COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

Reference: Review of the Australian Crime Commission Act 2002

FRIDAY, 7 OCTOBER 2005

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JOINT STATUTORY COMMITTEE ON THE

AUSTRALIAN CRIME COMMISSION

Friday, 7 October 2005

Members: Senator Santoro *(Chair)*, Mr Kerr *(Deputy Chair)*, Senators Ferris, Ludwig and Polley and Mrs Gash, Mr Hayes, Mr Richardson and Mr Wood

Members in attendance: Senators Ludwig, Polley and Santoro and Mr Hayes and Mr Kerr

Terms of reference for the inquiry:

To inquire into and report on:

The operation of the *Australian Crime Commission Act 2002*, with particular reference to:

the effectiveness of the investigative, management and accountability structures established under the Act, including:

- the Australian Crime Commission;
- the Chief Executive Officer;
- the Examiners;
- the Australian Crime Commission Board;
- the Intergovernmental Committee; and
- the Parliamentary Joint Committee on the Australian Crime Commission.

whether the roles, powers and structure granted to the Australian Crime Commission under the Act and associated legislation remain appropriate and relevant to meeting the challenge of organised crime in the 21st century.

The need for amendment of the Act.

Any other related matter.

WITNESSES

Committee met at 8.35 am

CHAIR (Senator Santoro)—I declare open this public hearing of the Joint Committee on the Australian Crime Commission and welcome everyone here today. This is the fourth hearing in the committee's review of the Australian Crime Commission Act 2002. The committee is being conducted under section 61A of the Australian Crime Commission Act 2002, which provides for a review of the operation of the ACC Act by either the minister or a parliamentary committee. The terms of reference call for the committee to review: the operation of the Australian Crime Commission Act 2002, with particular reference to the effectiveness of the investigative, management and accountability structures established under the Act; whether the roles, powers and structure granted to the Australian Crime Commission under the act and associated legislation remain appropriate and relevant to meeting the challenge of organised crime in the 21st century; the need for amendment of the act; and any other related matter.

The ACC Act has been in operation for almost three years. This inquiry is an opportunity to examine the appropriateness of the legislation and the management structures of the ACC's task. It is also an opportunity for the committee to hear from associated agencies to obtain feedback about the work of the ACC and its interactions with them. Criminal activity is growing in sophistication at an alarming rate. The opportunities for large-scale crimes, committed with the aid of technology, are growing daily and our criminal intelligence agency must be equipped not only physically but also legislatively to meet this challenge. This inquiry will, we hope, support the provision of such an environment.

[8.37 am]

GRAY, Mr Geoffrey, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

HARRIS, Mr Craig, Assistant Secretary, National Law Enforcement Policy Branch, Criminal Justice Division, Attorney-General's Department

JORDANA, Mr Miles, Deputy Secretary, National Security and Criminal Justice, Attorney-General's Department

MANNING, Mr Michael Grant, Principal Legal Officer, National Law Enforcement Policy Branch, Criminal Justice Division, Attorney-General's Department

CHAIR—Welcome. I remind witnesses that, as public servants, you are not required to answer questions relating to policy matters and you will be given the opportunity to refer such questions to either the minister or superior officers. Information on parliamentary privilege and protection of witnesses and evidence has been provided to you. I now invite you to make a short introductory statement, after which we can move to general questions and discussion.

Mr Jordana—Thank you very much for the opportunity to appear before the committee. I would like to start with an apology. Our submission was passed to you only yesterday, and I think we could have done better than that. It would have been better if you had had our submission in front of you for a little while before we appeared. So I apologise; our clearance process misfired somewhat.

The submission, I think, speaks for itself, but I would like to take the opportunity to take up some of the main points. Our submission will show that we believe the ACC is an important organisation which is making a telling contribution in combating organised crime in Australia. The ACC is meeting its objectives by enhancing national law enforcement capacity through improved criminal intelligence collection and analysis, setting clear national criminal intelligence priorities and conducting intelligence-led investigations into nationally significant criminal activity. Through its criminal intelligence function, the ACC is fulfilling an important role of supporting and informing whole-of-government policies and decision making on nationally significant criminal threats.

Our submission contains examples of the contribution the ACC has made to government responses to criminal threats in Australia and outlines in more detail the positive attributes of the ACC. I thought it might be useful today to perhaps concentrate on some of the issues that we see as important. Certainly, as we are going forward in our own internal processes, we would be very interested in the committee's view. I thought I would highlight some of the areas we have started to look at in collaboration with the ACC internally.

The separation of the roles of the chief executive officer and examiners in the ACC has in our view proved successful. The CEO has been able to effectively manage the ACC while the examiners have been able to exercise their independent use of the ACC's coercive powers on a

full-time basis. There are currently three examiners at the ACC. We understand that they are fully occupied exercising their coercive powers and conducting examinations but that that examination workload is increasing significantly. Without prejudicing the independence of the examiners, we believe it may be useful to consider what options may be available to the ACC under the act to manage the increasing examination workload. For example, would there be scope for longer terms for examiners or for the engagement of part-time examiners?

I gather some agencies have also raised the issue with the committee of the possibility of including the Commissioner of Taxation on the board. We see some advantages in this proposal, but we would only support it if there was general agreement amongst the jurisdictions and it was understood that it was not a precedent for the further expansion of the board. But we believe it is an issue that is worth looking at and, as we have pointed out in our submission, something that reflects the growing activities of the ACC that relate to taxation matters.

The board has played an increasingly active role in overseeing the strategic directions and priorities of the ACC, ensuring that the ACC's work is focused on matters of national significance. This role provides flexibility for the ACC to address, from a national viewpoint, issues of current public concern such as the question of organised criminal activities at airports.

I now turn to some of the legislative amendments which may be worth examining a little bit further and which we are looking at internally in collaboration with the ACC. There are some problem areas that the ACC has raised with us and which may require some amendments to the act—although, in our view, that proposition requires further testing before we can determine whether or not legislative amendments are actually required. These issues are discussed in greater detail in our submission but it might be worth me providing you with a short summary of them this morning.

The first one relates to a lack of clarity about whether a person may be summoned by an examiner under section 28 of the ACC Act if that person has been charged with a criminal offence and the examiner proposes to question a person on matters relating to those proceedings. The uncertain legal position has given rise to litigation that has significantly delayed ACC examinations. Clarification of the legislation may be a solution but any amendments should not interfere with the proper exercise of judicial power. For example, it might be possible to provide that an examination may proceed in these circumstances subject to special non-disclosure requirements but the power of the courts to exclude evidence or stay a prosecution on grounds of unfairness should not be affected. The second issue—

Mr KERR—Do not read your submission out to us.

Mr Jordana—No. These issues are all tackled in the submission, but we thought it was worth while—and I apologise that you have not had an opportunity to look at our submission—

Mr KERR—That is all right. It is partly my fault; it is residing in my computer system somewhere in Tasmania.

Mr Jordana—The ACC has identified situations in which it needs to employ or contract staff to perform functions that require some police powers or immunities. For example, a small number of former police officers are used as in-house investigators for continuity purposes. The

ACC also needs surveillance and technical staff and covert intelligence officers. These staff may need to apply for and execute warrants or may need to be armed for self-protection. The ACC thus far has addressed these needs by having staff members appointed as special constables by the AFP or a state police force. We do not see this as a satisfactory long-term arrangement as these persons are not under the control of the police force which appointed them but those same police forces remain notionally responsible for their use of police powers. We think that is perhaps a situation which is not really tenable in the longer term.

Options for addressing the ACC's needs that could be considered include creating a class of authorised ACC officers to exercise some or all of the powers of a constable or only focusing on particular powers or immunities for particular circumstances or people. Arrangements adopted for this purpose should not raise concerns that the ACC is usurping the roles and functions of any existing police force.

The failure of witnesses to attend and answer questions at examinations is a longstanding concern. The current penalty for these offences under section 30 of the act is up to five years imprisonment. These penalties are at the high end of the scale for offences of this type but the ACC still finds that some people associated with organised crime refuse to cooperate with examinations. There is a view that the current prosecution process is too slow and difficult to be effective. A contempt procedure with a prompt custodial response may prove more successful.

The NCA Amendment Bill 2000, which raised the penalty for the noncompliance offences, originally also included contempt provisions. The Senate rejected the contempt concept at the time but it was noted in the debates that it might be necessary to revisit the issue if the criminal provisions proved ineffective. This is a difficult issue and there may be no entirely satisfactory solution. The existing penalties would deter witnesses who are concerned at the prospect of imprisonment but some others may be prepared to accept a lengthy term of imprisonment rather than risk being perceived by their criminal associates as cooperating with the ACC. This is yet another issue that we believe is not an easy one but it is something we think is worth looking at a little more closely.

Another issue I want to briefly mention, with your indulgence, relates to the dissemination of criminal information and intelligence to appropriate bodies. That certainly is a key function of the ACC. The act authorises the ACC to disseminate information to Commonwealth, state, territory and foreign government law enforcement agencies, but there are some problems about the scope of this authority. First, a recent judgment in the Federal Court suggests that the ACC may only be able to disseminate information to Australian agencies other than police forces if they are prescribed by regulation. This may substantially delay the dissemination of relevant material to an agency with which the ACC does not deal regularly.

Another issue is that there is no provision for the ACC to disseminate information or intelligence to the private sector. This is a problem, for instance, in the ACC's work on financial and identity fraud. The telecommunications and financial services industries are actively contributing to the ACC's development of information and intelligence holdings on fraud but the ACC cannot disseminate information and intelligence back to the private sector to help it prevent and respond to further attempts at fraud. This tends to discourage corporations from cooperating because there is little tangible benefit for them in developing the relationship.

These examples I have just mentioned suggest a need to provide greater flexibility in the dissemination regime. Any relaxation of the current restrictions is likely to raise a degree of public concern and we would be very interested in the committee's views on this particular issue, as we are beginning to look at it as well. As I mentioned, the issues I have just raised are issues we have begun to examine in collaboration with the ACC. None of the issues that we have raised, we believe, have easy answers or straightforward solutions. Often it is probably going to be a question of balance—deciding where upon the continuum you think is an appropriate place to rest. As I said, we would be very interested in the committee's views on these issues. Thank you for bearing with me for this presentation. I would be happy to take any questions from the committee.

CHAIR—Thank you for your opening statement and your comprehensive and helpful submission. I particularly note your undertaking that you will advise the committee of any proposals for the amendment of the act that are approved in principle by the government while the committee's review is in progress. That would be assistance that we would value, because it would undoubtedly help us as we formulate views which may in turn be of interest to you. Thank you for that. We received the submission last night. If we do not get through all of the questions—we have limited time today—we may follow up with some formal correspondence to you trying to elicit further information and advice from you if we feel that we need that.

Thanks for being with us today. I will start with a general question which will give you some scope to elaborate on what you have already said. What do you see as the purpose of the ACC and how would you characterise the differences between that purpose and the purpose of the NCA?

Mr Jordana—As we have outlined in our submission, the principal purpose for which the ACC has been created is certainly the combination of undertaking intelligence activity with respect to organised crime in Australia as well as undertaking important investigations. I have not lived as intimately with this issue as some of my colleagues have. But my understanding of the main distinction between the NCA model and the ACC model is that the ACC model, through its board structure, has been able to utilise the views of the main law enforcement agencies in Australia and by so doing make sure that the ACC is very much focused on issues that are of immediate concern to policing in Australia, as well as—through the board structure and the participation of the major jurisdiction police commissioners on that board—ensuring a level of cooperation with the state and territory bodies. Those two characteristics of the ACC and the way it operates have meant that it has made itself more relevant to the national law enforcement community and opened up lines of cooperation which may not have existed before.

CHAIR—In your opening statement and your submission you make some comment in relation the membership of the Australian Crime Commission board and its functions. We have received a submission from the Victoria Police Commissioner in which she suggested that the chair of the board should be selected by board members. What do you think of that suggestion?

Mr Jordana—I gather that the act as it stands has the AFP Police Commissioner as the chair. Frankly, I do not see much reason for that to be adjusted. I am not quite sure of the reasoning that the Victoria Police Commissioner may have put forward, so I find it a bit difficult to respond to that notion.

CHAIR—Would you like to take that on notice?

Mr Jordana—I will take that on notice if I could, thank you.

CHAIR—The Victoria Police Commissioner has also indicated in her submission that she believes the Commonwealth ACC funding model, in which the Commonwealth funding is tied to particular crime categories, usurps the authority of the board. The commissioner also considers that Victorian police are now having to meet some of the staff and operational costs which used to be met by the NCA. Would you describe the ACC funding model as a reasonable model or a good model or one that would need improvement or revision?

Mr Manning—The ACC funding model was set up under the intergovernmental agreement reached in August 2002 on the basis that it would be reviewed at the end of three years by the intergovernmental committee. That review is just in the offing now. I think our impressions at this stage are that the funding model has worked reasonably well and that the Commonwealth wished to have an outcome where, without reducing its own overall commitment to the work of the ACC compared with the three bodies that had preceded it—namely, the NCA, the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments—the states would, through the process of joint task forces, gradually contribute a somewhat greater amount to the overall resourcing of the national effort against serious and organised crime. That has in fact, as I understand it, been the outcome. The ACC would be perhaps in a better position to comment on this as I know they have kept detailed records of how that has worked out in practice. That will certainly be an issue in the upcoming review by the intergovernmental committee but my impression is that that has in fact worked quite well.

Mr KERR—One of the counterpoints to the argument—that the ACC has facilitated more relevant relationships between the Commonwealth law enforcement agencies and state agencies and has been able to open new doors of cooperation—is the critique that the ACC becomes to an extent the dog being wagged by the tail and that the focus of some of its work, particularly the use of its coercive powers, moves towards undertaking work which essentially would be state policing responsibilities and, although capable in the broad of being encompassed as serious, would perhaps be not the sort of serious and organised crime that was the intended focus of the establishment of a national body to deal specifically with comprehensive networks across jurisdictions which could not be addressed by state policing. So I wonder whether that critique has been made known to the department and if you have a response to it.

Mr Jordana—We are aware of that critique. As I said in response to an earlier question, to be effective an organisation like the ACC has to be relevant to Australian policing, and it is police who have a very good insight into what are important issues for policing in the country. The existence of senior police people on the board is ensuring that the main issues of concern to Australian policing are at the forefront of the ACC's activities. By ensuring it is of interest to the Australian police forces, you are going to secure levels of cooperation.

Decisions are taken by the ACC on what particular priorities they are going to pursue both by doing a national prioritisation process—they do undertake a review of what the major criminal challenges to Australia are and, through that process, identify areas that they are going to focus on—and by having a particular formulation to undertake special investigations and so forth. The kind of decision-making process at board level assures that you are getting not just a state-

centric or individual-jurisdiction-centric take on it; you are getting a collective view from Australia's senior police authorities. I think the way in which they undertake it strikes an appropriate balance between making themselves relevant to Australian policing but not at the behest of individual jurisdictions or issues which are probably more appropriately handled at the jurisdictional level.

Mr KERR—I suppose it is at that second point that that critique comes in. The argument is that it would be difficult for an organisation which is dominated essentially by police commissioners of each state and federal level to second-guess the importance of a particular matter put forward as significant by one particular jurisdiction. Therefore, inevitably what happens is that you do get what you mentioned first—a wider range of demand on the uses of the coercive powers, greater pressure to use them and a widening of the scope of what was intended. There is no malice involved necessarily in this critique. It is simply the fact that, in order to give emphasis to the cooperative focus, the particular Commonwealth rationale for the establishment of the ACC and its predecessor organisations becomes diluted and it extends the reach of powers which were said to be extraordinarily exceptional—and in the nature of a special royal commission, never to be granted to police commissioners—into routine policing operations. It is not only in that very narrow band of serious and organised crime, which it was originally designed for, but gradually—there is as osmosis process—it extends into serious state issues but those which would have been outside the remit of the previous legislation.

Perhaps you could take that on notice, because it is an underlying critique that keeps coming back to us. It says that you have this creeping extension not through any malice but because the organisation has achieved one of the objectives of the Commonwealth—that of greater cooperation and relevance—but at some price, and that price being its extension into areas that have never been expressly articulated or endorsed.

Mr Jordana—It is an important issue and it is one we are conscious has been raised before. There is not much more that I can add to my previous answer other than to observe that in our view, from a departmental perspective, as we look at the kinds of issues that they have focused on, they are the kinds of issues that we would have expected or hoped to have been the kinds of issues that they would be looking at—those of major national importance that relate to organised crime. Certainly in our submission we have identified some of the areas where they have made an important contribution through their intelligence activities to the development of policy at a national level. From our perspective we have been very satisfied with what they have focused on. One would hope to think that the proof was in the pudding—that the system is working because they are focusing on the right things. There is not much more I can add to that.

Mr KERR—To the extent that they are, the critique goes this way: there is a real worry if we accept the basal proposition that we need to look at more examiners and expand the number of occasions. What happens now by having essentially only three examiners occupied full time—they were not previously because they had a whole range of administrative and policy roles as well—the time available for examination has already effectively increased. The fact that there are three examiners occupied full-time on this task is in a sense an effective mechanism for ensuring that only important things are addressed. The ambit of what is being undertaken by the organisation may pick up an occasional thing where you would say, 'We're not really sure about that, but that was something really important to South Australia's police or Tasmania's police or what have you.' It would be quite exceptional, simply because everybody knows that you cannot

devote significant resources of the examiners to pursue matters that are outside of that band. If you expanded it, given the way in which we now have much more facility for a cooperative approach, you would increase the risk and danger that this would become an add-on, a bolt on, an adjunct to law enforcement more generally across the whole Commonwealth, instead of an exceptional, extraordinary set of powers designed to deal with the real bad guys in the system.

Mr Jordana—I hear what you are saying. The ACC itself might have a better perspective on this than perhaps I could contribute. I guess the question is: if you accept that the issues that the ACC are looking at are well within the original concept of their remit and they are important national issues then providing them with the resources to be able to properly investigate those issues is what we need to strive for. I guess that is one part of the question. I hear what you are saying about the opportunities it may provide to go beyond their remit, but probably a good place to start is to see whether or not they have the resources to be able to investigate the concerns.

Mr KERR—I accept that fully.

Mr Manning—I think that the problem that you allude to—that this is a sort of 'you scratch my back and I'll scratch yours' approach to what issues are to be investigated—is probably one that is inherent in any kind of national structure like this, whether it be the NCA or the ACC. There is always that risk and you will always hear assertions that that sort of thing is going on. I do not think there is evidence of substance that the way the ACC is operating at the moment has produced that sort of result. The ACC will be in a better position to give you information on this, but they do have fairly rigorous internal systems, as I understand it, to ensure that the sorts of matters in which they become involved in joint operations with the states are consistent with the national objectives embodied in the authorisations and determinations made by the ACC board. It is not just a question of coming along, cap in hand, and the ACC saying, 'Right, we've got some spare capacity. We'll help you deal with this one.'

Mr KERR—I understand that. I suppose the point I was taking it to is that, if you did have the spare capacity, the temptation to do it and the constraints to prevent it, it would be very difficult to identify. The capacity to do it would be there and the constraints to prevent it would be hard to identify. One of the things that in a sense gives me great confidence that these powers are not being used in inappropriate ways is their scarcity. That may sound perverse.

CHAIR—It is a very sound reflection.

Mr HAYES—Following on from what Duncan had to say, it seems to me that one of the criticisms expressed in the former NCA was that it really did look at whether there was spare capacity and, effectively, a jurisdiction may make a bid for a particular investigative or operational activity. Certainly, criticism existed that it was not necessarily reflecting a general policing view about the discharging of its responsibilities at the time, whereas presently, as I understand it, at least from a police jurisdictional base, having each of the police commissioners involved certainly gives some broader oversight in terms of the gathering of criminal intelligence.

Mr Manning—I think it is right to say that the existence of the ACC board in its present form serves a bit of a dual function in that it not only allows the various heads of police forces and

other law enforcement-related agencies to pool their collective experience in making judgments but it also to some extent serves as an educative force in developing a collective and collegiate view among those people as to the law enforcement situation in Australia. So in that sense I think it actually contributes more, in the long run, to national thinking as opposed to parochial thinking. Obviously, there will be strong parochial pressures all the time for each individual agency to pursue its own objectives but we at least have the advantage of having this forum within which the heads of the various agencies are deliberately working towards forming a national view through their responsibility for things like the national criminal intelligence priorities. So we are developing a sort of counteracting force against the centrifugal force that arises from the needs of the individual agencies.

Mr HAYES—This is assisted by the ACC's ability to set up a task force for given operations which will not only act in a particular or targeted jurisdiction but will second police from other jurisdictions if necessary. That seems to me to have been one of the positive aspects of what has occurred.

Mr Manning—Yes, to some extent you get the same effect at a lower level within the organisation through the task force process.

Mr HAYES—I just want to take you back to part of your submission. At paragraph 64 you started dealing with the issue of whether a person who is charged with criminal offences can be brought before an examiner. I have to say that I was not aware of the difficulties that were experienced there. I had a former association with the activities of PIC in New South Wales. Can you describe how, in New South Wales, the PIC and ICAC jurisdictions are able to overcome what now looks like a legal difficulty with the ACC?

Mr Manning—I am not in a position to give you precise details of that but broadly speaking the way it operates is that those acts provide expressly that there is a capacity for investigations by the PIC or the ICAC to continue even though there may be relevant criminal proceedings in process, subject to quite strict requirements about non disclosure of the evidence that is produced and of the fact of the hearings. So the general objective of that legislation is to avoid any impact on the criminal proceedings by ensuring that none of the information arising from a hearing by, say, the PIC, actually comes into the public arena during the course of the criminal proceedings.

Mr HAYES—Could that be addressed legislatively or through regulations in terms of the ACC?

Mr Manning—That is something we will certainly be looking at.

Mr KERR—Isn't it not only public disclosure; isn't it the basal proposition of the criminal law that you are not entitled to arrest unless you have material which justifies putting a person to trial and you cannot supplement? You cannot then use these compulsive powers to make the case—

Mr Manning—Precisely.

Mr KERR—that you have proceeded in the court against. Isn't it a fundamental injustice to do that? That is why royal commissions have been stayed and a whole range of injunctions have

been issued in this regard. I am not clear—there is a suggestion in your paper that there has been robust use of these powers, but it would surprise me if persons who are the subject of criminal proceedings have been examined in relation to matters that are the subject of dispute in those proceedings to supplement the capacity of the prosecution to advance the case against them. I would regard that as a fundamental defiance of the criminal law and I have never heard an argument put in any of the hearings or circumstances that I have been involved in that it should be allowed.

Mr Jordana—Let us be clear on that: we are not suggesting any weakening of that. There needs to be a very clear firewall there. I guess the question is: is there a capacity for an ACC questioning of someone who is being charged to enrich what the ACC is doing without rebounding into this separate process and are we able to establish that firewall sufficiently strongly and clearly so you do not have that rebound? It is not an easy issue. It is very difficult issue. But clearly you could imagine circumstances where there would be people who could add substantially and add something very important to an ACC investigation who may be charged with a particular offence. It is no easy issue to address, for the very reason you raise—you need to make sure that that firewall is very strong.

Mr HAYES—It was not necessarily your recommendation but you have identified that as an issue and referred to a couple of cases. Is this something you would see as likely to emerge as further investigations take place or in terms of gathering criminal intelligence? Is it something that there needs to be some relief on?

Mr Jordana—It is probably best to pose that question to the ACC. They recognise that the length of time that they have been operating perhaps does not give a perfect guide to what the future problems might be.

Mr HAYES—Because it is something that was not enjoyed, for instance, by the NCA, I was wondering why it has been raised as an issue at this stage. That will be something that we will put to them. One further issue that I wanted to raise was about special powers for some ACC officers. You have indicated that your understanding is that a number of ACC officers are sworn in as special members of the AFP and as a consequence become special constables, under their oath of office, I guess. Are these the sorts of people who would have formally been seconded personnel to the NCA?

Mr Manning—Not that I am aware of. This is probably one that you would need to ask the ACC for the detail on. My understanding is that these are people who are employed permanently and would presumably have been employed permanently as part of the NCA. Why this is becoming a greater issue now, as I say, is probably something that the ACC would be better able to comment on. But certainly one of the issues is that they have found it necessary for the purposes of continuity in long-term investigations, given that most of their staff turn over every two to three years because they are secondees, to have a small number of ex-police employed permanently as investigators. I do not think the NCA did that, but the ACC would be in a better position to tell you that.

Mr HAYES—But the A-G's is nevertheless saying here today that might—

Mr Manning—It does appear to be a problem now. I am not in a position to comment on why it may not have been perceived as a problem five or 10 years ago.

Mr HAYES—Effectively, I think what was being said in the opening submission was that possibly we should be addressing whether the ACC has the ability to have special constables in its employ. Am I reading that correctly?

Mr Manning—That would be one possible solution to the problem. It may well be that you could look at identifying fairly specific requirements rather than creating something that looked a bit like a small additional police force, which I think would probably cause a bit of concern.

Mr KERR—Why can't you just leave your statement as 'certain persons can do certain things'?

Mr Manning—That would be an option, yes.

Mr Jordana—That is one of the options that we raised. We are not advocating any particular position here. We just wanted to let you know that these were the kinds of things we were beginning to grapple with. If the committee had any views on this, genuinely, it would be of very great interest to us.

Senator LUDWIG—In relation to AA against the ACC, is that under appeal at the moment or is there another legislative solution being considered?

Mr Manning—I understand it is under appeal, and we are also looking at temporary solutions in terms of making regulations to address the deficiency that arises there.

Senator LUDWIG—I understand what it is; I have read the case. The regulation—how far away is that?

Mr Manning—I could not say with certainty. There are still consultations going on about precisely how that would work. It is not unduly complex but there is some consultation to be done, and I am not sure precisely when that will end. I would anticipate that there will be a solution found fairly rapidly in that sense.

Senator LUDWIG—Perhaps when that is found you could advise the committee. In relation to the proposed commission for law enforcement integrity, is the ACC proposed to be one of those bodies subject to it?

Mr Manning—Yes.

Senator LUDWIG—In respect of AUSTRAC and the taxation department, is there any consideration for those two bodies to be on the ACC board?

Mr Jordana—Not that I am aware of.

Mr KERR—The tax commissioner, you said?

Senator LUDWIG—Yes.

Mr Jordana—The tax commissioner was one that has been raised by a number of people.

Senator LUDWIG—I know that has been raised but I have also added AUSTRAC and whether or not you have been considering that.

Mr Jordana—Not actively that I am aware of.

Mr KERR—It was one of recommendations of this committee in the establishment of the ACC that AUSTRAC be on it because I suppose the view of the committee is that it is a key and very effective part of law enforcement.

Mr Manning—It was considered at the time, but there was a problem of balance and overall size of the—

Mr KERR—It was at the time when everybody was worried about who had the numbers; whether the Commonwealth would have the numbers or the states would have the numbers. We may have gone past that point.

Mr Jordana—Having to work on a board, I am conscious that the number of people you have around a table is a fairly important attribute of a body and how it can function. I think it is a blunt way to look at an issue, but numbers are important.

CHAIR—Thank you. We are over time. We will carefully consider your submission during the next few days and we might send you a series of questions. If you could consider them within a reasonable time frame for us to be able to review your answers that would be much appreciated by the committee. Thank you for being with us today.

[9.25 am]

BERMINGHAM, Mr Ian Russell, Deputy Director, Commonwealth Director of Public Prosecutions

CARTER, Mr James Edwin, Acting Senior Assistant Director, Commonwealth Director of Public Prosecutions

de CRESPIGNY, Mr Mark, Acting Senior Assistant Director, Commonwealth Director of Public Prosecutions

CHAIR—Welcome. As you are public servants, you are reminded that you are not required to answer questions relating to policy matters. You will be given the opportunity to refer such questions to either the minister or superior officers. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I now invite you to make a short introductory statement, after which we will move to general discussion.

Mr Bermingham—The role of the Commonwealth Director of Public Prosecutions is to prosecute criminal offences against the laws of the Commonwealth and to confiscate the proceeds of Commonwealth crime. The CDPP has no power to investigate criminal matters and relies upon investigative agencies, including the Australian Crime Commission, to refer briefs of evidence for consideration of prosecution action. The CDPP, however, has a role to play in assisting investigating agencies by providing legal advice during the investigation stage. Under section 7A(c) of the ACC Act, the ACC is able to investigate matters relating to federally relevant criminal activity. Upon briefs of evidence being provided to the CDPP, those briefs are assessed in accordance with the prosecution policy of the Commonwealth.

That policy requires that a prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence has been committed by the alleged offender. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. Further, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.

The range of matters that may be referred to the CDPP by the ACC is very wide indeed. It includes drug importations, taxation fraud, money laundering, fraud on the Commonwealth, corporation offences and offences arising under the ACC Act. Since January 2003 we have had a total of about 184 ACC cases, but that includes 26 ongoing cases from the former NCA, so we see them as a significant client.

Mr KERR—How does that stack up, compared to your other significant clients?

Mr Bermingham—It would be less than the AFP, of course, but we work with about 40 agencies, and I would say that about a third or more of those would have fewer referrals than that. Some of these referrals are quite complex cases. They are quite significant. The CDPP and the ACC have established a cooperative working relationship, with liaison occurring at both the

regional office level and the head office level. A memorandum of understanding which articulates the respective roles of the ACC and us is in draft form. That is anticipated to be finalised in the not too distant future.

As a result of examinations conducted by the ACC, pursuant to the special powers regarding special intelligence operations or special investigations of the ACC, on occasions matters are referred to the CDPP concerning offences arising under the act—offences such as disclosing a summons or failure to attend examination, refusing to take the oath or an affirmation, refusing or failing to answer a question or produce documents at examination, providing false or misleading evidence, or obstructing or hindering the ACC in the course of examination. As with all other cases that are referred to us, with these matters we are responsible for ensuring that any prosecutions which are instituted are conducted and instituted in accordance with the prosecution policy of the Commonwealth. As I mentioned earlier, that requires sufficient admissible substantial reliable evidence with a reasonable prospect of conviction and the public interest factor to be satisfied.

It is also the CDPP's responsibility to determine the mode of trial—that is, whether the matter is to be dealt with summarily or on indictment. That is also to be done in accordance with the prosecution policy of the Commonwealth. In conclusion, the DPP has experienced a positive working relationship with the ACC, at both the investigative and liaison levels, and we look forward to continuing that relationship.

CHAIR—Thank you. The committee has received evidence suggesting that the existing penalty provisions for failure to answer questions or produce documents are inadequate due to the delays in prosecuting those offences. It has been suggested that the ACC should instead have some form of contempt power. What is your experience of the operation of these penalty provisions? Can you contrast that with the operation of contempt powers? Do you consider that a contempt power might be a useful tool in certain circumstances?

Mr Bermingham—The penalties provided for offences of the kind that you have mentioned are in each instance, I think, five years imprisonment. Without wishing to be seen as commenting on policy, I can make some observations, if I can put it that way. A contempt power may be seen as a solution to some sorts of cases, such as the refusal to answer or produce documents sorts of cases, whereas it is probably not a solution to offences of giving false or misleading evidence. The latter offences are probably more akin to perjury. One would anticipate that they would still be required to be the subject of prosecution if they were pursued. In the former cases I mentioned, refusal type cases, a contempt provision may in some instances provide an opportunity for a more expeditious determination of a matter. However, there may well still be cases where the person who is the subject of those proceedings has a fear of retribution which outweighs their fear of any penalty that may be imposed. That is a matter for others to consider, I imagine.

We have had experience with the sorts of cases you mention. We have had about 73 referrals. We have completed about 39. Of those 39, only seven had been finally determined by a finding of guilt or otherwise. There was one acquittal and there have been six convictions. So we see it as fairly early days, looking at the history of events. Of those six matters, the penalties ranged from a fine in two instances to custodial terms imposed in the other four. They ranged from a very short period to terms of two or three months and 12 months. They occurred, I think, in

Queensland, South Australia and Western Australia. So we have had had a little experience around the Commonwealth. I emphasise the word 'little'.

We are very mindful of the ACC's concern—I think that is probably the right word—about what they would perceive to be light penalties. We have had discussions at both the regional and national levels. We have discussed issues such as mode of trial—whether or not matters ought to be dealt with summarily, which usually will bring a swifter determination of a matter than if it were to proceed on indictment. Having said that, as the committee no doubt appreciates, there is necessarily a process to be followed in the criminal justice system, and that takes time. So there are two aspects which I have mentioned: the time factor and the penalty factor.

CHAIR—But if the contempt powers were available, do you think that would lead to an improvement in the quality of the evidence that could become available?

Mr Bermingham—It may in some instances. Possibly, in some cases. But in those sorts of cases generally the evidence is not always as difficult to marshal as in, say, a false or misleading evidence case. They are different sorts of offences. With respect, it is probably not an evidentiary issue—it is probably more a timeliness issue.

Mr KERR—In relation to timeliness, this matter was addressed by this committee when a draft came forward suggesting a contempt power, which we recommended against. One of the things that I think we suggested was that thought be given to either informally or formally, by statute, giving priority to these matters. There is a very real public interest when somebody actually refuses to identify themselves or to answer questions. I am not talking about false or misleading; they go into the queue—there is a trial, there are facts. If it is not dealt with summarily, there needs to be a jury. There is a whole range of complexities. But there does seem to be some merit in saying that where a person comes before the commission and refuses to identify themselves, refuses to answer any questions or what have you, the normal court lists should be jumped. These are not going to be matters that take long amounts of court time, but if they simply go into the queue in your office and the queue in the courts, then it increases the pressure to have a contempt power, which I regard as potentially very dangerous when given to a body of this kind. I would rather not do it. On the other hand, if we have an insoluble problem, the pressure to do it will be considerably increased.

Mr Bermingham—I see the predicament. We do not have a great deal of control over court lists, and for very good reason. I suppose one could even imagine that, if there were some process by which these sorts of matters were accelerated in a court list in one jurisdiction or another around the Commonwealth, it would still leave defendants perfectly entitled to take review action and challenge various powers of the ACC to defend the matters as fully and vigorously as they wished. So I do not know that we would always get the swift resolution that may be hoped for.

Mr KERR—There is nothing that prevents people taking whatever remedies they may wish to take. But there is nothing that would prevent this parliament either, in its administrative role, from directing courts as to priority of particular matters. It is not in interference with a chapter 3 administration of justice issue; it is a scheduling question about priorities we give to an important public function. That also applies with regard to your office. It is entirely conceivable that people will take collateral proceedings. But I think going down the path of giving a

contempt power is potentially very dangerous. It is very hard for a person who is possibly affronted by the way in which somebody conducts themselves to abstract themselves from that and deal with the matter in a way which is just and fair and to find a balance for how to respond. That is why, over a long time, courts have been moving away from exercising those powers and proceeding, in the main, by way of summons or what have you.

Superior courts have been moving in that direction, recognising those difficulties. But if the DPP does not give these things appropriate priority, there is an issue. One of the things that came out was that a protocol for the requests be worked through between the Commonwealth, in its administrative forms—I suppose that the department, you or whoever would do this—and the administration of the courts. Did anything ever come of this to get these matters resolved more quickly, or are we going to hear in another three years time that this is a really difficult problem and, yes, there are lots of delays and it is all terribly sad?

Mr Bermingham—I did not wish to give the impression that these matters were not given some priority in our office; quite the contrary. I thought I might have said that we are mindful of the circumstances the ACC now finds itself confronted with. We have been discussing that and we do treat those cases accordingly.

Mr KERR—What is the predicament that would prevent there being an appropriate protocol—understanding, discussion about priority and listings—about these kinds of matters? Obviously, courts list matters. I know that in jurisdictions like the High Court certain matters will be given priority for their importance in public administration. It is not an improper thing to advance an argument that a certain kind of listing priority be given to certain matters, particularly ones of this nature. If you are talking about refusals, they are not going to take a lot of court time.

Mr Bermingham—We are not at all opposed to that and, as you rightly say, there are instances where we actually say the very things you are saying and would be prepared, clearly, in these sorts of cases to say those very sorts of things. The predicament—and maybe that is not the right word—I was referring to is that we do not really have ultimate control over the list or the manner in which the defence is quite properly going to conduct itself. So a period of days or weeks—months, in certain cases—will flow, at least from our point of view, in terms of our ability to control things.

Senator LUDWIG—This question is about the way the DPP exercises its discretion, I guess. When you have a reference from the ACC, and it is about matters not directly related to a prosecution—so in a case where they have been unable to use their special powers because, as you have said, a person might wish to remain silent and not say anything—which policy do you then use to determine whether or not you should exercise your powers to prosecute for that?

Mr Bermingham—Concerning our decisions on whether or not to institute any proceedings?

Senator LUDWIG—Yes.

Mr Bermingham—That is under the prosecution policy of the Commonwealth.

Senator LUDWIG—And that deals with those issues as well?

Mr Bermingham—It deals—

Senator LUDWIG—I know it is a more general power; I was just wondering if it was a bit more focused because of the nature of the ACC and the use of their coercive powers. So I understand the general policy that you have, which more generally deals with the AFP and those powers and their prosecutions; in other words, the more—I do not want to use the word 'standard'—usual types of prosecutions you might get, from the tax department for fraud or from the AFP for their investigations. But in the case of prosecutions from the ACC—where they have been unable to use, or have tried to use, their coercive powers, and they have referred that matter to you for consideration of instituting proceedings—does your policy cover all those eventualities?

Mr Bermingham—The policy articulates the two-stage test. The first stage is probably the more relevant one, and that is the evidentiary test. If a matter is referred to us because, for example, someone has refused to comply with a direction to answer a question, we immediately look at the evidence and then we apply the test that there must be a reasonable prospect of evidence—those factors I mentioned at the beginning. That is the way we would approach that. If it transpires that there is a shortfall in the evidence, we would certainly discuss that with the ACC and we would offer advice along the following lines: 'If you continue investigation, there may be other evidence which may support your case which is available'—that is the sort of discussion we would have during the course of their further investigation, if that was the case.

Senator LUDWIG—There is no particular variation between your policy for what might come out of the AFP and for the ACC?

Mr Bermingham—I think the policy is sort of intended to apply to any Commonwealth criminal matter, irrespective of the agency from which it originates.

Senator LUDWIG—Yes, but not all of them have coercive powers.

Mr Bermingham—No, that is true.

Senator LUDWIG—I was just wondering whether you had taken that into consideration in developing your policy?

Mr Bermingham—As far as coercive powers go, if the evidence is relevant and admissible, in our view—and material, of course—we would propose leading it. If there were any issues as to the question of admissibility, for example—and all the evidence is, of course, disclosed to the defence prior to the trial or the hearing—that may well be dealt with by way of a voir dire, a trial within a trial, to determine the admissibility of the evidence.

Senator LUDWIG—So, once it is referred to you, you only exercise the policy, as it is stated more broadly, to determine whether a prosecution should be instituted? That is the point I am getting at.

Mr Bermingham—I should also have added that the coercive evidence itself is not actually used. When a person who has been required to appear before an examiner has given some

evidence, and that person becomes a witness, we normally have the ACC or the AFP take a statement from that person.

Senator LUDWIG—I see.

Mr KERR—Mr Bermingham, I think you were present when the Attorney's department was giving evidence. I raised the question of how one could address their concern about using these coercive powers in respect of somebody who may be currently facing criminal proceedings already filed. The response was: 'That is a matter of complexity, but we would have to develop processes that firewall this.' Have you been engaged in any discussion or reflection about the propriety of such an examination or whether it is conceivable to firewall it in any way and, if so, about the mechanisms which would address the concerns that would inevitably arise at a later stage, when you are involved, that this might be an unfair process?

Mr Bermingham—Yes. We had a discussion about that amongst ourselves yesterday afternoon in preparation. There is a distinction between a person who becomes a crown witness and a defendant, so maybe I should concentrate on the defendant. As I understood it, in the previous discussion the circumstances were postulated where, after the charging of the defendant, there had been some further examination and some further relevant evidence had emerged as a result of that examination.

Mr KERR—Firstly, it is a question of whether it is proper to have the examination in the first place, let alone whether evidence emerges.

Mr Bermingham—I personally do not remember any cases where the police have gone back and interviewed a person after that person has been charged, unless their legal advisers have for some reason or other consented to that. That is quite a different situation from the one you are thinking of. I do not know of any instances we have had, but I may be corrected on that. In terms of the use of that evidence, the court always has a discretion to rule inadmissible any evidence that has been unfairly obtained; a general discretion resides in the court to do that. As I said earlier on, if there is any dispute as to the admissibility of the evidence, that can be tested in the absence of the jury, in the voir dire situation, so that the position of the accused is preserved, but I would anticipate that they would be the safeguards if that situation were to arise.

Mr KERR—I go back to the fundamental proposition that you must not proceed with a matter unless you are satisfied that there is available and admissible evidence—

Mr Bermingham—Yes, that has occurred beforehand.

Mr KERR—I find it curious as to why one would be to wishing to. I think it appropriate to supplement the record there. It does seem to me that it is conceivable that somebody who is charged with a crime may still be a person of interest in relation to another set of criminal behaviours. That seems to me to be conceivable and it would not be improper for that person to be examined in relation to disassociated and unrelated matters. But to the extent that there is an overlap that might be material to the fate of the criminal proceeding in which they have already been charged I would be very surprised if anybody from the Commonwealth is putting forward an argument that this is a fit thing to do.

Mr Bermingham—With respect, I certainly have not said that.

Mr KERR—I am actually inviting you to say quite the opposite.

Mr Bermingham—I was about to say that I would have thought that the use of indemnity would spring into effect if a person, after being charged, is being examined about another alleged offence.

Mr KERR—But the indemnity only goes, as you would understand, to direct use of that testimony. It does not go to matters which are discovered in consequence of that testimony. So it is a frail shield, shall we say. It is not one that I would think excuses the pursuit of additional evidence in those circumstances.

Mr Bermingham—I am quite confident that we would not be using evidence that we knew had either been illegally or improperly obtained after someone had been charged or before they had been charged in considering whether they should be charged, if that is the point you are making.

Mr KERR—I am not. I am just trying to explore this point. I do not think Mr Jordana was actually suggesting that. But I do not understand what is actually being proposed—that is the truth. There is a suggestion that there is a difficulty in relation to examinations of persons who are currently the subject of a charge. It is suggested that there has been a robust application of these powers and that they have been resisted by lawyers representing the person subject to that questioning. I have in my head two possible scenarios, one of which is that the person has been the subject of questioning in relation to matters which are currently the subject of a charge. If that was the case, I would think that would be wrong. Whether it would be illegal and improper in a technical sense is a different point.

If it is in relation to distinct matters that concern the ACC but are not the subject of charge but the person just happens to be a person yet to have a trail in relation to distinctly separate matters, I have no difficultly in relation to it—except if it strays into issues that might be the subject of current charge, where normally a lawyer would be very apt and quick to say, 'This is not a matter which my client should be required to answer.' If this person is being prosecuted, it must only be on the basis that the prosecution holds—and the DPP is satisfied that the prosecution holds—relevant and admissible evidence. You are not allowed to use this as a fishing expedition to find the sufficient evidence that you assert you already have.

I am trying to flesh out where you stand in relation to these two possible circumstances and whether you agree with the underlying rationale for where I think the lines should be. If we do not agree then we need to work it out because there is something here that is being proposed which we do not really understand.

Mr Bermingham—First of all, that strikes me as being a policy issue. We are interested in evidence. As I said, we apply the policy in assessing that evidence, which includes its admissibility. If there is an issue as to the admissibility of the evidence, then the defendant, who has had our whole case disclosed to them in a timely fashion, is on notice of the totality of the evidence to be led. If we are satisfied that it is admissible, relevant and so forth, and there is an issue—

Mr KERR—Let me be blunt then. Assume I am the examiner. Somebody is charged with a crime relating to a particular act—the killing of somebody. After the charges have been laid the matter is before the court, but before trial, I call somebody before me and I insist they answer questions as to the location of the alleged murder weapon. As a result of that forced testimony, compelled at a period after charge but before trial, the murder weapon is discovered. Would you lead that evidence?

Mr Bermingham—And fingerprints are taken from the weapon?

Mr KERR—And fingerprints are taken from it.

Mr Bermingham—If that were to occur, we would anticipate that the person being examined subsequent to being charged would no doubt be entitled to object to answering the questions as there may be an abuse of the power of the examiner. That may well be a remedy for that person. If that were litigated and ruled and found to not have been the case, if it was found that the evidence was lawfully obtained—and, as I said, we have not had this experience, to our collective knowledge—we would then go through the process I mentioned before. The evidence would be disclosed and, if there were argument in the course of the trial, the question of admissibility would be argued then. But we are not quite certain that we are fully cognisant of all the policy issues that may or may not have been raised when this was brought to your notice earlier this morning. We have not been apprised of that at all.

Mr KERR—This is a serious issue—

Mr Bermingham—Yes.

Mr KERR—that the Attorney's department have said they will go away and give greater attention to. I ask that you liaise with the relevant officers of the department and seek to advise us in relation to this. I do not think such a scenario was contemplated by the Attorney's department; in fact, I think it was explicitly ruled out as being contemplated. But it would certainly reassure me to know that that is not happening, because, as I say, in 18 years in this parliament, of which I have always either been on this committee, on its predecessor committee or a minister, I have never heard the suggestion that the powers would be used in such a way. Yet the inference in this submission is that there is this area that is contentious at the moment.

Mr Bermingham—As I said, we have not come across it, in our collective memory here today, and nor are we proposing it. We rely upon lawfully obtained evidence that is relevant material and admissible in accordance with the laws of evidence. That is the way we apply the policy.

CHAIR—If you would take Mr Kerr's question on notice to liaise with your counterparts in other jurisdictions or departments, that would be appreciated.

Mr Bermingham—Thank you very much.

CHAIR—We thank you for being with us today and for your useful contribution.

[10.01 am]

KEELTY, Commissioner Mick, Chair of the ACC Board and Commissioner of the Australian Federal Police

NICHOLL, Mr Jonathan, Policy, ACC Board and Australian Federal Police

CHAIR—Welcome. As you are public servants, you are reminded that you are not required to answer questions relating to policy matters and will be given the opportunity to refer such questions to either the minister or superior officers. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you both.

Commissioner Keelty—That is correct.

CHAIR—I now invite you to make a short introductory statement, after which we will move to a general question and discussion session.

Commissioner Keelty—Thank you. I have been following the proceedings of the PJC with interest, and I note a variety of views expressed on the performance of the ACC. I hope that my appearance here today will assist in your review. Although we are here to discuss the PJC's review of the ACC Act 2002, before I start I will make a few comments on my role as chair of the board of the Australian Crime Commission, which might guide our discussion, as well as sharing some observations on the work of the ACC over the past 2½ years.

As you would be aware, the board of the ACC and my role as chair have their genesis in section 7C of the act. In essence, the act bestows upon the board a strategic oversight of the ACC's activities function, the powers to authorise investigations and operations with or without the use of coercive powers and the responsibility to chart a course for the ACC. The board exercises these powers and responsibilities through the CEO, who, as you know, is a non-voting member of the board and has responsibility for day-to-day operations of the agency. In this context, I hope you will understand if I refer any specific questions you may have on the internal operations of the ACC to the CEO when he makes his appearance before you this afternoon. The distinction between the roles of the board and the agency are important because it is crucial for the ACC's and the board's effectiveness that the ACC operates under guidance with an appropriate accountability framework overseen by the board and the intergovernmental committee. The ACC's ability to exercise coercive powers means that this governance and accountability system must be clearly understood and followed.

The board oversights the ACC through a number of mechanisms. Mr Milroy and I have regular meetings on a range of issues requiring my input and I communicate routinely with board members out of session. Further, at its regular meetings the board reviews the progress of the ACC both operationally and corporately through detailed reporting provided by the CEO. The board has also established what is called a strategic directions committee to provide guidance to the CEO and the board on strategic issues facing the ACC. Through these arrangements the board and the CEO have developed a productive working relationship based around sound governance processes, including the development of an ACC corporate plan and

provision by the CEO of regular performance output reports to board member agencies including the IGC of the ACC and also your committee.

As you know, the ACC has faced the challenges posed by corruption during its first years. I note the board has worked closely with the CEO to significantly bolster the ACC's professional standards and integrity management program. No agency can make itself immune from corruption, especially an agency that draws its investigative strength from such a large number of other agencies, as the ACC does. But the board has a greater degree of confidence that the ACC is well positioned to respond to corruption in the future. The CEO has been quick to respond to corruption within the ACC and within the parameters of the Australian Public Service Act, and he has engaged with the Commonwealth Ombudsman at an early stage on most cases.

I would like to briefly touch on the performance of the ACC since its inception. The first 2½ years of the ACC's operations have been marked by continuing achievement in difficult circumstances. The ACC has had to manage the transition from three distinct existing agencies to a single new agency with new governance arrangements involving a new act and a board with considerable powers vested in it. The difficulty of this task alone cannot be underestimated. Apart from creating a new agency culture, mission and direction, the ACC has had to contend with new and complex governance arrangements and a host of stakeholders. Its achievements in this context are testimony to the many fine staff of the ACC, who have made the agency work and work well.

Some of the achievements by the ACC and its board since January 2003 that I would like to highlight include: the substantial conclusion of carried-over NCA operational activity; the establishment of a national criminal intelligence priority system, designed to inform ACC operational priorities and provide the basis for ACC strategic intelligence and national threat assessments; the authorisation of new operations and investigations by the ACC, including the establishment of ACC task forces under the act; and productive use of the coercive powers—in fact there were some 515 examinations held last calendar year and we expect over 600 examinations to be completed by the end of this year.

Since 2003, 10 strategic intelligence assessments have been published as well as over 30 current intelligence reports, over 100 intelligence updates and 15 criminal threat assessments. There has been the completion of over 1,900 operational disseminations of intelligence to ACC partner agencies. There has been the establishment of regular reporting to the board on operations, finances and other performance indicators, as well as the establishment of the strategic directions committee to guide the CEO and the board in decision making and which I mentioned earlier.

A key aspect of the ACC's progress has been the practical cooperation displayed between agencies represented on the board on a day-to-day basis on matters that are major to law enforcement in this country, particularly the area of the creation of multi-agency task forces. This cooperation has allowed the ACC and its partners to better understand and attack organised crime groups involved in drug trafficking and manufacture, tax avoidance and money laundering, trafficking for sexual servitude and firearms offences. The board's ability to work cohesively across traditional jurisdictional divides is particularly gratifying and may surprise some of the ACC's critics from 2002. I cannot overstate the importance and value of the productive partnership with state and territory jurisdictions to achieve these successes.

Finally, this review provides a useful opportunity to consider not only what the ACC has achieved but how the ACC could usefully be improved to ensure it maintains its ability and remains best equipped to deal with serious national criminal threats. I note both the submission by the ACC board and the submission by the AFP, which provide suggested improvements to the current arrangements for the committee to consider, including improvements to legislation and arrangements for areas such as the ACC's policy capacity and its reliance on AFP legislation for arming some officers. Although some of the areas identified for improvement have been provided in confidence, either Mr Milroy or I would be happy to answer any general questions you may have on these issues or if necessary take the questions on notice. Thank you for listening to me this morning. I invite you to ask me some questions.

CHAIR—Thank you, Commissioner Keelty, for your submission and for the submission from the AFP and your opening remarks today. Given recent events, there is much demand on your time and your attention, and we appreciate your being here with us today under the circumstances. In your submission, you note that the Commissioner of Taxation could be added to the board. There is also some suggestion that AUSTRAC has a useful representative role to play on the board. How would these two additions, but particularly the taxation commissioner, assist the ACC if representatives or the heads were in fact members of the board? How in your view would the ACC be assisted?

Commissioner Keelty—I will give the committee some background. At the time of the creation of the ACC, being a new agency there was obviously some concern about whether the board would work, being a variety of people from disparate backgrounds and disparate jurisdictions. I am pleased to say that we have worked through that and, I have to say, perhaps more easily than I first thought. At the time of the creation of the ACC there was care taken not to have an overbalance of Commonwealth agencies over the state and territory agencies. We have worked through that. The board unanimously supports the Commissioner of Taxation being a member of the board, which is an indication of the maturity of the board and how far we have moved.

The benefit of the Commissioner of Taxation being on the board would be to have direct insight. Most of the major operations undertaken by the ACC are underwritten by investigations into finances and typically of organised crime. Even in the days of the NCA, typically in organised crime, one of the best ways to attack it has been through attacking the finances. There are not many organised crime entities that do not in some way or another affect our taxation system either through defrauding the taxation system or using the taxation system in a variety of ways to benefit themselves. It would be of enormous benefit to have the Commissioner of Taxation on the board to see the range of operations that are coming to the board and to look for opportunities to improve the performance of both the board and the ACC.

CHAIR—And AUSTRAC?

Commissioner Keelty—In fairness to the board, it has not had an opportunity to consider AUSTRAC, but if I were to talk to you personally from my own experience I would view AUSTRAC in a similar light. AUSTRAC, particularly in the current environment of terrorism, is a rich database providing enormous potential and opportunity for the underpinning of operations conducted by the ACC to be enhanced. I think that, similar to the taxation commissioner, when you look at what organised crime is and why people involve themselves in organised crime it

would be of benefit to the ACC board to have AUSTRAC there. But I make the point that the board have not had an opportunity to consider that, and I express those views as an individual.

CHAIR—Taken as such. The Hon. Michelle Roberts, the Minister for Police and Emergency Services in Western Australia, has suggested that the ACC Act be amended so that the right of commissioners to be represented on the board can be delegated further. How do you see that suggestion in terms of having people other than the commissioners attending board meetings?

Commissioner Keelty—I have enormous regard for Minister Roberts—obviously, I meet with her in other forums—but I do not agree with that position. The reason why I do not agree is that the board is tasked with some, I think, groundbreaking powers. It has enormous responsibility not known to law enforcement prior to its creation—not known to law enforcement in this country.

In the drafting of the legislation I have been very particular about speaking to the secretary of the department about delegation, because if we delegate we could end up with the lowest common denominator on the board. That would be an injustice not only to the ACC as an entity itself but also to the wider community, because the ACC has vested in it some extraordinary powers not vested in any other agency of its type. There are obviously some state examples of agencies of a similar nature, but in terms of what it stands for, there is not an agency of its type. I think to delegate creates a precedent that I really would be counselling the committee against.

CHAIR—So you see the value of the sensitivity and the continuity that accrues to the one representative attending all meetings, or as many meetings as he or she can, as being most important?

Commissioner Keelty—That is right. What we have said is that, if the commissioner cannot attend the meeting, an acting commissioner must attend. In other words, if the commissioner is on leave and somebody is acting as a commissioner, then that person can certainly attend the board. In the first year of the board we wondered just how frequently we could meet—how difficult it would be to align people's diaries. There have been circumstances where we have had to meet out of session, but we have been able to go into video links. The board can operate quite flexibly and quite effectively without delegation. If I can put it this way, without doing an injustice to my state and territory colleagues: if one or a number of board members are not present, we do not seem to have lost where the majority of the board people wanted to go. There has been enormous consensus in board meetings, which I think is a reassuring feature of the board, and, I think, reassuring to people who might not have thought it would in fact work.

CHAIR—Would you be able to outline for the public record the general allocation of roles between you as chair of the board, the board itself and the CEO? What is the extent of the CEO's authority?

Commissioner Keelty—The CEO's authority is based under the act, as is the role of the chair and the role of the board. To translate that to the practicalities, in a practical sense Alastair runs the ACC on a daily basis. There is very little interference from the board. In fact, the only time we have ever really turned around a decision of Alastair's has been I think in more recent times when we were being asked to consider a determination on aviation security. That translated within the ACC to something much broader than aviation security. I think they were looking for

aviation and transport. Of course, with the deadlines we had with Wheeler and other matters, the board wanted the ACC to be focused.

From my recollection—unless I am reminded of something else—working with Alastair through those corruption issues that I have mentioned, where the board has been sensitive to the corruption issues and in fact had an out-of-session meeting, there has been little interference by the board. We allow Alastair to get on with the job. I have to say to you that I think Alastair has been a welcome appointment as the CEO of the ACC. I actually knew him before when we were both working for the then NCA. He has had to work through some difficult issues and he has done so with extraordinary commitment and professionalism. He has been caught between, 'What do I do as a CEO for the ACC?' and 'How do I appease the board?' Hopefully it has worked out okay for him. No doubt you will elicit that from him this afternoon. I need to take advice on whether there is something else. I have just been reminded, Chair, that we may have done some refinements on some of the determinations to keep them focused.

There was also an IGC meeting where Minister Watkins questioned and compared with the New South Wales Crime Commission some of the performance indicators. That took us back as a board to look more closely at what we were using as performance indicators. Again, I have to say that the CEO has been extraordinarily responsive, as have the people working for him. I think the performance indicators that are now produced by the ACC—and that you have access to as a committee—are very high-class. You do not see a lot of that standard around law enforcement. It is a longwinded way of saying to you that we try as much as we can to say to Alastair, 'You run the day-to-day operations according to the legislation and we will stick to our brief.' We have really not had any conflict. We have worked through some issues but we have not had any issues beyond what I just outlined.

Mr HAYES—Like the former NCA, the ACC seconds a number of sworn police from each state and territory jurisdiction including the AFP. How many people do you have seconded there?

Commissioner Keelty—About 24 at the moment.

Mr HAYES—What is the range of time for those secondments?

Commissioner Keelty—They are roughly of about two years. But they can be extended, and from time to time they are shortened because people pick up promotions elsewhere and there are movements and transfers of people.

Mr HAYES—And when they are seconded to the ACC they maintain their sworn powers?

Commissioner Keelty—That is correct.

Mr HAYES—That being the case, they still have the power of arrest et cetera?

Commissioner Keelty—That is correct.

Mr HAYES—I am aware of the submission of the Police Federation of Australia, an organisation which I had some previous association with. I understand that in their submission

they are seeking the inclusion of some generic terms and conditions for police officers seconded to the ACC. In saying that, I understand that there was an attempt to initiate the same position by the management of the NCA some time back. Has that been progressed?

Commissioner Keelty—The former NCA went to a point where it contracted its own investigators. In the development of the ACC we deliberately moved away from that model. Those of us who are contributing to the policy creation of the ACC took the view that one of the benefits thought to be delivered through the creation of the NCA was that you would have state and territory police attached or seconded to the NCA and they would deal with the highest levels of organised crime. Transnational crime was not in the dictionary at that time for policing around the country.

What was lost in the NCA going to contractual arrangements—what basically ended up being private investigators—was that you did not have contemporary and current serving police being provided with the necessary skills and experience to do the work the NCA was doing and then returning to their parent police force where over a period of time there would be a critical mass of investigators investigating the highest levels of organised crime. In other words, a mutually beneficial arrangement was envisaged there.

When the ACC was created we went back to that model because we believe that the better model was to use contemporary state and territory police to provide them with the opportunity to work on the highest levels of organised and transnational crimes and then return to their parent police force where they deliver those skills and abilities back to their parent police force. Again, we were looking for the mutually beneficial model.

The issues raised by the PFA are difficult and complex. I am working through those issues—it is another hat that I wear—in terms of dealing with aviation security and the secondment of state and territory police to do the community policing around airports in Australia now and also with the International Deployment Group where we use state and territory police to work with us in the Solomon Islands and Papua New Guinea and East Timor. What is difficult for us is that each state jurisdiction has a different arrangement in respect of the powers vested in the commissioner. For example, some people are seconded to the AFP on leave without pay because their police commissioners, under their WorkCover legislation, have to be accountable for them in their state—

Mr HAYES—Queensland in particular.

Commissioner Keelty—Queensland. And South Australia and Western Australia might be other examples. There are disparate arrangements in place for the secondment of officers. That has opened up the issue of how officers are seconded to the ACC and whether in fact the secondment arrangements are appropriate. So it is very current. And it is very important because, as in the airport policing model, we want people to be able to exercise their state jurisdictional policing powers and, at the same time, exercise the powers of the Commonwealth, whether it be under the ACC or under the AFP. So far, we have not really come up with a model that will suit all purposes.

Mr HAYES—I understand that the difficulty the NCA had in making operational decisions was that seconded officers were on various conditions—some people got overtime, some people

did not; some people attracted penalties, others did not. The NCA believed that was affecting their operational capability. Do the secondment arrangements currently on foot—that is, all secondees continue to enjoy their home state or territory jurisdictional conditions—give rise to a similar problem for the ACC that the NCA formerly found in terms of its allocation of operational resources?

Commissioner Keelty—I am aware of those problems in the NCA because, as many members of the committee would be aware, I worked at the NCA for five years. That has not been brought to my attention, I have to say, but I know it is an issue in other areas. Perhaps the CEO is the best person to answer that question, because I cannot answer the question about whether it is affecting the organisational effectiveness of the ACC. It is obviously an issue; but, again, one of the principles behind the creation of the ACC and one of the reasons why the commissioners of police are on the board of the ACC is that, if a commissioner thought that a particular crime problem were such an issue in his or her jurisdiction, they would resource it.

One of the flexibilities that we have in the current arrangements is that providing assistance, for example, to Victoria Police in the investigation of the underworld killings in that state, might not be something you want to run for three years. There might be a particular issue that is only going to run for three months. So you want to retain some flexibility as well.

Mr HAYES—Just in relation to that, Christine Nixon, in her submission, makes not so much a criticism but a statement to the effect that, as a consequence of operational developments running in conjunction with the ACC, the Victoria Police jurisdiction is picking up more of the on-cost for the operation and allocation of troops, as would have been expected.

Commissioner Keelty—If you have the largest crime problem then perhaps you should take up the largest part of the cost. The issue of cost-shifting is one that a lot of people were nervous about at the beginning, but we seem to have worked through it. Of course, for anyone who has had experience with police ministerial councils or police in general across the jurisdictions, the issue of cost-shifting is a perennial problem and not one that is easily resolved.

Mr HAYES—You were asked a question a little earlier about the police minister from Western Australia having a delegate as opposed to having a police commissioner attend. If that came about, would you be concerned that that would give rise to the prospect of the leakage of coercive powers into a more returned policing?

Commissioner Keelty—I think there are some real issues around that. I appreciate what Minister Roberts is saying. From time to time, even for me, it has been difficult to get to board meetings because of other pressures. But the reality is—and I thank the chair for his comments earlier—this is an important institution. Regardless of what else is going on, we should all take on the responsibility and accountability for our positions as board members. I would not like to see that delegated further.

Mr HAYES—In your submission you effectively come up with three recommendations. You have already dealt pretty extensively with your position on the Commissioner of Taxation, which I understand is also supported by each of the board members. You have also referred to the issue of special members. As I understand it, there are officers employed by the ACC who are undertaking various surveillance and field operations. The practice at present is for those officers

to be sworn in under the AFP Act as special members. Essentially, it would follow that they are subject to the AFP integrity and discipline regimes. Is that indicative that these people should have been police in the first instance?

Commissioner Keelty—I think that is right. As I have said this before, one of the benefits of the secondment model is that there is a significant amount of oversight. People are accountable to the Commonwealth Ombudsman through their employment under the ACC Act. They are also accountable to their own jurisdictions and to the professional standards within those jurisdictions. The CEO has done a good deal of work in that regard. Provided that there is no inefficiency created by such arrangements, that level of oversight is something that the community expects with an organisation that has such strong powers.

Mr HAYES—In addition to the issue of oversight, this also confers upon various employees of the ACC the powers of a constable, including the powers of the use of force and arrest.

Commissioner Keelty—That is correct. And that power needs to be appropriately accountable. There needs to be a regime or a governance framework to oversee it.

Mr HAYES—Ordinarily, as the AFP commissioner, what personnel, other than police, would you swear in as special constables?

Commissioner Keelty—From time to time, we swear in people with particular skill capabilities. But by and large they would all be people who are police.

Mr HAYES—From other jurisdictions?

Commissioner Keelty—Yes.

Mr HAYES—Would they be stand-alone people—that is, people who are not police but are being sworn in as police, not only those that come under your integrity regime, but also those in instances where they have special powers conferred upon them, including the powers of the use of force and arrest?

Commissioner Keelty—The people who we would envisage would be captured by this recommendation would be former police who are working within the ACC but who do not have access to those powers at the moment. As I said before, one of the ways of having governance over those people, because of their access to the powers that you are talking about, whether it be the use of weapons or other powers, is by having a training regime or a standards regime to ensure that they are at an appropriate level before they could be issued, for example, with weapons et cetera.

Mr HAYES—Do you see that this could be an issue affecting the professional regime of policing whereby people who may or may not be former cops can be sworn in with limited training and have access to firearms and an ability to use force notwithstanding the fact that they come under the AFP integrity regime?

Commissioner Keelty—I see where you are coming from. I would envisage that this is to cover a gap with the former police who are serving at the ACC. I would not envisage that the

ACC would ask us to swear in as special members people who were not appropriately qualified or trained. I think qualification and training are the key elements of this, and we would strike up a policy and an arrangement with the ACC in that regard. It is not to back-door people into policing.

Mr HAYES—So, that being the case as I understand it, you would regard this as a temporary measure. Would you see the longer term solution being that they be police seconded to those particular surveillance operations or, alternatively, would you be advocating that the ACC have the ability to become effectively another police force, having their own sworn constables?

Commissioner Keelty—No, I see this as a transitional arrangement. I think the best model for the ACC would be that it include serving state and territory and AFP officers.

Mr HAYES—The other area that you have made recommendations on concerns refusing to answer questions during an examination. That has obviously come up in other submissions. You have questioned the effectiveness of the coercive powers of the ACC as they are currently applied. What would be your suggestion in relation to section 30 of the ACC Act particularly in relation to a refusal to answer questions during examination?

Commissioner Keelty—It is an issue of importance for the ACC because clearly the one area that distinguishes the ACC from any other law enforcement agency in the country is its ability to apply the coercive powers. We believe that if that is what distinguishes the ACC from the other police agencies then we need to have an appropriate mechanism to deal with those people who refuse to answer questions and that the courts should reflect the seriousness of that. Governments would not have agreed to the creation and application of the coercive powers if they thought they were not necessary. I think the gap here is having that reflected not only in the legislation but also in the attitude of the courts to people who refuse.

I know it goes against our fundamental principles of human rights and civil liberties but the reality is I have yet to see, for all the discussion and all the debate, an abuse of the powers that have been vested in the ACC. I think what have not moved on in people's minds on this issue are the accountability mechanisms and the issue of tape-recorded and videoed interviews. There is not a star chamber type of phenomenon around these things. As for people who choose to not cooperate with the ACC and are targeted by the ACC, you can see as a committee when you get the operational briefings that they need to be dealt with appropriately by the courts, and I have to say that the current environment would emphasise that even further.

Mr HAYES—So what would you suggest from a policing perspective that ought to be done in that regard?

Commissioner Keelty—Clearly the penalties need to be increased. The presumption to bail in these cases needs to be withdrawn, I think. There is no point having a person before an ACC hearing, charging them with not cooperating with the hearing and then providing them with bail. So I think the presumption to bail has to be eliminated and the penalties have to be much more severe than they already are.

Mr HAYES—I do not want to put words into your mouth, but certainly with the issue of secondments there is a professional benefit to state and territory jurisdictions in having officers

working at such a senior level of law enforcement, detection and intelligence gathering. Has that been emphasised at the board level? Is that just the view of the Commissioner of the AFP or do you believe that is the general experience of state and territory police commissioners?

Commissioner Keelty—I would have to be careful how I answered that, I think. I know we have discussed it as a board in the lead-up to the creation of the ACC, but I do not know that it is a current discussion that the board has had. I have enormous respect for the members of the board and I would not want to pre-empt their view on it. But certainly you can see, for example, the contribution that the South Australian police are making to the ACC. It is very significant. It is above the norm. I think that is a good example to the committee of where commissioners have a very high level of commitment to making the ACC work. I think we have moved beyond that issue of whether they should be current serving officers or whether it should have been back in the old NCA model. I would just add the one caveat that I have not discussed that specifically in recent times with the board.

CHAIR—One of the products that we have had the benefit of discussing with the ACC has been their intelligence dissemination. Certainly, it was my impression that that product now is much more streamlined and probably more valuable. I just wondered what your assessment of it is. I will open the issue to you as to how that perhaps can be improved or whether it is now at an optimal level. The impression that we receive is that it is being accessed and utilised more effectively than in the past.

Commissioner Keelty—Yes. I think there are two key areas where the ACC has really moved beyond our expectations. One of the areas is the streamlining of the intelligence reporting, the breadth of its dissemination and also the quality of the reports. The other area is its performance reporting. As to whether it could be improved, I guess in one sense I am not the right person to ask because I am so heavily involved in it in another capacity. But I know that one of the frustrations of government and perhaps the parliament can be why we are hearing about these crimes when they are on the doorstep and not earlier.

One of the things I think we have to maintain within the ACC—because nobody else is doing it to the level that the ACC can—is that over-the-horizon view of what is coming around the corner, particularly when you look at the wave of identity crime and how it has hit this country and many other countries and the way people-smuggling affected law enforcement almost immediately, yet nobody saw it coming. But globally the push-and-pull factors for what was sitting behind people-smuggling were quite evident to other disciplines or perhaps even other areas of government.

I think that the over-the-horizon product is critical and will be more important to us in the future, particularly when you consider how the funding processes operate in cycles and how we need to be very prepared for new policy initiatives to be in the cycle of the budgetary process in order to acquire resources in time to have an impact. In law enforcement one of the problems is that we are always lagging because of that process. If we took cognisance of some strategic intelligence we could perhaps be ahead of the game in some of these areas.

Speaking as Commissioner of the AFP, I can say that we are clearly now getting funding for things where we are just playing catch-up because the lead time to recruit people is too large.

Certainly, the lead time to recruit experienced people is much larger. So it is an issue for an entity such as the ACC.

Mr KERR—That issue relates back to what OSCA was originally established to do, which was to develop over-the-horizon strategic papers more or less of the nature of the defence white paper, which looks forward to future threat assessments and then allows budgets and planning to refocus around the best available intelligence as to the appropriate deployment of resources. In our discussions with the CEO, Mr Milroy, he spoke of making available a publicly edited version of the crime assessment, which I certainly would welcome. Similarly, something in the nature of a white paper in a strategic environment would be very valuable.

Commissioner Keelty—I think the board asked for the Picture of Criminality document to be in two versions: an open version and confidential version. I would not want my evidence to be misconstrued. My starting point was with you, Mr Kerr, and that is that there has been enormous progress made in this area. It has been very professional and something that the ACC should be proud of. As a sister law enforcement agency I am proud to see that they have gone in that direction.

The Picture of Criminality is a very good document. My only concern is to make sure that we are keeping the over-the-horizon aspect to the intelligence product. As you know from previous experience, in a certain environment airport security or aviation security may become an issue. Then you detract that from the over-the-horizon stuff that you are working on because you have been given a body of work with a time line and that diverts a significant number of resources. The issue for the CEO is to deal with that and also keep an eye on the future and to always manage the work—

Mr KERR—It is in the nature of public administration that the urgent often displaces the strategic.

Commissioner Keelty—Absolutely. For any students of public policy it is quite interesting to observe that in action sometimes.

Mr KERR—I will ask one other question. One of the difficulties we have had is that the usual range of suspects who make submissions to us have not come forward. That has been disquieting to members of this committee. There has been some reference to a couple of state ministers and police commissioners but, in the main, agencies which have historically made submissions to us have not this time. Mr Milroy says that that is disappointing to him because he thinks that they are all very satisfied and if they are why don't they just say so? From our point of view it is puzzling and I wonder whether—you chair the board—there has been some broad agreement that there will only be one voice in this? It is unusual and we are trying to unpick it. It is very difficult to make these assessments if some of the key players that we are being told are satisfied about this—and everybody is happy—are not telling us that. It is a bit tricky to unpick this and work out why people are not coming forward—even just to say, 'We're happy,' if that is the case.

Commissioner Keelty—There are two ways of looking at it. You can be optimistic and say that things are kosher. I can guarantee that if any of the board members or any of the jurisdictions were unhappy you would hear about it. Privately, I could guarantee who would appear before this committee. I could group them into people who are still fans of the old NCA

and disaffected by its closure, people who still wonder and always will wonder about the powers vested in an organisation such as the ACC—they are likely to be the same commentators I had on my back this time last week, although they have been quiet since the weekend—

Mr KERR—They are right behind your back right at this moment.

Commissioner Keelty—and there is the group that is actually doing the work. The board did discuss how it would represent its views before you and the board decided it would put a paper forward. Even though I represent the board, if there was any disquiet from any member of the board you would know about it. I have to say that I take some level of comfort in that. It is a robust board. Those of us who have been around this game for some time are quite surprised at the level of commitment and the level of non-jurisdictional bias there is in trying to get the job done. People represent their views. It has actually surprised me.

I had no idea that this would be final way that the ACC would be put together. When I was given this task, I thought, 'How much of my time am I going to have to spend in trying to get consensus on the board?' I have to say that the CEO has played a huge role. I cannot speak highly enough of Alastair Milroy. He engages individual board members and takes the time to integrate new members into the board. He has done a fabulous job. That has worked well and has had a lot to do with the way that consensus is reached by the board.

I guarantee that there has been no conspiracy to prevent any disparate views any board members might have from getting to you. You should take some level of comfort from the fact that they have chosen to go about their appearances in the way they have. I am sure that, if there had been anything different, your question to me would have been different. It would have been 'I've heard from so and so that you stood over them and told them this, that and the other thing', which is obviously not the case.

CHAIR—Mr Keelty, we have not heard any such suggestions and indeed we are reassured by your conclusion as to why things are as they are, although we might be tempted to invite you to give some evidence in camera about those three broad groupings that you defined. But on a more serious point, what is of particular concern—certainly to me and to the committee generally—is that some very serious allegations have been levelled against at least one jurisdiction. It mystifies me as to why representatives of that jurisdiction do not avail themselves of the public opportunities that are available to them if not to put the record straight then at least to put their case. This committee believes very strongly in procedural fairness. That is one of its guiding principles. We try to afford that to witnesses or individuals that have not been kindly referred to within public hearings.

Senator POLLEY—In the submission, in the part about the gathering of intelligence, reference is made to the shaping of that and to not editing it. Do you want to elaborate a bit further on that issue?

Commissioner Keelty—One of the strengths of the ACC is its preparation of the national criminal intelligence priorities. One of the difficulties in law enforcement is that for a long time we have used the parlance that law enforcement should be intelligence led. The ACC has, in fact, created a model that sees it being led by its intelligence. It creates its priorities and undertakes its work according to those priorities. The issue that I think is unquestionable is the number of

strategic assessments that have been done and the quality of those assessments. My comment to Mr Kerr was that we ought to be careful that we do not, in the day-to-day activity, lose sight of those important strategic issues that law enforcement needs to focus on not in 2005 but in 2007 and how we ensure the appropriate resourcing of the ACC to undertake those matters as they arise.

Senator POLLEY—In your submission you say:

The Public Service Act does not provide for the suite of investigative and discretionary powers available to the Commissioner of the AFP under the AFP Act to address misconduct or corruption.

You go on to say that the act does not direct officers to answer questions and undergo random drug testing. Is that something you would like to make a further submission on?

Commissioner Keelty—As with my own organisation, integrity is the ACC's stock in trade. We have to accept that if organisations such as ours are made up of people from the community, and if drug taking is part of community activity, then we have to ensure the integrity of the organisation by having appropriate professional policy regimes in place to minimise the undue influence of corrupt activity on the organisation. The ACC, just like a police force, needs to be beyond corruption. The government and the community will have no confidence in the ACC, or indeed the AFP, if we cannot account for the activities of our people. Some standards have been set.

The AFP has certainly had proactive professional standards policies on drug taking for some time. In fact, whilst we already had random drug taking tests, when I became commissioner we introduced 100 per cent random testing of our work force for drug taking. We looked not only to the critical areas—remembering that the AFP and, to a degree, the ACC are now dealing with much higher levels of intelligence and product—so we have targeted areas for those sorts of activities and we also have across-the-board drug testing in the organisation. Anything that improves the professional standards of the ACC, or even my own organisation, has to be a good thing.

Senator LUDWIG—Does the AFP have a separate reporting mechanism to the ACC for performance or issues of concern to the AFP, or is that dealt with through you, as a board member?

Commissioner Keelty—In terms of performance reporting?

Senator LUDWIG—How do you find the ACC's performance? Is it responsive to AFP requirements? In other words, how good is it? Does it serve your needs?

Commissioner Keelty—Senator Ludwig, as you would know from sitting on another committee, there has been a lot of collaboration between us on how we have developed our performance indicators. In fact, one of the police jurisdictions is now emulating the ACC model. I think that what Alastair has done is pick the eyes out of a number of models around the country. They are different, but they are very much in the same direction in what they are now reporting. Of course, we are reporting on different—albeit similar—issues.

Senator LUDWIG—You might have missed my point.

Commissioner Keelty—I might have missed the question.

Senator LUDWIG—I refer to how the AFP view the ACC in terms of how it performs and how it works—because, of course, the ACC adds to the AFP's operation; otherwise you would not need the ACC and you would do it yourself. So it provides a service, in part, and it provides assistance, in part. How responsive is it to the AFP's needs?

Commissioner Keelty—I think it has been quite responsive. Remember that a lot of the focus of the ACC has not necessarily been in the same area as the focus of the AFP—examples being the underworld killings in Victoria and the outlaw motorcycle gangs, which by and large tend to be the focus of the state jurisdictions rather than the AFP. So in a sense we are complementing each other. But of course the AFP would defer to the ACC on those determinations where we require the use of the coercive powers. There is actually quite a matrix of law enforcement potential here if you consider the powers now vested in ASIO. So, depending on what the crime type is, there are a number of options, whether they be through the ACC in a determination or through ASIO, whereby the AFP can fulfil its role. I see the ACC as complementing the AFP and, hopefully, the AFP as complementing the work of the ACC, particularly where the ACC needs to conduct overseas inquiries. The AFP already has quite an extensive network in overseas countries. Hopefully we are value adding to the ACC as much as the ACC is value adding to us.

Mr KERR—Maybe I am paraphrasing Senator Ludwig wrongly, but what I think he may be getting at is this: if you were not the chair of the board and the ACC were run by somebody else and had no structural engagement with the AFP, how would you assess the value of that organisation to your work? Do you make an independent assessment of that or is it all now part of a conglomeration that does not make that kind of assessment?

Commissioner Keelty—It stands alone and is quite distinct in the sense that its intelligence product is an intelligence product that we seek and receive from it, particularly in the area of transnational crime and particularly in areas where it sees crime within a particular jurisdiction or across a couple of jurisdictions through a determination that has an impact for us. I do not know that it makes any difference in reality that I am in both chairs. I think the organisation is successfully operating in a way that is complementing us, and hopefully we are adding some value to it.

Senator LUDWIG—At point 65 of your submission you state:

> The AFP notes however that the ACC does not have a dedicated policy capacity, with responsibility for the development of ACC policy shared by Executive Services ...

It goes on. Do you have a view that there should be a policy capacity within the ACC?

Commissioner Keelty—Yes, there should, for a number of reasons. One is that the demands placed on the ACC are quite distinct to the demands placed, for example, on the AFP's policy area, and the ACC, by virtue of its role, will form a view as an organisation in areas of policy. I think for all of us the current environment of policy making in law enforcement has been so volatile and so voluminous that the ACC can value-add in those areas because it does and will

see things differently to how the AFP will see them. It needs to be resourced in that area to enable it to make a positive contribution to policy.

Senator LUDWIG—In the conclusion of your submission, at paragraph 81, you stated:

Significant challenges remain however. A focus on intelligence analysis and operations rather than traditional enforcement investigations ...

Have you formed a view that they concentrate far too much on traditional enforcement investigations rather than on what you say their focus should be on, which is intelligence analysis? Are you critical of that?

Commissioner Keelty—Yes, I am. It goes back to the point I was making to the deputy chair—that is, there is no other body in law enforcement in this country that can provide the over-horizon strategic assessment of what is coming around the corner in terms of law enforcement. If you look at the broader policy perspective and look at where governments are right around the world, you will see they are investing less money in traditional areas and more money in law enforcement, particularly internal security. To me, that is critical because, if an appropriate security regime is in place, it then allows for other areas of public policy to be appropriately funded—if we get it right. If we get law enforcement right and we deal with crime and crime prevention in an appropriate way then health, education and other areas of public policy have to and should benefit.

Whilst the focus is on us at the moment, this is a transitional period. To take a 10-year look at where we are at this point in time, we have a big focus on terrorism, transnational crime and the trafficking of women and children. They are crimes not focused on before by law enforcement agencies. But we need to know ahead what is coming around the corner so that we can maximise performance, focus resources in the appropriate way and have the resources to do the work—and also to enable and to properly benefit the other areas of public policy, the critical areas of public policy.

I am talking from a number of years of experience of looking at the capacity-building work that we have done in other countries. Unless we occupy the youth and unless we have programs for education and employment then I am guaranteed a job for life—maybe not in this position; I would not be so presumptuous. But I am guaranteed a job for life in law enforcement because we will never deal with the problem. Law enforcement should be about prevention. It should be about having an end game where we minimise the number of people who transgress, we deal with them appropriately and the community gets on with life.

Senator LUDWIG—We are getting a bit tight on time but I have one last question, if the chair permits. Were you not then remiss when, in answer to a question in relation to AUSTRAC, you said you had a personal view but the AFP board did not in that AUSTRAC provide intelligence about a range of matters including money laundering and those types of issues? We have FATF, the Financial Action Task Force. They have nine special recommendations dealing with terrorist financing. They have 40 others, but let us deal with the nine on terrorist financing. This government, from about 2003, started talking about implementing legislation to deal with those. As yet, there has been no legislation, so it has been around for a while.

I suspect, if we look back at criminal intelligence information that has been provided, we would see that it would also include that there is terrorist financing, that there are money laundering issues that have been aired and that they are significant issues that should be addressed. AUSTRAC plays a role in that, although it is not a regulator as such because there is no regulatory framework to underpin it, as to date we have not met FATF requirements for it to be a regulator—or if it were to be the regulator in this area in any event.

So it came as a surprise to me when you said that you have a personal view that AUSTRAC should be on there but it seems that the board may not have considered it as a requirement. In my personal view, not only should the government meet those requirements of having exposure draft legislation in place to deal with terrorist financing and to deal with those nine recommendations but also AUSTRAC should be developed to include those powers to allow it to be a regulator if necessary and to sit on the board of the ACC.

Commissioner Keelty—Obviously, I cannot comment on government policy but, firstly and foremost, I should declare a conflict of interest in that I chair the Asia-Pacific Group on Money Laundering, and the mutual evaluation of Australia's adherence to the recommendation of the Financial Action Task Force on Money Laundering is to be deliberated upon at our next meeting.

The second point is that I would not want you to misconstrue what I was saying. I do not have any difficulty with AUSTRAC being there, or with whoever else needs to being there. I was being very careful not to represent the views of the board when we had not specifically addressed the issue. Why we have not specifically addressed the issue is that, at this point, I think the urgent thing that we wanted to see occur was the addition of the Commissioner of Taxation. But I am more than happy to take back to the board the question about representation from AUSTRAC, because I am a firm believer in what AUSTRAC can provide, and I think it makes sound sense. But, obviously, it will ultimately be a matter for the government as to what they will legislate.

Mr KERR—Can I, as Deputy Chair, apologise on behalf of the chair for the unflattering remarks referring to you as a public servant, and taking matters in relation to your superiors—

Senator LUDWIG—We know better.

Mr KERR—We know better.

CHAIR—Thank you, Mr Kerr, for the clarification. Thank you Commissioner Keelty and Mr Nicholl for your attendance and your helpful advice.

Proceedings suspended from 11.11 am to 11.28 am

JAYAWARDENA, Ms Pradeepa, Policy Lawyer, Law Council Secretariat, Law Council of Australia

RAY, Mr Ross, QC, Treasurer, Law Council Executive, Law Council of Australia

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I now invite you to make a short introductory statement, after which we will move to some general discussion and questions.

Mr Ray—The Law Council is the peak national representative body for lawyers in Australia. It represents some 50,000 lawyers. We are here to raise some concerns about the composition of the ACC board, the role and powers of the CEO and a number of other items such as the privilege against self-incrimination, legal professional privilege, the right to representation and the subsequent use of evidence.

We confirm that there is a limited ability to comment in relation to the investigative effectiveness of the ACC. We are very much on the outside and we cannot assess information about the actual work of the commission because of the reality that it is secret and not made available to us. We do, however, support the establishment of the ACC and we support the structure of defining and limiting powers and responsibilities through legislation. We now propose to go on and express some of the concerns.

The board itself—and you are all well aware of the construction and composition of the board—is a matter of concern. It is appropriate that the specialist parties such as the AFP, ACS, ASIC, ASIO et cetera are represented on the board and it is also appropriate that there is representation of the enforcement agencies from each of the jurisdictions. That being said, there is concern that the structure of the board is defective. We are of the view that the CEO plays a key leadership role in the ACC, and yet that CEO does not have voting rights. We are of the view that that CEO should have voting rights. We express concern about the dominance of police membership, that you have nine votes out of 13 and that that gives an unfortunate balance that should be corrected. Further, we are concerned about the absence of AUSTRAC on the board, and that absence is inexplicable and should be cured. Further, we express a view that the intergovernmental committee should have its role increased.

I will now deal with each of those. The CEO has got a number of key roles, and they are known to you on this committee. It is a central role of obtaining and assembling evidence, managing and administering the ACC, appointing legal practitioners and the dissemination of information. Notwithstanding that pivotal role, we are concerned that the CEO is not in a position to vote. The CEO is in the perfect position through his or her leadership of the operational aspects of the ACC to have a complete, full, national view of issues. That is important because many members of the board, although appropriately qualified, cannot help but bring a more parochial and state oriented vision to the ACC. It is our view that that can be balanced and it is entirely appropriate for the CEO to have voting rights. One of the reasons for that is the dominance of police membership on the board that I touched upon before.

The police membership is concerning. The role of the board is vital in setting intelligence priorities, strategic directions and putting a federal focus on the issues to be dealt with. Not only are we concerned that it is inevitable that the police membership will introduce a more state oriented focus but also it is very concerning that the membership is constituted as strongly as it is by leaders of the police forces. That must give a standard police investigative view to a number of operations that should not have such a view—for example, the determination of whether an operation or investigation should be classed as a special operation or investigation and a number of other issues. We are concerned, therefore, about that dominance.

Further, we find the absence of the Director of the Australian Transaction Reports and Analysis Centre puzzling in the extreme. It is very clear that that money-laundering investigative power should be part of the ACC role. It is a central component to the detection, monitoring and dealing with serious crime and major tax evasion, and it should clearly be part of the ACC.

Further, we express concern about the intergovernmental committee and indicate that the presence of that committee—a duly elected Commonwealth, state and territory group with high levels of accountability to the public—puts an important national focus on the work of the ACC. It is important that that role be perhaps increased. It is my understanding that the ability to refer matters from that committee to the NCA was an important referral role. That referral role was removed when the ACC was created. That is a matter of concern and capable of remedy.

As to the conduct of examinations themselves, the examiner, of course, can conduct an investigation as he or she thinks fit. We at the Law Council have formed a view and strongly believe that the examinations should be conducted in accordance with the fundamental rules of evidence. Rules of evidence provide a level of natural justice, and natural justice underpins the logic of each of the rules. We confirm that that would be appropriate. There is a right to legal representation. We expressed some concern when, historically, an examiner attempted to restrict the presence of a legal representative. That was then the subject of the court ruling. The Law Council has strong concerns in relation to the wide discretion provided to examiners to regulate the conduct of proceedings pursuant to section 25A(1). We indicate that it would be better to have that more prescriptively set out to enshrine a fair and proper process.

The Law Council is opposed in principle to the provisions that unduly abrogate or restrict the privilege against self-incrimination and legal professional privilege. It is concerning that the provisions surrounding the abrogation of the privilege are so overly broad. We highlight the function and operation of section 30. We believe that what is clearly lacking in the ACC Act is an obligation to caution in relation to the application of the use immunity where the privilege is claimed. It is one thing, of course, for people to exercise their own rights. It is another thing to ensure that the person carrying out the examination fairly points out from time to time the hazards that are about to occur in the course of a hearing. It is unfair to frequently place a heavy duty such as that on people who are subjected to this examination. It is a very stressful process. It places a high degree of strain on the decision-making process and on the person providing answers. People expert in the law who are conducting court cases are frequently too slow to take objection in court. They are trained experts. You have people subjected to a process where they are providing evidence to the ACC and the examiner and to expect them, to a nicety, to weigh up their own rights creates an unfairness that we are concerned about.

We highlight that, in relation to legal professional privilege, section 30(3) and (6) give the guidelines that a legal practitioner who does not disclose the name and address of a client is exposed to serious criminal penalties. The ACC Act purports in fact to protect legal professional privilege, but it is somewhat odd that a legal professional can be sent to jail for refusing to disclose the name and address of a client. It seems to us that that in fact does challenge legal professional privilege and that it is, with respect, inappropriate.

Further, on the use of evidence from examinations, the Law Council raises a concern in relation to the use to which evidence obtained by the ACC during examinations may be put. There was a case recently where transcript from an ACC hearing was used in the course of a trial where witnesses were challenged. The ACC hearing material was used as a prior inconsistent statement. That, of course, creates some real issues about the effective provision of that material, the circumstances that it is provided in and the circumstances of its subsequent use.

Mr KERR—In the circumstance of a prior inconsistent statement, how would that be admissible if it was the subject of a claimed privilege?

Mr Ray—The concern there was that the tape itself was played, and in my view there may have been ways around that by excising a very small extract of it in the course of out-of-court discussions between the prosecutor and the defence counsel. It could have been dealt with in another way. The concern is that it was not and the tapes were used as proof of the prior inconsistent statement. I do not know enough—I have not read the transcript of that particular exercise—but the fact that material elicited through the course of an ACC hearing subsequently surfaced in this way highlights the concern.

Mr KERR—I appreciate the point that you are raising—that people should be warned about taking the point of privilege. That is a different point. But unless privilege has been claimed, what is the difference between admissibility in that instance and, say, a statement made in a police record of interview or any other formal questioning process that the law authorises?

Mr Ray—There is no real difference. The difference is the seeking of the privilege and the fact that, through the fact that answers are compulsory—that is, the answer must be provided—a document is created that otherwise would not exist. That is, you have, through the coercive power, an answer that a witness has given that in circumstances without that coercive power would not exist. You would not have the prior inconsistent statement. The person was therefore in that way disadvantaged as a result of it.

To go back to it, we express a greater concern in relation to the structure of the board and a number of other issues. We have previously provided the committee with a document that sets out our concerns. I believe you received that yesterday. In 2002, you also received a full submission in relation to the then concerns of the Law Council. We reiterate those concerns and commend that earlier report to you as well.

CHAIR—I was very interested in your comments about the unfortunate balance that exists on the committee against lawyer representation. I was also interested in your fairly strong remarks about parochial and state oriented views being represented on the board. I am not sure whether you were in the audience when Commissioner Keelty was making some remarks to the effect that he thought that the board operated very much on a consensus basis. In fact, I got the

impression that there were not many votes. That is something that I will seek to clarify later on when the chief executive officer of the ACC appears before us. Your views seem to be slightly at odds with the views put forward by Commissioner Keelty as to how he sees the board operating—that is on the basis that I have interpreted his comments correctly. Do you have any evidence to back up your point that an unfortunate balance exists on the board and that there are, if I can paraphrase you now, detrimental parochial and state oriented views represented on the board?

Mr Ray—It is clear that I cannot give evidence in relation to the implementation of decision making and the extent to which those views prevail. The reality is, though, that the structure lends itself towards that weakness. There are two problems. One is the state orientation and the extent of the state orientation. The other problem—the concerning problem, of course—is the dominance of the police membership. So it is not just the state fragmentation; it is the combination of that with the police membership. With the police membership, when you are dealing with decision making on whether you declare something a special operation, there is a real temptation for a decision-making board constituted in the way this is to extend what must be very special powers that must be very carefully used in a broader investigate way to cover normal policing. That is only a natural consequence of the constitution of the board. It is a concerning one. Of course we do not criticise any individual commissioner of police: they are all very capable people. But it is not surprising to think that police are loath to criticise each other and loath to create issues for each other.

Mr HAYES—That's a long bow, isn't it

Mr Ray—Sorry?

Mr HAYES—You are drawing a long bow there.

Mr Ray—I have been involved in prosecuting cases and I have been involved in the criminal justice system for nearly 30 years. A lot of my work has been involved in prosecuting major trials. It is a reality that very capable people are of course products of their environment as well and that the environment in which they have worked for 25 years helps to form their views, as it has helped to form mine. Therefore, if you are dealing with an aggregate of nine commissioners of police you are dealing with people who naturally have an interest in law enforcement but who would potentially make different decisions to, for example, an independent and retired judicial officer who might head a crime commission in another structure.

CHAIR—Presumably, when you reflect and comment on the unfortunate imbalance, you have in mind a different emphasis and a different approach by your board that would have either more lawyers on it or a better balance of legal representation on it. I am trying to surmise what you are getting at. So would it be a board that would take a more strategic approach to the discharge of its duties as opposed to a more investigatory approach? I suppose my question would be: is there any strategic emphasis or direction that the current board has missed by focusing on that? I have not been trying to lead evidence. I have just been trying to define what you see to be any particular strategic failings of the current board.

Mr Ray—One of our difficulties is that we are not on the board and we are not active within the ACC. Were we to be so, there would still be some secrecy restraints upon us. The reality is

that most of what we say has to be an objective assessment of the structure without proof of departure, because we are not there to witness the departure itself. We say inherently that certain structures if they are flawed do not need proof of departure because it is the structure itself that can be cured by, for example, altering that balance. It is very important that each of the commissioners plays a contributing role—do not get me wrong about that. Their knowledge of law enforcement in each of their states and territories is absolutely vital. But we have to be very cautious, when we are dealing with such powers, that we do not permit the current climate, particularly the concerns about terrorism and the playing upon the fears of the community, to intrude. At a time such as this we have to very carefully monitor the application of these extraordinary powers that the ACC has. We say that that balancing process is made more difficult for a board that is constituted in the way in which this one is.

I do not suggest in any way that there are male fides or anything such as that. We are dealing with very capable people who do a very good job. But they do a job and make decisions based on their backgrounds, and their backgrounds are not the backgrounds of an independent judicial officer, for example, that is very mindful of the rights of individuals and the need to be very cautious when one declares, for instance, an operation as a special operation, therefore invoking the coercive powers.

Mr KERR—Those are powerfully made submissions. I want to take you to a few issues that have arisen in discussions. Concerning the contempt proposal, there have been a number of concerns about persons who simply refuse to respond to questions. You have made a point that you think the penalties are very high in relation to these threshold refusals, but the evidence that we have received is that there is a considerable delay between the time in which a person comes before the ACC and any effective judicial determination of penalty and, indeed, some of the penalties have been rather modest. The remedy that is being suggested by some is that there be a contempt power, and an alternative that has been put before us today is that the presumption in favour of bail should be abrogated in these instances. The third proposal that was addressed and suggested by this committee is that there should be some protocol between the Commonwealth and the courts to enable priority to be given to disposition of these matters. Could you just tease out some of those issues from the Law Council's point of view?

Mr Ray—We would not support a reversal of the presumption in relation to bail in these circumstances. That seems highly punitive when ordinarily, if you were going back to fundamental principles, you would be looking at the protection of the community. A person would not be released on bail in a reverse onus case where, for example, there is a murder charge, and that is logical. To simply reverse the onus here seems to be really a threat rather than a logical response to a risk to the community and a threat to the individual to then behave and give evidence in accordance with the wishes of the examiner. We would not support that. It is desirable that justice is dealt with as quickly as possible. If it is the view of others who are experienced that there is a delay, which then means that it can impact upon the nature and quality of the penalty, then I am confident that the council would support a system that more rapidly dealt with the issue of the contempt and that would be much fairer for all parties.

Mr KERR—One of the other issues that was raised is the questioning of persons who are subject to trial. We have to tease that out because it has been raised obliquely rather than directly. The suggestion is that there needs to be some mechanism to facilitate the questioning of persons who may be the subject of current proceedings. Because I am not certain of what is precisely

being proposed, I wonder whether you could address what you believe should be the principal position in relation to the examination of persons who would be the subject of current proceedings.

Mr Ray—It would be wrong to coerce a person to give evidence in circumstances where the subject matter was the subject of a criminal trial and that person would be in a position in due course of deciding whether he or she would give evidence. It would be a matter of concern if the coercive power were applied to force an accused person to divulge their position before a trial. That would demean the right to silence and demean a fair trial thoroughly and inappropriately. So we would express real concern about that. Of course it does not mean that there should not be an examination, full stop. It is merely a question of deferring that issue and that examination until the trial itself has been dealt with.

Mr KERR—And you would see nothing wrong in principle with that person being subject to examination on matters which are external to the proceedings and the subject of a criminal charge? Obviously, that is a matter where issues may blur, but it is a question of fact. In principle, if you can make that separation, you would make no objection to that?

Mr Ray—It is a very theoretical issue. It is very hard to make that separation, that distinction, between a matter that is the subject of a normal criminal trial and something that is properly the subject of an ACC investigation. We are always concerned to ensure that an accused has a fair trial. Anything that erodes that is a matter of concern, and this has the potential to erode it. So it is (a) the area of the investigation, and (b) the circumstances and timing of the eliciting of information that might then compromise the fairness of that trial. The prosecutor should not receive a proof of evidence from the accused prior to an accused running a trial.

Mr KERR—As to the warnings that you suggest are appropriate in relation to examination, what would you propose should be the required warnings, and how should they be administered and when?

Mr Ray—Ordinarily, a person going before an examiner would seek legal advice. That is not a matter that the examiner should assume has in fact occurred. It would be our view that the examiner should, as judicial officers do, indicate that a person does have a right to have legal representation. There are a number of rights that should be set out at the commencement of a person attending for the purpose of an examination. If, in the course of a hearing, a person is obviously about to make utterances that will self-incriminate, it would be another matter that it is appropriately raised at that time by the examiner.

Mr KERR—You may well self-incriminate when the examiner does not even know you are about to. Is it your proposition that there should be a general warning about self-incrimination at the commencement of the proceedings? That is what I understood. Is that right??

Mr Ray—Yes, that is our primary position.

Mr KERR—Does that occur at the moment? I am not certain.

Mr Ray—I do not believe it does.

Mr KERR—We have the examiners coming before us this afternoon, so we will inquire.

Mr Ray—You will find out.

Mr KERR—Your proposition is that there should be a protocol or a framework that says: 'Before an examination commences: (1) if you do not have legal counsel, you should be advised of your right to have legal counsel; (2) you should be advised that the act provides penalties for failure to provide answers; and (3) notwithstanding that, there are rules which entitle the exclusion of some evidence if it is self-incriminatory but it has to be claimed.

Mr Ray—Yes.

Mr KERR—What, if anything else, should be addressed?

Mr Ray—They are the major concerns set out in our submission. The only additional concern that we have is that it should be made clear to examiners that, were they to become aware in the course of a hearing that a person is venturing into an area where it is likely that an utterance will be self-incriminatory—and of course you do not know until the utterance is made, but we have all been in court cases where you can see the direction of questioning and the nature of the answers—that can be raised at that time.

Mr KERR—I am attracted to the first of your propositions, but I am not sure that I am attracted to the other set. If you imagine a situation where a normal police interview is conducted, people are warned; but, when someone ventures close to material which is incriminatory, the police do not have to say: 'Hang on, Fred, you are just about to incriminate yourself.'

Mr Ray—That is not surprising in the course of an interview with the police, but if you are dealing with a court case—for example, where a person is giving evidence in a court case and is not represented—you will frequently find that, when a person is getting close to making such utterances, a judicial officer will stop them and advise them of their rights.

Mr KERR—I understand that, but that is a judicial process. This is an investigatory one, and the parallel I am drawing is with the ordinary police investigation. Albeit this has powers of compulsion, but—

Mr Ray—It is because of that power of compulsion that it is our particular concern that the warnings be given at the outset. They can also be given in the course of the hearing if the examiner is—

Mr KERR—Speaking for myself, I fully understand the first and, if it does not happen, I think I would pursue it. As to the second, I would invite you to make a further case in relation to that, either now or later.

Mr Ray—Yes. We will not do so now, thank you. You spoke a moment ago and raised with me the issue of the composition of the board and the fact of that composition and, to our knowledge, whether it in fact leads to decisions that are inappropriate. As with applications for ostensible bias, for example, it is not the fact of the decision; it is the perception that is

concerning. What is concerning is the perception of the structure that has the composition that it currently has. We cannot take it beyond the perception and the suspicion of that structure being inherently unhelpful.

Mr KERR—I understand that. But, again, reading your submission very briefly—because I have only had it in front of me today—it did not seem to me that the remedy you propose is likely to do much about that. Firstly, making the CEO a member did not seem to me to fundamentally change that structure. Secondly, giving to the ministerial council the power to give directions in relation to particular matters that seem to them to be important also would not, I think, in practice alter the weight of that. So you have identified an ill but the remedy proposed does not seem to address the circumstances. I merely suggest that, having identified that, it may be worth while having a supplemental note. I think to remedy the issue that you have addressed neither of the mechanisms you have proposed would take us very far.

Mr Ray—It was an attempt perhaps to be realistic and it might be a somewhat understated suggestion that will not have a dramatic impact on the structure and the ostensible perception that people would have as a result of that structure. Weighted voting is another issue that can be raised. There is a range of ways of dealing with such issues; we have only offered two. Weighted voting is another issue.

Mr KERR—Have a bit of a think.

Mr Ray—Yes, certainly.

CHAIR—Just before we leave that point—forgive me for interrupting, Mr Kerr—having formed the view that you have about the inadequacy of the structure, particularly in terms of that structure being able to come up with outcomes that are better balanced, there are other oversighting bodies, and this committee is the most authoritative oversighting body as regards the ACC. Do you see that as sufficient protection as regards the role of the ACC against some of the concerns that you have expressed?

Mr Ray—It is a protection. The protection can be stronger. For example, there could be built into it a more dominant role for an independent judicial officer or a retired judicial officer so that there is a more active and independent oversight that is immediate within the structure. One of the problems I think of having a committee such as this as an oversight watchdog is that there is significant distance between the active daily decision making of the board and the reality check that a committee such as this can bring to bear. We need to relieve the perception of the biased make-up of the board in relation to its daily decision making. It is the daily decision making that affects the rights of individuals. Yes, the committee does play a very useful role in that oversight but it is a remote control structure.

CHAIR—You do not think that having an individual with that sort of oversighting power would be disruptive to the operational efficiency of a structure like the ACC or to a board that runs the ACC?

Mr Ray—Sometimes exercising decisions to be mindful of individual rights does impede operational effectiveness. But if we were to permit operational effectiveness to be the overriding factor, we would have police exercising coercive powers constantly. For example, there is the

new Major Crime (Investigative Powers) Act in Victoria. There is an increasing trend towards legislation that erodes the rights of the individual. We simply say that there is always a balance to be struck. You must have the strength of the coercive power, of the investigative tool, in certain circumstances. But it must be rare. It cannot be erosive so that the coercive power becomes a normal investigative tool. That is why we say that the presence of, for example, a former judicial officer is an integral part of the structure, together with the CEO that has a vote. That is an important alteration, if you like, to the perception of the structure as it is now.

Mr KERR—To take this point a little further, if you were perhaps more robust in your submissions you might be minded to say that the CEO ought to be chair of the board, or that the CEO should have a number of qualifications which would take them outside the normal pattern of law enforcement. One of the fundamental philosophies underlying the change from the old NCA to the ACC was the view that persons who were not experienced in law enforcement should not have the strategic overview or oversight of the organisation. To the extent that the state commissioners have become involved, we have heard consistently that it has made for much more effective cooperative arrangements. So, from a law enforcement point of view, it has achieved some significant advances.

But the critique you are making is that it has perhaps become too much the subject of decision making which can extend the role of the ACC into areas where we would not expect it to be, and that one way of dealing with that is by looking at its management. I invite you to put forward some more robust solutions—not that we would adopt them necessarily—bearing in mind that nobody wants to. A lot of people want to go back to the old format but, essentially, that policy decision has been made. It is not likely to be readjusted, whatever my or the chair's individual view. I think we have to accept that that policy change has been made. But offering a critique and then making very small adjustments does not seem to me to be much worth fighting for, to be honest. So perhaps you could take that further.

The other point I wanted to explore was your suggestion that requiring lawyers to provide names and addresses of clients somehow abrogated legal professional privilege. I must say that I did not raise any objections on that basis and I am usually pretty astute in doing so. I thought legal professional privilege covered advice provided to people. I did not think it was a privilege that extended to the fact of somebody's identity or where they lived. It seems to me that it is a privilege that is extended to permit somebody to obtain confidential advice in relation to their rights. But the protection of that basic data does not seem to me to be encompassed by legal professional privilege, in my understanding of it. Now, my understanding may be deficient, but I did not twig to the suggestion that it was a right that would ordinarily be protected. It seems to me that that information would be capable of being obtained on subpoena, and that even if you were to raise the objection of legal professional privilege it would not be upheld.

Mr Ray—It obviously depends on circumstance, but what it does do is coerce when a legal practitioner is approached and the basis of that approach is: 'I'm going to seek from you confidential advice.' In terms of going to a solicitor, the fact of dealing with them, and giving them a name and address—one would assume a name would be given—in circumstances where, if that person knew that that material would be released or could be released to an investigative body such as the ACC, the contact would not have been made, we simply say—

Mr KERR—I reckon there are lots of crooks who have made lots of contacts with lots of people who would not have made them if they had known that—

Mr Ray—That is true. But the inducement to make the contact, to make the approach to the legal practitioner, is the seeking of that advice, and that particular relationship is enshrined under privilege.

Mr KERR—I understand the point, but as I understand it, privilege extends to the advice, not to—

Mr Ray—The fact of contact.

Mr KERR—the fact of contact. Maybe I am wrong. I am usually pretty quick to jump up and down if I think that we are trespassing on a protected right.

Mr Ray—The easiest thing to do there would be to provide you with some cases that would assist you on that point, and we will do so by way of a supplementary submission to you. I must say that it is the first time in my legal career that I have been criticised for not being robust enough in a submission. I find it refreshing, I might say.

Mr HAYES—Going back to the position in relation to people having to come and give evidence before an examiner, would your position on privilege be the same as regards a royal commission?

Mr Ray—About the warning?

Mr HAYES—Yes.

Mr Ray—At the outset there should be a warning to the witness and safeguards set out.

Mr HAYES—How would you see that applying—that a warning would be given at the outset of the discussion?

Mr Ray—The examiner would, upon receiving the person that is about to be examined, recite to the person a number of items that remind the person of their rights—that they have a right to have a legal representative, that they have a right to remain silent—

Mr HAYES—I do not think that they would have a right to remain silent.

Mr Ray—but that in these circumstances they must answer questions. However, if they are concerned about the self-incriminatory nature of the answer they are giving, prior to the handing over of a document or prior to the giving of that evidence they should indicate to the examiner the concern and the objection they have to answering that question. That should be stated at the outset. It can be very easily prescriptively done by an amendment to the act providing guidelines to the examiner that must be adhered to before the examination can continue.

Mr HAYES—As I understand it, people do have the right to have their legal representative present. Has that not been the case?

Mr Ray—It is the case. What you do by not raising it at the outset is to assume a level of information and to assume that people have already received legal advice and that they have made a conscious, voluntary decision not to be represented. That will not always be the case.

Mr HAYES—I think you made it pretty clear that a person wanting to avail themselves of the right to silence ought not be taken any further in terms of contempt in relation to an ACC examination?

Mr Ray—What you are asking is whether a person who refuses to answer can be dealt with for contempt by the examiner or by the ACC?

Mr HAYES—By the ACC.

Mr Ray—It would be our position to think that the person should not be dealt with by the ACC for contempt but that the matter be referred to a judicial officer to deal with.

Mr HAYES—Coming back to structure, I do not want to labour the point but I have got to say that it is an unfortunate choice of words to believe that police commissioners are unlikely to criticise each other or would be reluctant to intervene in someone else's patch. Are you advocating a return to the position of the NCA?

Mr Ray—No. We simply say that the work of the commissioners is very valuable, and their input has demonstrated, as the committee has already indicated to us, that this has been a very effective elevation of the relationship so that there is much better cooperation between state and federal bodies. One of the important things in law enforcement is not only the gathering but the sharing of information. We do not challenge the efficacy of that structure; it is important. However, we do challenge the consequential perceptions that flow with that structure and the voting power that goes with it. We do not say, with a head-in-the-sand approach, that we should simply go back to the NCA. The two models are not mutually exclusive. It seems to us that you can have the benefits that are clearly apparent from this system but that you can moderate the influence of the police presence and the police bloc vote, represented by nine of 13.

Mr HAYES—That is why you were advocating having the CEO as a voting member, which is almost advocating not having a board but having the CEO of the NCA, Mr Crooke, being able to control that organisation—some would say quite effectively.

Mr Ray—I am not sure that one vote would control it. You would have one voter being the most informed person about the daily decision making actively working within the board, having a say at board level and voting at board level, which might more accurately reflect—

Mr HAYES—Implicitly, the CEO would not necessarily be directly responsible to the board; he is a peer of the board at that stage. Would that not be a problem?

Mr Ray—It is different to a standard corporate structure. A corporate structure, ordinarily, does not have the CEO making decisions and voting on those decisions at board level. But here you do have the important need for the person who has the daily management to bring together in a federal structure the disparate positions of different states. The person who is in the best possible position to, if you like, coordinate and to deal with those disparate positions and pull

them together does seem to be that individual, the CEO. In those circumstances why wouldn't you permit a person who is best placed and absolutely the full bottle operationally to play an active role in making decisions?

Mr HAYES—Some might say the buck already stops with the chair of the ACC being the current Commissioner of the Federal Police in that regard, being effectively the CEO to that extent.

Mr Ray—That the chair is a full-time position?

Mr HAYES—No, the chair having ultimate responsibility—not necessarily day-to-day responsibility—on behalf of the board.

Mr Ray—The difference in the position of each is that the chair has a full-time occupation elsewhere—that is, as the chief Commissioner of the Federal Police force. The person that is best placed to inform and to make decisions is a person who has the daily understanding and operation of the function of the ACC, and that person is the CEO. One would have thought that operationally that person is in the best possible position to be active and to assist in decisions at board level.

Mr HAYES—I do not disagree with that point about being active in the system. I just do not see that it follows that that person should naturally then be a member of the ACC board.

Mr Ray—It is merely one aspect of a model to introduce greater balance to the nine of 13 votes from the commissioners.

Mr HAYES—It looks like we are trying to find numbers to get this balance.

Mr Ray—Perhaps I was strong in the terminology that I used about the parochial basis of the decision making, but the reality is that, if you are the chief commissioner of, for example, the Tasmanian or South Australian police force and you are then brought together with others for the specific purpose of sitting on the board of the ACC, naturally a great deal of your time is spent discharging a role as the commissioner of the specific police force where you are employed full time. We simply say that that is a natural consequence of the structure and the structure would be better served by a person contributing and voting at board level to balance the police presence and vote—that person being the CEO, who is absolutely fully aware of the daily decision-making and operational structure and is in the best position not just to pass on information to various board members by way of papers but to specifically contribute and have a say in the direction. The board makes many significant decisions, such as whether something should be a special operation. There are a range of very important decisions and it is the overview that the CEO has that would qualify that person for the vote.

Mr HAYES—I have one more question on something that is not dealt with in your submission but I thought you may have said something about it. It has been dealt with by others. Do you have a view on officers of the ACC who are not police being sworn in with police powers to the point of power of arrest and the ability to use force?

Mr Ray—Yes. It would be the view of the police force that their members are trained. They are properly trained, I understand, on how to discharge those very special duties. Without thinking about the matter in any greater detail, we would be concerned that those very significant tasks would be undertaken by people who did not have the level of training of the police force.

Mr KERR—I would just mention that the secretary has been kind enough to provide me with a copy of the submission by Mr Alastair Milroy. It includes an unclassified document which is the procedures manual of the examiners. The warnings in relation to self-incrimination are provided. In fact, they are provided not only in form but also in a very extensive way along with examples if a matter were to arise. It gives a hypothetical example about an instance where the answer would be required and what could happen to the evidence. It takes a person through that in very great detail. This assumes the presence of a lawyer assisting, because it refers to the lawyer assisting. I imagine that there is probably another part of the document which may actually refer to circumstances where there is not a lawyer present. It does seem that at least a significant component of that matter which you have raised has been addressed. It would be useful, because I think this will be published after today's proceedings, for you to have a look at it and come back to us.

Mr Ray—We would be grateful if we could view that and get back in touch with you. If that is so, why then is it necessary to have section 25A(1) present, which gives a very wide discretion to the examiner as to how the examination is to be conducted? There is a tension between the two.

Mr KERR—Perhaps in this instance the good sense and wisdom of those charged with the responsibilities of conducting these examinations has shaped the way in which that discretion would be exercised—

CHAIR—Most of them are lawyers!

Mr KERR—and it is committed now to writing. I assume it would be available as a public document. Any failure to comply with it would be raised as an unfairness, no doubt, in any—

Mr Ray—If it is public—

Mr KERR—It is public, or it will be.

Mr Ray—It will be made public. If there is, therefore, a practice or code which is publicly committed to, that cures the difficulty that we are concerned about. In the absence of that being a public and accountable document there is a tension with the existing section 25A(1) that seems to be resolved by this.

Mr KERR—It is marked as unclassified; I would not have referred to it otherwise. Our practice is to make the submissions available.

Mr Ray—Yes.

CHAIR—At this stage that reference by Mr Kerr has a yellow submission marker marked confidential. But I am sure that once we go through it we will be able to release some aspects of

references in it. Ms Jayawardena and Mr Ray, thank you again for your attendance and for your advice to the committee. We appreciate it and look forward to hearing from you as indicated during—

Mr Ray—As quickly and robustly as possible.

CHAIR—We will appreciate further submissions. Thank you.

[12.27 pm]

COSTIGAN, Mr Frank, QC, Private capacity

CHAIR—Welcome. Has information on parliamentary privilege and the protection of witnesses and evidence been provided to you?

Mr Costigan—Yes, it has.

CHAIR—I now invite to you make a short introductory statement, after which we will move to some general discussion and questions.

Mr Costigan—Thank you. Might I point out that I have another capacity in that I am the Chairman of Transparency International Australia which, as the committee would realise, is a worldwide organisation, based in some 90 countries, dealing with anticorruption. It was asked to provide a submission to this committee and I took the view that, since I had quite definite views about these matters, it would be very difficult for me to appear before the committee as the Chairman of Transparency International and in my own personal capacity. The organisation is proposing to put a submission in and that will arrive shortly, I understand.

CHAIR—Thank you for that advice.

Mr Costigan—I am grateful to the committee for hearing me at this time. It has been a long morning but it is very convenient to me. There are four terms of reference for the inquiry, but I am not really in a position to comment on the first term because the way in which the ACC, apart from its annual report, operates is something that I have no personal knowledge of. I should say that I was very critical of the way in which the act was passed in 2002 and very critical of the structure of the act. I still have very serious reservations about the structure of the act but, as Mr Kerr indicated, that seems to have been a policy decision. I will go down fighting though. I am still of that view and I think there are matters of principle involved.

There are positives about the ACC Act, apart from criticisms, and I think I should indicate what I see. I have got no doubt at all about the necessity of a national, integrated body to enable a combined attack on organised crime and corruption. Nor do I have any doubt that such a body should have high standards of confidentiality and secrecy. That is true whether we are talking about investigations or the gathering of intelligence. In both situations, the investigator and the intelligence gatherer are seeking intelligence, evidence or information from various sources without knowing in advance for certain what conclusion an analysis of that information will produce. It is essential that such a person have the capacity to go down apparently relevant bypaths or detours that come up in the course of the inquiry. Such a journey may, in fact, turn out to be nonproductive or noninformative and therefore be discarded for the time being, although remaining in the database. But it cannot be put in the public arena, and that is both to protect the integrity of the intelligence and the investigation and to protect the names of the persons who are mentioned in such evidence or who are called to give evidence.

So I have a general view in favour of the kind of body that the various governments have decided to set up. I still have serious problems with the way in which it was done. I repeat those concerns, but they appear in a document that I think the committee has available to it if it wants to look at it. The particular—

Mr KERR—The government paid no attention to me either, I have got to assure you.

Mr Costigan—I find that hard to believe, Mr Kerr.

CHAIR—But in the end, though, I think it is fair to say it was a reasonable outcome.

Mr Costigan—I will not go through all those criticisms. They are well known. One of the difficulties you have is, when you set up a body like this that may be subject to very serious criticism in terms of its structure, inevitably the first appointments to it are people of integrity, capacity and intelligence. One is not concerned—certainly with the current composition of the ACC—that there is going to be any corruption or problems. But if you set up the institution, one must never forget that it is a feature of police forces over a significant period that corruption occurs, and we have seen it in Australia. We have seen it in Queensland; we have seen it in Justice Wood's inquiry in New South Wales; we are seeing it at the moment in Victoria in relation to the drug squad. So one had to be very alert to the fact that a structure might appear to be okay and the people who are running it are certainly okay at the moment but, when it is on the statute books, who is going to be appointed 10 years down the track and what will happen?

If I could just say this: we are living in a climate of increased police powers in all sorts of areas, which are necessary—and one only needs to mention the word 'antiterrorism' to realise that there are specific problems—and there are very difficult decisions that need to be made by government as to where you find a balance. The greater the powers and the greater the secrecy you give to bodies that are involved in those activities, the more important it is that you have appropriate accountability and the more important it is that you introduce into those structures appropriate accountability and appropriate protection of the rights of people who are affected by it.

That is all I want to say by way of a preliminary comment. I might say that, when the committee was told I would not be appearing on behalf of Transparency International, they very kindly and complimentarily invited me to appear in my personal capacity. I did wonder what benefit I could give to the committee but it was suggested that perhaps you might ask me some questions and I would be very happy, to the best of my ability, to answer them.

CHAIR—Thank you. We appreciate the richness and the length of your experience in relation to matters of law enforcement and investigative powers that apply to various organisations that serve governments of all political persuasions. So we very much appreciate the fact that you are here, that you have taken the time to be with us and that you are willing to assist the committee.

We are very conscious of your time restraints, so we will aim to finish by 10 past one. I will start with a general question. The ACC's genesis lies in the royal commissions of the late 1970s and the early 1980s. You have great familiarity with some of those. The NCA was envisaged as a kind of standing royal commission. You have touched on the answer to this question, but if you

would be kind enough to be more expansive: is the rationale for a standing royal commission still relevant?

Mr Costigan—It is a question of language. Even in Victoria we are having a great dispute at the moment as to whether there should be a body called a standing royal commission or a standing police integrity commission which can oversee the kinds of problems that the Victorian government does not seem to understand need independent scrutiny. I am not sure that I would use the expression 'standing royal commission'. I am convinced that you need a permanent body—subject to review from time to time—which exercises the unusual powers akin to the powers which are exercised by a royal commission. In other words, it would have the facility to exercise compulsive powers to require people to give evidence—to require people to give evidence in secret if need be—and to act on that evidence in terms of an analysis of the material that is provided and to disseminate that, with appropriate safeguards, to those other law enforcement bodies which need access to that information. I am convinced there is a need for a body like that. Whether you call it a 'standing crime commission' or a 'standing crime authority' or a 'standing royal commission' may not matter much, except that words are important. If you call it a standing royal commission, then that creates in the mind of the listener an idea of a body which may not be quite what it should be. I am not sure whether that is a full answer or not.

CHAIR—In what way does the ACC differ from a standing royal commission?

Mr Costigan—I am not sure that there is such a thing as a standing royal commission—not in this country. We set up royal commissions to deal with particular inquiries or particular events, and they stop, report to government and cease to exist. What I am talking about—and I think what governments of both political persuasions have talked about—is a body which has some of the quite unusual and compulsive powers which are seen often in royal commissions but which continue on. I suppose the answer is that there is not much difference at all. It is just the wording.

CHAIR—Could the role of the ACC be effectively undertaken by the AFP so that we would dispense altogether with the ACC?

Mr Costigan—Yes, I think so. I think the ACC is almost a subset of the AFP already.

CHAIR—Why do you say that?

Mr Costigan—It really reflects my view that the ACC is, in effect, another police force under the control basically of the AFP but with the assistance and cooperation of the police commissioners of the states and territories. There is no doubt that it has been effective, as you would expect it to be. It has been effective in two areas. One is in the improved cooperation between the police forces of the various states and territories and two is that it has had access to powers of a compulsory kind, which the police forces themselves do not have. So it is not surprising that it has been able to do things that would not be done in its absence.

CHAIR—With respect to the two reasons that you have just stated, people could argue that that is justification for the ACC's existence as a separate entity to the AFP but, in addition to that, would you see the significance of the highly effective exercise of gathering intelligence and

sharing intelligence and the dissemination and use of that intelligence as being a third and perhaps a good reason for the existence of the ACC?

Mr Costigan—I think if you did not have it as a separate body and you gave to the AFP the powers which you have given to the ACC, it would be more likely that you would have problems with the states. I think if for no other reason you are going to get this better working relationship, which is absolutely critical, then you need to draw it back a bit from one police force. That is why I am a bit troubled about the statutory head of the authority always being the Australian Federal Police Commissioner. I think that could have been done better, but no doubt the Commonwealth is spending most of the money.

CHAIR—A lot has been said today—and prior to today—by witnesses who have appeared before the committee about the perceived imbalance between legal representation and police service representation within the ACC generally, but particularly on the board. How do you perceive those statements, including those statements recently made by Mr Ray from the Australian Law Council?

Mr Costigan—It is difficult for me to answer that question in isolation from my basic proposition that the structure of the organisation is not right. Lawyers are not trained as police investigators and one must always remember that. On the other hand, they have a very valuable role in an organisation in terms of their experience in the criminal justice system, their understanding of the analysis of evidence and the conclusions to be drawn from it and also their understanding of the basic principles behind the system of criminal justice and the basic rights of individuals who appear before tribunals and courts. They have a very important role to play there. I think I agree with the Law Council that, when you look at the structure of the ACC under the act, there is not really a major or perhaps even a minor role for that sort of activity. I am not sure that you cure it by insisting on having a few more lawyers. I do not think you do. I do not think that is the problem.

I do not think there is any chance of going back to the NCA, and the NCA was not perfect anyway. There were problems with it and it did need some reform, although the way in which the reform was done left me with some concerns. It may be that an amalgam of the two kinds of structures might work, whereby the police commissioners formed an advisory board to the ACC but were not part of the actual control of the organisation. I would have to think that through.

CHAIR—If you have the time to think it through and you would like to make a further formal submission to the committee, we would be grateful for that assistance.

Mr Costigan—Yes, I will think it through, and if I think I have anything sensible to say I will do that.

Mr KERR—One of the issues that has been agitated in front of us is this problem of the witness that declines to answer questions. Do you have any views as to how that should be addressed?

Mr Costigan—I have never been a great fan of the contempt concept. I think if people are not going to answer questions then they are not going to answer them. My experience when I was doing the royal commission, particularly in terms of confidential hearings—it is true that there

are powers under the Royal Commissions Act which are slightly different to those of the ACC—was that I did not have much trouble with people refusing to answer questions; my difficulty was that they told lies. But even the lies are information of value because you go away and check them. The fact that people have bothered to tell lies about a particular matter is valuable information to have.

I would not bother with the contempt power, quite frankly. People who refuse to answer questions are not going to be frightened by it. Contempt of court is always a problem. I think historically it reflected the feeling of courts that they were too important and people should treat them with respect and if they did not they would be dealt with. I do not think it advances the cause of justice greatly.

Mr KERR—What is your view about the suggestion that there should be a reversal of the presumption on bail?

Mr Costigan—I do not like reverse presumptions on bail. I think you start off with the presumption that people should not be locked up without good cause. There are some well-defined exceptions in the Crimes Act around the country and it requires a very serious offence like murder to get the reversal. I am not sure what happens in the terrorist organisations, but I think there might be a case there for reverse onus on appropriate evidence, but not generally.

Mr KERR—There is another issue that seems to confront us. I think the committee formed views, similar to those that you have expressed, that we do not like those things unless we are driven against the other circumstance, which is that at the moment there is this very long queue of matters not being proceeded with with the expedition that the ACC ought to expect. It cannot control that because it hands it over to the DPP. There have been no negotiated protocols between the courts and the DPP or whoever else would negotiate that in an appropriate way. Your experience is certainly far greater than that of any of us at this table. I wonder, from your experience, if there was anything that you would see as impracticable about the capacity—either by legislation or, I would have thought, by negotiation and agreement with the registrars and the administrators of the courts—to give priority to these matters where refusal is involved. Lies will take a long time—there are long trials—but it seems to me that the factual area of dispute in a refusal is so narrow that it should not be particularly hard to schedule these things quickly.

Mr Costigan—I agree with that. It seems to me, quite frankly, that if at a hearing before the ACC a witness refuses to answer a question there should be no inability to go to a court—whether it is the Supreme Court of a state or the Federal Court—within a couple of days. We are constantly in the law making urgent applications—you need an injunction for some reason or other—and, with appropriate discussions between the chief justices of the various states and the ACC, I cannot see any trouble in that.

Mr KERR—It seems to be unimaginably hard at the moment, from what we heard from the DPP. It just seems as if it is a matter that is far beyond the whit of man.

Mr Costigan—I did not hear what the DPP said.

Mr KERR—Neither did we, actually.

Mr Costigan—I cannot believe that it is not soluble.

Mr HAYES—What are your observations on how the act has worked over the last three years? I understand that you have reservations about structure and all the rest of it—I am aware that you know reasonably intimately the former body, the NCA—but in terms of the functions of the ACCC—

Mr Costigan—You mean the ACC, do you?

Mr HAYES—I am sorry, I have given it one more C.

Mr Costigan—That is Graeme Samuel.

Mr HAYES—In terms of the tasks legislated for the ACC—and, as I say, notwithstanding your concerns about the structure of the board—from your vantage point, how do you see its performance over the last three years?

Mr Costigan—Firstly, I do not have any personal knowledge at all. I have never appeared before the ACC, and I have not spoken to anyone who has—indeed, they would be shackled in telling me what went on—but I have browsed through the most recent annual report of the ACC and I have read the submission to this committee, so I have some understanding. One might say that it is a self-serving submission, but it also seems to be a submission based on a good deal of material. I would accept without question that the ACC has been successful in the work that it has done. My criticism of it is of a different order. It is not reflecting that it is not successful, just that the price of its success might ultimately turn out to be too great.

Mr HAYES—Issues about transparency?

Mr Costigan—That is a good word, yes.

Mr KERR—One of the issues that we teased out this morning with the Attorney-General's Department flowed from a suggestion that there may need to be additional examiners appointed. I raised and, to its credit, the department accepted as a legitimate matter that needed to be counterbalanced that the fact that there are only three examiners in a sense acts as a device that ensures that only matters of priority get addressed. If you had 12 examiners, I am sure you could fill their slate with work too. But the fact that there are three means that those on the board and those who look at priorities focus the use of the coercive powers on what broadly we would say would be areas of national importance.

There might be some dispute about some of the references. You might say that where you are using these powers is edging towards state responsibilities or routine policing, but in the main you would say that they are being used because the time price is such that you have only three of these people, so you have to use them for the highest priority matters. Apart from that sort of practical concern, I wonder whether you think there is any way—assuming that there is a legitimate case for addressing the proper requirements of the ACC—we can secure a boundary that does not allow this leakage across into routine policing. Have you any reflections on that?

Mr Costigan—It is difficult. It seems to me a product of human nature that if you appointed, say, 10 examiners their time would be filled, because they would provide an opportunity to the organisation to make use of their availability. So that is a problem. I think there is a built-in problem within the act. For example, under the old NCA Act, the only people who could apply for a search warrant or a telephone interception warrant were the three members of the authority. That had a built-in limitation on the number. Under the ACC Act, there is a whole range of eligible people who can apply for telephone interception or search warrants. It includes any police officer who is a member of the ACC, and members of the ACC are defined to include people who are seconded. A very large number of people can make these applications. It may be that, because of the kind of work that has been done by the ACC, the ACC Act needs to allow for more people to make these applications than under old National Crime Authority Act. I cannot answer that, although when one looks at the latest report of the ACC one sees there were a lot of examinations, weren't there? I was surprised when I read the report just how many examinations there were. The examiners are clearly busy and they have been given a lot of work and, as I said at the beginning of this short discourse, if there were 10 of them the numbers would go up inevitably.

The control mechanism ultimately resides in the bodies or with the people who are given those powers under the act. Whether it be the board who determines that there will be a particular special investigation or whether it be the CEO who appoints the head of that particular investigation or the examiner, there are a lot of people who are making these decisions and I am not quite sure that they have got it right.

Mr KERR—One of the things you will remember is that, when we introduced the NCA, it was introduced specifically for serious drug offences. I think that is correct; I may be wrong. But I think it was quite narrow in the remit of matters it could examine and it was established as an extraordinary expedient.

Mr Costigan—There was certainly a strong view among some of the proponents for the establishment that it should be directed towards drug problems. I certainly think that Mr Hawke, as Prime Minister, had that view. But there was also quite a feeling about white-collar crime, fraud and money laundering.

Mr KERR—It has widened out as we have moved. It has widened out as each iteration of the legislation has emerged.

Mr Costigan—Yes. I was always more concerned with the money-laundering side of it on the basis of, whatever kind of criminal activity you are looking at, it is all concerned with money and if you can follow the money trail backwards you are likely to establish something. There were mixed reasons. You would remember the crime summit in 1984 where a couple of hundred people turned up, and you cannot say there was a unanimous view about why it should be set up. There was a unanimous view that you did not give these powers to the police, but that was another matter.

CHAIR—I just want to follow up on that answer to Mr Kerr's question and also your answer to Mr Hayes's question where you suggest that the Australian Crime Commission has been successful in doing what it is meant to be doing. One of our terms of reference states:

2. whether the roles, powers and structure granted to the Australian Crime Commission under the Act and associated legislation remain appropriate and relevant to meeting the challenge of organised crime in the 21st century.

That is one of our terms of reference. If you had to answer whether or not the Australian Crime Commission has been successful, according to the questions posed in that term of reference, what would your answer be, particularly in the context of the involvement of its remits that have just been acknowledged in the exchange between you and Mr Kerr?

Mr Costigan—If the question is strictly 'Has it been successful—

CHAIR—In terms of fighting organised crime and within the increasing ambit that has been provided to it to fight organised crime.

Mr Costigan—The answer would, I think, be yes, but it is not appropriate.

CHAIR—So you are saying that there are other structures that may be more appropriate.

Mr Costigan—Yes. Whilst saying that, I put a number of ticks beside the ACC for all sorts of reasons—not only the quality of the people who run it but also the additional powers they have got. They have been able to achieve things, looking at their report, and I am sure they have. But it raises my basic principle that this is not the most appropriate way to do it and that the balance should be better. So my answer is a guarded yes, with a qualification about appropriateness.

Mr KERR—One of the fundamental reasons that in the 1984 summit it was regarded as not appropriate to give to the police is that there was then a widespread view across the community that no person should be required to give testimony against their own interests and that these kinds of powers were simply inappropriate to go with law enforcement. Therefore, you would put it that, if you needed it for serious and organised crime, you would give it to people other than the police and supervise it explicitly in a different arrangement.

Mr Costigan—I think that is right. I think also there was a strong feeling that, because these were exceptional powers, you had to build into the organisation independence. For example, members of the authority could be appointed for fixed terms and could not be reappointed so they were not subject to persuasion or influence. There were all sorts of sections of the act which had that achievement. Moreover, the NCA was subject to a lot of independent appraisal—the intergovernmental committee. I gave evidence two or three times before the interdepartmental committee on the NCA, which performed a very valuable role. The NCA was the most audited organisation in the country, I think. So is the ACC. That was certainly the thrust of the crime summit: 'These are exceptional powers. Let's be careful how we give them.'

Mr KERR—Flowing that through, to what extent do you think the 'success'—using that language in inverted commas because I understand all the qualifications you have put to it—has led us perhaps to regard these things as routine rather than exceptional and therefore has perhaps softened the kind of resistance that would have existed before? How valid was the original resistance to it? Does it remain valid? For an old-fashioned hack like me who worked in the law for ages, I cannot get it out of my head that it is still an extraordinary and exceptional set of powers to give to law enforcement. I accept we need them in some limited circumstances, but I wonder about the degree to which young police and young citizens now coming forward say, 'Oh well, that's just the way it is.'

Mr Costigan—I do not think we should ever get it out of our minds. We do live in a fantastic community with great traditions of individual liberty and so on. On the other hand, we are also living in a community where organised crime has become more sophisticated and more difficult to follow. It is transnational and it is deliberately hiding what it is doing. At the same time you have the whole problem of terrorism. We are living in a community which I think properly recognises that exceptional powers need to be given to try and solve these problems. But we must not at the same time forget that they are exceptional powers, and we must not forget that we can change the community we live in if we do not remember that, particularly a committee like this. And the parliament has to be constantly aware of the fact that every time you give additional powers you are changing the community you live in, so you have to be constantly alert to whether it is the right way to go. That is why you have to review it, as you do, every three years. You have to be comfortable not only that it is not successful. The Stasi was pretty successful in East Germany, but we do not want to live in that sort of community. So we have to be watching all the time that we have not gone too far. We have to be prepared to acknowledge that perhaps we have made some mistakes and we need to change it from time to time. Is that the sort of answer you want?

CHAIR—It is an open and refreshingly honest answer, Mr Costigan. We will adopt the usual practice of circulating the transcript of this hearing. If subsequent to receiving it you wish to make any further submissions to the committee, we would be grateful for that. Thank you for your attendance and your presence here today and for your very useful advice to us.

Mr Costigan—Thank you again for your courtesy in allowing me to.

CHAIR—It is our pleasure to be able to assist you. Thank you.

Proceedings suspended from 1.06 pm to 1.54 pm

HANNAFORD, Hon. John Planta, Examiner, Australian Crime Commission

KITSON, Mr Kevin John, Director, National Criminal Intelligence, Australian Crime Commission

McDONALD, Mr Robert Richard, General Manager, National Operations, Australian Crime Commission

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

OUTRAM, Mr Michael, Director, National Operations, Australian Crime Commission

CHAIR—Welcome. Thank you very much for making yourselves available to be with us today. As you are either public servants or, possibly in one case, statutory officers, you are reminded that you are not required to answer questions relating to policy matters and will be given the opportunity to refer such questions to either the minister or to superior officers. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you all. I now invite you to make a short introductory statement, after which we will move to some general discussion and questions.

Mr Milroy—As the commission nears the completion of its third year of operation, it has faced many challenges including the need to: ensure a smooth integration of the structures, people and processes of its antecedent agencies; establish a head office in Canberra; put in place an appropriate organisational structure; identify its future menu of work; and progressively deal with a range of difficult work force planning and management issues. I am pleased to be able to say that it has not only successfully met these challenges but also delivered effective criminal intelligence and investigative outputs; established productive and robust working relationships with its board, national law enforcement partners and other stakeholders, including private sector organisations; and developed robust investigative management and accountability governance structures.

The commission has also been able to assess the practical application of the act and found that it provides an effective framework for delivery of its core functions. As you would be aware, the ACC is playing a unique and significant national role in gathering, correlating and analysing national criminal intelligence and information gained from Commonwealth, state and territory law enforcement agencies and the private sector. The commission adds value to this intelligence and disseminates it in a strategic and actionable form to assist in determining a national response to serious and organised crime. This helps shape law enforcement policy and strategic direction at both a jurisdictional and a national level.

The integration of intelligence functions with the ACC's investigative capability through national taskforces and joint tactical operations has been instrumental in disrupting the criminal activities of some of the country's key organised crime syndicates and individuals. The strategic placement and unique role of the ACC's criminal intelligence investigative functions, supported by its coercive powers, have allowed the commission to develop informed positions on nationally significant criminal matters beyond the capacity of single law enforcement agencies.

The ACC, through the tactical use of special powers and an appropriate balance and mix of specialist resources, has delivered solutions to address national criminal intelligence and investigative priorities.

While the commission takes pride in all of its investigative and criminal intelligence outputs, as an intelligence led organisation it particularly recognises the importance of its national criminal intelligence priorities and the picture of criminality in Australia to strategic intelligence products that are informing national law enforcement policy and operational responses to the activities of serious and organised crime groups in this country. The commission has developed effective intelligence, investigative and management and accountability structures. It is progressively establishing itself as a critical national repository for criminal intelligence and information. As mentioned previously, it is playing a key role in facilitating the exchange of this intelligence.

As a direct result of its joint intelligence and investigative arrangements with Commonwealth, state and territory agencies, the commission has continued to produce quality strategic and tactical criminal intelligence and investigative outputs, the results of which are outlined in the written submission of the ACC board and the ACC. I would like to stress that the ACC, when undertaking its board-approved criminal intelligence and/or investigative functions, has done so predominantly in partnership with other law enforcement agencies through either joint investigations or board approved taskforces.

Based on available criminal intelligence, the commission believes that the major drivers for change for the next five years will be the continuing phenomenon of globalisation and advances in information and communication technology. Indeed, the same factors that have been instrumental in quickening the pace, volume and scope of international commerce are the very same drivers that are being exploited by criminals. These factors include the continuing advances in transportation methods and the rapid uptake of telecommunications and information systems. Most notable are the uptake of mobile systems, increased data transmission rates and the proliferation of increasingly powerful multifunction devices. There is ample evidence that criminal groups are taking advantage of these developments and as a result continue to become more flexible and sophisticated in their operations.

In the coming years there is no doubt that serious organised crime will continue to engage some of the best professional minds in the legal and accounting professions, as well as engaging and soliciting information and advice from experts in shipping, transportation, travel, banking, finance and communication technology. This will be aided by the time-held strategy of organised crime corrupting people in the public and private sectors to facilitate ongoing criminal enterprises and activities.

The commission believes that major developments and trends that may occur in Australia over the next five years are likely to involve finance sector fraud becoming even more prevalent, serious and organised crime groups continuing to develop regional partnerships to facilitate the trafficking of a wide range of illicit commodities, the lucrative and growing nature of the local amphetamine market, and identity crime remaining a key enabler of many criminal activities. In response to these and other challenges, the ACC's vision for 2010 is to continue to develop as a specialised criminal intelligence collection and investigative organisation that informs and shapes national law enforcement strategic policy, formulation and direction.

The commission must access and keep abreast of the latest advances in telecommunications, information systems and technology, maximise our intelligence dividend and maintain the appropriate balance and mix of specialist staff across a wide range of disciplines. Since its inception, the ACC has continued to work closely with the Attorney-General's Department to strengthen the act in a number of areas. While the functions specified under section 7A of the act establish clear parameters in which the ACC is to operate, the last three years have demonstrated that, if the commission is to effectively meet the challenges of organised crime in the 21st century, there are opportunities to amend the act and associated legislation. A number of these amendments are outlined in appendix C of the in-confidence submission of the ACC board and the ACC. My colleagues from the ACC and I are happy to respond to questions either publicly or in camera.

CHAIR—Thank you very much for your opening statement and for your offer of assistance, and also for the comprehensive submission you provided to us prior to the start of this hearing. There is one technical matter that we would just like to clarify. You have provided us with a confidential submission, which we have numbered 14A and which we received on 4 October. There has been some reference to a part of that submission, mainly relating to the appendix. Are you comfortable with us making public the appendix of that submission?

Mr Milroy—I think it may be something that I might take on notice and check the appendix for public release because it does, of course, outline the procedures for the examiners. We just want to make sure that, as we have now been advised of this, there are no issues of methodology that would be inappropriate for us to release publicly. We will deal with that as expeditiously as possible.

CHAIR—I would appreciate that. There were references to the procedures adopted by the examiners earlier on today by another witness. He suggested that it would be useful to him if he were able to view the formal document outlining the practices and the conduct. If that is possible that would be of assistance at least to one of our witnesses. Perhaps I will make a start with the questions. There has been quite a lot of discussion this morning by witnesses in relation to the structure of the board and the role of the CEO. In fact, one witness even suggested that you should be a fully fledged member of the board with full voting powers. There has been a range of opinions. A lot of the comments related to the type of people who are on the board. The comment was made, and in most cases in a critical manner, that the board has an overrepresentation of police people on it and that, because of that, there is a lack of balance and a lack of perspective, which would come about if, for example, there was a balance between legal people and police people on the board. How would you and your officers react to that suggestion?

Mr Milroy—From my observations—being a non-voting member of the board—I can indicate that, in my view, this sort of perception is unwarranted. I think that all of the board members, whether they are police or from other agencies, are chief executives of major Commonwealth, state or territory government departments and are highly professional. The board operates very robustly. There are a lot of open and frank discussions, and all of these heads bring to these board discussions a lot of experience, most from a Commonwealth, state or territory environment, as well as a lot of knowledge of policy. I do not think it is for me to comment on whether the board should be increased.

I realise of course that, at page 19 of the board and the ACC submission, it does make reference to the Commissioner of Taxation—that there would be potential benefits, and the board generally supports that, but I do not believe the board has been asked to consider the issues that you have raised and it may be more appropriate for that question to be directed through the chair to the board and for the board to comment back to the PJC. I believe it is unfortunate that this sort of perception is around and I think it is totally unwarranted, because I believe that the non-police members of the board would not take too kindly to the suggestion that the board is being run by one particular body over another. Those are my general observations at this stage.

CHAIR—I will try to elicit a bit more of an opinion from you, Mr Milroy. The suggestion underlying the remarks that were made is that, basically, people who have been trained to be law enforcement officers are probably keener to pursue the investigative function with reasonable and sometimes excessive zeal. In doing so, there might be a willingness, perhaps unconsciously, to have some disregard for individual rights and civil liberties. That is where I think those comments were coming from, in a general sense. How would you react to that suggestion?

Mr Milroy—I have not seen that exhibited, and I have been to all the board meetings since March 2003. I think the board, as I have indicated, is a robust working board. It definitely deals with matters in the national interests and it works very efficiently from my observations as a non-voting member. I think it is unfortunate that there is that kind of perception. I guess that people from the outside make up these observations, and I think they are unwarranted.

CHAIR—How would you view the suggestion that the quality of the board would be enhanced if you became a voting member of it?

Mr Milroy—I have not actually looked into that. I have a very good working relationship with the board. I think there are some advantages and disadvantages to not being a voting member. I have not looked at boards in other environments as to whether the CEO has a vote or not. I do not have a view either way. I think that, as the commission head with the responsibility to bring to the board the relevant information for them to consider and make strategic decisions and priorities, that is the primary role that I have. Through that process, my views are considered by the board, clearly, because I represent the organisation that is gathering the information and bringing it to the board to make such decisions. So I am comfortable at the moment in my current position as a non-voting member.

If a decision were made that I should became a voting member, then I would accept that. I do not think it would change very much really, because I am allowed by the board to brief them in detail not only in board meetings but also in my regular face-to-face meetings with them around the country between board meetings, as we try to understand the problems that we have encountered in various jurisdictions as part of our process of collecting intelligence and understanding the policy issues.

CHAIR—Perhaps I am straying into an area of policy here, but I think that the committee would benefit greatly from your operational and organisational perspective of the proposition that has been put to the committee today—that the board would benefit greatly by having the Commissioner of Taxation on it. Do you think that that additional member would add considerably to the operations and effectiveness of the board?

Mr Milroy—As I outlined on page 19, the board indicated in its submission that there would be some potential benefits, particularly in relation to broadening the attack on organised crime in the areas of money laundering and tax fraud. I think there is probably an acknowledgement that to break up organised crime syndicates it is necessary to pull them apart at the seams, and one of the most significant ways of doing that is going after what they are involved in, which of course is making money. Breaking up these organised crime syndicates is about removing the money by whatever legal means possible, and I guess the tax commissioner would assist in that process. I think that is one of the reasons that the board saw the benefit of supporting that, as it indicated in its submission.

CHAIR—Earlier today Mr Keelty stressed that his view that the Executive Director of AUSTRAC would be a useful addition to the board membership was his personal view only. He stressed that that policy position had not been taken to the board. From an operational point of view, how would you see the inclusion of a representative from AUSTRAC on the board?

Mr Milroy—I still think that would probably be a matter for government, but I feel that the current operational working relationships that we have with AUSTRAC, who are members of the financial action team, which is part of the money laundering determination, work very efficiently. Regarding the Commissioner of Taxation, one of the interesting points is that the board has the opportunity at any time it sees fit to bring him in as a visitor to the board. Likewise, of course, at any time the board could call in any head of any body that it felt it would benefit from getting its information or experience in relevant matters. But whether there is a need to extend the board numbers with representatives of every agency that is involved in law enforcement or related fields I believe is a matter for others to consider and look at the benefits or otherwise of any such expansion when there are mechanisms in place already and excellent working relationships in various fields to draw on—AUSTRAC and other similar bodies.

Mr KERR—May I particularly thank Kevin Kitson for his rather glorious charts of the work you are doing. One of the things that came out in the AFP commissioner's testimony to us today was his view that the intelligence work of the ACC is highly valuable and very well focused, but if there was a criticism that he articulated it was that in his view the ACC is yet to fulfil adequately the task of providing that forward-looking intelligence—the strategic foresight that would be the equivalent of the Defence white paper reporting—that was initially supposed to be the brief of OSCA but then fell into disuse. I think a fair summary of what the commissioner suggested to us is yet to be adequately responded to by the ACC, although it is within its remit.

I wonder whether you could tell us a little bit about how you see the development of your intelligence-gathering capacity and its dissemination, the *Picture of criminality* report and the decision of the board to prepare two versions, one being for public release. Then there is the second issue of the resources you devote to strategic long-term intelligence. Criticism was not expressed in the documents but once Senator Polley raised the issue it was made very explicit in the commissioner's response to the question.

Mr Milroy—I would make this point: the responsibility for us to have an over-the-horizon-capability is warranted. It is one of the major roles that the ACC should be involved in. I will ask Kevin to define what we really mean by over the horizon, what we did when we first merged the three agencies to focus on the functions under section 17 of the act, what we have been doing in the last 18 months, what resources we have put into the area and what we are hoping to do in the

future, although of course under *Picture of criminality* we do have these forward issues. I think it is important to define what we really mean by over the horizon and to give some examples of areas where we have done it and other areas where we probably need to do more work, but I think we acknowledge that it is a significant role that we need to perform. I will pass to Kevin, who can clarify that point for you.

Mr Kitson—I think it is fair to say that the over-the-horizon capability that we inherited from the Office of Strategic Crime Assessments has endured through the life of the ACC. It has not endured in the way that might make it immediately visible if you were to inspect our structure or organisation charts today; you might not readily recognise the capacity that is there. That is because we have taken an approach that integrates it across a number of our functional areas. An outcome of that is that we have embedded that outlook capacity in documents like *Picture of criminality* so that, whilst we might not have something that is akin to the defence environment where we might say, 'Where do we think this will be in 2015 or 2020?'—or perhaps even further afield—I think we have made it much more directly relevant to the current and immediately anticipated environment for law enforcement. So we are projecting forward, as you would be aware from *Picture of criminality*, both in terms of the documents that have been made available to the committee and in terms of some of the briefings that the ACC has given to the committee in recent times. We do look forward to 2010 at the very limit.

I have chosen, in terms of my time in this position, to not look very much further than about five years out because, having looked over material going back to the mid-nineties produced by the NCA and ABCI and, from about 1994 onwards, by OSCA or the various bodies that were like that, I think we can quite readily identify that very little changes over that kind of period. Some of the trends that were predicted in the mid-nineties have come to pass but nothing is dramatically different. I think the nature of crime does not change in its broad sweep; it changes in its minute detail. It changes in its method of operation rather than in its actual style. So I think it is more useful to concentrate on saying: 'This is how we see it in the next five years. This is how law enforcement needs to adjust its focus in that period.' I think it is useful nonetheless to speculate on some of the issues that might confront us beyond the immediate five-year period, and indeed our *Picture of criminality* does do that. For example, it touches on the potential of, say, a pandemic to significantly affect regional and global dynamics in economic, political and social contexts. Our capacity to explore that in a criminal environment that has meaning for our readership is really rather limited.

That said, we acknowledge that there is a demand and a hunger out there for some kind of advice and some kind of commentary on that. So, in the current budget cycle for the ACC, I have established a research unit that is designed to take on a whole raft of issues, including research into criminal markets—which again is a matter we have discussed before this committee. But that will also look at the what-if scenarios that go beyond 2010—they might go out to 2015 or even 2020. So, for example, if we wished to dwell upon concerns about Australia's access to, say, water and energy supplies—where we might focus on those from a key infrastructure or even counter-terrorism perspective—it would be useful to apply a law enforcement lens or an organised crime lens and ask, 'If there was an opportunity for criminal exploitation, what challenges would that pose for law enforcement?' I think I am suggesting to the committee that we have addressed a good part of that and we recognise that there is an area we need to address.

I think it would also be reasonable to acknowledge that in our production of strategic criminal intelligence assessments those are some of our front-line products that really provide what we hope are authoritative accounts of any particular issue or criminal entity. We do recognise that there is a need to expand the product range there and that we need to explore areas that are not currently the primary focus of law enforcement attention. But in one of the annexes to the ACC submission to the committee we have outlined a number of products that we anticipate producing in the next 12 to 24 months, and you will realise from that that you can anticipate seeing a broader sweep of product.

I think one other thing that needs to be recognised is that the development of the ACC has seen us build some very strong partnerships domestically and peripherally in the international field. We have to continue to strengthen those and we have to continue to be able to collect intelligence from the widest range of areas. That is a process that is ongoing. We have built some spectacularly strong relationships and we have had some very encouraging returns from some of our partners. We must continue to build that aspect, because it is that global reach and that global perspective that will give us, I think, a true dimension and give meaning to our work in terms of strategic criminal intelligence.

Mr KERR—What would your response be to that polite but, I think, express criticism that, basically, the ACC does not give sufficient attention and resources to forward projection? Would your response be that it is difficult to do that beyond the five-year frame and perhaps not as valuable as the commissioner believes? He was fixing upon the white paper—and I suppose that was again the parallel—which indicates that law enforcement must anticipate forward challenges and opportunities but funding agencies must too. That is necessary for budgeting for government and for public acceptance of the need to fund certain things—or to withdraw funding from things. One of the things we tend to do in life and in law enforcement is to continue to fund things that have been done traditionally, even if, truthfully—because of reduced harms—there is no real priority to go into a particular area. It is hard to withdraw from something because often that will be very much criticised. So, if you are developing a document, it needs to give government the confidence to make hard funding decisions in the real world.

I think that was the framework the commissioner was talking about: the product is terrific in terms of its dissemination. It is articulate and it is able to be used as fairly definitive material about current threats and organisations and what have you. He was very pleased about the picture of criminality and he was looking forward to the publication of that—and I am too—but maybe he was wrong about this other issue or maybe he was right or maybe there is a middle position here. Certainly, from a public point of view, I do not think the community have any real basis at the moment for making judgments about whether the government is making wise or unwise assessments about the various demands that are placed on them in this area in particular. We do not have a sensible debate because we do not have the information framework to enable us to have that debate in this public policy area. Yet, to an average Australian, this is just as important as defence expenditure.

Mr Milroy—I can indicate that seven or eight months ago, I think it was, we had a strategic direction forum and the chair, Commissioner Keelty, attended and he did raise this issue about how over the horizon there is a need for the ACC to do this work, because no-one else is doing it. One of the interesting things about this organisation is that we are very flexible. We have to be flexible to change because our menu of work is set based on the intelligence and the strategic

directions of the board. We are running these programs for 12 months—and some of them might run for two years—and they are very focused, very targeted and intelligence driven. On that basis we have adjusted our structure and functions, predominantly of the intelligence area, focusing on these new areas to be specifically targeted.

Kevin can comment on the emerging crimes area, the changes that have occurred over the last six or seven months and what is contemplated for the next 12 months, to pick up on what Commissioner Keelty raised, which was a need to have a dedicated capability. As Kevin pointed out, the process is about looking at what current Commonwealth agencies we can utilise to gather this intelligence and what other areas we need to go to to pick up this information. We are building on this and Kevin can probably comment on what the unit looks like at the moment and what is programmed for the future. He mentioned additional staff to do more research work. He could probably comment on that and then we could comment on the issue of the *Picture of Criminality*—the public version and the process that you referred to.

CHAIR—Mr Kitson, as you comment would you indicate to the committee how you define flexibility? Mr Milroy just talked about the organisation being flexible enough to strategically consider developments in the criminal world. Could you try to define for us how the flexibility is achieved within the organisation—whether it is within the existing skill sets, bringing in additional skills, or in the relationships with other organisations?

Mr Kitson—I suppose that the best way to describe it would be that we take a case-by-case approach to it. There is no one-size-fits-all approach to dealing with criminal intelligence. In firearms, for example, we set out to acquire somebody with expertise in how firearms operate—what they are, what the different makes are, the fine differences between one kind of weapon and another, and what a serial number might mean. We apply that in other areas.

Within the scope of the ACC's resources we cannot justify having our own research or analytical chemist onboard, so we have built some very strong relationships with research chemists in Queensland and Victoria, and indeed in most of the states, so that on a very regular basis we can talk to them and ask what the impact would be if a particular drug were scheduled. If the scheduling under the drugs and poisons regulations was adjusted, what difference would this make to criminal exploitation? Could they make methamphetamine by the same system? What would they replace it with? If we managed to reschedule or prohibit imports of certain things, where would they go next? That is a very active process that we have going.

The other element for us in terms of flexibility is that over the last 18 months, in particular, the agency has supported my efforts to restructure the nature of the intelligence staffing within the ACC. We inherited an agency with a good number of skilled and experienced people but of a certain seniority. We needed to adjust the staffing profile so that we had a broader base of people with perhaps more contemporary and more diverse skill sets. That has allowed us to expand our numbers and to take people who only want to work in law enforcement for one to two years and who are not necessarily looking for careers in law enforcement.

We have a flexible approach to being flexible. We have shown very clearly that we can move our resources from one area to another within intelligence and, indeed, across the directorates. Michael Outram and I share resources as we need to, focusing them in different parts of our

business as the needs apply. I think there is a highly flexible response there. I do not know whether that addresses your question.

CHAIR—Yes, it does.

Mr KERR—If the criticism could be summarised in a very short sentence it is that too often the urgent drives out the strategic. This is no criticism of your organisation—the urgent drives out the strategic in my office too often as well, and I think across the board it is a difficulty of public administration. If that is the case, is the structure in the way in which you do your intelligence sufficient to, in a sense, have sufficient resources always abstracted from the day-to-day to enable there to be this step back and to say: 'Okay, there is a crisis or whatever. But there is always going to be a crisis; there is always going to be another demand. We still have to have a good component of our body focused on the non-urgent and the strategic'?

Mr Kitson—We have, if you like, quarantined those resources—now a relatively small proportion of those resources—as a dedicated unit. We set a menu of strategic criminal intelligence reports which is endorsed by the board. That is our over-the-horizon product. That is a menu of work that we propose to the board each year, with a rationale for each piece of work that is in there. Indeed, we generally add a body of work that we would like to do if we have the opportunity to get to it. Therefore, we follow that board-endorsed menu of work. With the exception of perhaps one piece, where we rescheduled because we lost a particular piece of expertise which is incredibly difficult to replace, I think we have completed the menu of work as agreed by the board.

In the current cycle of work proposed for strategic assessment, we have some ambitious projects in areas that are perhaps seen by some as almost peripheral to law enforcement—issues of wider labour exploitation, potential criminal exploitation of international trading systems and the potential impact on criminality in Australia, of democratic patterns and shifts. These things do not have an immediate applicability for day-to-day operational policing but begin to get into those areas that the commissioner would have been alluding to, I think, in terms of how the government and law enforcement adjust their resource bases into the future.

Mr Milroy—As Kevin alluded to, one of the concerns is that we have a group of specialist people who carry out the fundamental requirements for this organisation. When we talk about flexibility, it is the ability to be able to adjust the balance and mix of the specialist skills that are required, as you indicated, for the new matters that come in. The organisation's balance and mix of resources in 2003 was a lot different to what it is at the moment, and that is one of the advantages of the ACC. It is a small organisation that has an ability to shift its resources to meet emerging needs, although there is a quarantined or core group who have key responsibilities for emerging crime and developing the picture of criminality for this intelligence collection.

For example, the issue to do with the airports was a very good example where the ACC looked at its available resources to respond to the requirement to collect intelligence at the airports without disrupting the foundation units that are there to gather the intelligence, produce these quality products and service the wider law enforcement community. That allows us to actually vary our skill base to suit the emerging needs in that sort of operational area, whereas in the intelligence field in general there is a large block of resources that is functioning on an ongoing basis and there are the data bases that continue their services. They are not driven by the

emergencies, although they have the capability, if need be, to respond. I think that is very important. That is one of the advantages of the ACC having a flexible structure.

The current menu of work for the next 12 months set by the board, based on the intelligence that the board has had to consider, has seen some changes. You will notice that the document in the joint submission indicates what the menu of work is. We have looked forward another 12 months or two years to work out whether any of these matters will continue forward or whether they will have to be varied or submitted to the board for a conclusion based on the results. Where there are emerging areas—for example, in the trade agreements or other fields—we have the ability to pick up these matters with the key group of quarantined officers and say: 'These matters need to be dealt with. The board and the government need to be advised on the changing trends.'

Usually that is done on the basis that other matters have been concluded. It is an interesting process but it is also very important that the organisation has this flexibility. I think that is one of its significant benefits. As well at that, we draw on the larger capabilities of the wider law enforcement community, who come to us and work on task forces and joint operations at their cost. As a result of the intelligence that we have given them, they bring additional resources which, of course, not only value-add to our intelligence dividend but also allow us to get quicker results for them as well as ourselves without us having to react with our own resources.

We have seen that change and I would imagine that next year things will change. We need to have this ability to be flexible in certain areas to move our resources. But in the key areas of intelligence collection, strategic work and over the horizon we have a quarantined or core group of specialists that we are looking to increase to do that important work. We acknowledge what the commissioner has raised with the board and with the PJC and will develop it further.

CHAIR—How would you characterise your relationship and that of your executors with the board?

Mr Milroy—I believe my relationship with the board is very positive. I take the view that for the ACC to work in this environment they have to acknowledge that this is an area of responsibility for a lot of bodies. We need this flexibility to move around in key areas and we need to understand what the key roles and responsibilities are of our partners in law enforcement and the wider area. They have to understand what we are hoping to achieve, which is to bring some benefit to their work.

In that process, we realised that there was clearly a need for us to improve our relationship management—that it was not about going out in this area and saying, 'This is what we want.' We realise we have to understand our partners and we have to brief them on what we are trying to achieve for their benefit in national criminal intelligence. That requires both of the executives who are here at the table with me to get involved in joint management groups. So we have an interesting structure. We have the board and, reflective of the board in each of the jurisdictions, there is a joint management group which has representatives of most of the board agencies.

These executives here at the table sit on those joint management groups and deal with the issues to do with intelligence-led operations. That was a very urgent requirement because the organisation needed to be able to work in this environment and be accepted and, at the same

time, understand what our stakeholders' needs are. We also had to understand specific tactical and strategic areas that we wanted to go into to do our work as approved by the board. So it has required a lot of relationship management and it has taken a long time to get these joint management groups up and running. It requires a lot of meetings.

Mr KERR—It sounds like a Mormon marriage, doesn't it!

Mr Milroy—Yes, and there are not too many divorces in the marriage either!

CHAIR—How interventionist is the board in terms of your day-to-day operations? I will try to give you a better indication of where I am coming from. This morning Mr Keelty told us that, to the best of his memory, he thought there had been one decision that the executive had made that had been reversed by a decision of the board, and there were a limited number of other decisions that I presume were operational type decisions where the board had—if I remember his term correctly—'finetuned' some of the decisions that the executive had made. That is an indication from Mr Keelty. How interventionist is the board or the chair in representing the board?

Mr Milroy—They do not intervene in my responsibility in terms of day-to-day management, administration and coordination of operations and investigations. To understand the processes, let me say that we prepare submissions based on intelligence. Those submissions go to the board as statements in support of other intelligence operations, special intelligence operations and special investigations. We will put forward a submission suggesting a certain course of action. Quite rightly, the board brings further knowledge and policy understanding. So, in relation to a statement that might suggest that it approve a special investigation, the board, from its discussions, may decide that it should not be a special investigation but rather a special intelligence operation. If you call that interventionist, I do not think that is quite right. That is the board in their role of setting strategic directions and priorities. I have never received a phone call from any member of the board to say, 'Stop this operation.'

On the basis that the board deals with the menu of work, they have a discussion about the submissions. The board may decide that the decision, because of certain factors, should not be as the submission recommended. Then the determination will be changed, or there may be a requirement for us to collect intelligence in another area and come back to the board and advise them on that—similar, for example, to what they have requested with the airports determination. At the same time as doing the airports project, they have asked us to collect intelligence in another area related to the airports and bring that information back to the board in November for them to consider whether it is worth broadening the determination. These are the sorts of discussions—

CHAIR—In fact, you used that example this morning to illustrate the finetuning aspect.

Mr Milroy—Yes. The board receives statements in support of operations, which for the committee's information set out all the intelligence gathered on it and all the requirements under the act and recommends whether it is worthy of the special powers of an intelligence operation or an investigation—that is if traditional police efforts have been unsuccessful. The board very thoroughly goes through these submissions, even though our legal people have spent a lot of time on them. The board also clearly understands that the objectives are very detailed. The

submission indicates clearly, based on the intelligence available, what the appropriate course of action to be taken is. These are the objectives that my staff follow.

The governance of operation committee manages operations and investigations to ensure that they are carried out under the act and under the board's direction. There is no major variation in that. A very healthy and robust discussion takes place to come to these conclusions. But there has never been any case of any interference.

I might add the comment that members of the board in actual fact take a significant interest individually in the ACC. It is quite common for me to receive phone calls from the non-police members on the board interested in how we can improve things and how their agency can work better with the ACC. That is a very healthy environment to be operating in.

CHAIR—In terms of the oversight and managerial functions that the board has, is the board, from an operational point of view, relatively in sync with the work that the executive and that the commission does in terms of its meeting schedules and the participation of board members in the meetings? We heard this morning a fairly strong opinion from Mr Keelty to the effect that he would not favour substitutes. He does not favour the commissioners being empowered to send substitutes, and he explained his reasoning for that. In terms of the actual meeting schedule and the attendance of board members at the meetings, is the system working to the point where there is a continuity and a sensitivity built into the way that the board oversights the executive and the operations of the commission?

Mr Milroy—Yes. As you know, the act indicates the board only needs to meet on two occasions. In actual fact, the board has met one year for five and is averaging about four meetings per annum. As you know, we report on a monthly basis to the board, as well as to the parliamentary joint committee and the IGC on the activities. And, of course, the board would like a more detailed report in relation to the operational activities that are linked to the decisions that the board makes. In between the board meetings there is a strategic direction committee, which was established by the board and consists of the chair, the chief officer from the ACT, the commissioner from New South Wales and me. It does not usurp the role of the board in any way, but it looks at the performance of the ACC in between board meetings in terms of operational activities—where can the board help, if need be, in relation to the work of the ACC. In addition to that, there are fortnightly meetings that I have with the chair of the board which address some of those matters that he, as the chair of the board on behalf of the board, is interested in.

In addition to that, I go around the country and meet with the board members, between every board meeting, to discuss the board agenda, to look at any policy issues that may be coming from the various board members' environments and to discuss the work that the ACC has been doing, particularly in the determination area.

So you are looking at four meetings, plus a strategic direction meeting, and I have regular meetings with the board members and report back to the chair if any of them have issues that they wish to raise. Also, the board members themselves contribute to the upcoming agenda, and they regularly send letters of interest about matters that they identify in the monthly reports. So there is quite a lot of interaction in that regard.

In addition, where the ACC is working in areas of special intelligence operations and investigations which relate to a board member agency's jurisdiction, then I have meetings with the head of the relevant board member agency in relation to those matters—which, of course, are part of the approved agenda of work. I believe that that is a very full working relationship. Whether additional meetings are necessary is a matter for the board and, of course, for government.

CHAIR—It sounds agreeably like the structure under which the Senate operates.

Senator POLLEY—There have been three years now of operation. In terms of the professional standards and the integrity of the ACC, a number of things have been highlighted in the submission, like drug testing and ensuring that officers can be encouraged to answer questions. Are there any further comments that you want to make in relation to this—as far as misconduct and corruption inquiries are concerned—relating to ACC officers?

Mr Milroy—Yes. I think I will answer this on the basis that we have Australian Public Service staff who are permanent members and then we have seconded officers who come to work with us from all the police forces and, of course, officers from Customs and Tax as well. The officers from the police forces in particular are subject to the integrity regimes of their parent force in the event that we uncover that they are involved in a corrupt activity. In addition, we have the task force personnel who come to work under the task force arrangements. They are all security vetted, irrespective of whether they are an APS officer or a seconded officer or a task force member who is only coming in to work for six months or thereabouts.

Acknowledging, of course, that the Commonwealth government are going to establish an Australian Law Enforcement Integrity Commission, we have acknowledged that it was a requirement in the early stages of the ACC that we put in a professional standards and integrity process. There is also the Commonwealth Ombudsman, if there are corruption matters that could be referred to the Federal Police to investigate Commonwealth officers.

There is this hybrid arrangement and we have been required to put in place processes to deal with seconded officers, irrespective of where they come from, versus Public Service staff. We have been having meetings with the Public Service staff and the Public Service Commission in relation to the issue of drug testing for public servants. Some of the police forces do have random drug testing regimes which impact on the officers who come to work on secondment.

So we have looked at all of those issues and put in place a professional standards and integrity process with random auditing by the executives at this table who target the key areas of risk that have been identified from a lot of the history that occurred not only in the ACC and the former organisations but also in the wider law enforcement area, looking at the risks associated with our people working in this fairly complicated environment and, working very closely with the Commonwealth Ombudsman, putting in some processes as a result of some lessons learnt very early in the piece over a couple of officers. I think it is a process that we have to strive to keep reviewing and improving on a regular basis. These processes have been through board clearance, and all of the board agencies contributed very thoroughly to the regime that we have in place at the present moment. I think it is working, but of course it is a very difficult environment and one can never guarantee that these staff will not stray, irrespective of whether they are secondees or Commonwealth public servants.

Senator POLLEY—When we talk about resources and funding, there is not an endless bucket of money, unfortunately. In what areas would you say you are sufficiently resourced and, further to that, what activities could be pursued if there were more resources available, particularly looking to the future? Crime seems to be a vicious circle—it goes round and round. The criminals get smarter and we seem to be further behind with our technology. So how can we better use the resources? Have you got any comments?

Mr Milroy—Yes. In one respect, there has been a recent increase in our budget following the Wheeler review. For your information, it is $20 million over five years, which will allow us to increase staff numbers by16 or 19 in the intelligence collection, research statistics and other areas that deal with crime at airports. We also received quite substantial funding for the 2007 financial year to really enhance the intelligence database and some of the other systems and analytical tools that we need and identified. That was most welcome because not only does it service the requirements for the crime and airport project—and that funding will commence this year—but also it allows us to really deal with those issues you talked about: technology and keeping ahead of the game. That one-off injection in the second financial year will really sufficiently deal with the ACC's technological needs.

The interesting issue is that, when we make a submission to the board to look at the menu of work for the 12 months, one is conscious of the current budget. We do financial impact statements. We try to cost operations for 12 months based on our experiences over the previous three years. We are getting to the stage now where we are very rarely wrong in our estimation. That is a credit not only to the operations intelligence area but also to the finance people working on the activity based costing system, which we are hoping to develop further in the next financial year. Our current menu of work is appropriately funded. Now we have the increase of some $20 million over five years to deal with crime at airports, which is a significant benefit for the organisation. We have considered the menu of work for the future—looking at the trends and, of course, the successes the ACC has been having working with its partners—and we are starting to better understand the organised crime markets and the characteristics of organised crime groups so we can better target them.

Currently, we are working through the normal budget process to address our future appropriation—and that is of course a matter that would go through the normal government process. I do not think it is appropriate for me to comment on what amounts we are considering here, because it is early days. My view is that we are adequately funded to service the menu of work that we have at the moment. But we have looked forward to increasing the capability of the organisation to have more sustainable resourcing in the intelligence collection and investigation areas, and that is going through the normal process at the moment.

CHAIR—You would be the first public service department that I have ever had the pleasure, or even sometimes displeasure, of dealing with that has not put in an ambit claim for funding. It is very refreshing.

Mr KERR—It is a sign of incipient madness!

CHAIR—That must be worth at least a brownie point—not the incipient madness.

Senator POLLEY—Earlier today, a witness made the comment that, although the ACC have some additional powers to the AFP, had the AFP been granted some additional powers they would have been able to perform the role of the ACC. What would your comments be in relation to that?

Mr Milroy—I do not think it is appropriate for me to comment as to whether this role should have gone to another agency. If one recalls the discussions that took place on the establishment of the ACC—and some members of the committee were part of that process—it was clearly stated that this was the first time in Australia that there would be a focus on national criminal intelligence and investigations of national organised crime. It is important that we understand that the ACC is a national body. I believe that role was identified as one required to be carried out by an agency that would concentrate at the national level and that would work with the various agencies and bring them together as a result of the intelligence collection process. It was not in place in 2002, and that is the role that we were asked to perform. I do not think it is appropriate to comment as to whether the powers should have gone to another agency. I do recall that Commissioner Keelty made the comment in 2002 that the police force should not have the coercive powers.

Mr HAYES—Following on from Senator Polley's last question, how much overlap is there, in effect, between the ACC and the AFP in terms of international crime intelligence?

Mr Milroy—The AFP are a federal agency that have international responsibilities, and we are a national agency. Kevin is part of a working group with the AFP and Customs—Customs are involved because they have posts overseas—that has been developing for some time this intelligence collection framework for identifying globally where we should collect the intelligence and how we should facilitate that process. We have an international liaison officer at the ACC who works through the appropriate protocols—either the AFP or Customs—to collect the intelligence. An intelligence collection process was developed and, under the hand of the commissioner of the AFP, that was distributed to his international posts for the collection of intelligence that the ACC wanted. That is an ongoing working relationship.

It is understandable that the AFP, Customs and the other Commonwealth agencies do not cover the whole of the world, but there are protocols that are in place to facilitate that and to make contact with relevant agencies. I think it is very important that the ACC works through that process. There are always a lot of opportunities—and Kevin and some of the other officers have been overseas, as I have been—to liaise with Interpol, Scotland Yard, the serious and organised crime group overseas and most of the Asian agencies. It has all been done following appropriate protocols and I think that is very important. But in that framework there is always going to be an issue of—'turf' is the wrong word to use—

Mr HAYES—It is probably close to it, though.

Mr Milroy—In this world of law enforcement—and I have worked in the state, nationally and internationally—the issue of turf comes up. It does not matter whether you are in a local police station in New South Wales and you have to deal with another police station nearby, it always comes up. I think it is important that we understand our role, we understand the role of others and we try to ensure that we can work with them to facilitate the process. And I think that is working. I think there is a very good framework being developed through this working group

comprising Kevin, the head of AFP intelligence and Customs, and I feel very confident that the collection of intelligence through that process, international contacts and other methods will be successful or reasonably successful.

Mr HAYES—Notwithstanding your response there and also the subtlety between a federal organisation and a national organisation, you are aware that the AFP are effectively seeking some form of delineation in terms of intelligence-gathering activities for internationally based crime. Is that something that will exercise the mind of the board of the ACC? Is that with a view to eliminating the duplication of resources? There are enough ex-AFP guys here who could probably tell me how many offices are out there acting internationally. So I am just wondering: to what extent are we duplicating resources in that regard?

Mr Milroy—We are not duplicating resources, because when we put up a statement in support, if we take the high-risk crime group determination or the previously established criminal network determination, that identifies the area for the ACC to operate in. It also identified the objectives that the ACC was going to pursue in that area. Under the umbrella of that determination, there have been a number of operations, and I indicated in my opening address that the majority of the operations that we do in the investigation determinations are carried out with our partners. In all of the operations that we carry out that have an international flavour, we have AFP, Customs and state officers as part of either the ACC-board-approved task force or a joint operation. So, as far as our role goes, we are working in a partnership.

On numerous occasions, even the AFP have come to us to see what intelligence we had on a matter. There were probably opportunities for them to use the coercive powers to assist them in enhancing their evidence and intelligence on a matter, so that opportunity is there. But what I am trying to emphasise here is that any matters we deal with that have a transnational crime link we do so in partnership with the AFP, Customs and others. One should not get the impression that the ACC has this investigative unit that goes out and does its own investigations outside of, say, the guidelines of the determination, or that the ACC actually operates on its own, without any partner agencies. We have never done any jobs on a high-risk crime group or even in a firearms determination where we have exclusively used ACC officers and not worked with a partner.

One of the other points is that, under these joint management groups that Bob and Michael and others go to, it is at those meetings—where you are dealing with the general manager type person from the AFP or Customs or assistant commissioners from the different jurisdictions—that they discuss the targeting: what projects they are working on, what projects we should work on together, what resources they are going to put into the project and what specialist assistance we will provide. That is the way it is operating.

As you indicated, there will always be those issues about turf. Someone might say, ‘This is my operation,’ or, ‘We’d like to know a bit more about it,’ but we enter into dialogue on a regular basis with a variety of agencies. Bear in mind there are crime commissions, CCCs and CMCs and we are conscious of the need to consult. I have not seen any example of any investigation that has had an international issue attached to it that has not been resolved in discussions with my directors or general managers and the relevant Commonwealth agency.

Mr HAYES—In a submission this morning much was made of the fact that matters can be brought on with some degree of expedition and someone could be subject to an examination.

The concern was put as to whether people were adequately aware of their rights to legal representation and whether they were made aware of issues around self-incrimination. I know this goes very much to examination and procedure, but are you able to address that?

Mr Milroy—Yes, but if we are going to get into discussions that relate to some of the practical issues to do with examinations and we are likely to touch on some sensitive issues we may seek to discuss them in camera. The examiner, John Hannaford, is here to discuss these issues if need be. In a public hearing, to get down to a clear discussion that is in more broad terms does provide others with an advantage at a later stage. If we are going to have a number of questions that relate to the examinations and some practical examples to get a better understanding of why we are having problems, it may be appropriate if we move in camera.

Mr HAYES—I will put that question on the backburner to save a little time. Perhaps we can address that later if we need to go in camera for it.

CHAIR—The way I see it is that it would be preferable to keep as much of the hearing as open as possible. If Mr Hannaford needs to use a practical example, by all means we will go in camera. The committee will either press Mr Hannaford or Mr Hannaford will tell us.

Mr Hannaford—I am happy to answer that question because I do not think I need to draw upon any examples. When a summons is issued it has on it an explanatory memorandum. Within that memorandum is a comment advising the witness that they are not to disclose the fact of the summons having been served on them. However, they are at liberty to refer that to and discuss it with their lawyers. I guess we have taken the view that the presence of that advice is enough to draw their attention to the fact that they can go and see a lawyer. But I also understand that the practice is that, when the summons is served by the officers, that is emphasised to the person verbally—that they are not to discuss the summons with anybody. However, they can discuss the summons with their lawyer. If there is a view that we ought to expand that explanatory memorandum, then that could be looked at.

Let us go to the issue of the summons. The examiners always have regard to the question of whether there is a reasonable time frame between the issue of the summons and the return date. That is always addressed. There may be circumstances where there will be a need for an urgent issue of a summons; that will arise having regard to the circumstances. But we look at the question of a reasonable length of time between the issue of the summons and the return date. There can arise the problem of service of the summons. It is not inconceivable that the time between the service of the summons and the return date is inadequate. If that arises and the witness turns up—sometimes with a lawyer—and says that they have not had a reasonable time to get a lawyer, we grant an adjournment if it is reasonable in that circumstance. Sometimes they will turn up with a lawyer who says, 'I haven't had a reasonable opportunity to give advice.' We take that into account and, depending upon the circumstances, we might grant an adjournment to allow that to occur. The next example is somebody who might want to get legal advice and they are indigent—they do not have the resources. I would like to be able to discuss that particular issue in camera because it can raise some tactical issues. But there is a concern there.

In relation to the question of them understanding their rights, we have a process whereby we spend some time talking to the witness about what their rights are and what entitlements and protections they have got. We seek to explain to them by use of examples how they can take

advantage of those rights. We also seek to get the witness to seek the general protection from self-incrimination which is available under the legislation. The submission from the board and the ACC suggests that there should be some improvement to the legislation in that particular regard. There has been a questioning in one particular case as to whether or not we are able to extend a general protection to witnesses from self-incrimination.

The practice of each of the examiners is up front to encourage people to take advantage of a general protection. Notwithstanding there has been that questioning by the courts, we take the view that the better functioning of this process is to allow them to take that advantage and get them to totally understand what that protection means. Sometimes witnesses will say to us, 'Look, I don't need the protection.' We will then say to them, 'If a question is asked of you where we think you ought to take advantage of the protection, we'll draw your attention to it and then we will discuss this matter again further.' Invariably, the question is then asked. We then encourage them to take advantage of the general protection.

Mr HAYES—So that is procedural.

Mr Hannaford—Yes. I have looked at the submission from the Law Council which addresses this. Our submission would go further than the Law Council's in suggesting that there ought to be a change to entrench, in a sense, a general protection and to draw upon some examples that exist in other jurisdictions where there are similar coercive hearings.

Mr HAYES—Such as the ICAC.

Mr Hannaford—ICAC and the PIC.

Mr HAYES—The Police Integrity Commission is much the same.

Mr Hannaford—That is right. You will see that if that is encapsulated in terms of the board's submission in the comment 'permit an examiner under section 30 to declare that any classes of answers of documents will be regarded as being covered by claim for a protection from self-incrimination'. I will give you an example. One witness said to us, 'Why are you doing all this? Why are you explaining this to us ?' We said, 'The legislation is not clear about exactly what benefits you've got. We're trying to make it as clear for you as possible.' One of the witnesses said, 'Why don't they draft the legislation to make it clear that we have got these rights and then we don't have any doubts about it and we'll feel comfortable with it?' That is what we are suggesting in one of our submissions.

CHAIR—In fairness to the Law Council, I think their witness was almost mortified when we suggested that he should be putting in a more robust submission. He told us it was the first time ever that he had been told that he was not robust.

Mr Hannaford—I guess we are being more robust today.

Mr KERR—You have addressed these points on self-incrimination. The matter that the chair referred to earlier was that I drew the attention of the representative of the Law Council to the part of the unclassified procedures document which relates to your opening statement. I would hope that at least—maybe there were other aspects of the document—it would enable them to

understand what is actually said at the opening of an examination and they can respond to that. Also, in light of the evidence that you have just given, you want to change the proceedings so that there is a substantive protection that is more convenient both to yourselves and to witnesses rather than it being a little bit clunky, as you would describe it at the moment.

The other point that the Law Council raised concerns the commencement of proceedings when somebody turns up unrepresented and that is not mentioned in the opening statements. They said there is probably an assumption at this stage that this person is voluntarily there on their own and they have renounced the right to legal representation. They suggested that the opening statements should include a provision such as, 'Of course, you have been advised that you have a right to legal representation,' or something of that kind so that, if they wished to, at that point they could say, 'I didn't think I did'—foolishly as that might be—and that could be addressed. I am not sure whether that is what happens in practice if someone who is naive turns up.

Mr Hannaford—As a matter of practice, what happens is that the examiner will ask the counsel assisting to talk to every single witness before the witness comes into the witness box. We explain to them how we operate and what the procedures are. Those matters are addressed beforehand. We do it for an additional reason: examinations are going to be more fruitful if there is a working rapport between the counsel and the witness, so counsel will spend time with the witness talking through all of these processes with them and talking about the question of legal representation. More importantly, we do it where there are people that have a language difficulty. So before an examination begins the interpreter and counsel assisting will spend time with the witness using the interpreter, developing that relationship and making certain that they understand what our processes are and understand that there are protections that are available for them. The examiner will spend time talking to them about this. At all times, examiners also say to the witnesses, 'If you've got any questions of us about the processes, let's talk about those. If you've got concerns that you do not understand it, let's talk about them so that you are comfortable with the process and you understand where you stand.'

Mr KERR—One of the things that the Law Council does is refer to the protection of self-incrimination in a way which I think is not accurate. I think it suggests that the privilege extends to statements that could extend to forfeiture, whereas if I am correct—and I may be wrong; correct me if that is so—the privilege only extends to matters in which criminal charges might be preferred against somebody. There may be some instances where forfeiture only follows criminal conviction and, clearly, that would be covered. But I think proceedings for forfeiture have been constructed as quasi-civil proceedings in most areas, so the privilege does not extend there, does it?

Mr Hannaford—The approach that we take to the legislation is that the protection from self-incrimination extends to criminal proceedings or proceedings for the imposition of a penalty. Therefore we take the view that the evidence that they give would be able to be used against them in any forfeiture proceedings. We explain that to them. We would have to acknowledge that there is some question mark about the clarity of the law in this area and that some lawyers have expressed the view to us that our statement to that effect is not right and the area is unclear. It is also unclear as to what is meant by the protection against the imposition of a penalty. Is forfeiture a penalty? We do not know.

Mr KERR—It would be, according to me, if I was about to lose my yacht!

Mr Hannaford—The law is unclear in that regard. Take the taxation issue. I think it is something I can talk publicly about because lawyers have raised it. Is the Taxation Office's issue of an amended taxation return, as a result of the information that has been given, a penalty?

Mr KERR—I think not. I understand the point you are making. Let us say it is unclear and we want to clarify it. Let us assume that, as a result of this discussion, one of the things we turn our minds to is how it should be clarified. It does strike me as, I suppose, consistent with the basic framework that we construct in our heads that the reason you have the privilege against self-incrimination is so that somebody will not be the subject of imprisonment or fine and that broadly the loss of personal property as a consequence is analogous to a fine. It represents the imposition by law of a consequence which removes from you that which was otherwise your property, and, by analogy, I would say that that is a penalty in the ordinary language—whether it is interpreted as such in the technical sense, you say is unclear. On the other hand, I would think—maybe my colleagues disagree—that the imposition of a tax assessment is never considered to be a penalty as such. It is simply an exaction of law that follows the correct identification of your income, whatever it be. Whilst many people might say that all taxation is theft—

CHAIR—Legalised theft.

Mr KERR—Legalised theft or whatever; we have all this sort of rhetoric—nobody really thinks of that as a penalty. In my head there would be, I think, a distinction. In practice, you are suggesting that this really has not worked out yet. There has not been an instance where privilege has been an issue in the courts in relation to forfeitures?

Mr Hannaford—No, we have not got to that stage in any court case. I suspect that it will get there. Take the issue of taxation and the issue of an amended assessment. It might not be a penalty. But if the tax office imposes additional tax, is that in fact a penalty? We do not know. This is part of the problem that the examiners do face in talking to our witnesses and getting them to feel comfortable about the process. Firstly, if the law is not clear or if government in introducing the laws have not in their policy statement in support of the bill enunciated clearly what was the purpose, what was to be achieved and how it was to be worked, then we cannot with honesty say to a witness, 'This is what is going to happen.' The practice of the examiners in dealing with witnesses is that we have got to have the witness feel comfortable that we are working with them as clearly and honestly as possible. So we would say to them, 'Look, we don't know.'

Mr KERR—I do not dispute that. The statement you make in the unclassified document makes it plain that you say that the law provides for privilege in relation to criminal proceedings and implies or asserts that it does not in relation to forfeitures. Maybe that could be tidied up in saying that we are not certain whether it applies in relation to forfeitures, but certainly no-one could be mistaken and think, 'I have protection,' because of this particular provision.

Mr Hannaford—Yes.

Mr KERR—To that extent, no criticism can be made of it. It is quite interesting that after—I do not know how long the NCA and ACC have been proceeding with his kind of framework; how old are these particular provisions?

Mr Hannaford—They came in only three years ago.

Mr KERR—Three years ago, so they have not worked their way through that system yet.

Mr Hannaford—Whilst there have been lots of charges laid—I can give you details of those and perhaps talk about those—

Mr KERR—Forfeiture often starts before conviction under these civil penalty regimes.

Mr Hannaford—And to some extent also keep in mind that, once the forfeiture provisions have been triggered, as a result of the Mansfield decision, we cannot question people about matters that relate to that.

Mr KERR—Yes, which almost implies the courts are treating it as a penalty.

Mr Hannaford—The Federal Court just recently questioned the Mansfield decision. Until a couple of new examiners came on board, there was a particular view about examiners' powers as a result of Hammond and the implications of Mansfield. The new examiners took the view that Mansfield should be narrowly interpreted and therefore allow questions to proceed in certain circumstances. The courts have now taken the view also, supportive of the examiners, that Mansfield was wrong and have now questioned whether or not at some appropriate time it ought to be either judicially revisited—or it may be that during this review there ought to be a legislative clarification of that.

Mr KERR—We cannot really invite you to be policy-specific—it is not the purpose of this. I do not think that anybody has come to us in the course of the evidence that we have had with this particular point in front of them. If it does need to be clarified, it ought to be clarified at a higher level, I suppose, so that the question of what ought to be the situation and what ought to be the protection is clear—rather than the accident of what the courts, if left to their own devices, might infer we intended when we did not make it explicit. Perhaps there ought to be some consideration between you and the department to come up with a bit of a submission as to what ought to be the case. I think that the onus on somebody who is saying that you should be compelled against your interest to testify in a way that can be then used to your disadvantage—the forfeiture of property that would otherwise be yours—is a big step to take.

Mr Hannaford—Our submission adverts to this. When the legislation came through, there was no clear statement that the Hammond principles were to be revoked. We had a series of court cases that have now said that by implication the Hammond principles have been varied.

Mr KERR—Can you explain that? I know what Hammond sort of says but—

Mr Hannaford—Effectively, over the Hammond principles you cannot question somebody where they have been the subject of charges or—and the examiners have taken the view—a decision has been made that charges will be laid against somebody and that the principles of self-incrimination have not been revoked or varied. Courts have said that by implication you intended to vary the common-law rights about self-incrimination—

Mr KERR—I do not think that was by implication; that was explicit.

Mr Hannaford—The courts have said that it was not sufficiently explicit.

Mr KERR—There is no doubt that in all the discussion we meant to get rid of it.

Mr Hannaford—That is right.

Mr KERR—We had an amplitude of discussion about that.

Mr Hannaford—Part of the problem of not being explicit about the impact of the legislation on certain common-law rights is generating litigation. In other jurisdictions, there have been express statements in the legislative framework about the impact on certain common-law rights. There has been a clear statement as to whether or not the inquiries should be allowed to proceed and guidelines given as to what should happen if hearings are to proceed. All of that in our legislation arises by implication and, wherever you have got things that arise by implication, you are going to have litigation.

Mr KERR—As to the legislative framework that we are reviewing, this was teased out this morning with the Attorney-General's Department, who agreed that there was no intention to change the position. Once a person has been charged with the crime, that decision is based on the proper basis that there is sufficient material to put a person properly to their trial. Once that point has been reached, it is not a matter of your powers—it is a matter of fundamental unfairness to then require them under compulsion to add to the material that the Commonwealth asserts legally that it has to put them to their trial. So there is a bright line, I suppose, there. There must be all these grey areas until you reach that point. Quite frequently a person will be the subject of considerable suspicion but a decision is not made to charge. But once they are charged, I would not have thought that you would then call me, if I were accused of a particular crime, and say, 'Tell me, under penalty of five years imprisonment, where did you bury the gun?' knowing that the gun could be searched for fingerprints and be used. I do not think that anyone contemplates that possibility ever emerging.

Mr Hannaford—It is not as simple as that. There is no bright line. The examiners have sought to implement a procedure which would create some demarcation, but the legislation is not clear, and that has other implications which I will allude to in a moment.

Mr KERR—Why can't you use a bright line?

Mr Hannaford—We have created a line in the practices we have adopted. It is not published and it is not in the legislative framework.

Mr KERR—What is it?

Mr Hannaford—If a person has been charged, the examiners take the view that they are able to issue a summons for a person to be questioned on other intelligence matters but they must not be related to the subject matter of the charge. But, in order to avoid or to minimise the chance that there will be an allegation of unfair advantage, the examiners as a matter of course exclude from the hearings any person who might be associated with the laying of the charges and they exclude the dissemination of the transcript to anybody who might be associated with the laying or the conduct of those charges. That can create some management problems, because the person

associated with the charge may also be associated with a line of investigation that has arisen from those charges. That person to some extent therefore is then going to be precluded from gathering access to the other intelligence. That is a management problem for the operation.

Mr KERR—That is essentially a bright line, and it is consistent with what I said. When I was saying, 'Let us assume that I am the subject of an allegation that I murdered somebody and you are conducting an inquiry in relation to the theft of a motor vehicle,' I saw no objection to my being questioned. Now, if I were questioned in relation to a series of murders with which I had been associated and I had been charged with murder A, it might become difficult. In fact, it might become impossible to separate things and that would present a factual difficulty. If you could not exclude the possibility that the person having to provide additional material at that time might be providing material which might be used to their disadvantage once charged, you would defer. But it does seem to me that you are actually applying the same test that I think should apply. It is just the practical application of it. If we were to articulate it—

Mr Hannaford—We are applying that test, but I will highlight some difficulties as a result of the legislation not being clear. The police might have laid charges against a particular person and we might want to ask questions of that person about their knowledge of a related criminal activity. We are aware of situations like that where the police have gone and spoken to the DPP about it and the DPP have indicated that they would be reluctant to proceed with the charges if the examiner conducts any further questioning of that person, because the legislation is not clear and they would not want to put at risk those particular charges or risk the prosecution being stayed because of an element of unfairness. We have faced that situation. We have faced similar situations in relation to the conduct of these matters, because of the DPP's reluctance to face having to run a trial where there might be a question about the element of fairness.

Mr KERR—I wish the DPP had spoken frankly to us about these issues today. They gave evidence as if this was the first they had ever heard of it and it was all very puzzling. They scratched their heads in a sage sort of way and said they had never been confronted by these dilemmas.

Mr Hannaford—I cannot comment on that.

Mr KERR—I can. I wish they had been frank with us. They may have been extremely frank, but it would have been good if they had produced a witness who was capable of addressing these issues.

Mr Hannaford—We would be more comfortable—and I think the DPP would be more comfortable, from what has been conveyed to me—if the legislation were to clearly state what the courts have now interpreted the legislation to mean. That gives them statutory guidance.

Mr KERR—What do you take to be the position the courts have reached?

Mr Hannaford—The courts have not yet interpreted—**Mr KERR**—No, what do you take to be the position?

Mr Hannaford—The position that we take would be that we are entitled to ask questions about matters, provided that they do not impinge upon the charges which lay upon the person.

But sometimes you can have an unavoidable consequence. I will give you an example of where, in one particular case, charges had been laid against a person. We were conducting an examination of that person, and the person disclosed a significant amount of evidence. It subsequently became clear to us that the evidence that he had given was evidence that related to the charges, but we were not aware of it at that time. We are now aware that that defendant is going to seek to have stayed that prosecution because that person voluntarily gave evidence in response to questions that impinged—we were not aware of it—and, therefore, could give an unfair advantage.

Mr KERR—That is a real risk, of course—

Mr Hannaford—It is a risk.

Mr KERR—no matter how we draw this line, because, if you are not wrongful but simply do not know these facts, people can presumably accidentally immunise themselves—or accidentally on purpose immunise themselves.

Mr Milroy—We are probably heading into policy with this speculation.

CHAIR—We have actually come to that part of the day when we should consider winding it up. Some of us have planes to catch. I will just make a couple of concluding remarks. One is that I think that there is a necessity for us to reconvene later on during this inquiry—possibly as soon as next week in order for us to be able to meet the deadlines—so I will ask the secretariat to be in touch. I think we will probably need another hour or 1½ hours with you. We would be grateful for your assistance in helping us to arrive at that mutually convenient time. The other point is that I have suggested to the secretary of the committee that there is no reason that we cannot invite people who have come before us—for example, the DPP—to make further submissions in response. We will certainly consider that. Thank you very much for your attendance today.

Committee adjourned at 3.38 pm