COMMONWEALTH OF AUSTRALIA

JOINT COMMITTEE

on

THE NATIONAL CRIME AUTHORITY

Reference: Evaluation of the National Crime Authority

MELBOURNE

Wednesday, 8 October 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT COMMITTEE

ON

THE NATIONAL CRIME AUTHORITY

Members:

Mr Bradford (Chair)

Senator Conroy	Mr Filing
Senator Ferris	Mr Sercombe
Senator Gibbs	Mr Truss
Senator McGauran	Mrs West
Senator Stott Despoja	

The Parliamentary Joint Committee on the National Crime Authority has resolved that it will conduct a comprehensive evaluation of the operations of the National Crime Authority.

The committee will examine in particular:

(1) the constitution, role, functions and powers of the authority, and the need for a body such as the authority, having regard to the activities of other Commonwealth and state law enforcement agencies;

(2) the efficiency and effectiveness of the authority;

(3) accountability and parliamentary supervision of the authority; and

(4) the need for amendment of the National Crime Authority Act 1984.

WITNESSES

JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Evaluation of the National Crime Authority

MELBOURNE

Wednesday, 8 October 1997

Present

Mr Bradford (Chair)

Senator Conroy
Senator Gibbs
Senator McGauran
Senator Stott Despoja
Mr Sercombe

The committee met at 9.04 a.m.

Mr Bradford took the chair.

CHAIR—I declare open this public hearing of the Joint Parliamentary Committee on the National Crime Authority. The committee is required by section 55 of the National Crime Authority Act to monitor and review the performance of the authority. By the authority of its functions, it has been performing this task for the past 13 years with mixed success. The committee last undertook a comprehensive evaluation of the National Crime Authority during 1990-91, which led to the committee tabling a report in November 1991 entitled *Who is to guard the guards?* The current committee resolved late last year that it was timely to embark on another such review in view of the significant changes in law enforcement that had arisen in the interim.

Today's hearing is the 11th in the program of hearings which the committee has conducted around Australia to get an in-depth feel for the strengths and weaknesses of the NCA's operations and to hear what the experts in the community think the NCA should be doing in the future.

The committee held its preceding hearing on 23 June. Since then two significant appeals have been settled in support of the NCA's operations. They were the overturning decisions of both Justice Merkel in the Federal Court of Australia and Mr Justice Vincent in the Victorian Supreme Court. The committee will be taking the opportunity later this morning to discuss the implications of these judgments with the NCA itself.

LIVERMORE, Mr Garry, Latham Chambers, 500 Bourke Street, Melbourne, Victoria 3000

CHAIR—Welcome, Mr Livermore. In what capacity are you appearing before the committee?

Mr Livermore—I appear as a former staff member of the NCA and, of course, as the former team leader of the NCA special investigation, codenamed Albert. I also appear as a concerned member of the public.

CHAIR—Thank you for making yourself available, despite the pressure of your court commitments. I should say that your appearance before us this morning largely arises from the committee contacting you to seek your input into some adverse reflections that were made against you by a witness who appeared before the committee at an earlier hearing. As a result of that, you responded to those reflections and indicated your desire to appear before the committee.

Since we received your letter, of course, those matters I referred to have occurred, but we still appreciate the fact that you are interested in appearing before us this morning. I am sure you will make a valuable contribution to our inquiry. We do not actually have a written submission from you but I understand that you would like to make an opening statement.

Before you proceed with your statement, I am required to state that, if during the hearing you consider that information you might wish to give or a comment requested by the committee is of a confidential or private nature, you can make application for that information or comment to be given in camera and the committee will consider your application. In fact, I think we have actually provided for that contingency. We are certainly happy to make time at the end of the hearing to deal with any matters that you may indicate you prefer to speak to us about in camera. I should also remind you that it is a contempt for a witness to give any evidence which a witness knows to be false or misleading in any material in particular.

I will now give you the opportunity to make some opening remarks before we ask some questions.

Mr Livermore—In 1986, Lord Roskill, in England, chaired the fraud trials committee and prepared a report. The very start of that report reads as follows:

The public no longer believes that the legal system . . . is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of evidence laid before us suggests that the public is right. In relation to such crimes, and to the skilful and determined criminals who commit them, the present legal system is archaic, cumbersome and unreliable. At every stage . . . the present arrangements offer an open invitation to blatant delay and abuse. While petty frauds, clumsily committed, are likely to be detected and punished, it is all too

likely that the largest and most cleverly executed crimes have escaped unpunished.

Unfortunately, that is what has happened in the case of Mr Elliott and his co-accused. That is not just my opinion. I refer the committee to the decision of the Court of Appeal last week in the judgment of Mr Justice Brooking, where he made comment that it is cases such as the instant case, Mr Elliott's case, that bring the criminal justice system into disrepute.

When we at the NCA prepared the brief of evidence and submitted it to the DPP, all we wanted was for the evidence that we had assembled to be led before a jury and for a jury to make a decision. Not one of some 130 witnesses ever gave evidence before a jury in this matter. It is a disgrace and a blight on the system.

When I requested the right to appear before the committee it was, of course, before the Court of Appeal judgment and I had anticipated that much of my time would be spent explaining Mr Justice Vincent's ruling and going through it in detail as to what he did and did not find and where he had made mistakes. But the Court of Appeal has done that job for me. They completely destroyed the foundation and the basis for his ruling excluding the evidence in the trial. I commend it to the committee because it is one of the strongest rulings you will ever see from the Court of Appeal in its criticisms of the findings of a trial judge.

That was the first reason for me wanting to attend. As I say, I will not spend much time on it because the Court of Appeal has now done the job effectively on that and the NCA has a clean bill of health. The evidence should have been led and it should have been presented before a jury and the trial should have proceeded. That did not happen. And it is the system's fault; it is not the fault of the NCA.

The second reason for me wanting to appear was that, with the experience that I have, I was hoping that I would be able to provide some useful contribution to the committee in the broader aspects of its inquiry into the role of the NCA in investigating white-collar crime and in relation to the investigation of white-collar crime generally. I will be in the committee's hands as to any questions they ask in relation to that general area and, hopefully, I can offer something useful in that regard.

Mr Chairman, I attended the Carlton football match at Optus Oval the Saturday after Mr Justice Vincent's ruling throwing out all the evidence in the case. I sat down and listened to Mr Elliott tell the crowd, roar to the crowd, in the words of Ted Whitten, 'He had stuck it right up the NCA.' He had not done that at all. What he had done was stick it right up the system and he stuck it up you, Mr Chairman, and every law-abiding member of the Australian community.

Just some brief comments on Mr Justice Vincent's findings as they relate to the outrageous allegations that Mr Elliott has been making for years against the NCA. Mr

Justice Vincent did not find that the NCA had acted in bad faith or with mala fides. He found that even the technical argument that he upheld had no impact at all on the cogency of the evidence that the Director of Public Prosecutions was seeking to lead in the trial. So the technical argument that succeeded before Mr Justice Vincent, even on his finding, was that there was no impact on the cogency of the evidence that was sought to be led.

He found untenable the ridiculous assertions of political motivation and unfair treatment. He specifically found that Mr Elliott and others had been treated fairly. The criticism of the NCA's coordination of its activities with international agencies was one of the big ticket criticisms, if I can put it that way, that Mr Elliott and others ran. Mr Justice Vincent found that that had no weight. His finding was a technical one and a fundamentally flawed legal one.

He then went on, unfortunately, one step further than excluding all the evidence by insisting on entering a verdict of not guilty in respect of all the charges rather than, as the Director of Public Prosecutions had submitted, they be permitted to enter what is called a nolle prosequi, day of the proceedings. I do not think there is any doubt that he had the power to enter that verdict, but I also do not think there is any doubt that he did not have the obligation to do it. And, if he had not done it, perhaps the evidence could have been led before a jury and the matter could have been determined on its merits.

During the running of the trial when Mr Justice Vincent made the first of his two rulings that effectively excluded all the evidence, the Director of Public Prosecutions attempted to review that legal decision at the time. It is my understanding that Victoria is the only state in this country where that decision could not be reviewed by the Supreme Court during the running of the trial. So what the DPP attempted to do was to go to the High Court and try and convince the High Court to exercise its overriding jurisdiction to review this fundamentally flawed legal decision which was going to skittle the whole trial.

The High Court did not determine the matter on its merits. It does not generally interfere in the running of criminal trials, and did not in this case, so the DPP was in a situation where they just had to sit there and cop it. There was nothing they could do until after the trial concluded when they could refer the questions of law to the Court of Appeal. And we have all seen the results of that. That should have been able to happen during the trial. The trial then could have proceeded and the matter could have been dealt with on its merits.

In this case, it is my submission to the committee that Mr Elliott effectively outlasted and outresourced the NCA and the DPP—it is as simple as that—and it should not be allowed to happen. The system should not let it happen.

Turning to some of Mr Elliott's criticisms, to describe them as pathetic is probably overstating them. As far back as 1993, Mr Justice Foster in the Federal Court summed up Elliott's allegations that the NCA was acting unlawfully to get him, conspiring with all

sorts of people around the place to get him, but the various matters put before him by the NCA in that proceeding—and I quote Mr Justice Foster here:

> . . . could lead one to believe that this attack upon the legitimacy of the NCA inquiry into the foreign exchange matter is a highly elaborated afterthought.

They are Mr Justice Foster's words, not mine. If what has happened in this case was not so serious, it would be laughable.

The attack that Mr Elliott made on the NCA as being a Star Chamber is a joke—and he knows it to be a joke, and so do his legal advisers. Every time he turned up to an NCA hearing he was surrounded by a bevy of barristers, Queen's Counsel, and they dictated to us what they would and would not say—what questions they would and would not answer. He could have got up and walked out the door any time he felt like it, because he cannot be compelled to answer questions that have the tendency to incriminate him. His lawyers knew that, and they beat us over the head with it. They only answered questions on topics that they agreed to answer them on. As I have said, he could have just got up and walked out the door whenever he felt like it. Many people who attend NCA hearings do just that. The local dog catchers have got more powers than the NCA to compel people to answer questions. These assertions about a Star Chamber are ridiculous.

He insisted on answering questions, and I think he had a history of successfully thwarting law enforcement agencies investigating his conduct as far back as the National Companies and Securities Commission investigation, when he again outresourced the NCSC and gave them an absolute hiding in the courts as far back as 1986.

It was only his arrogance and self-confidence as to what he had been able to get away with in the past that led him to believe that he could talk his way out of it this time as well. But he made a fundamental mistake, because the NCA produced a brief of evidence that showed the story he told about the H-fee was a pack of lies.

He committed himself to the two foreign exchange transactions that were the subject of the brief. He said he authorised them; he said he knew all about them; and he said they were legitimate transactions. We proved that that was a load of rubbish: that they were lies, and deliberate lies. We proved it so conclusively that, following the ruling of Mr Justice Vincent, Elliott and others came out with a press release for the first time with some other news story about why they did not know about the foreign exchange transactions: 'Of course they were fraudulent but we did not know anything about them.' They were gone. They would have been gone if the evidence had been led before a jury.

The evidence against them was overwhelming, and it was overwhelming without Ken Jarrett. The brief had been prepared without him. The DPP had agreed to prosecute the matter without him. With him, when he decided to plead guilty and tell the truth, if the evidence had of been led then the result was inevitable. All the NCA wanted to do,

and all the DPP wanted to do, was to lead the evidence.

The allegation that he made regarding the dissemination of information to overseas agencies by the NCA goes to the very heart of what the NCA is about and why it was established. The act compels the NCA to coordinate its activities with international agencies, and coordination must involve the exchange of information and intelligence. That is exactly what the NCA does in all its investigations, and this one was no different.

In this case, however, we had to put up with months and months and months of pre-trial arguments, where every single piece of correspondence from the NCA to an overseas agency was pulled out and waved around, and ridiculous implications were sought to be drawn from it. It was all rubbish: it was all just pie in the sky and throwing sand in the air to waste time and abuse the operation of the system.

The criticism of the NCA using the mutual assistance legislation: again, if it was not so serious it would just be laughable. The files show clearly what happened. The Attorney-General's office, as the central agency responsible for mutual assistance requests, vetted everything; but of course, during the implementation of the request, the investigating officials from the international agencies deal with the investigating officials from the requesting country. That happens all the time. It just makes sense; otherwise requests could never be properly actioned.

In this case all mutual assistance requests were vetted, approved by the Attorney-General's Department, vetted and approved by the delegated central agency of the other country and then hived off to the investigators to implement. That is just the way the system operates; and it must operate that way, otherwise it could not operate at all. We had to put up with months and months and months of ridiculous allegations and assertions about these mutual assistance requests and about the sharing of information with international agencies.

I just want to say something briefly about Mr Justice Vincent—again this is in relation to my overall submission as to the system failing in this case—and why Mr Justice Vincent was allocated to hear this case. He had been a public and private critic of the NCA since its establishment. He had made a number of submissions to parliamentary committees arguing strongly against not only NCA's powers, but its very existence. Quite simply, this was a very clear case where there was a possible perception of bias, and he should not have heard the case. He should not have been allowed to hear the case. The system should not have allowed him to hear it: it is as simple as that.

We have a double problem in this case, though. What are the members of the public supposed to think? You have a judge in this situation hearing the case, and you have him throwing out all the evidence. You then have the Court of Appeal almost in disbelief both as to the way that he approached his task and as to the substantial errors of law that he made in throwing out the whole case. It is a disgrace. The system is just not

delivering.

On the NCA's role in white-collar crime: under the chairmanship of Mr Faris, QC, and of Mr Justice Phillips, and under the acting chairmanship of Mr Leckie, the NCA improved and established its role in investigating serious white-collar crime. One of the early successes in that regard was an investigation code named Viper, which I and many of the people who worked on the Albert investigation were involved in as well. That resulted in the successful prosecution of numerous individuals, including lawyers and other professionals, and the obtaining of millions of dollars through cooperation with the tax office and through civil action. The head defendant, a man named Talia, received a sentence of about 17 or 18 years. That was reduced by a couple of years on appeal but it remains, to my knowledge, the heaviest sentence ever imposed in Victoria for a white-collar crime.

Under the chairmanship of Mr Leckie, Mr Faris and Mr Justice Phillips the NCA had three-year plans and five-year plans; white-collar crime was an important part of the strategy; and people were recruited with expertise in the area—lawyers and accountants, a police officer and an analyst. There was a core group formed that had the capacity to properly investigate those sorts of criminal activities that require people with the specialist knowledge to investigate; cases that had just been too hard for the police and other law enforcement agencies to look at. Of course, the Elliott case fell well and truly into that category. I am sure Mr Bosch from the NCSC was delighted when he was able to handball it back in 1989.

The problem, though is that, because of the way the system works and it is so open to blatant delay and abuse, if the agency investigating it so much as puts in one short step when it is going for the ball during a period of five, seven, nine, 10 years, they lose. That is what happened in this case. Unfortunately, the composition of the authority changed, the direction of the authority changed and three-year plans and five-year plans were thrown out the window and new ones were developed. The authority effectively changed its priorities and turned away from white-collar crime and that had a dramatic impact upon the support that the NCA was able to give to the prosecutor in the Elliott case.

There was another key factor that happened at about the same time. I think it was after I left, but it was probably to save money. During the course of the investigation, and from the outset, it was part of the strategic plan to utilise the Australian Government Solicitor's office to handle for the NCA any distractive legal action that was mounted, and there were many of them and we won many of them. Some of them went right through to the High Court.

The strategy was very successful from our point of view, because it allowed the people working on the investigation to concentrate on the investigation, to concentrate on assembling the evidence and not be distracted from these side issues. We had competent solicitors who briefed counsel from the Australian Government Solicitor's office to handle

those matters and, if we did not have that strategy in place, we never would have assembled the brief that was assembled, because we would have been running around putting out spot fires defending all these other myriad of legal actions that were taken during the course of the investigation.

The reason we set up that strategy is not that we were so smart but that it has happened many times before in this sort of investigation. It is a standard tactic of people the subject of this sort of investigation to try and split the investigative resources, get them running around chasing their tails on other legal actions, so that the investigation effectively stagnates. Unfortunately, I suspect that that has probably happened with the remaining matters concerning Mr Elliott within the NCA now.

The other thing that happened, particularly after Mr Leckie left the NCA, was the whole structure of the multidisciplinary approach to investigations was changed as well. The big strength of the NCA, particularly to investigate white-collar crime, was that for a while it had the true multidisciplinary team approach to investigations working properly, that is, lawyers, accountants, police officers, analysts—all the areas of professional expertise that are needed to investigate such complex and difficult matters—and that was working for a while.

Unfortunately, what happened with the turn away from white-collar crime is that really the NCA is now structured more like a police department. There are police running all the investigations and there is probably only 30 per cent of the number of lawyers, particularly in the Melbourne office of the NCA, that there was at the time when I was there. There are less accountants and less analysts, more police, and police running the whole structure, with the other disciplines sort of hanging off the side rather than being part of the one multidisciplinary team, everybody contributing to it, and have it functioning properly to investigate these difficult matters.

Finally in my opening remarks, I am concerned about the NCA's current position—not just in terms of its role in investigating white-collar crime. More particularly, I am aware of at least two other aspects of the Elliott investigation. In my belief, with appropriate resources being devoted to them to put the material that the NCA has into evidentiary form, both those matters are capable of being prosecuted and ought be prosecuted. I am very concerned that the NCA just is not resourced at this stage, even if it has the best will in the world, to properly conclude the compilation of the briefs in those matters and to adequately support the prosecution of those matters. Mr Chairman, they are my opening comments and I would be happy to answer any questions that the committee has.

CHAIR—Thank you, Mr Livermore. I think you have given us a fair bit to think about there. I should say that the committee has had to balance a couple of things in its deliberations on this whole issue. I have been at pains not to allow the committee to re-try Mr Elliott. I do not think that is the role of this committee and yet the whole Elliott matter

has focused our attention on some particular issues and I think that they are central to our inquiry. I think you said at one stage that the Elliott matter sort of led to this inquiry. That in fact is not true. This inquiry was established, as I said at the outset, in a routine sense because we thought it was timely to conduct an inquiry such as this. The Elliott matter happens to have given the inquiry a particular flavour and directed our attention, I suppose, to some of those issues.

I know my colleagues will have a lot of questions about that, but I am rather interested, probably for the purpose of the inquiry, more in your experience as an officer of the NCA. Of course, you have got perhaps a better knowledge of the Elliott or Albert inquiry than anyone in Australia, and perhaps we might take some advantage of that, but I would not like us to spend all morning talking about that. Could I just observe that you seem to have taken this all very personally. You were leading the team. You obviously took great offence at what Mr Elliott said publicly, but this has not become some sort of an obsession with you, has it?

Mr Livermore—Certainly not. I would be quite happy to walk away and slam the door on it. I am here under sufferance really because I felt initially that I was one of very few people, as you have observed, with sufficient knowledge of the case—I was involved in it from the outset—to try to give some sort of explanation regarding Mr Justice Vincent's findings and the allegations that Mr Elliott was making. I could quite happily just walk away, but I feel I have got a responsibility to do that and, likewise, a responsibility to assist the committee, if I can, with my experience as to what they can do in the future. But I am outraged as a member of the public—and a member of the public should be outraged—about what happened in this case. It should not happen. The system should not let it happen.

CHAIR—Why did you join the NCA? Tell us a little bit about how you perceive the NCA as an organisation to work for. I think you have also in your remarks been a little critical, in a sense, of the direction the NCA has taken. Is there some implicit criticism there of the current chairman?

Mr Livermore—No, there is no criticism of the current chairman. I have not worked with him, so there is no criticism at all.

CHAIR—But to some extent people have said the NCA tends to follow the direction in which the chair wants to take it and, if you look at the history of it, there seems to be some evidence of that. Is that a weakness, do you think?

Mr Livermore—Yes, that was a problem. Mr Faris did not stay for his full term, Mr Justice Phillips did not stay for his full term and Mr Leckie was acting chairman for a considerable time. Even though there were three chairman in a short period of time, there was a reasonable amount of stability during that time, but then when Mr Leckie left there was quite a significant change in direction. If you have an authority making three- and

five-year plans, and recruiting on that sort of basis, and then 18 months into your five-year plan the composition of the authority changes—different priorities are given to different matters and that is thrown out and a new plan is developed—obviously it is very unsettling and unsatisfactory for an organisation.

CHAIR—Why does that occur? Is it that the chairman, when he is appointed, has a particular interest or does the Attorney-General say to him something like, 'Oh look, I think we ought to just concentrate on something else'?

Mr Livermore—My perception is that particular chairmen and particular members have particular interests and particular emphasis. What a lot of people do not realise is that, even when the NCA was investigating white-collar crime actively, I think there was some analysis done of the resources that were devoted to it. It was never more than 30 per cent of the NCA's overall resources.

The act says the NCA should be investigating relevant criminal activity, which includes fraud, bankruptcy and company violations. So a balance has got to be struck. But different chairman and different members obviously had different views on how that balance should go and different views on specific matters that should be investigated. When you have got a quick turnover within the authority, it can become very unsettling. The authority tends to do the more complex, long running investigations so, if it is halfway through an investigation that a particular authority thinks is important and then the constitution of it changes and it is not thought of as being so important and resources are diverted, that job is not going to be done as well as it might have been, the morale of the organisation is affected, and people who joined because they perceived a certain direction was going to be pursued find that that is not the case. I think it has many unsettling effects.

CHAIR—Is that why you joined? Why did you join the NCA?

Mr Livermore—I joined the NCA primarily because of my interest in major fraud areas and corporations. I had previously worked at the Corporate Affairs Commission in Victoria and the securities commission and I had previously worked on fraud matters at the Director of Public Prosecutions as well. So I had a particular interest and I thought that lawyers and accountants in particular really had something extra to offer the investigation of major fraud and the way the authority was structured suited that.

Mr SERCOMBE—Mr Livermore, what do you say to the suggestion that is put to the committee by those who are critical of the role the NCA has played in what is called white-collar crime that the establishment of the ASC in fact has created a new environment that ought to enable the NCA to not pay particular attention to white-collar crime matters. Is the environment now different from what it was when you were in charge of Operation Albert?

Mr Livermore—I think a little. Again I think it is because of the change in chairmanship of the ASC. Most countries, I think you will find, do not combine the task of market regulator with that of law enforcer in terms of serious fraud and my personal view is that that is the correct approach. I do not think you should have the same people who are regulating and in the marketplace dealing with the participants every day, advising them and settling things with them, also investigating them with serious criminal sanctions at the end. Certainly a lot of people within the ASC hold that view as well and that was the view that I held and that is why I think the NCA or some sort of specialist agency should have a role in investigating these serious fraud matters independent of the market regulator.

Mr SERCOMBE—In that respect, at the end of your opening presentation you rather intriguingly, I suppose, referred to a couple of matters that you are aware of that arose from Operation Albert types of issues. Would you care to elaborate on them for the committee and put the particular allegations that you have in mind?

Mr Livermore—They are not allegations. They are simply aspects of the investigation of which I am aware and that in my opinion should be pursued.

Mr SERCOMBE—Would you care to put them to us?

Mr Livermore—Yes. The first was known as Operation Alice. It has also been known as the convertible bonds investigation. In 1986, when BHP was under threat from Robert Holmes a Court, a parcel of convertible bonds was sold to BHP as part of that transaction. There had been speculation in the marketplace that Mr Elliott and other directors of Elders were the beneficial owners of those convertible bonds and the NCSC conducted an investigation into it and effectively hit a brick wall during that investigation. The Attorney-General's office made a number of mutual assistance requests to Switzerland to gather evidence in respect of that matter. It is the matter that Ken Jarrett pleaded guilty to, a breach of his duty as a director of Elders, and he acknowledged in pleading guilty that he and Mr Elliott and Mr Scanlon were the beneficial owners of these convertible bonds. The sale of those convertible bonds reaped them a profit of around $70 million-odd.

The NCA, by the time I had left, was in possession of substantial evidence corroborating everything that Mr Jarrett had said about that convertible bonds transaction, namely, that from the outset of the issue of those bonds Mr Elliott, Mr Scanlon and Richard Weisener in Monaco were the controllers, the beneficial owners, of those bonds and that quite sophisticated financing structures were put in place that effectively moved the credit risk for the borrowers of the money to buy the bonds to Elders—effectively moved the credit risk to Elders—thereby being able to keep secret, if you like, the ultimate beneficial owners of the bonds.

Mr Jarrett told us that when the bonds were sold and the profits were distributed

among Mr Weisener, Elliott, Scanlon and himself the profits were then deposited in nominee Swiss bank accounts with a bank called Bank Cantrade in Zurich—pretty aptly named. The NCA is in possession of documents showing, as Mr Jarrett said, money coming out of Elliott and Scanlon controlled bank accounts with Bank Cantrade through Hong Kong and back into Australia as part of the equity that they needed. The money—

CHAIR—Excuse me, Mr Livermore, you would be absolutely aware of any sub judice issues in respect of the matters that you are raising. So I will just caution you to—

Mr Livermore—I am just answering the question.

CHAIR—That is all right. I just make you aware of that because I think we would want to be careful on that issue. I do not think that anything you have said so far would be likely to cause a concern, but I just need to—

Mr Livermore—I confirmed with the secretary to the committee yesterday that, if I were asked, I was free to answer any questions relying on information—

CHAIR—Excuse me a moment. You can proceed. It is really up to me or the committee I think to make a determination on that issue. You are obviously saying that you are answering a question, but I think I have to be careful to make sure that you do not overstep that line.

Mr Livermore—And I did check with the secretary to the committee yesterday that in respect of the NCA Act secrecy provisions I can feel free to answer questions put to me by this committee.

CHAIR—That is certainly the case.

Mr Livermore—The convertible bonds matter: the NCA is in possession of material confirming what Ken Jarrett said about the money coming from these Bank Cantrade accounts of Scanlon and Elliott into Australia as the equity they needed for the Harlin transaction, the attempted privatisation of Elders.

We also took evidence in Zurich. I was present when a man named Peter Stussi, who was an account manager within the Swiss bank, Bank Cantrade, was questioned by the chief magistrate of Zurich in relation to bank accounts held by Bank Cantrade where Elliott and Scanlon were the beneficial owners of those accounts.

Importantly, Ken Jarrett told us that, after the profits of the sale of the bonds were deposited into these bank accounts, the nominee structure that had been in place was changed. There were just nominee names that operated the accounts and they had fictitious directors. Liechtenstein foundations and other jurisdictional ploys were put in the way to prevent the beneficial owners being identified. Jarrett told us that in 1986 the structure

changed, and Peter Stussi confirmed that. He remembered Mr Elliott and Mr Scanlon going to Zurich on a number of occasions to discuss the operations of the accounts.

Mr SERCOMBE—Who is Mr Stussi?

Mr Livermore—He is an account manager with the Swiss bank, Bank Cantrade, in Zurich. He is not now, but he was at the time in the mid-1980s, and he was responsible for reporting to the chairman of the bank for the administration of these nominee accounts run by Mr Weisener, Mr Elliott and Mr Scanlon.

He confirmed in his evidence that he remembered Mr Elliott, Mr Scanlon and Mr Weisener and these nominee accounts, that he thought he could remember the names of the accounts—which was a bonus for us—but he also remembered, as Mr Jarrett had said, significant deposits coming into the accounts at this 1986 period, at the time when the convertible bonds were sold for the profit. He also remembered the structure being changed. Because Liechtenstein was so close to Switzerland and the Swiss banking system was beginning to open up a bit, it was becoming possible for law enforcement agencies to identify the beneficial owners of accounts by simply going across to Liechtenstein and getting the information. So they changed the structure to bring in some British Virgin Island companies and other directors to change the structure of those accounts. And Mr Jarrett recalled he had to go there and put on the file, for file purposes, the beneficiaries of the discretionary trust that was being run by the bank for him, for his part of the profits, how all that was to work.

So the NCA is in possession of all that evidence and, in particular, a large quantity of documentary evidence, all of which backs up everything that Mr Jarrett says. That is the first investigation that I am concerned, and I think the committee should be concerned, to ensure that the NCA has proper resources to conclude the brief on that matter and for that matter to be properly prosecuted.

Mr SERCOMBE—And the second one?

Mr Livermore—The second one is known as Operation Leopold. That investigation has a close link to the H-fee investigation, the subject of Mr Justice Vincent's ruling. In 1986, during the Holmes a Court attempted takeover of BHP, Allan Hawkins and Richard Pratt jointly controlled the company that came into the marketplace and bought about five per cent of BHP shares right towards the end of the takeover offer of Holmes a Court. Holmes a Court's people have always asserted that it was that activity that thwarted his takeover of BHP. The NCSC declared that acquisition of shares to be unacceptable, and the matter went to court and Mr Justice Marks in the Supreme Court threw out the NCSC's declaration about that.

The H-fee brief was based on the fact that the payments of $66 million made to Hawkins by way of fictitious foreign exchange transactions was repayment to him for his

role in that Beid transaction—the company was called Beid. It was to compensate him for holding costs, because they had to borrow all the money to buy the BHP shares, but also there was a goodwill figure of some millions of dollars in there as well.

The other side of that was Mr Pratt. Mr Jarrett provided a statement to us, detailing how Mr Pratt was paid his share of the money for his involvement in that Beid transaction in 1986. He was paid by a different mechanism to Mr Hawkins. He was not paid by fictitious foreign exchange transactions. There were attempts—the first attempt to pay him failed because it—

Senator McGAURAN—I am happy to get advice from the witness that this is coming to the conclusion that the NCA needs more resources to pursue certain cases, but I think he is going into a detail of the cases which is not beneficial to the committee.

Senator STOTT DESPOJA—He is answering a question.

CHAIR—I have already asked Mr Livermore to particularly ensure that the comments he makes, notwithstanding the privilege he has got here, do not in any way risk legal proceedings that may yet occur. I think, from what you said, it would be in your interests not to do that. So I ask you to keep your comments—

Senator CONROY—Is that a qualified legal opinion, Mr Chairman?

CHAIR—I am just referring to the Senate standing orders. Maybe if you keep your comments general, because you have indicated your concerns about this issue. You would be aware—I probably do not need to warn you—that if you make comments here that may in fact be prejudicial to a future trial it may exacerbate the situation you have described that already exists. So maybe you could make your comments slightly more general.

Mr Livermore—I am in the committees' hands. I am just here to answer questions; I am not making judgments.

Mr SERCOMBE—Mr Chairman, would it be helpful if you read 8.56 to the witness? Because if matters are not current or imminent I don't think there is an issue.

CHAIR—The point you might clarify is that you are not saying whether these matters are current or imminent because you don't know. Is that right? You indicated that there may be some future prosecutions.

Mr Livermore—What I am indicating is that by the time I left the authority these two matters were sufficiently advanced to warrant the finalisation of the investigations and briefs, and I am concerned as to whether the NCA is properly resourced at the moment.

Senator McGAURAN—If you could just add to your comments on that, rather than re-running the whole case before us.

CHAIR—I think Senator McGauran has raised a valid concern. I understand that you are just answering questions, but just to clarify it for the committee and for you, the advice that we are given is that if it becomes apparent that either a witness or a member of the committee wishes at a public hearing to discuss a matter relevant to current or imminent trials, we need to be aware of the need to apply the sub judice convention. We can, of course, deal with that matter in camera. That may be preferable if you want to go into any detail that may—

Mr Livermore—It is not a matter of what I want to do, Mr Chairman, I am in the hands of the committee. I am just here to answer questions.

CHAIR—If you could just perhaps bear in mind the need to be aware of that difficulty we have had. I am happy for this to be as open as possible. I think everything you have said this morning has made a very valuable contribution, but neither you nor us as a committee would want to prejudice anything. We do not know whether those matters are imminent; I do not know the status of them.

Mr Livermore—I don't know the current situation either.

CHAIR—We could ask the authority. In fact, one of the immediate questions I want to clarify with the authority later this morning is the status of those two matters.

Mr SERCOMBE—As I understand it, Mr Livermore is talking on historical record on the situation at the time and the knowledge arising out of his experience at the authority.

Senator CONROY—Which was over two years ago.

CHAIR—I think that is in order, so you can proceed.

Mr Livermore—The question I was answering was whether I could describe what this was about.

CHAIR—Go ahead.

Mr Livermore—None of these notes have anything about this in it; I am just going from recollection. I took the statements from Mr Jarrett, so I know what he says about these transactions. I know that the investigations carried out by the authority confirmed what Mr Jarrett said about them and what Mr Jarrett said. What was confirmed in investigations was that there was an attempt to pay Mr Pratt his share relating back to the Beid transaction, when Elders floated an investment company in Hong Kong and there

was a put/call option arrangement entered into with Mr Pratt's companies there, which looked all set to—

Senator McGAURAN—Mr Chairman, we have let Mr Livermore go for some time and, as you say, it has been very beneficial. Unless you overrule me—he has mentioned Mr Jarrett and Mr Pratt and the details of Hong Kong transactions and everything like that—I would just ask him to anchor his comments to our terms of reference. The answer to the question is meant to be anchored in more resources for the NCA. We do not need the detail that you are giving us. You are just throwing names around.

CHAIR—I have already ruled on that. My only concern is the question of whether there may be an imminent or current trial. We are not aware that that is the case, so I am happy for you to continue to answer the question. I have made the committee aware of the dangers here. You are aware of them and I think so far we are probably not crossing that line.

Senator McGAURAN—Could you ask him to keep it a little more general.

CHAIR—Mr Livermore can answer the question the way he sees fit. Carry on.

Mr Livermore—Thank you. Unfortunately with that attempt to pay Mr Pratt his side of the H fee, the stock market crash occurred the day the Elders investment company was listed in Hong Kong. Instead of Mr Pratt looking at a big profit, he was looking at a big loss. There was significant publicity about that at the time.

Elders, for some reason, did not go on to enforce their rights under the option agreement that had been entered into because when it was entered into they never envisaged that they would have to. But the stock market crash changed all that. Mr Elliott was personally involved in delaying, if you like, Elders taking action to recover moneys that it could have recovered under the put and call arrangement with Mr Pratt. Eventually that was settled with the Pratt companies for quite a minor amount compared to Mr Pratt's obligation under the agreement. They then had to think of a way to get the money to him for his part of the H fee. They used a transaction which, within the NCA, was known as the Vic Invest transaction. That was a company controlled by Mr Pratt and incorporated in the Bahamas or somewhere. Elders purchased about $50 million-odd worth of preference shares in Vic Invest. Of course, Vic Invest went down the gurgler, as did the $50 million.

The allegation and the brief that is being put together at the NCA concerns that transaction, that that money that was invested in Vic Invest was, in fact, payment to Mr Pratt, as the foreign exchange transactions had been payments to Mr Hawkins, for their role in the 1986 cross-share holding transactions involving Beid, which they jointly controlled.

So they are the two aspects that I am very concerned about. Numerous other aspects arose during the course of the investigation that are probably also subjects worth more investigating, but they are the two critical ones that I am personally most concerned to ensure that the NCA has the resources to properly conclude.

Senator McGAURAN—I would like to take you to the other end of what seems to be the NCA's problem and that is the court end—the justice end. No doubt NCA's ability to do its job is sorely affected if it has trouble with its court appearances. You said that the system has failed, the hearing by Mr Justice Vincent has failed and that by the mere fact that he was able to hear the case the system has failed. For the record and for public digestion, what are the checks and balances that should have prevented Justice Vincent hearing that case and where did they fail?

Mr Livermore—In relation to Mr Justice Vincent hearing the case?

Senator McGAURAN—Yes.

Mr Livermore—That gives rise to another issue. The NCA's role is to investigate, prepare a brief and then furnish the evidence to the DPP. It then effectively loses control of the matter. It is my understanding that the NCA wanted to run an application on a perception of bias. No-one is saying that he was biased but there was the perception of that, which is sufficient to warrant a judge disqualifying himself from a case. It is my understanding that the NCA wanted such an application to be run but was not a party to the proceedings. It could not run the application and the application was not run. Bias applications have to be run before you get the bad decision. You cannot wait to get the bad decision and then say, 'Hey, you are biased. You should not hear the case.' There was obviously a judgment made within the DPP that they did not think it was necessary to make a bias application in the case. I can only assume that that was the decision that was come to. But, from the NCA's point of view, it loses control once the brief goes to a prosecutor and the bias application cannot be made.

Senator McGAURAN—This is sort of throwing a line out: we also have the Justice Merkel decision in the bikies' case, which was also overturned. We have two significant cases that the NCA were running—watershed cases for them, as they would see it. They hit the wall on two judgments which were perceived to be biased before they were even heard. The two judges are well known for their opinions on the NCA prior to that.

In all my experience on this committee—tell me if I am wrong—there seems to be a culture, even within the legal profession, of objection to the NCA, almost from day one. Is that true? Is there something foul in the justice system that the NCA cannot get past?

Mr Livermore—No, I do not think so and I do not think that is the general perception. One of the problems is the act itself. The act was compromised and the act

creates many of these problems and that opens the door to all sorts of technical challenges. Mr Justice Merkel's decision was on a completely different topic about whether a notice of referral specifically identified the relevant criminal activity enough. He took one view and that view was overridden by the full court of the Federal Court. But it is really the act. The act could do with some tightening up to stop these sorts of legal actions occurring to allow the NCA to get on with its job.

Senator McGAURAN—I took it that you seek the NCA continuing to pursue the white-collar crime area.

Mr Livermore—It is my view that the NCA has a role in that area. If it does not, we need some other sort of specialist agency to do that with similar or better powers than the NCA but, equally as importantly, there is the unique multi-disciplinary team approach to investigations. That at least used to be the prime characteristic of the NCA. They are the two things as I see it: the sufficient power and the unique multi-disciplinary team characteristic.

CHAIR—Just to clarify, the reference system to which you have alluded has been something we have concentrated quite a bit on. Senator Ferris, a member of the committee who was unable to be here today, was very keen for us to canvass that issue with you and the NCA. Prior to the Court of Appeals decision, there was some doubt, but it seems now that the reference system is solid. Yet there has been a lot of suggestion that it is also a major limitation as far as the authority is concerned. What are your feelings about that?

Mr Livermore—Certainly, following the full Federal Court decision and the Victorian Court of Appeal decision, there are now good legal precedents for the NCA that should help it in a practical sense in operating effectively. That is true. The problem that I found, because I was involved in obtaining a number of references for the NCA, is that due to the way the act is drafted every QC in Australia would take a different view on what is required to be put in the notice and how the notice is to be constructed. It was really a minefield for technical challenges. We received numerous advices in the Albert investigation. Within the authority, there is no doubt that we had the tightest references of any investigation—and look what ended up happening in that case. That should not happen again, hopefully, because of the bikie decision and because of the Court of Appeal decision.

Senator STOTT DESPOJA—Mr Livermore, I just wanted to go back to your comments in relation to mutual assistance. From your comments, I get the idea that you categorically deny or reject that there was any conspiracy between the NCA and the Attorney-General at the time. We have had evidence in a confidential submission that suggested that the idea of your direct liaison with the Swiss authorities was, in fact, some form of conspiracy between the NCA and the Attorney-General.

Mr Livermore—No. That is just fanciful. What happens with the mutual

assistance applications is that each country which is a party to the treaty and which has passed legislation reflecting the treaty nominates a central office to which requests come and go. In Australia, it is the Commonwealth Attorney-General. So all law enforcement agencies funnel their draft requests into the Commonwealth Attorney-General's office. Many agencies, including the NCA, become frustrated at times because they are so closely and properly vetted and because of the time spent doing that and making sure they are just right before they are approved by the Attorney-General's Department here. The Attorney-General's Department then sends the request to the central office in the reciprocal country. Those two central offices determine whether there is a valid request.

It is only once that request has formally been made and accepted that, from the practical point of view, the central offices then allow the person implementing the request to get any extra information they need from the investigating agency. I would venture to say that it would happen in every case. Not just the NCA, but any law enforcement agency—state or federal—that utilises that system would, at some stage, have the law enforcement agency officers talking directly with the investigators who are implementing the request.

The Attorney-General's Department always knows what is going on. If there are ever any visits to or from, they are always fully aware of those. Sometimes they attend; sometimes they do not. They monitor the enforcement of the request, but the agencies necessarily get involved.

The second aspect to that, of course, is that now there are many agencies around the world, and the NCA is one of them. Under their own statutory charter, there is a requirement to cooperate and coordinate with other international agencies. So apart from the mutual assistance act, you have now got agencies around the world dealing with each other because their own statutes compel them to do that. The independent commission against corruption in Hong Kong is a classic example. That is probably the one that the NCA has the most to do with. There is just such an overlap in these worldwide investigations that agencies around the world now have the power and the obligation to deal directly with each other.

Senator STOTT DESPOJA—I would like to follow on from Senator McGauran's point in relation to the decision not to pursue further the matter of Justice Vincent's bias against the NCA. I think you have gone halfway to explaining why the NCA was not necessarily a part of that process once the DPP was involved in the decision. What I would like to know is why? Why did the DPP decide not to pursue that matter and was it politically motivated?

Mr Livermore—I do not know.

Senator STOTT DESPOJA—You do not care to comment; you do not have an impression?

Mr Livermore—No, I do not know.

Senator STOTT DESPOJA—What about the notion that the DPP was given scant and rather meagre resources in relation to pursuing the prosecution? Is that hearsay or is that something that you would agree with, that the resources were not adequate?

Mr Livermore—I have got no evidence or information of any political involvement with the political influence on the Victorian DPP and, in fact, my belief is to the contrary. I do not think there was any political involvement there. However, on the resource point of view, it was clear to anyone who turned up in court that it was like David against Goliath in that 12th court. You walked in there and there were teams of lawyers and advisers on the defence side. It just did not look like a fair fight at all on the odd occasion that I called in there and had a look.

Senator McGAURAN—What effect does that sort of judgment—Justice Vincent's judgment and the subsequent overturning—have on the justice system or the legal profession? In politics there could be a similar damnation of a judgment and its rippling effect. We had a similar situation in the last two weeks. They are bombshells. Has it had a huge effect up there in William Street—a disillusioning effect?

Mr Livermore—I think everywhere—it is not just within the legal fraternity. Something like that happening must bring the justice system into disrepute.

Senator McGAURAN—But should Justice Vincent go, if he is that wrong?

Mr Livermore—That is not for me to determine. But I certainly commend Mr Justice Brooking's ruling to the committee to read, just to have a look at the strength of that judgment.

Senator STOTT DESPOJA—Mr Livermore, I am wondering why the NCA did not seek to obtain any reference to investigate the H fee transaction. What was the rationale behind that and was it influenced by anything?

Mr Livermore—When the initial Commonwealth reference was obtained in December 1989, when we first sought to issue process under that reference to gather documents and to examine witnesses, the Queen's Counsel that were briefed to settle those notices and summonses advised us that they thought there might be a problem with the terms of the reference, that it could be open to legal challenge.

It was not until September the next year that a new and final set of references was obtained in the Albert matter. They were looked at by numerous Queen's Counsel officers of the Attorney-General's Department, and they were settled as being the bulletproof references to cover the matters that we were investigating involving Elders and Mr Elliott, which included the H fee.

From September 1990, and all our relevant process was issued under those references, we believed on advice we had been given that we had bulletproof references to do that. So there was no need to get a new reference. Our advice was that those references were fine. They were fine; it was just Mr Justice Vincent's view of them that was wrong.

Senator STOTT DESPOJA—I might explore the issue of references later. I was just checking that the election of a new state government did not have anything to do with your decision.

Mr Livermore—No, no impact at all.

Senator CONROY—I just wanted to turn to the problems you experienced with the MAA and your attempts to obtain information from the Swiss bank. That would be a fairly common problem in all sorts of white-collar fraud. I believe there were two separate MAA acts that were and are still being frustrated by legal process. Could you just expand on that?

Mr Livermore—This issue of the ownership of the convertible bond was always a red-hot issue. At the outset of the investigation there was a request made to the Swiss bank to try to determine the beneficial owners of those bonds. That was based on evidence that had been given at an NCSC hearing where basically the version from Mr Elliott, Mr Scanlon and Mr Jarrett was that these convertible bonds were owned by Belgian dentists, that they had been placed in Europe by Mr Weisener with people who were friendly to Elders and held by the Swiss bank, Bank Cantrade, and the chairman of that bank on behalf of the beneficial owners.

So our first mutual assistance request was to go to Bank Cantrade, to get all the documents they had showing who were the beneficial owners of that parcel of bonds—

Mr SERCOMBE—A lot of gold fillings, were there?

Mr Livermore—As it turned out there were not a lot of gold fillings because that request was frustrated for some years through the Swiss courts. Our request was ultimately upheld and actioned. There were submissions—ludicrous submissions in my opinion—made by lawyers on behalf of Mr Elliott in Melbourne through the Swiss bank that were put up before the court in Switzerland.

You have to bear in mind at this stage, of course, that Mr Elliott is saying, 'I have got nothing to do with the ownership of these convertible bonds.' The NCA goes to the Swiss bank and says, 'We want the information to show the beneficial owners of these bonds.' What has it got to do with Mr Elliott? One would think that it would have nothing to do with him because, if he is not the beneficial owner, all the NCA is going to get from the Swiss bank is a big list of names of Belgian dentists who own this parcel of $105 million worth of bonds.

Instead of that there was Mr Elliott funded litigation right through the court system in Switzerland for years until we ultimately won. We got the documents and the documents showed that the Belgian dentists did not exist; that that parcel of bonds was never held by the Swiss bank on behalf of any clients as beneficial owners.

Senator CONROY—How can you be sure that Mr Elliott funded that first case?

Mr Livermore—I did not see the actual evidence of him paying the bills. I saw the file held by the Swiss magistrate where all the material virtually had been supplied by Mr Elliott's lawyers in Melbourne. I was informed by the magistrate that the practice within Swiss banks is that, if a request is made, the banks will not challenge the efficacy of the request but they will give any person affected the right to do that via the bank, but they will not fund it themselves. If there is legal action taken challenging the request, it is the person who wants it challenged that pays the bills. It is on that information that I base my assertion that it was funded by Mr Elliott.

Senator CONROY—Where is the second attempt at at the moment?

Mr Livermore—After we got the information from Mr Jarrett, he was able to clarify for us, of course, why there were not any Belgian dentists on the record within the Swiss bank. He said that Mr Weisener in Monaco controlled the bonds until they were sold. It was only when they were sold that the profits from the sale went into the nominee bank accounts within the Swiss banks. So the second mutual assistance request was directed to obtaining records of all bank accounts held by or on behalf of Mr Elliott, Mr Weisener and Mr Scanlon.

I was advised before I left the NCA—this was after we had the hearing with Mr Stussi, because he was able to remember the names and identify the accounts—that the Swiss magistrate had in his possession those banking records. I think he told me that there were either 21 or 23 separate nominee accounts in Bank Cantrade that fitted that description. Legal action was then instituted again in Switzerland—I think it is still ongoing—that has prevented him from handing those documents to the NCA.

So, as of over two years ago when I left the NCA, that was the situation with the second request: the magistrate actually had the documents relating to those nominee accounts, but legal action in Switzerland had stopped him handing them over to the NCA.

Senator CONROY—As an illustration of the complexity of those sorts of white-collar transactions that go through the Virgin Islands and those sorts of things, I wonder if you can explain how money was transferred out of Vic Invest? What was the process that was used?

Mr Livermore—The money from Elders was simply paid to Vic Invest to buy convertible bonds, or convertible preference shares—I think they were preference shares—

securities issued by Vic Invest. Vic Invest turned out to be just effectively a shell company that had issued these securities that Elders purchased for $50 million-odd. So Vic Invest then put the money in its pocket and years down the track—not long down the track actually—Vic Invest just went into liquidation in the Bahamas or wherever it was and that was the end of the money, and no attempt was made by Elders to recover that money until it became the subject of the NCA investigation.

Fosters Brewing Group then commissioned its lawyers to look into the transaction. Civil action was taken regarding the transaction against Mr Pratt and others and that was settled out of court about 18 months ago on Mr Pratt paying something like $20 million to $25 million, plus selling cheap cardboard boxes to Fosters for a few years. So the civil action based on the same circumstances was settled in those terms.

Senator GIBBS—Were those bonds actually put in a person's name or were they put in a company name when they were transferred from Vic Invest?

Mr Livermore—Just the company name, I think. I think they might have been bearer bonds. I am not entirely sure on the details.

Senator GIBBS—You said before it was the pay-off to Mr Pratt. How did they do that? They did not transfer them to his name at all?

Mr Livermore—No, Mr Pratt controlled Vic Invest.

Senator GIBBS—So he simply drew money from the company and that is how he obtained his money?

Mr Livermore—Yes.

Senator CONROY—I think I read in the weekend paper that there were 15 people working on your team on operations Albert, Alice and Leopald?

Mr Livermore—It varied over the years. It was probably more than 15 at one stage. The numbers varied according to the amount of work that was required.

Senator CONROY—Was that the entire component that worked on white-collar fraud, or were there other teams working on other cases within the NCA at that stage?

Mr Livermore—I was responsible for a number of unrelated investigations and there were people within the NCA's other regional offices working on white-collar matters as well.

Senator CONROY—Are you able to give the committee any information about relatively how many people would be working on the white-collar fraud area within the

NCA at the moment? Do you have any information that is current?

Mr Livermore—I know that some of the regional offices just have fewer staff.

Senator CONROY—Totally?

Mr Livermore—Totally. I know that the number of lawyers and accountants has decreased across the board. I do not really know how many people are working in white-collar matters there now.

Senator GIBBS—You said before that the NCA Act was compromised. Obviously, it needs a lot more money; that is probably the main thing. In what other way could it be changed? Does the NCA need more powers?

Mr Livermore—The right to refuse to answer questions on the grounds of self-incrimination is a constant frustration and it is not really accurately reflected—I do not know whether you have got any figures—by the number of people who claim that right and walk out the door because what it does, as it did in the case of Mr Elliott, is force investigators into compromising on the areas that questions would be asked about in hearings to try to get at least some information out.

The securities commission has the power to compel answers but, if a person claims privilege, the answer cannot be used against them in criminal proceedings. I think the NCA should have that power. That is my personal view.

Senator GIBBS—If people can walk out the door that is quite ludicrous bearing in mind the importance of these investigations. They are really stymied in a lot of ways, aren't they?

Mr Livermore—Yes.

Senator GIBBS—The general public have this perception of the NCA being this really powerful body, but it is actually not.

Mr Livermore—That is right.

Senator GIBBS—From what you have told us today, you do not have to be a financial genius to work out that there is a hell of a lot of money laundering going on here. It seems to me that if Mr Elliott can brag that he 'stuck it up the NCA', poor old Mr and Mrs Average haven't got a hope in hell, have they?

Mr Livermore—That is right, particularly when you get the feeling within the community, when the propaganda machine is at work characterising the NCA as a star chamber, that we have the power to get people in there, shine a bright light in their eyes

and whack them over the head and shoulder regions and force them to answer questions. But nothing could be further from the truth.

Senator GIBBS—I suppose it reinforces, to the general public, the perception that the more money and power you have justice is dealt out, and the rest of us just hope.

Mr Livermore—I think Lord Roskill summed it up in that quote that I read out at the start of my submission and that still prevails in Victoria.

CHAIR—To clarify one point you made, why was the self-incrimination rule put into the act rather than, say, the ASC model? What would a change to the ASC model achieve?

Mr Livermore—It would achieve greater efficiency in the conduct of investigations because people could not refuse to answer questions on the grounds of self-incrimination.

CHAIR—In the end, the lesser of the evils is that you will be more effective in the investigation but, of course, you may not be successful in the prosecution in that case. Would that be right?

Mr Livermore—Many people would argue that the NCA should be empowered to compel answers to its questions and, even if self-incrimination is claimed, it should be allowed to use that in evidence. The compromise position would be the ASC provision, where someone still has the right to claim the self-incrimination privilege and any question they claim that right in respect of cannot be used against them in evidence. But at least then the NCA or whatever investigative agency would get the information they needed to take the investigation further.

Senator STOTT DESPOJA—In your comments to the *Weekend Australian* you said you were surprised that Mr Elliott had never availed himself of the privilege section. Why were you surprised?

Mr Livermore—Because I knew that his lawyers would have advised him of his rights and some of the lawyers that represented Mr Elliott from time to time were very well versed in acting for clients who were before the NCA and had on those occasions advised their clients to take a particular course. My suspicion was that Mr Elliott would have been advised to act in that way as well.

Senator STOTT DESPOJA—So what is your response to speculation that Mr Elliott is seeking compensation from the authority?

Mr Livermore—When the DPP advised that there was sufficient evidence for him to be charged, back in 1993, and he was contacted by police officers within the NCA and

given the opportunity to participate in a taped interview and told about the decision on the evidence, that is when they went off and got an ex parte order at 8 o'clock in the morning from a Federal Court judge, without the NCA being present, to stop those charges being laid. That injunction was based on this conspiracy allegation, and it is that action that is still actually in the court. I do not think anything has been done on it in years. That substantive action alleging all sorts of conspiracies and claiming damages is still on the record; but, to my knowledge, no action has been taken on that for years.

Senator STOTT DESPOJA—Finally, I wanted to return to the issue of the powers of the NCA. I know you rejected, in your opening statement, the notion of the NCA and the hearings being star chambers and those allegations by Mr Elliott. But we have heard from a number of witnesses related to that case and many others who have said that the authority has quite extraordinary powers, some of which are considered quite intrusive from a civil libertarian perspective. I would like to know what your response to that is.

I am also interested in claims by some witnesses—it is something we have pursued earlier in this committee; and has this happened to your knowledge?—that members of the NCA have given to the media names of witnesses or people under investigation. In one circumstance, in confidential evidence, we heard of one witness who was forced to 'run the gauntlet'—I think that was what the quote was—because his name was leaked to the press. He got out of bed to be greeted by the authority and the police, and the media was waiting there. Has that happened to your knowledge? Do you sanction it? What do you think of the intrusive powers of the NCA, as according to some witnesses?

Mr Livermore—We conducted literally hundreds of hearings in respect of the Albert investigation. Very early in the piece, lawyers acting for some of those witnesses requested a change in the practical implementation of the hearings because witnesses, when they attended, were generally put in a room to wait before they cleared security to come into the building proper to attend the hearing. There were some quite helpful comments made by lawyers representing those people as to how that system could work a bit better in terms of getting them off the street and away from the streetscape quickly and more efficiently. And we adopted a number of suggestions that were made there in that regard.

I had to laugh, though, because we had these complaints being made and then at lunchtime one day I was sitting in my office looking out the window and I saw Mr Elliott and his lawyers walking up and down the street gesticulating wildly to each other about various topics. It was those same lawyers who had said to us how horrible it was us making them wait in a room where someone possibly from the street could have peered in and seen them.

I am unaware of any leak ever having occurred. I remember in one investigation—it was not the Elliott one—when a summons was served on a person, whoever served the

summons got the person to sign for their conduct money and that enabled the person to see some names on a list of other people who had been summoned. That was a mistake, and that should not have happened, but I am not aware of the example that you referred to.

Senator STOTT DESPOJA—Just briefly—this is something we have pursued in earlier discussions—are you aware of the case in any private hearings, any of the confidential hearings, when a member of another investigating agency or force has been in one of the confidential hearings but has not been identified to the person being investigated or the witness? Has that happened, to your knowledge?

Mr Livermore—Yes. I know there have been numerous hearings conducted where officers of other agencies have attended. By other agencies I mean other agencies in Australia—the tax office, the securities commission, those sorts of agencies.

Senator STOTT DESPOJA—What about other overseas agencies?

Mr Livermore—Yes. I know that a group of people came from France in an unrelated matter to the Albert one and numerous hearings were conducted that they sat in on. I think in Albert there was at least one—there may have been more than one—where one or more officers of the Serious Fraud Office from New Zealand may have sat in. I think there may have been one, but I am not sure, where tax office investigators who are part of the team sat in, as well.

Senator STOTT DESPOJA—They were not identified to the person being interviewed?

Mr Livermore—I am just not sure.

Senator STOTT DESPOJA—I am happy for you to take that on notice if you like. We have heard evidence that someone from the Serious Fraud Office in New Zealand was present and was not identified for the benefit of the person being investigated or interviewed.

Mr Livermore—I do remember one instance and I think it was fairly early in the piece, where counsel assisting the authority who was conducting the hearing advised we were determining whether the names of all the people present should be listed. My recollection is—and this, I think, goes right back to 1990 or 1991—that the decision was taken that a generic description, something like ‘all investigators working on this case’, or something like that be used. My recollection is that that decision was taken because it was believed that that generic description covered everybody, including the people from maybe the tax office, or the Serious Fraud Office, as well. There was certainly nothing ulterior in doing that.

Senator STOTT DESPOJA—Thank you.

CHAIR—Can you wait a couple of minutes? Is that all right? We have just got one more question from Mr Sercombe.

Mr SERCOMBE—Mr Livermore has dealt with mine. I think Senator Conroy has a question.

Senator CONROY—I probably have two questions, unless you want to go to the tape break now. I am quite happy to wait.

CHAIR—We have overcome that problem.

Senator CONROY—I just want to return to the question of the Swiss bonds. Were you satisfied in your mind that the profits from the sale of those bonds actually went into those bank accounts in Switzerland in terms of the paper trail? Were you able to establish a—

Mr Livermore—That is what Mr Jarrett said happened. I have not seen the actual account detail showing the deposits being made. In that regard, Mr Stussi told us that he recollected significant deposits being made at the time the bonds were sold. Probably more significantly though, money coming from Bank Cantrade accounts, controlled by Mr Elliott and Mr Scanlon, through the Hong Kong Bank in Singapore and then through to Australia, has been traced. That shows that that money was utilised for the Harlin transaction which, Mr Jarrett said, at least some of the proceeds of the sale of the bonds were used for. I think that is pretty compelling evidence in support of what Mr Jarrett says, coupled with him pleading guilty to that very charge.

Senator CONROY—It is probably good evidence, pleading guilty. There is the question of lawyers—and I know it is always fraught to ask a lawyer to be potentially critical of other lawyers or judges. But there is the question of lawyers seeming to help create this confusion. We have had some examples here where, in my belief, certainly, the committee has been misled by lawyers acting on behalf of witnesses. There seems to be a fair degree of complicity or cooperation for lawyers to help obfuscate the matters. Would you like to comment on that?

Mr Livermore—If lawyers are engaged to act on someone's behalf, they are really bound to use everything that the system allows them to do. A common tactic used is to delay, obfuscate, or take whatever actions they can. One of those actions which I should mention because it is a specific example is the way the AD(JR) Act—the Administrative Decisions (Judicial Review) Act—is used. It is a Commonwealth act that was actually used by Mr Elliott, as well, but it is commonly used to try and review decisions of Commonwealth agencies, including law enforcement agencies, during an investigation or a prosecution.

In this case, it was the sort of jurisdiction, or hook, if you like, to try and challenge the decision of the NCA to lay a charge against Mr Elliott. That act was never designed for that purpose. It had many good purposes that it was designed to deal with, but that is the sort of thing that the system allows to happen. My understanding is that that aspect of that act is being looked at at the moment by the Commonwealth—and it should be as well, because it is open to abuse and it facilitated abuse in this case.

CHAIR—Thank you very much, Mr Livermore. Did you want to say anything else before we finish?

Mr Livermore—No.

CHAIR—Your evidence this morning has been very useful to us. We appreciate the fact that you have been prepared to come forward and say what you said. I know that you, like the committee, are looking forward to our report being completed. I think your evidence will have been very useful to us in achieving that end. So thank you very much.

Mr Livermore—Thank you, Mr Chairman.

Short adjournment

[10.49 a.m.]

BROOME, Mr John Harold, Chairperson, National Crime Authority, 201 Elizabeth Street, Sydney, New South Wales 2000

MELICK, Mr Aziz Gregory, Member, National Crime Authority, GPO Box 5260, Sydney, New South Wales 2000

CHAIR—I welcome the members of the National Crime Authority, Mr Broome and Mr Melick. Before inviting you to make an opening statement, Mr Broome, I am required to state that, if during the hearing you consider that information you might wish to give or comment requested by committee members is of a confidential or private nature, you can make application for that information or comment to be given in camera and the committee will consider your application.

I would like to indicate that I would like to finish before 1 o'clock, if that suits you. Therefore, we should probably leave some time for some in camera deliberations. So we will see how we go for time. Mr Broome, I understand you would like to make an opening statement. You are welcome to proceed with that.

Mr Broome—Thank you, Mr Chairman. We will do our best to finish in that time frame. There are some things which I think are better discussed in a confidential sitting of the committee, and we might flag those at a slightly later date in the evidence that we will give.

Much has happened since the authority last appeared before the committee. Both of the adverse decisions of single judges have been overturned by full benches of the Federal Court of Australia and the Victorian Court of Appeal. Those decisions make it abundantly clear that so much of the criticism which has been meted out is unjustified and that the authority has acted not only with legality but with propriety. We therefore welcome the opportunity to discuss the underlying issues with the committee in the light of those recent court decisions. We also welcome the opportunity to discuss what are, in the long term, much more important issues relating to the structure and content of the National Crime Authority Act.

However, obviously we do need to say something about the decisions of the full court of the Federal Court in overturning the decision of Mr Justice Merkel in relation to A1 and A2 and the NCA, and in particular, in relation to the decision of Mr Justice Vincent to order the acquittal of the defendants in the proceedings conducted by the Victorian Office of Public Prosecutions against Mr Elliott, Mr Scanlon and others.

Since our last appearance, a number of witnesses have appeared before the committee and have made a number of critical comments about the authority. These were referred to us by the committee with an invitation to comment. I have with me today a

number of responses which I can provide to the committee in relation to those matters. The first response relates to the allegations made by Mr Elliott and Mr Scanlon in their evidence in relation to the conduct of the prosecution against them. The second response relates to the complaints by Mr Skrijel, and the third set of material relates to some other complaints which have arisen in the course of the committee's inquiries.

For our part, we would be content for the responses to be treated as confidential by the committee, particularly in relation to the response to the allegations made by Mr Elliott and Mr Scanlon. There is material in our response which, at least in part, goes to the substance of the allegations against them which were the subject of the prosecution.

As I have said to this committee on previous occasions both in public and private session, we have never believed it was appropriate for the defendants in those proceedings to be retried before a parliamentary committee. Each of the defendants is entitled to the benefit of the judicially entered verdict of not guilty. Mr Elliott and Mr Scanlon made a large number of criticisms of the authority in the evidence given to you and in other documents which they may have provided to the Attorney-General. It is apparent from reading the formal submission given to this committee that the documents, as I said, may have been prepared for presentation to the Attorney-General at an earlier time.

In responding to those criticisms, we have tried, as far as possible, not to include the evidence that would have been led at the trial but to confine ourselves to answering the allegations of impropriety and illegality levelled against us. Nonetheless, release of those responses may be seen by some as re-raising issues that have been legally determined by the trial judge. What we believe is important is that the committee is satisfied that, at all times, the authority acted legally, properly and consistent with the best advice available to it. Consistent with our view that the committee should address the allegations of impropriety against the authority rather than revisit the criminal proceedings, there are a number of points that ought to be made and made in public.

As a result of the decision of the trial judge and of comments made by Mr Elliott and the other defendants prior to, during and after the trial, the authority and its staff have been subject to significant vilification and accusations of impropriety and illegality. We, unlike the defendants, have had to be constrained in what we could say while related matters have been considered by the Victorian Court of Appeal. Certainly, it was not possible to rebut many of the accusations made during the course of the investigation, the committal and the trial because to do so would, in our view, have been most improper. We remained content in the knowledge that we had acted properly throughout the investigation and we believed that our position would subsequently be vindicated.

Anyone who reads the Court of Appeal decision would reach the same conclusion. It is now obvious that, in respect of the fundamental issues, the trial judge erred in law and his subsequent decisions must be seen in that context. As I said at the time when Justice Vincent entered verdicts of not guilty, we accepted his decision as we were bound

to do, but we did not agree with it. The decision of Mr Justice Brooking, with which the other members of the Court of Appeal agreed, makes it clear that, on every question of law referred by the Director of Public Prosecutions for consideration by the Court of Appeal, the answer given supports the position of the prosecution.

On a number of occasions, including immediately after his judicial acquittal, Mr Elliott asserted that the authority had broken into his home, bugged his telephone and placed him under surveillance. He clearly implied that such conduct was illegal and had been carried out by the authority knowing it was illegal. The truth is that we never entered his home with or without a search warrant or tapped his telephone with or without a warrant, nor did we place him under surveillance.

These outrageous claims, which have never been supported by a single shred of evidence, are typical of what we and our staff have had to put up with for many years. It is interesting to note that, when Mr Elliott gave evidence to this committee, which I assume was under oath, those allegations were not repeated by him. Similarly, others have expressed substantial criticism of the authority and were often quick to do so yet, when the criticism was found to be unjustified, the same people are slow to apologise, if they take that action at all.

Obviously, we and our staff have taken great satisfaction from the result in the Court of Appeal. It is unfortunate the media coverage of that decision was but a fraction of what was given at the time of the original decision of the trial judge. While it is true to say that the Court of Appeal did not specifically find that the authority's actions were lawful, this was not a function it could perform under the relevant Victorian legislation.

There are additional questions which we would have liked the court to consider, but those were also outside its role under Victorian law. Any person who reads the judgment is left in no doubt that the foundations on which the trial judge reached his decisions on the essential legal questions was flawed. Effectively, the Court of Appeal has demolished the trial judge's legal reasoning.

There is a related matter to which I should refer. As the committee is aware, the Attorney-General, in his capacity as chairman of the intergovernmental committee, asked his department to conduct a review of the authority's handling of this matter. That review was completed in a large part by November 1996. However, the IGC has not finished its consideration of this matter, and it is obviously a matter of some regret to us that this process has taken so long, although we are always extremely confident of the outcome.

In the light of the decision of the Court of Appeal, there is clearly no other possible finding that the authority acted according to law. Hopefully, the committee will be able to make clear findings based on the decision of the Court of Appeal and the other material available to you that we did conduct a proper, professional and lawful investigation.

Finally, there is one other matter which I should refer to in the context of the Elliott prosecution. The committee will be well aware that Mr Elliott has on a number of occasions claimed that he either had or would commence proceedings against the authority seeking $200 million in damages. He has not. He has at present proceedings on foot in the Federal Court of Australia. These were commenced in 1993 and were unsuccessful.

Indeed, there is an outstanding costs award against Mr Elliott in favour of the National Crime Authority. Those proceedings did seek extensive damages, but they have not been prosecuted since 1993. No action has been taken in respect of them since Mr Elliott was acquitted in 1996. We are taking the appropriate action with a view to having the proceedings struck out for want of prosecution and, I might add, to collect the outstanding costs.

The other important judicial decision has been that of the full bench of the Federal Court in what is styled NCA and A1 and A2. That decision, while a majority decision in favour of the authority, saw all three appeal judges lay down very clear principles concerning the validity of National Crime Authority references. It makes it clear that its investigative processes do not require disclosure of the material available to the authority to witnesses and it establishes that it has considerable scope to establish whether or not relevant criminal activity which is the subject of a reference has in fact occurred or is being planned. The decision draws on well-established principles and, in one sense, is not particularly novel. In fact, it was the decision of Mr Justice Merkel which was clearly out of line with established principles, and that has been recognised by the full court.

We can discuss in some detail both decisions if the committee would wish. The decisions in NCA v A1 and A2 have not totally removed some constraints on us. This should, however, be something we discuss in a confidential session with the committee. The point I would wish to make, notwithstanding these resounding victories, is that recent history demonstrates the capacity of the present act to give rise to doubts as to the validity of the authority's actions and therefore to encourage challenges which, while they may turn out to be unsuccessful, nonetheless create delay and uncertainty.

That is not to argue for the removal of appropriate judicial scrutiny of the authority's actions. We should be accountable to the courts to ensure that we act according to law. The problem is that the law should not be so unclear as to enable decisions of the kind we have seen in both these cases. They have required substantial time, resources and judicial consideration to set right. We look forward therefore to discussing with the committee today matters of substance involving the powers and functions of the authority and to respond to the issues that have arisen as a result of your deliberations today.

We believe there is a considerable scope for the act to be improved either within the current basic frame work of references or within a different structure, if that is what the committee would wish to recommend and if, subsequently, the relevant parliaments chose to so enact. What must be retained and what is fundamental to the importance of

the authority's functions is its unique position to deal with multi-jurisdictional crime in a cooperative structure with other elements of Australian law enforcement. Thank you, Mr Chairman.

CHAIR—Thank you, Mr Broome. You very kindly provided the committee with a fairly detailed briefing note on the Elliott matter after the decision. Are you happy for that document to be made public?

Mr Broome—I believe that is appropriate. Every piece of information in that document is available on the public record through judicial transcripts, decisions of various courts and so on. It was an attempt by us to provide you with just some of the overview that put the decision of the Court of Appeal in context. I do not think there is any reason why it should not be a public document.

CHAIR—All right. There being no objection, it is so ordered. I think it would be helpful for that document to be made public. That would, in fact, add something to the remarks you make before us this morning. Did you refer to other documents you wanted to table this morning, Mr Broome?

Mr Broome—I have got some other responses. As I said, there are three. One relates primarily to the allegations made by Mr Elliott and Mr Scanlon which was referred to us. I would ask the committee to consider whether that document should be made public or not. As it is a somewhat lengthy document, it may well be one the committee might like to think about before it makes a decision.

CHAIR—We will not deal with that issue today then.

Mr Broome—It may be useful to table these in the confidential session and then we can handle them in that way and then you can make a considered judgement about how best to deal with that material. I am very concerned to ensure that we are not seen to be doing something which may be regarded as improper.

CHAIR—Right. Mr Broome, you heard Mr Livermore's evidence this morning. Under parliamentary privilege, he took advantage of the opportunity to go into some detail about what he referred to as remaining Elliott matters. In that context, he was obviously feeling very much vindicated, as the authority has been by the decision of the Court of Appeal. I think it has been in the public interests in view of the criticism he put forward this morning of the system which apparently has allowed somebody an opportunity, I suppose, to escape a trial, without putting too fine a point on it. But I think it might also be in the public interest for you to indicate, if you are prepared to, or you may indicate that you are not prepared to, what the status of those outstanding matters is.

Mr Broome—I did not in fact hear Mr Livermore's evidence. I heard a very, very small amount at the end of the evidence which he gave, so I am not in a position to

comment on what he said without having the opportunity of examining the detailed transcript. What I can say is that it is now some two years since Mr Livermore ceased to be a member of staff of the authority. Whatever he has said to the committee is obviously to be read in that context. He does not know what the authority is or is not doing at this present time.

I do not propose in a public session of the committee, for fairly obvious reasons which I think you will all fully understand, to indicate any current matters which may or indeed may not be the subject of operational activity. Not only do I think there are some significant constraints upon us to do so in terms of the provisions of our act but it would obviously be quite inappropriate to speculate about such matters. All I would ask the committee, and indeed the media who are here in these proceedings, to do is to bear in mind that, whatever Mr Livermore has discussed in terms of his apparent knowledge of matters at a time when he was a member of staff, no necessary assumptions or conclusions should be drawn about what is happening at this stage in 1997.

CHAIR—In the broader context we have had the impression that the authority had, in effect, backed off any further involvement in white-collar crime. Is that the case or not?

Mr Broome—I have said to the committee previously and I have said publicly that the authority has not backed off white-collar crime any more than the authority has, of its own volition, taken on other areas of activity. The authority works under a reference process which are issued by the IGC members. They decide the broad direction of the authority's investigations. It is quite clear that in respect of some of our current matters which have been the subject of general comment by relevant ministers we are examining issues which involve the possible link between serious organised criminal behaviour, major taxation fraud and money laundering. By anybody's definition, some of those activities will necessarily involve the use of corporate structures and so on. I am not quite sure what white-collar crime is.

Senator CONROY—That is a bit of a worrying statement from the Chairman of the NCA.

Mr Broome—No, it is not. What I am saying is that it is the kind of label that people throw around without defining it. I am concerned about investigating relevant criminal activity within the terms of our act. That is a much more precise notion. If, in the course of investigating under a reference relevant criminal activity, we were to be involved in the investigation of the misuse of corporate structures, for example, and what some may call white-collar crime, then that would clearly fall within our current areas of activity.

I do not think it is correct to suggest that there has been such a fundamental shift in the direction of the authority as perhaps some have suggested. Often that is comments made that are based on historical knowledge rather than current knowledge.

Senator CONROY—Would you take up a matter that you believed could possibly fall within the ASC's sphere of influence?

Mr Broome—It depends on a number of circumstances. It would depend on whether we had a reference in respect of the matter. Obviously if we did then we would. We would not be taking it up and exercising our special powers without a reference. Clearly, it is open to any law enforcement agency, including the ASC, to put to the authority and in fact to put to relevant ministers that they believe there may be an area which we could investigate. But there is a very explicit process laid down in the act in terms of the giving of references and that process would obviously need to be met in looking at those kinds of issues.

I do not think you can categorically rule out that an area of conduct which may involve significant criminality which also involves breaches of the Corporations Law is necessarily something that the authority could not or should not be involved in or, conversely, that only the ASC must be involved in. As a number of well-known examples will demonstrate, a number of the legal proceedings which arose out of events of the 1980s, in particular, demonstrated that there were both Corporations Law and more traditional criminal law offences that may have been involved and therefore drawing black letter lines around these issues, I think, is a dangerous process.

Senator CONROY—I think we recently celebrated the two-year anniversary of the Yannon transaction and investigation. The ASC does not seem to be able to find the resources to prosecute—that is not for you to necessarily comment on. The ASC's investigative and prosecuting arm has been substantially reduced also. Because of those cutbacks at the ASC level, I would be concerned that the NCA would not bother with an issue such as corporate fraud—if that gives you a slightly clearer definition of what I mean by white-collar fraud—that you would automatically refer it to the ASC. I just wanted to draw you a little bit on that reference procedure. While I fully understand the reference process, it is not uncommon if a matter is brought to your attention for the NCA to put an issue to the IGC requesting a reference.

Mr Broome—That is true but a preliminary point would be a belief on our part that there was some element of relevant criminal activity within the terms of our act which was the subject of it. I get frequent correspondence from people writing to me alleging all sorts of misconduct by various individuals or companies.

Senator CONROY—So do I.

Mr Broome—The vast majority are obviously referred to relevant law enforcement agencies because they clearly do not fall within our charter and they could not be the subject of a reference even if we thought they were very serious and important matters. I guess that is what really happens. We make judgments about that. I obviously am not going to make comments about the ASC's resources or capacity. I have enough

responsibility worrying about my own and I am not going to buy into somebody else's patch.

But I think it is fair to say that we have demonstrated, and I think our current range of references demonstrates, a flexibility in the kinds of matters which we can investigate. Of course, like any agency we have resource constraints. I think one has to give credit where it is due. We have been given some substantial additional resources to deal with particular matters at the present time, some of which will clearly involve very significant money laundering issues and, as I say, quite complex corporate structures. We just do not rule out those things.

But one has to also make the point that the situation a decade ago, which was the genesis of what became the Elliott prosecution eventually, was a very different corporate regulatory structure. Whatever changes have been made to the ASC's resources at present, the ASC is still a very different organisation than was the NCSC back in middle to late 1980s. I do not think it necessarily flows that the ASC is not able or well equipped to deal with those. It has had some very, very significant successes.

Senator CONROY—Where are they? Could you name one?

Mr Broome—The recent successful prosecution of Mr Bond is one that comes to mind. The point I would make is that I do not know—maybe you do, Senator—what is the reason for what, from an external perspective, may seem to be two years—I think these are your words and not mine—of inaction in relation to Yannon. A close look at the chronology of matters with which we are a little more conversant will demonstrate that it is possible for these matters to be delayed for long periods through the use of various techniques. For all I know, that is maybe what is going on in that case. I simply have no knowledge of it.

Senator CONROY—To give context for the line of questioning, one of the areas that the committee has been debating at some length and is a possible part of our recommendations is whether or not the NCA should be restricted to drug related issues. Certainly Senator McGauran has argued strongly that that should be the primary and virtual sole focus. Committee members are interested in your perspective on that because it is an area that has actively been debated in terms of our report.

Mr Broome—In relation to that kind of activity I think we are producing some significant results. But, at the end of the day, the authority, under the present arrangements at least—and I am not saying they should change—receives its fundamental direction from that inter-governmental committee of ministers of all jurisdictions. They are the ones who essentially make the judgments about the areas we should look at. It is true that we are involved in a process of advising them and briefing them and so are their own independent advisers. So the current mix of our work reflects what governments across Australia believe the authority should do with those resources available to it, but that may

change in the future.

Senator CONROY—Has the IGC ever knocked back a reference?

Mr Broome—Not that I am aware of.

Mr SERCOMBE—Mr Broome, I wonder if you could give us your current thinking on the reference system and the associated framework of relevant criminal activity following on from, most obviously, the recent judicial decisions. As I understand earlier views that you have hinted at with us, there are significant areas where reform from your point of view would be desirable. I am wondering whether that remains your view. It has certainly been put to this committee, for example, that the legislative framework in that respect ought to be changed so that the NCA assumes perhaps more of a character of a standing royal commission with respect to its operations rather than operating within the current reference framework. I wonder where your thoughts are at on those matters at the moment?

Mr Broome—I might make a couple of very brief comments then I must ask Mr Melick to comment because it is something, obviously, we have given some thought to. There are a couple of issues. The royal commission model raises questions about a limit to relevant criminal activity. So one issue is whether should we have a definition of the area of criminal activity which we can investigate at all. The second issue is how you might, within that broader definitional framework, identify particular areas of activity. So you really have two separate issues.

In relation to the first, I think there are some strong advantages in having some clear parliamentary indication of the area of work we should undertake. We do not want to become another police service. We do not have the resources, the expertise, the geographical spread, et cetera, to do that. We are much better off playing a key role of coordination, assisting in cooperation, using our special powers in special ways. That is not necessarily exclusive of changing the definition of relevant criminal activity, but I think there is some value there.

As to the reference process, I have hinted in the past that there are other options and there clearly are. But there are a number of considerations which I think work both ways, and I ask Mr Melick to take those up.

Mr Melick—Part of the problem with the reference system is that when you read the second reading speeches and a lot of the intentions of parliament and compare them with what the act says they are two completely different things. If the act were clarified to express clearly the intention of parliament, we would be content with the reference system with some minor modifications. We continue to get tied up in arguments about the reference, the extent to which they allow us to ask questions, to investigate matters. It is very fertile ground for challenges all the way up to the High Court. That causes inordinate

delays in investigations and proceedings.

At least the reference system has the advantage in that we are given a reference by the inter-governmental committee. It allows all members of the inter-governmental committee, which includes the Commonwealth, the states and the territories, to have input into what we investigate. I think that is important because I think there should be some ownership, some national corporate ownership, of the areas we should be dealing with. The reference system allows that to be properly directed and controlled and then does not open us to accusations of going off on frolics on our own.

I get quite annoyed when all sorts of outrageous allegations are made when all we are doing is investigating matters which the elected representatives of the people of Australia have requested us to investigate. The reference system gives us protection from misinformed allegations of that nature. I think if the act is amended and accords with the matters we have raised in this committee before, to make it quite clear what parliament's intentions are, the reference system is an appropriate vehicle for us to conduct our investigations.

Mr SERCOMBE—It is an appropriate vehicle.

Mr Melick—Yes.

CHAIR—Where was the conflict? Can this be clarified—what the act says and what the second reading speech indicated it was saying?

Mr Melick—For instance, the act does not make it clear as to whether or not we can investigate future conduct. It seems ludicrous that you can investigate conduct up to and including the date of the reference.

Mr SERCOMBE—Predicate activity is the problem, is it not?

Mr Melick—There are two problems. One is future conduct and the other one is a predicate criminal offence. Once those two matters plus some other minor matters are clarified, the reference system becomes very satisfactory.

The full court in A1 and A2 has gone back and looked very carefully not only at the history of the act but also at the history of the judicial decisions under the act and said that references give us very wide and far ranging powers. But that matter is still under appeal to the High Court. We think it is inappropriate that the act should be so unclear as to allow that potential avenue. Firstly, despite the fact there is a long history of judicial opinion saying what we can do, we continue to argue disputes about where we are going. Secondly, there are currently in South Australia six motions to review in relation to the very same matter, yet again.

Mr SERCOMBE—In South Australia?

Mr Melick—In South Australia.

Mr Broome—One of the problems is that you do not have to have a meritorious claim to make it. So the difficulty is that you can be in the middle of an investigation and be threatened with an injunction if you proceed. The matter goes off for judicial determination, which might take three, six, nine or 12 months, and there may be an appeal. Even in an area where you end up effectively winning at each stage, you may delay just the investigative process by a year or two without too much difficulty, providing you have got the funds to do so—that is the problem. One would have thought that some of the provisions in the act that were in fact fairly clear would not have given rise to the kinds of decisions we saw in those two cases we have referred to.

It seems to me that, when the full bench of the Court of Appeal in Victoria unanimously says that it is quite clear to them what the legislation requires—that a reference is a reference is a reference, and that you interpret by reading the plain words; Mr Justice Brooking went so far as to actually include in his decision the plain words of the reference so all could see what it said—and yet you find it possible to go through something like an eight-month voir dire in which the process is examined in terms of the antecedent opinions of people who were not involved, at the end of the day, in making a decision to issue the reference, that is, the ministers, it seems to me a curious outcome. But it is an outcome which occurred. We would argue that, if it is possible to amend the act to remove that kind of fertile ground for challenge, it would be a very useful step forward.

Mr SERCOMBE—Given, though, that the Court of Appeal and the full bench of the Federal Court have now made determinations that bear on these matters, don't you run the risk with legislative change of creating new grounds now that the law is somewhat clearer with respect to the status quo?

Mr Melick—I think there are several parts. If you make it clear, it makes it a lot more difficult to challenge those two full court decisions. Until the High Court has ruled on these matters those decisions are still open to challenge. It is not only a question of clarifying the references; I think the act also has to clarify its processes or tighten up its processes by which people can challenge either the reference itself or the right of the authority to summons a person and the right to give answers.

At the moment I would think conservatively a person with enough funds and properly advised could probably delay the authority's investigative processes by some three to four years before they could actually be forced to answer relevant questions before a hearing. Firstly, they could challenge the reference itself and take it all the way to the High Court. Secondly, they could then come back before you and ad seriatim state they have good reasons to refuse to answer a question, and they have an automatic right of appeal to the Federal Court.

The court has a lot of other work. They do not tend to give our matters any sort of priority, and sometimes it can take nine months to a year to have the matter determined and a judgment given by a single judge. You then go to the full court, which sometimes takes up to 12 months to give you a decision. You then apply for special leave to the High Court, and this can occur at several stages along the way.

I have got very firm views that the right of appeal from a decision of a member of the authority should be modified to have a threshold test. In other words, you have to seek leave before you are given the right to proceed further with the appeal. If you cannot convince the judge at first instance that you have a prima facie case that should be the end of the matter, and there should be no appeal from that judge's order that you have not established a prima facie case—

Mr SERCOMBE—Can you give us an example, Mr Melick, of where that position would operate in an Australian area of administration of justice?

Mr Melick—I am sorry?

Mr SERCOMBE—Can you give us an example of how the system you are describing or proposing actually functions? Where does that process of seeking leave apply?

Mr Melick—I am with you. I am not aware of such, but if you want to take a prerogative writ to restrain somebody from doing an action or forcing them to do an action you firstly have to get an order nisi, which means you have to go to a judge and convince him that at least there is a prima facie case for preserving the status quo or stopping the status quo. Unless the judge is prepared to give you an order nisi—in other words, unless you can convince him you have at least passed that threshold—you do not go any further.

Prerogative writs were one of the most common ways of trying to regulate the behaviour of administrative bodies and sometimes judicial bodies. The act has set up a different scheme and the scheme is open to 'abuse'. I am not saying it is improper for a lawyer to advise a client to take these procedures, but what it does do is frustrate our investigation. The Elliott matter is a typical example: three and a half years of litigation, in which they did not win one stage but they delayed the matters by a substantial amount of time.

Mr Broome—But that is it; we are not saying in any sense that there should not be appropriate processes for judicial review. The interesting thing is that we have got an overlay of the AD(JR) Act on top of some explicit statutory appeal provisions within the legislation itself. You have got section 39B of the Judiciary Act as an alternative means and you have section 75(v) of the constitution. Obviously, all of those things are available and they give people an interesting array of options. But the real solution in those cases is

for a fast-track process to exist within the court system to deal with challenges of a kind—and this is a matter the judges have to decide for themselves, obviously—where they are satisfied that there is some kind of attempt to in a sense misuse the system. It is hard to sometimes draw that conclusion.

Whether there should be some sort of fast track is an interesting sort of comment or context which may be looked at. You do see cases which get expeditious treatment through the courts despite the general delays. I am very reluctant to argue that the authority, as important as I believe our work is, should be getting precedence over other litigants before the court. I think there are real issues in that.

It is fascinating to sit back and watch some of the cases which get enormously fast-tracked systems—challenges by footballers to tribunal decisions, for example, seem to be able to get all the way to the High Court in the space of days, if not hours. One does have to wonder about the system of justice when that is the way in which judicial resources are being exercised. I think there is some need to look at the system in slightly more detail. They are quite complex issues.

CHAIR—On these powers and jurisdictional matters: AUSTRAC put on record with us the Limbeck matters—the question in relation to references. What is the problem with references in respect to that matter?

Mr Broome—I do not think there is a problem at all. I think that we can perhaps explain some of that in more detail in the confidential session. I do not believe that there is any problem with any of the references. The point needs to be made—and it can be made in public—that there has never been so far as I am aware, and I am pretty sure this is right, a finding of an authority reference being invalid which has stood judicial test.

CHAIR—I am more concerned generally. The broad question is more related to the fact that you are given a reference, say, on money laundering, but the problem is that it cannot be specific. You cannot gaze into a crystal ball and be specific about what you are looking for because you do not know.

Mr Broome—There are a couple of issues. There is a question about whether money laundering itself should be an offence which is referred to in the definition of relevant criminal activity. A second question is whether money laundering in relation to activity which would be relevant criminal activity is something which we can investigate. I think it is quite clear that in the course of investigating relevant criminal activity, it is appropriate, if the evidence exists, to also, for example, lay charges in relation to the money laundering which may be uncovered.

Indeed, if one looks at the definition of relevant criminal activity, it talks about ‘and like offences’. In fact, there is a very strong argument that if you look at the elements of relevant criminal activity in the act, it is almost a description of what money

laundering is: it is the use of complex procedures and processes on a repeated basis and so on. I think there are some issues that perhaps we can discuss confidentially, but I do not believe that there is any problem in that area that needs to now be addressed, particularly in the context of the decision in A1 and A2.

CHAIR—But should the NCA have a wider charter than 'relevant criminal activity'? I suppose that is another question.

Mr Broome—I think our view is that we are quite content with the size of the patch that we have got and there is plenty of scope for activity within that definition. I note that a number of people who have given submissions to the committee have suggested that perhaps it could be wider. My concern about that, as I say, is that we should not be seen to be the body that is available to investigate something which is serious criminal behaviour which is quite clearly outside the whole underlying rationale for the authority.

For example, a very difficult, complex murder investigation is obviously a matter of great importance and it is a matter which the relevant state police service should obviously devote resources to, but our task is not to be a general criminal investigation bureau. It is not to investigate those kinds of offences. I think it would have some deleterious impact on our relationship with other police services. I think it is very important that we all understand what our part of the world is and what our role is—and that is that coordination role, in particular, and also our expertise in particular kinds of criminal investigations.

So we are certainly not arguing for a broader remit. Of course, there is always the argument that you end up investigating something which is outside the definition, and that raises some questions. But that gets back to the more fundamental question of how you have a statutory authority created and, by definition, a statutory authority is a creature of its enabling statute. We only ever do what the law says we can do. We only have the powers the law says we have, and so on. Then there will be those who, for their own reasons, will wish to argue that we have overstepped the bounds, and you will always have a fertile ground for challenge.

Mr SERCOMBE—You say you are satisfied with the patch you have got, but in terms of your boundaries, not just with other law enforcement bodies generally but with federal or common law enforcement bodies, are they sufficiently defined and clear? For example, in respect of intelligence assessments, I wonder whether there is sufficient clarity in respect of the roles that ought to be performed and are being performed by, say, the ABCI and the AFP and yourselves in respect of those sorts of matters, or is there a problem of duplication, potentially?

Mr Broome—There is always the risk of duplication. One needs to look at the intelligence issue at a number of levels. At the day-to-day level, there is tactical

intelligence, which is the kind of activity which is going on—

Mr SERCOMBE—I am talking about assessment.

Mr Broome—Sure. This is where the things interplay. You have got to have a tactical intelligence capacity to drive your day-to-day investigations. You have got to have a much broader strategic intelligence capacity to look at the broader picture of where we are going, how we are getting there, and what kind of issues are coming to face us. There are a number of agencies in Australia which conduct that kind of intelligence assessment.

We have certainly conducted a number of those, and I believe we have a significant capacity to do that. It is clear that the intelligence assessments that we have conducted have, I think, brought together more agencies reaching agreement about the kind of conclusions that are contained in those documents than has previously been the case. We have worked very closely with other agencies.

For example, the exercise we are carrying out at present on this examination of the current criminal environment is one which is a joint exercise between the ABCI, the AFP and the NCA. That, in my view, is exactly the way we should be going. We complement each other, we use our respective skills and information bases, and we produce a product which at the end of the day is useful to the whole Australian law enforcement community.

But, inevitably, in law enforcement—and you have heard evidence of this in the past—it is an environment in which there are concerns about patches and about turf and about functions and roles. It has historically been the case. I do not think it is going to change in the medium term. Part of our task is to manage that as best we can to overcome the negative factors that are involved in that kind of attitude and demonstrate that working together is much better than working separately. One of the things the authority has put a lot of effort into in the last four or five years is doing just that.

I think the intelligence work is an example of that. Every assessment that we do is widely circulated to partner agencies. They are given every opportunity to comment on it and to provide additional information. If they challenge the assessments, we say, 'Why do you do so? Where is the evidence you have?' and we adjust the finding as a result. I think we have developed a model with the SIU which is a very good model and shows the way there can be a cooperative relationship.

Mr SERCOMBE—Nonetheless, it would be true to say that the ABCI was less than fulsome in its praise of the NCA in relation to the NCA's contributions to what it calls ACID.

Mr Broome—I have read the material that was provided to the committee. Like all enforcement agencies, we provide information to the ABCI database and we do so in ways so that some of it is limited in terms of its access for very obvious operational reasons. In

theory, the material on the ABCI database is available to anybody who can plug into the system from the local police officer at Kununurra to the CIB in Sydney. Within that broad base you have to be able to decide levels of access.

Some agencies have elected to use ACID and the ABCI's computer system as their basic internal management computer system as well as their intelligence database. There are others who have not. I think every major Australian police service falls into the latter category.

So there are broader issues than just the NCA. There are some questions about our capacity to disseminate information of the ABCI because it is not of itself an investigative agency. The Standing Committee on Organised Crime and Criminal Intelligence as part of its charter from the relevant governments is looking at ways in which we can enhance the value of the ABCI. It is a current activity which we are undertaking. That committee consists of the heads of every law enforcement agency in the country—Commonwealth and state.

Out of that work being done by Greg Neil, who is the head of the ABCI, and Kevin Rogers, the executive officer from SCOCCI, together, I believe we will see a much better framework not only for the NCA's capacity to work with ABCI but also all the other law enforcement agencies. But there is a lot of history to be overcome. Unfortunately, it is not as fast as it should be.

Senator STOTT DESPOJA—Mr Broome, I note that Justice Brooking has commented that some of the matters in the Elliott case reinforced his view that criminal proceedings in Victoria were 'in some respects out of control'. Do you agree with that comment?

Mr Broome—I am not as close to the Victorian scene as His Honour is, but I have to say that, from what I have seen, I would have some difficulty disagreeing with his point of view. I know Mr Melick wants to make some comments as well. There are aspects of those proceedings which I find unsatisfactory and there are aspects of a whole range of matters in which we are involved which I find unsatisfactory.

We have to be very careful to recognise that the system should not be one in which the deck is stacked in favour of either the defence or the prosecution. It should be a system which seeks to impartially enable guilt or innocence to be determined. It is often attractive to those on one side or the other of that debate—defence counsel or prosecutors—to argue for changes which would make their life a little easier. I think we have to be very careful not to fall into that trap.

On the other hand, there are developments taking place in the law in Australia in relation to the way in which proceedings are drawn out, the length of time that is taken, the way in which commonsense often seems to be thrown out the door in favour of

formalism and so on which really do make me wonder. Why does it take weeks and sometimes months of evidence to establish what seem to be fairly basic propositions?

I think we have to be a bit more sensible and rational about that kind of thing. You cannot run two- and three-year trials. The community cannot afford it. We have to subsequently seriously examine the balance. But in saying that, I am not saying that we suddenly go back to a process in which we change the standards of proof or we change the fundamental nature of our judicial system.

Mr Melick—I think you have to understand the way in which the criminal justice system has evolved. It basically goes back to when, if you allegedly committed a wrong, you hired a knight to go and fight for you, as did your accuser. The decision was handed down in favour of the person whose knight was left standing. That is a classic adversarial system.

Senator STOTT DESPOJA—A bit like parliament.

Mr Melick—The criminal justice system is all about making the crown prove its case; it is not about the search for the truth. There is no room for searches for the truth in the criminal justice system in the way it is set up in Australia at the moment or in the common law world. I think that is one of the fundamental problems.

Every time you try to do something to streamline the system, you get accused of taking away the fundamental right to silence of an accused person. That right to silence stays right to the end of the trial process. I am firmly of the view that it is about time we started looking at the trial processes. Once the investigative stage is finished and once the matter is before the court—so we are not talking about people locked away in a police station, in a 'torture chamber' or anything like that; we are talking about the full public glare of the court system—it is about time in Australia we started having things such as defence disclosure.

The Elliott case is typical. We went to a great deal of time and money to prove that the foreign exchange transactions were a sham. That very fact was conceded by the defence for the first time towards the end of the voir dire before His Honour Mr Justice Vincent. In an investigation the prosecution must negate every one of the 100 possible defences as part of the crown case. There is no compulsion on the defence to say before the trial starts what the issues in the trial are.

So as long as we have a system of justice like that in Australia, it will be a system of injustice. It means that anybody who can afford it can probably avoid the consequences because, if you have got the money—and it takes millions of dollars—you can protract the system for as long as you like.

Senator STOTT DESPOJA—Both of you have mentioned different systemic or

other problems in the system. I take on board Mr Broome's comments in relation to delays and interruptions, which reinforce what Justice Brooking was saying. I guess there is another matter here in terms of the anomalies in Victorian law. Clearly, you would regard it unfair that the rulings by Justice Vincent could not be challenged during the trial process.

Mr Broome—In fact, they could have been.

Senator STOTT DESPOJA—Why?

Mr Broome—The Director of Public Prosecutions sought leave to appeal to the High Court. That application was heard. It is true that the High Court's decision was that special leave was not granted, but if one reads the decision of the Chief Justice in that matter, it is a reasonable inference that he, at least, believed that special leave should have been granted. He described the issues involved as important ones. But the other two judges were clearly of the view that the statutory scheme in Victoria was that it was inappropriate for there to be interlocutory appeals in the middle of trials. That is a view with which I have a great deal of sympathy in the sense that it is the very process of being able to take appeals at every step of the way that prolongs these matters. It is a concept which I can understand in terms of trying to stop the kind of process that we are talking about.

But there was a means by which that could be done. We were roundly criticised for seeking leave to intervene in those proceedings. In the complaints that were made to you, you would know that that was seem to be somehow improper, yet it clearly went to fundamental questions about our powers and functions. We thought it was not unreasonable. While we were not given leave to intervene, that was after we had been able to at least present our side of the argument. The High Court then reached the view that there were important issues involved, so I think there clearly were.

But part of the problem is how you strike a balance between providing for appeals at critical stages where, in the absence of them, a trial may come to nought and at the same time not encouraging continued appeals every time there is an adverse decision which the defence does not like. That is the sort of dilemma that you have got. Quite frankly, I think it needs an enormous amount of wisdom and judgment. I myself would be quite content with the judges exercising a great deal more discretion about the way some of these matters are dealt with.

I think that there is concern these days about possibly getting overturned on appeal and that has led to a lot of judges letting processes drag on—both in administrative and criminal proceedings—which simply would never have been tolerated in the past. They would have made a decision and said, 'The evidence is admissible. Get on with it Mr So and So.' Now there is this sort of reluctance that we might get overturned. We need, at the end of the day, judges who are able to run trials and not have trials run for them. But at

the end of the day, we also need a process which means that if they get it wrong there is a system which can correct it.

Mr Melick—I will give you a typical example. In a trial in South Australia we were issued with a third party subpoena to produce documents. It was quite clear there was no legitimate forensic purpose upon which that subpoena could be based and, more importantly, it was also quite clear that section 51 of the National Crime Authority Act showed the court that it could not compel us. It was not a question of protecting us, but the point was that the documents were not relevant and they were not compellable.

That was evident even to, I would have thought, a basic law student from day one, but it took the judge five weeks of hearings to rule in our favour. He insisted not on looking at section 51 but on going to the question of legitimate forensic purpose and satisfying himself of that test. He could have approached the matter with a lot more rigour on day one and said to the defence, 'There is no legitimate forensic purpose, put up or shut up.' But he exercised an abundance of caution. His honour was trying to be, I think, overly fair to the accused. The rules were quite clear. He chose to bend them to make sure there was absolutely no chance that there would be any suggestion that the accused had not had a fair trial. To my mind, the balance is all wrong.

The accused has always got a right of appeal against a conviction at the end of a trial. The crown, except in Tasmania—and somebody said in Western Australia, but I am not sure about that—have not got a right of appeal against an acquittal and that is where the imbalance occurs in Australia at the moment.

In fairness to Victoria, what they attempted to do with the amendments to the Crimes Act was set up a scheme whereby it could deal with complex crimes. The act was amended to allow all these determinations to be made prior to the empanelling of a jury. So you had to put all your objections up up front and the trial judge would determine whether evidence was admissible or not admissible. It specifically provided that there should not be a right of appeal against an interlocutory decision of a trial judge at that stage.

As John has already said, that was to stop the process being abused. The problem is that because the crown has not got the right of appeal against an acquittal at the end of the trial you get a possible injustice. One way you could perhaps amend it is to allow the crown the right of appeal. The crown, despite comments made by a lot of barristers usually from one side of the bar table, is usually very responsible. They are horrified about the thought that the crown in Tasmania has the right of appeal against acquittal. In the 10 years that I was involved with the crown down there we had two appeals against acquittal and they were appropriate cases. I would have thought the Elliott case was a most appropriate case to appeal against acquittal.

Senator STOTT DESPOJA—So you are not particularly critical of the Victorian

law in the sense that the prosecution is unable to appeal a ruling by a judge during the trial?

Mr Melick—I think if you have got a system where the crown does not have a right of appeal against acquittal, the crown should be allowed the right of appeal against a judge's interlocutory order. If the crown starts abusing it they are obviously going to lose the right. It is very rare that you can ever accuse the crown of causing unnecessary delays by unnecessary appeals. I am not saying they are perfect, but it is not in the crown's interests to prolong a trial and delay it and make the evidence so stale it is no longer relevant or people die or cannot remember what happened. It is clearly to the defence's advantage to create those sorts of delays.

Senator STOTT DESPOJA—Thank you for that. I do not think the committee necessarily wants to revisit too much ground today in relation to the original decision as to whether or not to proceed. I am curious—and I asked this question earlier—about the perceived bias of Justice Vincent. Do you have any thoughts that you would care to put on record as to why the DPP did not pursue this perceived bias?

Mr Broome—I shall keep my counsel.

Senator STOTT DESPOJA—You have a right to.

Mr Broome—It is a matter you could put to the DPP, but it is not one on which I can make comment because it was a decision in relation to the way in which the prosecution was conducted and, despite suggestions to the contrary, we did not conduct the prosecution.

Senator STOTT DESPOJA—I am deciding whether or not to compel you at this point. Should Justice Vincent have been permitted at all to hear this case?

Mr Broome—That is not really a question I can answer because it involves questions about what the trial judge himself felt was appropriate. As in all cases in which issues arise as to whether a judge should continue, they are matters which are brought to the judge's attention by counsel. If I can make a contrast, the fact is that at no stage did the prosecution raise with his honour whether he should continue with the matter. In those circumstances, it is very difficult to be critical of him doing so. I am not. The question was never taken up with him.

In a related matter, in the decision of Mr Justice Merkel—and this is a matter that is on the public record—we raised, in that proceeding, our concerns about the fact that his honour had previously given advice to the authority on what we believed was the same question. He took the view—and he handed down a formal ruling—that he was not in any sense disqualified from hearing that case because the subject matter was different. The issue we believe was the same, but the subject matter was different. So he sat through that

case and handed down his decision. Having raised it, we took the decision that it was not appropriate in all the circumstances to seek to have his decision about him continuing to hear the case taken further. I guess at the end of the day we got the result which we thought was the appropriate one.

Senator STOTT DESPOJA—But do you have a view as to why the DPP did not raise that matter—that is, the possible bias? Why did they not bring it up? Is there a rationale?

Mr Broome—You will have to ask them.

Senator McGAURAN—They must have told you.

Mr Broome—I know what the decision was, because it is patently obvious that the issue was not taken up. I do not know why they made that decision. I do not know whether they believed they had a proper ground to raise an objection. That is clearly a matter for the prosecution not for the investigative agency.

Senator STOTT DESPOJA—On a general note, it has been inferred publicly and by witnesses before this committee that the National Crime Authority—I do not think they have specified who exactly—has leaked confidential information to members of this committee. When I say confidential information—that is, information to individual members of the committee, not through the chair. I just wanted to give you the opportunity to put on record whether or not you have been responsible for leaks to individual members of this committee?

Mr Broome—I did not, senator.

Senator McGAURAN—This is a more general question and not related to the previous questions. It will help me understand where the NCA fits into the overall police forces around Australia. You remember recently it was reported that the Victorian police inquired into and indeed solved a murder case where hit men came into Melbourne from overseas and carried out an assassination. It was a complex case, no doubt an expensive case and they solved it. It seemed to also relate to organised crime and probably drugs. Were you part of that investigation? I would have thought you should have been the leading lights.

Mr Broome—Perhaps the best way to answer it is this. An organisation of 350 people is not going to be capable of investigating every serious criminal activity that falls within that general description of relevant criminal activity—every major organised crime activity in the country. Every state police service and the Australian Federal Police have and will continue to have major responsibilities in relation to organised crime, to use that general description. They bring the expertise. They have the investigators. All the investigators we use are obviously state or Federal Police officers. What we bring to the

equation are two things—firstly, a capacity to help coordinate cross jurisdictional investigations where that is appropriate and necessary and, secondly, if a reference is given, we can bring to the inquiry those special powers.

I need to be very careful about this, but let me just say that there is a reasonably recent matter where there were some murders and a state police service was the primary body involved in the investigations. But at an early stage, they came to us and went to their own minister and we approached the Commonwealth Attorney-General. As a result, a reference was issued after appropriate consultation with the IGC and we have conducted some investigations in relation to that matter under the reference. That was all done in a very quick time frame and I think it does show the way in which we can come in and assist. So it happens but it does not have to happen all the time.

I think it is a reflection of the confidence which police services have that in this case we were approached very early and asked to assist in the process. It is fair to say—and I do not want to go into the details for obvious reasons—that our involvement has been quite instrumental in advancing the matter very, very significantly.

Senator McGAURAN—I would almost conclude from that—given this case I have just given was a major, serious, organised crime situation and you were not involved in it, at least not at the forefront of it—there is still this looseness and vagueness about your role in organised crime and drugs pursuit. It is too loose.

Mr Broome—There are two issues. The police services have a vast majority of the available resources and, quite frankly, a vast amount of expertise. The kind of work that we are doing is not, and has never been, designed to be to investigate every significant criminal activity. We cannot do it. We are not placed to do it. Whether a particular police service seeks the authority's assistance is primarily a matter for it in the first instance. If it believes it can—and obviously, from what you have said, it was quite capable of successfully carrying out the investigation—it does not need to come knocking on our door.

I am saying there are examples when people have felt we could add some value to the process and I believe we have done so, but clearly it is something which you have to look at on a case by case basis. We obviously involve relevant state and federal agencies in the work we are doing, but it is not reasonable or appropriate that every time a state police service or the Federal Police are involved in a major investigation we are necessarily involved. We simply are not big enough to perform that kind of function.

Senator McGAURAN—Well you should be.

CHAIR—Mr Broome, the question the senator is probably asking is that there is something a bit ad hoc about all of this still, isn't there? I recently discussed with you the major bust on the Gold Coast—which of course is my electorate—and it was uniquely a

QPS activity. I was surprised the authority had not had some involvement in that because it was a major activity. The implication of the question and the point I am making, I suppose, is that there must be things slipping through the cracks somewhere because they are not picked up by you and they are not picked up by a state police service.

Mr Broome—I am not so sure it is a case of falling through the cracks. We are doing our work in relation to the particular references that we have got and, as the committee is well aware, at the present time the references we have are, let us just say, reasonably specific. So for that reason, our capacity to roam in a wide sense is somewhat circumscribed. Whether we should have a slightly greater scope is something we can better talk about confidentially, but I do not think it has ever been intended or assumed that the authority—whatever its level of resources—could or would effectively get involved in every major criminal investigation which may have some link to 'organised crime' conducted by every police service.

We do not have enough resources on the ground in any law enforcement agency to have that kind of overlapping duplication. I think we have now got a fairly good working relationship. We do try to make sure we are not getting in each other's way. At the same time, it is a question of focusing whatever resources you have got where they are best used. I think we are doing better than we have ever done before.

CHAIR—We are the people's representatives dealing with this issue, but there is a perception out there that we are not doing enough to stop this. I picked up the Melbourne paper on the way down here yesterday and the front page said that heroin deals are being done out in the street here, and that was a local police activity. Somehow the public are thinking—and we as their representatives are, I guess, also concerned about this—we are not doing enough to stop this.

Bob Bottom said you should just be given the work of being a drug agency and get on and do the job. There is a feeling in the public when they read the papers and they see that going on outside the town hall almost that something is not happening. The issue for us in our inquiry and it will be addressed is whether you need more power and more resources to somehow be a more effective umbrella organisation.

Mr Melick—Sure, the issue is that we should not get involved until the matter becomes one that is not capable of being dealt with by ordinary police methods and investigations. Look at the New South Wales police force. They have about 16,000 officers with a $1 billion budget. They must be carrying on an enormous number of complex investigations on very serious crime with organised crime overtones. Until it becomes a matter which they can no longer deal with and our powers could be appropriate to help them, it would seem to me to be inappropriate for us to get a reference to get involved with that matter.

Firstly, it is duplication of enormous amounts of money and resources. Secondly, it

is going to cause us very significant problems in our relationships with our partner agencies if we are seen to come in and do the work which they are more than capable of handling. Thirdly, you have got to bear in mind that, with the way in which we structure our multiple disciplinary teams, they are very expensive animals to run. So you do not want to have a Rolls Royce system to deal with a lawn mower type problem. Once again, until the matter becomes something that cannot ordinarily be dealt with by ordinary state police forces using ordinary methods, I think it is inappropriate that we have a charter to go and poke our nose in.

Senator McGAURAN—Neither of these were ordinary matters.

CHAIR—The fact is that the local police were involved in picking up somebody out here doing a heroin deal, and we saw the picture on the front page yesterday. That is fine, that is their focus, but your focus is on stopping the heroin getting to that point.

Senator CONROY—And customs and the AFP.

CHAIR—Customs and the AFP as well.

Mr Broome—Our focus is certainly to try to disrupt at the level of importation if possible and, if it is not caught at that stage, we work on the major distribution levels and find out what is going on. It is self-evident that our success along with the other agencies in this country is by no means complete. Part of the problem there is that you are always going to have difficulties, given the enormous profitability of the activity and the preparedness of some people to go to extraordinary lengths to try to avoid detection—added with a whole range of factors, including the size of our coastline, the amount of international trade and so on.

Could we use more resources? Yes, of course we could. Governments have to make decisions about those kinds of resource allocation processes, and they can and they will do so. What we are trying to do with the resources and the dollars available to us at present is provide the best value with what we have got. It seems to us that that is best used in coordinating those national activities, not duplicating what other agencies are very capable of dealing with. But at the same time, as Mr Melick made the point, we have to maintain a close cooperative relationship and we do not want to and we cannot do the vast amount of work that particularly, in all of the states, the state police services are equipped and resourced to do.

Senator CONROY—An example was given in evidence to the committee recently—I think it was the Nestle corporate blackmail situation—where an investigation seemed to fall between two jurisdictions. I think it was either Queensland and Victoria or Queensland and New South Wales. People have argued that an NCA coordination of that situation—notwithstanding that it would be outside any reference, and how could you get one that quickly—could have helped, if it was more of the standing type of organisation to

which Senator McGauran referred.

Mr Broome—There are a couple of points there. Firstly, you can get references very quickly; we have had them in two or three days. So that is not impossible; it is unusual, but it is not impossible. Secondly, it obviously has to fall within the scope of relevant criminal activity. If we broadened our charter then, clearly, we may be able to provide some kind of coordination function there.

Between the commissioners, of course, there are quite detailed arrangements in place to deal with interstate crime and crime which cuts across two jurisdictions. It is not as if the police services are not talking to each other. There clearly is, at the commissioner level and all the way down, very close cooperation in many areas.

I do not know enough about the detail of the case to which you have referred—and I have seen some of the press speculation—to know what all the ins and outs of it might be. One of the problems is that quite often what is reported is not an accurate reflection of what was in fact happening, so one has to be a bit careful about drawing some conclusions.

But I am concerned about suggestions that we might become some sort of a general umbrella group for crime in Australia and that we should have a general anti-corruption function—which I know has been suggested to the committee. The problem is that we would simply be trying to fight so many fires on so many fronts that we would not put any of them out, and I think that would be totally counterproductive. I think we have got to keep close to something which we are doing well. If we are to get increased resources, then that needs to be done in such a way that reflects nationally agreed priorities. Bear in mind that it is a matter for those relevant police ministers, on the advice of their own commissioners and so on, to determine the kind of work they believe we are best placed to do. In terms of giving us references, there is a statutory requirement that the ministers have to be satisfied that it is not the kind of work that normal police activities can deal with. So you have to in fact have that extra element that takes it outside their normal capacity. Clearly, the police services have, in many respects, very substantial capacities.

Mr SERCOMBE—Presumably, some of these issues are going to get a sharper focus arising out of the work that is being done in preparing the strategic assessment of the Australian criminal environment that you referred to earlier. Is that a fair observation?

Mr Broome—Yes, that assessment should give us the best overall picture of what is happening across the country. Coming out of that, I expect, will be a consideration by ministers of what we might describe as the next menu—to use that kind of description—that we have been working for three years on the basis of what was determined in 1984 to be major areas of interest. Some of those areas no doubt will remain and some new ones might eventuate.

Mr SERCOMBE—Are you able to speculate on where those new directions might be?

Mr Broome—I would not like to, other than to say the obvious one—which everybody is talking about—is the extent to which electronic commerce and so on may create not only some great opportunities on the commercial front but it might also provide a few opportunities for the crooks. No doubt we will get involved in the latter part of that.

CHAIR—Mr Broome, for the purposes of completing our inquiry, there are a number of issues I think we probably need your answers on. I do not want us to get bogged down, and I do want to have some time in camera, so perhaps you could indicate whether you might be able to give a very brief response to a number of questions or, alternatively, take them on notice and provide us with written answers.

Mr Broome—I will try to fire some back and give you some in writing if necessary.

CHAIR—Yes, we need to have complete answers. Are you happy that we have canvassed sufficiently with you your views on the functions of the authority in section 11? That is, the whole question of whether the authority's powers in section 11 need to be clarified or expanded.

Mr Broome—I think the broad powers are adequate. There has been evidence heard by the committee in relation to whether we should be merely an intelligence gathering body, whether we should have investigators and so on—and Mr Costigan has given evidence on that point. I think the simple answer is that the body that was created by the parliaments of Australia was not the body that he recommended. But that is what has happened. We do have an investigative function, we do have the capacity to lay charges and so on. I think the powers are basically the right ones, but there are some areas of greyness which could perhaps be dealt with. There are a couple of specific examples I might mention to you later.

CHAIR—All right, and anything else if you want to have any further input. The committee would like to be aware of your views on this; it would help us in finalising our report. What about the appointment process? Is there scope for simplifying the appointment process as far as authority members are concerned?

Mr Broome—Yes.

CHAIR—Is that too difficult to answer quickly? Would you like to take that on notice?

Mr Broome—It just seems to be a process which has, over the years, taken a great deal of time. The formal consultation requirements with the states as well as within the

federal government have always seemed to make it difficult to get quick appointments. There are some other factors in that, of course, but I think there is some scope for that to be looked at. That is obviously a matter for ministers at the end of the day as to the kind of process they want to have. The states obviously feel that they need to be consulted about appointments—I have no problem with this—but at the same time I think we need to come up with something which can enable us to be fully staffed relatively quickly.

CHAIR—We will have a look at that as an issue. I think we have dealt with the incrimination—the whole question of the hearings—pretty well, unless you want to add anything?

Mr Broome—I would like to make one simple point about self-incrimination. Our model is one that says that you do not have to answer a question which is self-incriminatory. The kinds of questions which people assert would be incriminatory never cease to amaze me. I have actually had a person refuse to tell me the name of their parent on that ground. So I think that there is some scope for change there. There are a number of models. Perhaps the most workable is that there be a requirement to answer questions but that the answers cannot be used against the person who has given them.

CHAIR—The important issue for us is that, if that were the model that were adopted, that would make you more effective?

Mr Melick—There is no question about that, because the vast majority of objections are taken on the basis of self-incrimination. They say, 'Until you are more specific about what you already know about us or where this investigation is going, how can we determine whether or not an answer is going to incriminate us?'

CHAIR—The immunity questions related to that too.

Mr Broome—We have had no difficulty in getting immunities from the relevant directors and, at the end of the day, they have got to be the ones who decide whether—

CHAIR—Why should you have to, though?

Mr Broome—Because our function is not to prosecute; it is the director's function to prosecute and it is the director's function to get, usually from the relevant Attorney, an agreement that an immunity should be given. There may be broader public policy considerations other than our investigation, which make it quite appropriate that ministers are advised independently by the DPP as to whether in this case, for our purposes, an indemnity may prevent somebody from being prosecuted for something much more significant.

Mr Melick—And if you have a process whereby you answer a question over objection, you get the derived immunity in relation to that answer anyway, and a lot of

that problem goes away.

CHAIR—You have dealt only with this particular 38th parliament committee.

Mr Broome—It has been a pleasure, too.

CHAIR—The feeling is mutual, Mr Broome, but we had better not be too friendly. Could the role of this committee be extended in some way? To your credit, and I think to the betterment of the interests of the people of Australia, you have been very helpful to the committee. But in the past there have been chairmen who have not been so cooperative.

Mr Broome—I can't believe that! It has certainly been our policy to be as helpful and as cooperative to the committee as we can, because we do believe it is an important part of the accountability process. I think there is a role. I think that, for example, the committee's exposure to our work and to more general issues involving the criminal law could enable it to take on a broader function of looking at criminal law issues within the federal parliament.

One issue which the committee might like to take on board is the capacity to look at the broader powers and functions questions in the criminal law—the kinds of things that we have had debates about, including whether the processes of the criminal law are such that they are counterproductive to the public interest and so on. It seems to me that there is no other committee of the parliament which immediately has a role in terms of looking at those issues. Admittedly, a lot of criminal law is a state matter, but there is enough criminal law in the Commonwealth context, and there is enough criminal jurisdiction in the Commonwealth context, and I think there is a broader function there that the committee could in fact very usefully perform.

CHAIR—What about the access to operational information? Once again, you have been reasonably helpful. We have had plenty of evidence to suggest that the committee—certainly perhaps the chair and deputy chair, or some variation on that theme—ought to be given access to more information.

Mr Broome—There is a history to this. I think it is fair to say that this authority has sought to stretch the envelope as far as we can properly go. I think we have been conscious of the limitations placed upon us by the act but also conscious of the committee's role, and we have tried very hard, without overstepping the mark, to give you as much as we can.

There has been a history of concern expressed about whether the committee should have access to operational information: it requires a very careful balance. I think a lot of it comes down to building up, as I think we have, some sort of mutual respect and cooperation between the authority and the committee.

Whether you can legislatively deal with some of those issues raises some difficult questions. If you look at some of the history, it has created problems in the past. I hope we do not go back to those kinds of problems.

CHAIR—What about the restrictiveness of section 51?

Mr Broome—It seems to restrict some more than others, I have to say.

CHAIR—We have noticed that. What can be done to ensure the safety of witnesses and the protection of reputations whilst, at the same time, enabling greater publication of information? That has been the issue here this morning, but it is always the issue: what is it that is in the public interest to be on the public record?

Mr Broome—There are different models for secrecy provisions in Commonwealth legislation. Our act talks about not disclosing—unless you have a duty to do so—information obtained in the course of your employment as a member of staff of the authority. A member of staff includes the authority members themselves.

In other cases, what is prohibited is the disclosure of information. The notion of disclosing information suggests that one is then free to talk about information which has already been disclosed. The constraint that I have felt under, to some extent—while having taken a fairly robust view of what my duties as chairman of the organisation involved—is that I have not always been able to talk about things that I would have liked to have talked about. I have not always been able to answer the criticisms I would have liked to have answered because of what section 51 imposes.

One possibility is that you can in fact maintain the prohibition on authority members and staff disclosing information, but you can at least provide that when material is on the public record it can be the subject of then greater discussion and debate. There are models for that kind of provision. But at the same time, I would be very concerned if we moved away from what I think is a very important requirement; that is, that we do protect the confidentiality of witnesses and that we do protect the confidentiality of the investigations. Unless and until decisions are made that it is appropriate for charges to be laid and they become public in the normal way our system operates then, in a perfect world, no-one should ever know that a person has been not only the subject of NCA investigations but even that they have given evidence to the authority. Sometimes, that will not occur as much—in fact, almost always—because of the actions of the witnesses or the others involved.

I cannot say that there has never been a situation where information has been disclosed which should not have been, but certainly we have been very meticulous. We make it very clear what our policy is, but I think there is some scope for amendment there to clarify some issues around the edges.

Mr SERCOMBE—On the question of the accountability of the authority, I would presume that, as a consequence of recent ministerial changes, Senator Vanstone is now your minister?

Mr Broome—I do not know. At this stage, I think decisions are still being made about the actual break-up of portfolio responsibilities within the Attorney-General's portfolio. It may well be that there have been some decisions made this morning while we have been at this meeting.

Senator STOTT DESPOJA—I have a brief question in relation to a bill that has recently come before the parliament, which you would be aware of: the Telecommunications (Interception) and Listening Device Amendment Bill. I get the impression from earlier evidence and submissions to this committee that you or the NCA and other authorities favoured the extension of the powers; that is, the extension in the number of organisations that were able to have the power of bugging phones, basically.

I have a concern with the second part of the bill in relation to who can approve the applications for telecommunications interception devices. As you would know, that legislation enables the AAT to undertake those functions as well as Federal Court judges. Do you have an opinion as to whether or not the AAT is an appropriate body or should it have been restricted to Federal Court judges?

Mr Broome—I think it important that we retain the right to obtain telephone interceptions. If the position is that the Federal Court judges will refuse to exercise the jurisdiction—which is a personal jurisdiction conferred on them, and not a jurisdiction as a judge—and they have decided, either individually or en masse, to not exercise those powers, then I think that the most important public policy outcome is that we have that capacity in the future. Therefore, I think it is important that we get a solution which enables the warrants to be issued.

I certainly have no reason to doubt the integrity or capacity of the AAT and, if that is the answer which the parliament comes up with, I am certainly content with it. What I am worried about is that we might run into a situation where warrants become impossible to get. I think that would be a very significant and serious outcome.

Senator STOTT DESPOJA—Impossible by virtue of the fact that judges would refuse to issue the warrants. Do you know of cases where judges have actually refused to—

Mr Broome—Not every judge of the Federal Court, so far as I am aware, is an eligible judge for the purposes of the Telephone Interception Act or for the body cavity search provisions of the Customs Act and so on. It is a matter for each judge to personally decide whether they will accept that appointment.

So it is certainly the case that some judges have refused to exercise a jurisdiction in the past. As I understand it from what has been said in the public arena, they have indicated that they do not wish to do so at all in the future for any of them. My concern is that it will be a very unfortunate result if we end up in a situation where they stop issuing warrants and we have not got an alternative in place.

Mr Melick—The judges have some very firm views as a result of the Mathews case about the appropriateness or otherwise of their becoming involved in administrative decisions such as this. Secondly, they are also concerned about the fact that that at one stage I think there were 13 or 14 of them as respondents in actions before their own court.

Senator STOTT DESPOJA—Do you think that cases like the Mathews and the second one involved have set a precedent? Do you really think that there is a separation of powers issued here?

Mr Broome—The High Court has made a number of comments which the judges are drawing some attention to and some support from. I am not sure what the actual outcome of each case suggests but, at the end of the day, if they are not prepared to do it, we need another solution.

Senator CONROY—Giving them contracts might be a solution.

Mr Broome—I think there might be a constitutional problem, Senator Conroy.

Senator STOTT DESPOJA—Industrial strength like we have not seen before!

CHAIR—When is the report on organised criminal paedophile activity going to be published? What is the situation?

Mr Broome—We certainly have not decided to publish the whole report and I do not think it ever will be published. The question of what might happen to the executive summary is still a matter which is being considered in another place, as they say.

CHAIR—The committee has asked the Attorney-General for a copy of that. He has not yet been forthcoming, but we will be very interested to have a look. I read about it in a press report, so we are probably aware of what it concludes. The leak certainly did not come from this committee, and I assume it did not come from the NCA.

Senator CONROY—It came from one of the ministers' offices, didn't it?

CHAIR—There is nowhere else it could have come from.

Mr Broome—Can I say on that, Senator, it did not because the version that was referred to was not a version which would have found its way to ministers.

Senator CONROY—So the leak came from the NCA.

Mr Broome—No. Some 60-odd agencies were consulted in the course of the preparation of that document.

CHAIR—As there are no further questions, we will resume in a confidential session after a short adjournment.

Evidence was then taken in camera—

Committee adjourned at 12.56 p.m.

[The committee subsequently resolved to incorporate in this transcript supplementary advice received from the National Crime Authority. The document is appended.]