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Official Committee Hansard

JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

Reference: Australian Crime Commission Amendment Act 2007

TUESDAY, 29 JULY 2008

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JOINT STATUTORY

COMMITTEE ON AUSTRALIAN CRIME COMMISSION

Tuesday, 29 July 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, Hutchins and Parry

Terms of reference for the inquiry:

To inquire into and report on:

Australian Crime Commission Amendment Act 2007

WITNESSES

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Committee met at 3.01 pm

CHAIR (Senator Hutchins)—This is the final 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's resolutions, 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 which 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 also be made at any other time.

[3.02 pm]

RICHTER, Mr Robert, QC, Law Council of Australia

DONOVAN, Ms Helen, Director, Human Rights and Criminal Law, Law Council of Australia

CHAIR—Welcome. Thank you for making yourselves available to talk to the committee this afternoon.

Mr Richter—It is a pleasure.

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

Mr Richter—I take it that the committee has a copy of the Law Council's submission and has examined it. There are a few things I want to add which are, I think, of some interest. First of all, the fact that precipitated the legislation was a judgement of Justice Smith in the Brereton matter. All I can say is that there was a massive overreaction to that judgement. It was an unnecessary overreaction and it was a reaction which diluted the kinds of safeguards that existed prior to the amending act. The reason I say that it was an overreaction is this: it is very easy for the Australian Crime Commission or any other body that finds some structural hurdle in its path to assert that the sky is falling in. I do not believe that this committee would have had the slightest evidence from the ACC that the sky fell in or would have fallen in, in the sense that, given that they systemically failed to act in accordance with the act and certainly with its spirit—and I put aside for the moment debate that the Commonwealth Attorney or others may want to join as to whether or not Smith was right and whether or not the section was ambiguous; putting that aside for the moment, the fact is that there was a systemic failure which no-one oversaw. The only way that existed to bring it to account was by way of a subpoena to examine what had happened procedurally to make sure that there was in fact a valid summons.

Some people would see that as a glorification of our system, a glorification of our system that has enabled such checks and balances to exist. Others who do not like oversight for any reason—any effective oversight—would not see it as that. They would see it as someone picking on technicalities in order to get themselves out of trouble. But the reason I say that this committee would never have had any evidence that the sky might have fallen in is that, in all the summonses that they issued, which were issued irregularly, according to justice Smith anyway, if that judgement applied there was never, I would say, an irremediable aspect of urgency that could not have been remedied by proper notices. These agencies love to operate in secrecy and they have to to some extent, but there are some areas where that secrecy should be tested.

The reason why the legislation is bad is that it removes one layer of accountability. That is No. 1. It is a layer of accountability that needed to be there and there was systemic failure in even watching it by those to whom it was accountable. So the only people who had an interest in enforcing the accountability were the people who were served with the summons—that is, Brereton and others.

Some people see a reliance on rights as pettifogging, as looking for loopholes and the rest of it. The Law Council of Australia regards adherence to the rule of law as paramount and, if a citizen says, 'You want to use coercive powers on me, show me why I should abide. Show me that you are behaving lawfully.' So there is this fundamental difference in philosophy between the Law Council of Australia and bodies that use coercive powers who behave, I might add, in very odd ways. If we take the Brereton case, for example, you will recall that, where there was a subpoena to produce the reasons, there was a most extraordinary response on the part of an organisation that one would have thought ought to behave as a model litigant. What did they do? I do not think they had the document to begin with at that stage; I think it came into existence later. So, instead of fessing up and saying, 'We haven't got the reasons,' they took the objection that it was a fishing expedition, knowing that they failed to comply with the law. It is not a wonder that bodies like the Law Council of Australia have a sense of mistrust of certain organisations that use coercive powers. The fact is that they behaved dishonourably it seems to me by taking that objection rather than the proper objection, which would have been one of public interest immunity, if this was something that was contrary to the public interest to release.

So that is just an insight into the way these organisations have always worked in my experience. The NCA, the predecessor of the ACC behaved that way. They put every obstacle in the path of citizens who wanted to vindicate their rights. Some people say, 'Well, the ACC only goes after the big fish and, if we take shortcuts and we do them injustice it doesn't really matter because they are guilty.' The ACC proceeds on the basis of certain assumptions—the targeting process and the motion of trying to make out the case—and I do not think anyone would disagree with that. The ACC might say, 'We're looking for the truth,' but in truth the ACC is looking to make a case against a target where they have already ascertained the targeting position.

So, firstly, bodies exercising coercive powers need to be properly supervised—and properly supervised by the courts. Any limitation on the courts' ability to supervise them betrays a trust; it represents a mistrust in the tripartite system of government. The judiciary ought to be trusted. The judiciary will do the right thing.

Secondly, there was this ridiculous notion, in our humble submission, that the legislation was necessary because the sky would fall in on 3,000 or 800 summonses—or however many other summonses—and that prosecutions would fail. That is complete and absolute nonsense. The reason I say it is complete and absolute nonsense is that for any evidence that was obtained and had been obtained in pursuance of those notices, whilst, if the notices are shown to be invalid and in nullity, they could be said to have been obtained unlawfully, the ordinary rules of admissibility of evidence would still operate. In other words, the Bunning v Cross and the Ridgeway type considerations would apply to whether or not the evidence would be admissible. So the kind of panic reaction that was taken was wrong—and I think it was deliberate, in a sense, because it was seen as getting additional powers and a reduction in accountability. That part of it is my personal view. But, in terms of the Law Council, the reaction was a panicked reaction and an ill-considered reaction, as is demonstrated by the fact that Justice Smith's judgement was not appealed. It should have been appealed, even after the amendment was passed. It should have been appealed because it actually affected the Brereton situation, in a sense, and such an appeal would have given guidance as to whether or not the amendment was necessary in the first place.

There are also practical considerations why it seems to me that the ACC, in advocating these changes, is acting contrary to its interests. I say that in this sense: it is in the ACC's interest to find out at the earliest opportunity whether or not it has acted validly. If there is a challenge to the validity of its actions, it is in its interests to find out whether or not it acted validly rather than to wait for a possible denouement that occurs at trial when it is too late to fix it. From my own experience in relation to, say, the Elliott case which involved the NCA, it would have been in the interests of the agency to find out at the very earliest stage—at committal—what they did wrong and to try and rectify it rather than wait until trial. Pre trial, of course, they covered up. They claimed all kinds of privileges under the sun so that we did not have access to the material that we wanted. That has been the natural approach of the ACC as well in cases in which I have been involved since. They will fight tooth and nail to prevent a look in, even when there are no proper bases in terms of a public interest immunity. Alternatively, if there were, they could be dealt with by certain redacting of material. That is counterproductive if we are talking in terms of bringing people to justice.

Take the case of Brereton. Had there been an up-front concession by the ACC that they did not comply with the act and that the subpoena or summons was invalid, there would have been absolutely nothing stopping an examiner from creating a proper summons to Brereton—going through the necessary requirements and creating a proper summons—so that, if it were necessary to examine him, he would then have committed a crime if he had not taken the oath. They have precluded themselves from doing that in that particular instance by the approach that they took.

What really worries me is the knee-jerk reaction of any law enforcement agency—but, in particular, law enforcement agencies that rely on secrecy—that, if something goes wrong, they need more powers, or they need to validate things retrospectively. There was no need to validate anything retrospectively here. None of the summonses would suffer these defects, I venture to say, and this committee needs to look to see if that is in fact the case—that is vital. I do not know whether the committee has done that. We need actual instances of summonses which were defective, where the urgency was such that they could not be remedied by a proper application of the act as it stood—where they cannot be remedied now. There were no such urgent matters, as far as I am aware, given the way that the ACC works and given the way it works things out. There would have been no summonses that were so urgent that they could not comply with the requirement of forming a reasonable belief.

So the changes were and are unnecessary and they were remediable. Instead, we have now the removal of a level of accountability against which the validity of process can be tested. The situation now, of course, is that you can have the written reasons before, at the time of, or afterwards. But even if you do not have them at all, it is still all right. Why reasons ought to be there, especially when one substitutes the possibility of one examiner carrying on an examination instead of another, is that the examiner should always be conscious of why it is that the process was issued. If there is no proper explanation for the issue of the process, and the examiner who has been appointed is not the one who issued the summons, for example, then he does not have that touchstone of the reasons. That is one of the constraints on an examiner acting in a way that the examiner considers proper in any event. He might get that from the file, but we need precision because we are talking about coercive powers.

On the whole, it seems to us, with the greatest respect, that it was not necessary to do this—that the law provided for the slip rule, in terms of the admissibility of evidence that is formally

unlawfully obtained. The law provided for that. The High Court has done very well for that, and the law exists. If, on the other hand, you had a situation where you had a deliberate flouting of the law by the enforcement agency, then the Bunning and Cross discretion would be exercised against it—and so it should be. I do not know that any members of the committee would disagree with the proposition that a law enforcement agency which deliberately flouts the law should suffer the consequences.

There were other ways of dealing with it. If the ACC thought, 'My God, we're going to lose a whole lot of evidence,' they might have introduced an amendment which said that 'but for the timing of the provision of the reasons, the evidence obtained as a result should not be excluded'. There are a number of alternative formulations that would not have created the drastic impact of this legislation, which is effectively to say that an examiner can issue a summons and coercively examine someone without recording reasons. The recording of reasons, subject to public interest immunity considerations, would always be the touch stone that one looked to, to see whether the examination was within power or out of power; it is one of the means of looking at it. There are very few means these days of holding to account bodies that act coercively, other than by superior bodies. I am talking about what is available in courts and that is being eroded. This act erodes it further, and it has the additional vice of creating a crime retrospectively, it seems to me.

The other comment that I want to make relates to the evidence that the committee has already had from the representatives of the ACC. The tenor of the ACC's evidence in June can be ascertained from the chief executive officer, who said:

> Many subjects of ACC operations and investigations vigorously resist the exercise ... 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 ... Brereton needs to be seen against this backdrop.

The tenor of the representations made by the ACC is that those who are subject to the ACC's operations should not vigorously resist the exercise of those powers.

There is a difference between vigorously resisting because you insist on your rights and vigorously resisting because you want to lie. If you are going to lie or withhold information when you have been lawfully compelled to give it, you will be dealt with; it is a crime. But the tenor of the ACC's approach is wrong and it highlights what I said before about the targeting aspect of the work of these organisations. I do not just mean the ACC. There is the ACC, the ACCC and sometimes ASIC—all sorts of other bodies. We need to consider very carefully what they say and we need to examine very carefully their factual assertions about the damage that would have been done but for the passing of that legislation. My own assessment is that there would have been no damage at all or no damage that was irremediable. I think that is all I need to say. I am open for any questions.

CHAIR—Would you like to say anything, Ms Donovan?

Ms Donovan—No.

CHAIR—Thank you very much, Mr Richter, for that compelling presentation. You mention the 800 to 3,000 cases that may be put in jeopardy if any action were taken by the government to deal with that act.

Mr Richter—I read those figures in some submissions.

CHAIR—It is anywhere between, as I recall, 800 and 3000.

Mr Richter—Yes.

CHAIR—You mentioned it in your presentation. You seem to be casting doubt as to whether that may be the case.

Mr Richter—I will tell you why they are not in jeopardy. Say those people have been summoned before examiners; they appear before the examiners and they refuse to take the oath or to give evidence. All that has happened is that they have committed an offence. This is not what the ACC is about; it is not about dealing with offences of refusal to give information. The ACC is about prosecuting the real crimes that are alleged against various people. The kind of Al Capone approach—'You have evaded taxes,' or, 'You didn't answer the question'—is a kind of fallback position. If those summonses are invalid, they can be reissued validly and then the information obtained. That is for the people who refuse to answer them or to give evidence. I would say that, out of the 800 or 3,000 no more than a handful had refused on that basis: either they did not say why they refused, as Brereton did, or they are claiming invalidity of the notice. If there is a claim of invalidity of the notice, the ACC can have a look at it and say, 'Okay, we'll give you another one.' There are no cases of urgency that I am aware of where that could not have happened. It could have happened and still could happen with Brereton.

The second aspect is the actual obtaining of evidence and whether or not the evidence that is obtained, or documents obtained or gathered and so on, are admissible or lose their admissibility because of the invalidity of the summons. The answer to that is that they do not lose their admissibility. They may be categorised as 'unlawfully obtained' evidence in some circumstances, but then they would be subject to the sifting of a court which will pass judgement as to whether or not the unlawfulness should result in an exclusion. I tell you this from experience: judges are very loath to throw out evidence where it is unlawfully obtained because of an honest mistake, because of somebody saying, 'Well, I honestly didn't think I was required to put in reasons,' or whatever. If that is honest, the evidence will not be excluded. I say that from experience. A court moved to exclude unlawfully obtained evidence will be so moved if it is faced with a prosecution or with an investigatory body that has set its face against the law deliberately, and it operates as a sort of punishment. A law enforcement agency, of all agencies, cannot set its face against the law deliberately. It is a cost too high to pay for this democratic community.

It is for that reason that I say that the knee-jerk panic reaction 'give us more power', 'validate that which was invalid' or 'remove supervision' is unnecessary. Pseudonyms or otherwise, I would love this committee to ask me about any case that the ACC has brought up where those considerations that the Law Council raises will not be a sufficient answer, acting on the basis entirely, contrary to some law enforcement agencies, that in some circumstances the acquittal of a person is one of the glories of our system because it shows that the system works and it works properly. Even in cases where a court says, 'You have contravened the law; your evidence is chucked out because you have deliberately set your face against the law'—I see that as a vindication of our system; I see that as not a failure of the system of justice but a failure of the investigators. If the committee is aware of any particular case, pseudonyms or otherwise, that

goes contrary to what I have said, I would love to know of it, because I would have an answer as to its remedy without the draconian consideration of introducing retrospective criminality.

CHAIR—In its submission your council recommends that certain sections of the act be repealed; the first is section 288 and of course the retrospective one. We would like to get on record why you believe they should be repealed, and perhaps you could outline for the committee what you might see as actions or difficulties that might arise if that did occur. I say that for both that and section 10 dealing with retrospectivity.

Mr Richter—I will deal first with the retrospectivity, because I think it is by far the easier one. The fact is that, if there were an invalid summons, it is not a procedural nicety as to whether or not there was a crime committed. If there were an invalid summons in the Brereton case, for example, it is not a question of loopholes; it is a question of the foundations of power to require the taking of the oath or to require the giving of evidence. If there is no lawful requirement, there is no crime in refusing. Senator Hutchins showed me a document from the *Australian*—

CHAIR—I showed Mr Richter that response we got from a question on notice to the Attorney-General's office.

Mr Richter—With the greatest respect, I entirely disagree with that. That, once again, shows this notion that people only get off because of technicalities. There are crimes that are not retrospective—they are not crimes at the time and they are made into crimes. There was a crime at the time of disobeying a lawful command, as it were. If the command is not lawful, there was no crime.

This act says, 'The command was lawful; therefore, there is a crime.' I cannot think of an easier or simpler example of making something retrospective. At the time the person acted, they did so lawfully because there was no proper compulsion of law. So the Attorney's view is wrong. It just seems to me that the failure to appeal Smith, for example, was a demonstration of bad faith on the part of those who wanted an expansion of power and a reduction in supervision.

The reason we want the other section repealed is that essentially, as we say in our submission, we need safeguards to the exercise of coercive power. The more safeguards the better, especially if they are reasonable safeguards. It seems to me that the safeguards that were contained in the act did not go as far as we would have liked originally in the sense that there was no outside supervision, as it were, by the courts as to the reasonability of the reasons. It was not that kind of accountability. Shallow though the accountability was in that sort of sense—a formal accountability—we want real accountability so that the notion of accountability is enforced rather than compliance with the law produced by the removal of the accountability. The amendment said, 'Listen, you're not complying with the law, so we will make it easier for you; we will remove the law.' That just seems wrong.

Those controls were introduced after committee reports and so on which said that they were necessary. What made them unnecessary? Was it the fact that someone in the ACC stuffed up? Was it because they did not understand the words 'before' or 'prior'? That is silly. If there was ambiguity, they should have got advice about it. I don't believe they did. If anyone had thought about it, they would have said, 'By the way, what does this require?' and they would have got advice about it. You would be privy to whether or not they had got it—and I do not believe they

did. If they had got advice about it, at the very least they would have said, 'There's a possibility that a court is going to say that you need the reason beforehand, so be careful and do it.' So why don't they seek advice on these things?

Senator PARRY—If a summons can be reissued without loss of evidence or without the loss of any material aspect which would assist in what the aims and objectives are, how would we test that? You say that it can happen, but how can we test that?

Mr Richter—Why can't it happen? You tell the ACC that that is what they ought to be doing.

Senator PARRY—But what if that goes against the ACC? What if a judge does throw that evidence out?

Mr Richter—Then we deal with it. Which evidence? I am sorry; we have to distinguish between the two cases where there is a failure to comply with the notice, in which case there is no evidence that is going to disappear. So put that aside. If you then have the situation where notices have been complied with and evidence has been produced, firstly, it seems to me that the normal processes of Bunning v Cross, Ridgeway and all the rest of it look after it properly and it can be determined before trial. The fact is that, if evidence is obtained, the evidence is in the possession of the ACC; they have it. It becomes a question of whether or not they are going to lose it because it was unlawfully obtained—assuming it was unlawfully obtained. If the agency deliberately obtained it unlawfully, I would have thought this committee would say—

Senator PARRY—That is a different matter. I accept your assertions on that.

Mr Richter—Yes. But, if they did not, a court would allow that evidence to be admissible; it will admit it.

Senator PARRY—Because of a technicality.

Mr Richter—No, not because of a technicality, because of consideration of public policy. It will allow the evidence to be retained by the ACC and will allow it to use that evidence because it will say that it is not in the public interest to strike out that evidence.

Senator PARRY—Doesn't the amendment achieve the same thing?

Mr Richter—It is not necessary. The amendment goes beyond that. The reason that the amendment goes beyond that is that it removes the law and it does not need to. We should trust the law. There is a bulwark of law that has been created for these sorts of situations. I would like to see one instance where the ACC or, indeed, any other agency, having got the evidence by way of a technical defect, sought to use such evidence in a trial and a judge excluded it without a finding that there had been a deliberate abuse of power. I am not aware of any. A judge will have to find that there was some kind of deliberate abuse of power before they will exclude the evidence because the evidence is there and the ACC has it.

So, we have the two categories. One is a refusal to give evidence, reissue and do it properly. The second is that the evidence has been obtained but the legality of the obtaining is questionable and you go to a court. If the obtaining has been done bona fide through some

mistake or misunderstanding or whatever, the evidence will go in. If the evidence was obtained through a deliberate abuse of power, the evidence will go out and this committee should applaud that in encouraging the rule of law—because convictions obtained by the use of evidence that has been deliberately obtained unlawfully is too high a price to pay for our system.

Senator PARRY—I agree.

Senator BARNETT—Thank you, Mr Richter, for your evidence today and for the submission of the Law Council; it is very much appreciated. You have made some pretty strong allegations in your evidence that the ACC has acted dishonourably and in a knee-jerk fashion in some senses. In addition, you have described the ACC's saying that the sky would fall in as nonsense. So they are pretty strong views that you have set out. I want to ask you a few questions. The first is about the subpoena and the reasons for the subpoena being required to be made available to the witness prior to the witness responding.

Mr Richter—Do you mean the reasons?

Senator BARNETT—The reasons. That is the normal course and that is what you have referred to in your evidence. You have said that the ACC acted dishonourably. Do you have any evidence to back that up or to support that view that they have acted in such a dishonourable manner?

Mr Richter—The evidence is in the logical deduction. If the truth were known, they would have said, 'There is such a document, but it was signed afterwards.' That is my first point. They would have said that. Alternatively, they would have said, 'There is no document.' I am not sure whether there was a document, but the one thing we know is that there was no document that was signed before, as the act requires. I do not see much ambiguity in it. I know that there have been some representations that the concession that Justice Smith referred to in terms of the inarguability of the proposition may have been half-hearted or whatever, but the concession was made at some stage. Anyone reading the section would have read it as requiring prior reasons. If the ACC were aware that there were no reasons prior to the issue of the summons or that the reasons did not exist at all—

Senator BARNETT—And it was a fishing expedition consequently, or was it not?

Mr Richter—No, it is not a fishing expedition. How can it be said to be a fishing expedition where someone says, 'I want to know your reasons why you want to compel me. I want to know whether your processes are within those reasons.' It seems to me that is just a normal testing of power. Every citizen, whether they be a criminal or otherwise, is entitled to say, 'Show me your power.'

Senator BARNETT—Why was it dishonourable and not just a mistake?

Mr Richter—Because to call it a fishing expedition is wrong. It is not a fishing expedition. A person is looking for the source of power, the validity of the summons. They are entitled to satisfy themselves. Whether they are hiding something or not, they are entitled to say, 'I'm called into this secret chamber. I am not allowed to tell anybody except my lawyer that I am

here. I want to know why.' What is wrong with that? If I am an innocent man, I would want to know why.

Ms Donovan—The basis on which the subpoena was resisted, as we understand it, was that 'this is a fishing expedition,' and there is no information available to Mr Brereton which would give rise to him thinking that the requirements of the act were not complied with. At the time that the ACC, or counsel for the ACC, was making that argument, they must have been aware that there was in fact a very real possibility that the act was not complied with, either because there were no reasons or because those reasons were recorded after the issue of the summons. I think it is on that basis that—

Mr Richter—It is on that basis.

Senator BARNETT—But they acted dishonourably.

Mr Richter—Yes. I am sorry if I did not explain it clearly enough, but that was the basis for my saying that. Agencies always resist subpoenas—they try to; even if they claim to be model litigants they try to. Whether it be secrecy provisions or whether it be public interest immunity and all the rest of it, quite frequently when a judge actually gets to look at documents he laughs at the notion of public interest immunity. The insistence on that kind of non-disclosure is wrong, but it becomes immoral where you know you are hiding something which is wrong. That is what they did.

Senator BARNETT—Let us go to the second point, which is your assessment of the ACC's evidence that the sky would fall in and your view that that is entirely—not fabricated, but nonsense, using your words.

Mr Richter—It is an exaggeration.

Senator BARNETT—Exaggeration, nonsense or whatever, and you say that the ordinary rules of admissibility of evidence should apply and therefore the sky will not fall in if those ordinary rules apply.

Mr Richter—Yes.

Senator BARNETT—Can you help us a little more there? Apart from saying, 'It is my opinion,' as a learned QC and so on, 'that this will not obfuscate or void the 800 to 3,000 cases and put them in jeopardy—

Mr Richter—Yes.

Senator BARNETT—Apart from your opinion, can you help us?

Mr Richter—Yes. It is not just my opinion; it is the opinion of the Law Council, which rests on a wealth of experience in the field and which says to you, members of the committee, and which says to the ACC, 'Show us one case where an accidental failure to observe the law resulting in the obtaining of evidence which for technical reasons becomes unlawful—a case that says the evidence goes out.' So it is not just my opinion; it is the opinion of the courts and it is

my opinion and the Law Council's assessment of the opinion of the courts in cases where there is a challenge to unlawfully obtained evidence. It is the fundamental principles: you do not exclude unlawfully obtained evidence unless, on a significant public policy test, you do so in order to punish deliberate lawlessness or reckless lawlessness.

Senator BARNETT—Can you provide examples of that either now or on notice?

Mr Richter—Examples of where the evidence has not been excluded? I cannot provide you with examples of where unlawfully obtained evidence has been excluded, and I mean in a real, criminal sort of case. I do not mean in a case of exceeding .05 where the certificate is not properly signed and therefore does not have a basis of admissibility at all—not that kind of thing. But we are talking about evidence in proper criminal investigations. I do not know of a single case where a judge has said there has been a technical fault and therefore the evidence is excluded. There might have been setting aside of search warrants, for example, where a warrant on its face is invalid. There are those sorts of cases. But in cases involving these sorts of considerations where there is a Bunning v Cross weighing of whether or not the evidence should be excluded, there is no judgement of which I am aware that says, 'I'll exclude the evidence because of a slight technical hitch.'

Senator BARNETT—I am not a practising lawyer, although I have practised in the past. We are all country bumpkin senators and we are trying to get a handle on this. I am reading *Underbelly: The Gangland War*, and every second chapter at the moment talks about how these guys get off in courts over technical hitches of the law where the police—

Mr Richter—Where the person arrives either dead or in jail.

Senator BARNETT—Most of them, indeed—

Mr Richter—In chapter 1.

Senator BARNETT—But you understand where I am coming from. Whether it is a drink-driving charge or whether it is the criminal investigation or criminal cases where these guys get off on a technicality, you need to help us understand the difference between that scenario and the scenario you are painting here, where you say that if there is a public interest or public policy reason then they will deny the evidence.

Mr Richter—I will say this: I am familiar with the gangland wars.

Senator BARNETT—I am only halfway through.

Mr Richter—Good. By the time you get to the end, you will find that nobody got off on any technicality, unless you call self-defence a technicality. No-one has got off on a technicality. It does not happen in serious crime. That has been my experience. You cannot call self-defence a technicality, obviously, and that was the one acquittal I can think of. As I say, the others are either dead or in jail—and very happy to cooperate with the ACC or any other agencies. But we are talking about serious crime, which is what the ACC should be about. We are not talking about exceeding .05; we are not talking about a parking ticket that has the wrong date on it or something like that. They are technicalities.

Senator BARNETT—Yes, but what is the difference?

Mr Richter—What is the difference?

Senator BARNETT—Yes, apart from the level of seriousness of the crime.

Mr Richter—The difference is in the judicial approach. If you are talking about an exceed .05 certificate that is wrongly made out, there is just no foundation for the charge. So in those sorts of things it goes out. We are not talking about admissibility of evidence in that situation; we are talking about the prima facie validity of the certificate. If we are talking about a real crime, we then talk prima facie about admissibility in substance. There will be cases or may be cases—and I do not know whether anyone would argue against them—where the statute itself says, 'You break the law, you lose the evidence.' In telecommunications interceptions, for example, the parliament itself will provide for inadmissibility—end of story. We do not quarrel with that because of the sort of interference that interception creates to the rights of privacy and all the rest of it.

So we do not quarrel with the need to comply with the law properly. There are not many examples such as that where the law says, 'You break the law, you lose the evidence.' So we are down to common-law considerations. That is why I say that, when you come to these common-law considerations of admissibility, you will not find cases in which the courts will refuse to admit evidence that has been obtained where the illegality is incidental and unintended. The only times that a court will exclude it will be when there has been a deliberate flouting of the rules. I assert that as a fact in terms of the authorities with which I am familiar, and we can provide to you a whole lot of judgements that restate that principle. What I cannot provide to you is any case that is a serious case—I mean a real crime; I do not mean exceeding the speed limit or this or that—where the court has said, 'There has been a technical breach of the law and therefore this evidence will be excluded.' That I cannot find for you. So it is positive evidence of a negative, but I cannot improve on that. That is the experience of the Law Council—it is not just my experience. We would like to be able to show you a case like that which, in the end, has been upheld in some way by authoritative judgement; I am not aware of one.

CHAIR—In your opening statement, you said that it was a massive overreaction. Could you give us a reason why you believe that the ACC did undertake this massive overreaction?

Mr Richter—I do not want to be cynical—

CHAIR—I understand a number of people in the previous federal government—not that I was a member of it; these two were—would have been very concerned about, particularly, retrospective legislation. However, clearly, the ACC convinced the government that it was necessary. I am asking you for your opinion: what do you think may have lead to this action of theirs?

Mr Richter—Their motivation? I can go back to generalities. Secret bodies do not like accountability; they just do not like it. They have to put up with it; otherwise, they do not get the powers. That is principle No. 1. Principle No. 2: I have not come across a coercive body that has ever surrendered a power that it has because it is unnecessary or not useful. Organisations that exercise coercive powers accumulate coercive powers; they never give them away. That applies

to coercive bodies that hold secret hearings. It applies to police forces; police forces do not surrender powers. The only time you have argument from police forces about police powers is when they want more. The same applies to bodies such as the ACC, the ACCC and ASIC and so on. When things stuff up, they want more power. They say, ‘We don’t have enough power.’ They do not say, ‘We’ve stuffed up.’ They say, ‘We want more power, and it’s needed.’ That is part of the knee-jerk reaction. It is a one-way street.

I have been fighting that one-way street for many years and I have watched it develop through the history of the NCA and through the ACC. Why do they do it? They are decent honourable people; I do not doubt that. But they do have a particular mindset, which is that they are supposed to get results. If they do not get the results, they will usually blame an insufficiency of power. If they find that someone questions their use of power and somehow is successful in the challenge, they will put it down to reliance on technicalities and ask that the technicalities be removed, even if the technicalities are ones of real substance—in other words, they are meant to protect rights. It is the natural accretion of power of such organisations that produces this. As to why they thought the sky would fall in if you did not have retrospective legislation, I do not know.

CHAIR—We have been told that anywhere between 800 and 3,000 cases are affected.

Mr Richter—Yes, but affected in what—

CHAIR—That is no doubt what they advised two very decent men, the previous Attorney-General and the justice minister.

Mr Richter—Yes. But, if I were here and asking questions, I would be asking them to show me in what way those cases might fall over. In addition, I would question the assertion that they would fall over. If the answer was, ‘Oh, these are going to fall over because in five or 10 cases people have refused to turn up and they won’t be convicted of failing to turn up,’ I would say, ‘That’s not a reason to remove the law.’ If they were to say, ‘We have obtained important evidence of serious criminality through the process of summonses that will now be held to be invalid,’ I would say to them, ‘You show me a Bunning v Cross case where, through an accidental oversight, an illegality was committed.’

Senator PARRY—So, on that point, you would regard the failure to put reasons in a summons, prior to the summons being issued, a minor technical regularity that then would not impact further down the track with the reissue of a summons.

Mr Richter—No. I would regard it as a serious impediment if it was intentional. But, if it was unintentional because the agency thought there was ambiguity and said, ‘We don’t really mean to break the law,’—

Senator PARRY—That is what we are referring to. We are saying that it would be unintentional.

Mr Richter—Unintentional because of ambiguities. That is not going to result in the exclusion of evidence that has been obtained in hearings that have already taken place. That will not result in the exclusion of that evidence.

Senator BARNETT—Just on that point from Senator Parry: frankly it would assist the committee, I believe, if you could provide evidence to back up your opinion and the opinion of the Law Council that it would not remove that evidence as admissible.

Mr Richter—I will send you a number of judgements from the High Court.

Senator BARNETT—If you could.

Mr Richter—Yes. We will send you the judgements in Bunning v Cross and Ridgeway and a number of other cases, which discuss the concept of exclusion for illegality. We can do that, can't we?

Ms Donovan—Yes.

Mr Richter—By all means. There is a substantial body of law on this. I would be asking them: 'Tell us how' and I would analyse those cases before saying, 'Remove the law because it is inconvenient.' I see the statement of reasons, as does the Law Council, as being very important because it is another safeguard to say that you give the reasons first. In those secret hearings they may stumble into areas that they have no right to go into, and having got the answers or having obtained the evidence they will then provide the reasons, and that would be seen as wrong.

Senator PARRY—I would like to make a comment because I think it needs to go on the record. We have been debating the issue, which is to one side. You have made some comments today which, in the interests of not digressing too far from the inquiry, I would take exception to in relation to the attitude of agencies and police. I want to make that point. I am not agreeing with the entirety of your submission.

Mr Richter—Could I say that the expressions of opinion about intentions and the like are personal views; they are not the Law Council's views in that sort of sense, certainly not in terms of the strength with which the opinions about that are stated. They are my views from my experience. The Law Council's position of course would not characterise them in the way that I have.

Senator PARRY—It is good to have that on the record.

Mr Richter—The Law Council's response would be measured; but, in terms of the principles I have enunciated, it would strongly support those.

Senator BARNETT—I have a few more questions. In terms of the examiner issuing the summons, I think you referred in your opening statement to the fact that that same examiner should be the person examining the witness.

Mr Richter—Not necessarily.

Senator BARNETT—Is that correct?

Mr Richter—No, that is not the position. It goes as a package in terms of the reasons for the issue of the notice. If you do not have reasons for the issue of the notice in writing by the

examiner who issues the summons, and it is a different examiner who holds the hearing, you do not have that charter for that different examiner, in a sense. The reasons are a sort of limiting principle. If they are not there before the issue and they are not before the hearing by another examiner, it is just one other measure of accountability and control for the other examiner. I have no objection in principle to a different examiner conducting the examination, as long it is someone who knows properly what the investigation is about.

Senator BARNETT—If we do nothing, does that open the door to fishing expeditions by the ACC?

Mr Richter—No. I would have thought that the ACC, subject only to public interest immunity to protect things that ought to be protected, ought to volunteer these sorts of documents to the defence rather than fight tooth and nail, thereby raising suspicions that something is being hidden. In other words, there need to be legitimate reasons to hide documents from the purview of people whose rights are being tested. I find that the rush to claim all kinds of privileges is usually done in a knee-jerk way. People just do not want to disclose what they have got. What is wrong with someone saying, ‘Here are the reasons why the summons was issued,’ providing you have obliterated the names of the informers or anything that could identify them and so on? What is wrong with that? Why should an organisation which is a law enforcement agency seek to hide it, if it does no damage to the investigation and cannot do damage to the investigation?

Senator PARRY—Therein lies the problem.

Mr Richter—Yes, I appreciate that. But in most cases it would do no damage to the investigation. In most cases where you have edited out the sensitivities, it will do no damage. But privilege is frequently claimed where, when the document is ultimately ordered to be shown, it would have saved an awful lot of time and effort had it been redacted by the deletion of names or whatever and so on.

Senator PARRY—But, after the lapse of time, the document ceases to lose some sensitivity; the reasons lose their sensitivity. Investigations are about timing as well as about documentation.

Mr Richter—Yes, but the operations of the agency would not normally disclose a number of things that might alert a suspect, if we are talking about a suspect. Assume the suspect is a criminal; they will have their own ideas of why they are there. But there might be something in the reasons that causes them to say, ‘My God, I can demonstrate that this is garbage.’

CHAIR—You have been to a few examinations too.

Mr Richter—I have been to a few, yes.

CHAIR—If you can talk generally, is that a bit of your experience?

Mr Richter—I have not been shown the reasons. I have not done much challenging, because I have generally told my clients, ‘Just sit there and tell the truth’—because the only thing they have to fear is not telling the truth—‘and take privilege.’ But generally people know why they are there and what the investigation is about and what the examiner is after. So there are no real

state secrets—that is, with people who are in the know. There are people who are not criminals who go before the ACC—not hard core criminals who may have problems with tax and things like that. Anyway, we have not challenged summonses.

CHAIR—I do not think you should promote that.

Mr Richter—No.

Senator BARNETT—Firstly, in terms of the Covenant on Civil and Political Rights, which was referred to earlier, and the Attorney-General's view which you disagreed with, can you state categorically the Law Council's opinion that this legislation is in breach of that covenant?

Mr Richter—Yes.

Senator BARNETT—Can you confirm that?

Mr Richter—The Law Council considers this retrospectively creating criminal conduct when no criminal conduct occurred—that is in our submission—and that is contrary to the covenant.

Senator BARNETT—So we can assume, can we, that the Law Council believes that this legislation is in breach of the International Covenant on Civil and Political Rights?

Mr Richter—Yes, by the creation retrospectively of criminal liability for something which was not a crime at the time.

Senator BARNETT—And specifically article 15?

Mr Richter—Yes.

Senator BARNETT—In regard to your earlier comments and the tenor of your discussion today, you have talked about the secrecy arrangements and the coercive powers of the ACC. Can you make any other general observations about the process that you would like to advise us of—I am looking more generally now, apart from the specifics of the legislation in front of us—that you think we need to be aware of in terms of the process and how it could be improved?

Mr Richter—It is an interesting question. Do not get me wrong: I do not oppose the notion of having a body like the ACC. I do not object to it in principle, subject to proper safeguards. The improvements in actual investigatory efficiency have to do with the kind of improvements that everybody needs, like police officers who are not secretive or coercive. I cannot really think of ways to improve the efficiency of investigations.

Senator BARNETT—That is fine. It was a sort of general catch-all question and I thought I would open it up.

Mr Richter—Yes, except for this: there are times when it seems to me that the examinations could be made much more effective and much more efficient by the commission or the examiner saying, 'This is what we are really interested in.' There is an awful lot of playing around or fishing around done for a purpose, because the purpose is to demonstrate a theory that is acted

on. For my part, I liken it to a sort of collegiality where somebody says, 'Look, this is what this is really about; now can you tell us that we are wrong?'

Senator PARRY—We could say the same about defence counsel in court trials—they become a bit more direct.

Mr Richter—Yes, that can happen too.

Senator PARRY—That is part of the style of investigation and the style of defence rebuttal.

Mr Richter—I agree with that. But I have had occasions where, for example, counsel assisting take me outside and say, 'Look, what we're really on about is this and this and this, so you just tell your client so that we are not stuffed around.' I have found it to be very efficacious. It is not the common experience that this is what happens. I think it is a case of horses for courses, but there are a good few cases where that approach would produce good results.

Senator BARNETT—I have one specific question in the area of compensation and recompense to the witness where the witness is not implicated in the crime but is there to respond to questions and queries by the ACC that may assist them in other activities and whatever investigations they are undertaking. Do you have a view as to the appropriateness of the current arrangements whereby they have to apply to the Attorney-General to obtain compensation for costs, for example? I am thinking of cases where they have been subpoenaed to be in a certain place at a certain time and have gone to a good deal of expense to get there—their own time and effort with or without legal counsel. Costs are involved. What do you say about that?

Mr Richter—I have not had the experience of appearing for people who are just there to be helpful in that sort of sense. But it seems to me that, as a general principle, if you entrust the examiner to use coercive powers, you should entrust the examiner with the authority to order the costs. Rather than have that kind of circuitous route being taken, the examiner should be able to say, 'It has cost you this and that. I find these costs are reasonable and you should get them'—otherwise it becomes bureaucratically unnecessary and onerous.

Senator BARNETT—So they should be able to, for example, make an application for costs—

Mr Richter—Yes.

Senator BARNETT—and the examiner should be able to perhaps order costs and, if they disagree with that order, perhaps they could appeal to—

Mr Richter—To the Attorney.

Senator BARNETT—To the Attorney?

Mr Richter—Yes.

Senator BARNETT—I appreciate your feedback.

CHAIR—We have had members of the legal fraternity raise concerns regarding the prohibition of the disclosure of summonses or notices under section 29A. We would be interested in the Law Council's response to the question: do you have any concern about the inability to disclose information about summonses or notices? And have you ever sought or received written notification from the ACC CEO cancelling a section 29 notification?

Mr Richter—I would have to make inquiries of the council in relation to that. In my experience, I have not received any. I would have thought that, in a number of cases, some of those prohibitions may have been unnecessary or unnecessarily broad. I have had situations where people have said to me, 'What the hell do I tell my wife?' Where the wife is not considered to be implicated, in the context of a strained marriage, which sometimes happens, it creates difficulties. I understand the need for secrecy in terms of communicating with people who may create evidence or obliterate evidence and all the rest of it, but the kind of proforma prohibition on communication in every case is probably excessive.

CHAIR—I wonder whether we could ask the council to respond to those two questions as we formulate our report to parliament.

Mr Richter—Certainly. In addition, Ms Donovan was not sure whether I have made the position clear insofar as those 3,000 or 800 cases are concerned in terms of the loss of evidence. There may be uncertainty about loss of evidence in certain cases, but that uncertainty would have been determined by the courts on certain principles, which I think I have explained in terms of the public policy and the need to judge whether or not there was a deliberate flouting of the law such that the judiciary needs to take action to rectify it. I thought I was clear, but I am not sure.

CHAIR—We are going to adjourn our hearing shortly. Is there anything that the council would like to put on the *Hansard* before we adjourn?

Mr Richter—I think we have covered it.

Committee adjourned at 4.12 pm