the examiners is in two parts. You will see that on the flowchart. There is a statement of facts and circumstances. That is the sort of thing where you are drawing the analogy back to an affidavit or an application for a warrant et cetera. There is also a statement of legal reasons that the team lawyer puts together. This is an important part. The set of facts relating to the witness and the subject of the investigation are aligned. We have to show that this witness falls within the terms of the board's approval document. That is done—

CHAIR—You have to show that to the examiner?

Mr Brady—Yes. So he gets two documents. There will be the factual matrix and how that fits within the parameters. He will then draw on that material to put together his reasons. So there is a bit of work involved.

CHAIR—Which he does not have to supply?

Mr Brady—That is correct.

CHAIR—So you can get hauled in and you do not know why you are being hauled in?

Mr Brady—That is in fairly limited circumstances. As I said before, there is usually the general particulars set out on the face of the summons.

CHAIR—When you go before the examiner, the examiner appears to me to be a quasi-judicial person rather than some sort of interrogator or inquisitor. Would that be right?

Mr Milroy—It is probably like an investigative magistrate, to take a position. They participate in the process because the strategy to examine a person or the tactics to be used and the areas to go to and the areas not to go to are discussed by the lawyer or the case officer, who will be asking the person summonsed certain questions. So the examiner is aware of the areas not to go to. The examiner is aware of the strategy or what outcome we are looking for in relation to the examination of an individual. But for people who receive summonses, it would have things like your knowledge and circumstances of X, Y and Z. So people do have some idea why they have been summonsed. So you have the process where the examiners receive this very detailed submission, which they have said is more efficient than they have ever seen in their respective judicial careers. A lot of dialogue is entered into. The examiner as soon as practicable records the reasons as to why they have issued the notice or the summons based on this volume of material.

It is interesting that in some other agencies they have a situation where they receive the submission and they just have a template document on the top that says, 'In respect of the 60 pages based on the material I have before me I have now issued a summons,' and they are their reasons. But our examiners examine this information and they prepare the reasons individually and record them and retain them. That is the way that they do it.

CHAIR—I have two more questions and then Mr Gibbons wants to ask a question. Mine are just on the examiners. If you are visited and you have to go before an examiner, are you able to get legal representation?

Mr Milroy—Yes.

CHAIR—And before the examiner, are all the statements recorded? Is there a transcript?

Mr Milroy—Yes.

CHAIR—Is that available to the person who is being brought before the examination?

Mr Brady—Only in certain circumstances.

CHAIR—Why is that?

Mr Brady—Because, (a) there is no specific entitlement to it and (b) there may be ongoing aspects of the investigation why that cannot occur at that time. In the vast majority of matters that go before the courts there would be a subpoena or we would be obliged to provide the relevant portions of the transcript that relate to those charges as part of the prosecution disclosure. So it does come out at that stage. There have been occasions when, in adjourned examinations, the legal representative, who of course is present, has changed and we have given them access to the transcript for previous days so that they are aware of what their client has already covered. We do not—

CHAIR—So legal counsel is not prevented from access to the transcript. Is that correct?

Mr Brady—Access is arranged, yes.

CHAIR—Is arranged?

Mr Brady—We do not normally give them copies simply because of the obligations that we have under the act in terms of the non-disclosure of—

CHAIR—But everything is to be recorded. When the DPP, or whatever the title is, goes before the examiner, he or she is arguing a case about this person. They are compelled to answer the question. They have a solicitor or barrister there or whatever. But it is not a matter of course, even though they have been examined and they have to answer the questions, that they have access to the transcript. Is that correct?

Mr Brady—That is correct.

Mr WOOD—What if they are subsequently charged? Would they get a copy then?

Mr Brady—Inevitably they would, through either subpoena or prosecution disclosure, get those portions that are relevant to that charge. There may be a raft of subject matter covered in an examination. We would not be necessarily producing the entire transcript.

Mr GIBBONS—If a person receives a summons and does not believe that that person has been adequately informed as to the reasons why that summons has been placed, how often is that used as an excuse not to cooperate? What would be the stats?

Mr Milroy—We would probably have to provide that to you out of session.

Mr GIBBONS—So you would not be able to tell us what proportion of people do not cooperate?

Mr Milroy—There are probably some records. We would have to probably go back and look at the number of summonses issued and the certain reasons. Some of them may have been in hospital or had lawyer contacts.

Mr GIBBONS—Would you say that the number of people in that category is increasing or decreasing?

Mr Milroy—Again, we would have to probably check. We are talking about thousands of summonses.

Mr WOOD—With regard to the examination process, who is actually present during the examination?

Mr Brady—The examiner has to approve, under the act, who is present. Typically it would be counsel assisting, the witness of course, and their legal representatives. There are circumstances where a particular lawyer for the witness may be excluded because, for example, he has already represented a number of other persons the subject of other examinations, so there is a conflict issue. Then you have a person that assists the examiner who swears in the witnesses. There may be some staff supporting our counsel assisting.

Mr WOOD—Do you have the investigators? Are they there if questions are being asked? They may hint to the examiner to continue down a certain path. Does that take place?

Mr Brady—Yes.

Mr Milroy—Yes. They are like the case officer. Normally the case officer sits beside the counsel assisting. In some cases, the actual case officer has asked the questions of the person who is the subject of the summons. In some instances there are very few people who are allowed to be present because the matter may be highly sensitive. It may involve issues of corruption. There might be a requirement for the safety of the person that there is a non-publication order issued by the examiners or someone has to be in witness protection. A very important point here is that the powers can be used across all areas of crime. We can even call in subject matter experts, for example. If the ACC wants to, as we have done in the past, understand about the firearm market, or we want to understand about the airport environment or the maritime sector or the financial sector, we have served notices or summonses on experts who have been approached. They are quite happy to come and divulge, in the confidentiality of the hearings, their knowledge of a subject matter. But they would like the summons to be issued. Then you take it to the extreme issues of an organised crime figure who you want to examine because of their knowledge of the activities of others right through to informants and persons in prison. So the summonses are used on quite a broad range. Based on the sorts of people you are examining, the hearings are conducted in a certain way. Only certain people are allowed to be present.

Mr WOOD—With that, I assume that hearsay evidence is allowable, if you are asking a witness questions about other people's conversations?

Ms Maharaj—Yes.

Mr Brady—The rules of evidence do not apply.

Mr WOOD—Subsequently, in any court case, is their evidence admissible? So you get a witness who under normal circumstances you would summons through a court and he obviously does not want to give evidence. But if he has been compelled to attend the inquiry is all that evidence admissible at subsequent court cases? How does that work?

Mr Brady—No. The act has a specific section. Section 30 provides a framework for admissibility. Only in rare circumstances that are set out in the act would the evidence be admissible against the witness.

Mr WOOD—So the advantage of this is basically to compel a witness to answer all those questions which an investigator would not normally be allowed to ask under a normal investigation and to give them the tools to utilise that evidence. Would that be correct?

Mr Brady—To collect other evidence is a key one. Witness A can give evidence and his evidence could be introduced into evidence against person B.

Mr WOOD—So how would that work?

Mr Brady—A witness could give evidence before the ACC. The material arising may be admissible against another person. So you build up a matrix of—

Mr WOOD—Would there not be the conversation, though, that maybe that person has said a person has delivered drugs somewhere and they subsequently discover the drugs? Can you use the conversations too? I am trying to work out where the admissibility fits into it.

Mr Brady—The normal rules of evidence would apply when you come to admit the evidence in a court proceedings. In terms of compellability under the ACC Act, it will not affect the evidence that the witness gives against someone else, but it would in relation to any admissions they make against themselves.

Mr WOOD—For themselves but not against other people?

Mr Brady—Generally, yes.

Mr WOOD—So if a witness gave evidence in a murder investigation and they said, 'Such and such did it', that evidence could be subsequently used at a court case if they are not implicating themselves?

Mr Brady—Against B.

Mr WOOD—Against the other person, not themselves?

Mr Brady—Correct.

Ms Maharaj—The evidence collected at an examination still has to pass through all the tests of admissibility in a court.

Mr Brady—At that second stage.

Mr WOOD—Including hearsay evidence then?

Ms Maharaj—Hearsay rules. All the rules have to be satisfied for the admissibility of evidence in a court before the evidence makes the grade and it gets admitted into court. On top of that, as Peter Brady has mentioned, section 30 of the ACC Act has a framework which has to be satisfied before certain types of evidence can be admitted in any event. So the material collected in an examination by and large guides an examination. That answers Senator Hutchins' question about what the summons discloses on the face of it. It discloses sufficient to give an indication of the general nature of the matter being investigated provided it does not jeopardise the investigation itself.

Mr WOOD—How important are the examinations for investigators to get evidence? Is it like the last resort when all other avenues have failed? Is that pretty much it?

Mr Brady—It is hard to generalise.

Mr WOOD—Is it vital that the ACC have these powers?

Mr Brady—Absolutely.

Mr Milroy—Of course. That is right. The test, of course, is in the special intelligence operation, where the traditional methods have been effective. There is a strong test that has to be applied here in terms of the ACC making a submission to the board for the use of the powers. We have to justify that the methods that they currently use in law enforcement have not been effective and we need to use them either in an intelligence operation or, as you say, an investigation. What we have seen in the use of the powers is the significant intelligence that you are able to derive from the use of the powers, both from friendly and unfriendly sources or witnesses. The use of the powers in special investigations, be it the homicides that have occurred in Victoria or the drug operations, has been instrumental in getting some significant results, not only for the ACC but for our partners, which has led to a significant number of criminal operations being disrupted and prosecuted.

Mr WOOD—You probably do not have this information on hand. Is it possible to supply the committee with some specific cases where the evidence provided during examination was actually vital in subsequent court cases? You mentioned the underworld killings in Melbourne. If we had some of that evidence, it would be of benefit.

Mr Milroy—Yes.

Mr WOOD—At the moment, it appears to members of the public to be some mysterious tool, unless we can actually provide reasons why we have these coercive powers to help out an investigation, such as A, B and C.

Mr Milroy—I think we can provide you with some examples of what is obtained in a special intelligence operation using the powers and what has been gained in an investigation using the powers so you have an example of the intelligence dividend as well as the evidentiary issues.

Mr WOOD—Thank you.

Ms Maharaj—I want to amplify the CEO's answer to that question. The statutory framework under the ACC Act is that a particular matter is only declared a special operation or a special investigation by the board if it is of a certain ilk or calibre where ordinary police methods have failed. Once the board declares a matter or determines a matter to be a special operation or a special investigation, only then are the coercive powers triggered in any event. Then you come down to the third tier, which is that the examiner has to be satisfied that it is reasonable in the circumstances of a particular matter to exercise the power before the power is triggered. Just to answer Senator Hutchins' question, which is supplementary to the answer given by the Attorney-General's Department, under section 28 there is a statutory obligation for the examiner to record the reasons. That is point No. 1. It is a separate point.

CHAIR—Where?

Ms Maharaj—Section 28(1A), which is before the issue of the summons, at the same time as the issue of the summons or as soon as reasonably practicable. The failure to do so does not spill into the validity of the summons issued. But it also means that the statute—

CHAIR—I agree with you.

Ms Maharaj—Yes. The statutory obligation can be enforced.

CHAIR—I want to ask about the disclosure of summonses of notice. Under section 29A(1), the examiner issuing a summons under section 28 or a notice under section 29 must, as provided in subsection 2, include in the notification to the effect that the disclosure of information about the summons or notice or any official matter connected with it is prohibited except in the circumstances, if any, specified in the notation. Does that effectively mean that if you are brought before an examiner, you may not even be able to disclose for up to five years what was in that examination process?

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

CHAIR—But the suspension of it, in effect, says that Mr Milroy can cancel it?

Mr Brady—That is correct.

CHAIR—That is right?

Mr Brady—He can vary it.

CHAIR—Does that mean that even if within that five-year period the case has been resolved or whatever, that still applies?

Mr Brady—Yes. Unless it is the notation—

CHAIR—Unless the CEO gives permission for the disclosure.

Mr Brady—They can speak to their lawyer, of course.

Mr Milroy—There are requests made for such considerations. And then the paperwork comes to me for consideration whether to lift the non-disclosure order.

CHAIR—I want to ask questions in relation to Brereton. I want to ask questions of the Attorney-General's Department and you, Mr Milroy. When was the Attorney-General's Department advised of the Smith decision? Equally, as you know, I am new on the committee, but I understand from talking to my colleagues that we were not advised of the difficulties that the Smith decision had caused. Certainly I know my colleagues and I, regardless of our party, are here to assist. Particularly in relation to operational or administrative matters, we will certainly do what we can. I seek your response on that. I suppose the Attorney-General's Department can answer themselves. But why did we not get told?

Mr Milroy—Well, I can understand the PJC, of course, is a strong supporter and takes considerable interest in the activities of the ACC. But my only comment there is that there was a considerably tight time frame and there were certain actions taken to try to brief as many as possible. But the Attorney-General's Department, of course, did take the lead to drive the process and initiate some consultation, which Mr Outram and the Attorney-General's Department were involved in. I may ask Karl Alderson and Michael to comment in relation to the process.

CHAIR—The magistrate's decision was appealed and then the Smith decision. I am not aware that we were involved at all in that period.

Mr Milroy—No.

Dr Alderson—There are two comments I can make. Firstly, I do not have with me the exact date the department became aware, but I can tell you that the communication to the department was with me in the first instance. So I was the person involved. It would have been a date during August, I think, but I can check that, if that would be of use to the committee. Secondly, in terms of the process that was followed, those decisions are very much ones for the minister and the government of the day to decide. Ministers and governments make choices between a sort of broader consultation and narrower one moving more quickly. The process that was followed was one that was judged by the minister and government at the time as being the appropriate one.

CHAIR—Fair enough. Dr Alderson, we have had evidence that there is often some conflict with people using the coercive powers within the ACC. To your knowledge, do other state based bodies, such as the New South Wales Crime Commission, encounter similar legal contests?

Dr Alderson—I think broadly, without talking about this specific issue but the broader issue of challenges, yes. In fact, we had an opportunity to meet with a number of the state bodies a couple of months back and get a pretty good understanding of some of the challenges they face. Clearly the ACC is more at the coalface. But from the department's perspective, there are quite a

number of agencies—maybe half a dozen agencies in Australia—that have powers of this kind. There are probably more than half a dozen—probably about 10. They have these powers to summons witnesses to appear and answer questions and to issue notices to produce documents. Particularly those agencies that deal with serious and organised crime and well-funded suspects who have good access to legal advice tend to face this difficulty that they are very regularly the subject of all sorts of challenges to the exercise of their powers and the following of their procedures. Probably no agency faces those challenges to the degree that the Australian Crime Commission does because of the nature of the areas that it is investigating.

CHAIR—In your submission, again on the state-federal issue, you indicate that the ACC examiners are more constrained in the exercise of coercive powers than their state counterparts. Are you suggesting the need for the further relaxing of procedural safeguards?

Dr Alderson—No. We are not advocating in any direction—narrowing or broadening. What we thought would be useful to the committee was to have that picture of comparative legislation. I suppose the notable thing—I am talking about the legislation rather than anything that happens in practice—is that when you look across the legislation of other Commonwealth and state agencies that exercise powers of this kind, in quite a number of cases there is no provision about the recording of reasons and there is no provision about a consequence of invalidity.

CHAIR—I read in the submission that what the New South Wales Crime Commission has essentially mirrors the federal legislation. Where are you up to with the other states and territories with trying to get similar amendments into their particular legislative frameworks?

Dr Alderson—We quite consciously have not pursued that. The previous minister wrote to the state and territory police ministers around 29 September, shortly after this legislation had been through both houses of parliament, to draw the states' and territories' attention to these amendments and to encourage them to consider equivalent amendments for the state and territory laws. But in that letter the then minister flagged his intention to refer the matter to this committee. He flagged that it would be open to the states to look at what this committee came up with. In the officer level contacts we have had with the states and territories, we have drawn their attention to this committee's inquiry and the timeframes for it. So, in essence, the position of the Commonwealth has been not to press the states and territories for equivalent amendments until we wait and see what comes out of this inquiry and what decision is made about the Commonwealth's position. The only other thing to add is that New South Wales is in a different situation because instead of having an equivalent piece of legislation where there is this issue of correspondence, New South Wales directly applies the Commonwealth legislation.

CHAIR—In the use of coercive powers by the examiners, does someone in the Attorney-General's Department examine the ACC board's decision to use coercive powers?

Dr Alderson—Only in the sense that the secretary of the Attorney-General's Department is a member of the board. So the department does have a place in this process.

Mr Milroy—I might also point out, Mr Chairman, that the inter-governmental committee, of course, have a veto. So when the board approves the coercive powers, the current Minister for Home Affairs is required to write to the respective IGC ministers and advise them that the

coercive powers have been approved by the board in a specific area. The IGC, under the governance arrangements, can veto the board's decision.

CHAIR—We heard from the examiners. There are only four of them. You even suggest, Mr Milroy, that 'operational pressures'—I think that is the term you used—suggest that sometimes they do not outline why they are going to use the powers. I am just concerned that these fellows may be overworked. Sometimes because there is a difficulty, as was highlighted by either the magistrate's or Mr Justice Smith's decision about how quickly the examiner did issue the summons, someone should be looking to make sure that these fellows are not stretched to the limit. Maybe there is a need for more examiners. I do not know who does that. But it may be that someone needs to watch the watchers. We have the example of the New South Wales Crime Commission and what happened up there in the last few weeks. I could surely tell you, as you well know, that it has shaken the confidence in the police forces and the use of coercive powers.

Dr Alderson—I think I can give a general answer to that. The commission may have something to add. It is one of the department's functions to support the government in thinking about issues regarding the resourcing and structure of each of the law enforcement agencies, including the Australian Crime Commission. So those kinds of structural and resourcing issues are ultimately made by ministers and governments. Where legislation is needed by the parliament, it is within our responsibilities to draw relevant issues to ministers' attention and to brief them on them.

Mr Milroy—Mr Chairman and the committee, I can indicate to you that I have had a fair interaction with the examiners. They have a coordinator who actually looks at the requests for the examiners to exercise their powers. There are plans properly in place to actually look at hearings in the future and the availability of the examiners. Since I was made CEO in 2003, 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.

Of course, the Ombudsman's office also has a requirement to audit. You will have noticed in our submission and earlier what I said today that we are looking at the role of the Ombudsman to randomly audit from an administrative point of view the recording of their reasons. I believe that that auditing process will start within the next couple of months because the templates have been designed to suit the audit program for the Ombudsman's office. Earlier I commented that it is impractical to record more than a brief note. That is mainly to do with the fact of the cases that they have. Being expected to make notes and write reasons at the time of receiving a notice or

even before issuing a notice is impractical. I think that is one of the reasons why the changes to the act were requested.

CHAIR—I just have one more question, and it is to the Attorney-General's Department as well. I understand that we are a signatory to the International Covenant on Civil and Political Rights. One section of it 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.

Does the Attorney-General's Department consider that this legislation contravenes this covenant?

Dr Alderson—Can I seek to answer in a way that gives you some information but that does not transgress the line into providing legal advice to the committee, which I think is—

CHAIR—You may well wish to take it on notice, Dr Alderson.

Dr Alderson—There are pieces of information—

CHAIR—But we are a signatory to that convention, are we not?

Dr Alderson—Yes. There is a piece of information I can give, which is that there is certainly a number of precedents in Commonwealth law for either in some cases actual retrospective criminal offences—they are done rarely, but they have been done—or, more commonly, retrospective validation of administrative action. I think there is an important distinction. I think they are quite different categories. There is retrospective criminal law, which is criminalising conduct that was not a crime before, and having something that was always a crime and what you are validating is a step in the administrative process.

CHAIR—I have no more questions. Thank you all very much for coming along this afternoon.

Committee adjourned at 6.14 pm