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JOINT COMMITTEE ON NATIONAL CRIME AUTHORITY

Reference: Involvement of the National Crime Authority in controlled operations

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Friday, 27 August 1999

Members: Mr Nugent *(Chair)*, Senator George Campbell *(Deputy Chair)*, Senators Denman, Ferris, McGauran and Stott Despoja and Mr Edwards, Mr Hardgrave, Mr Kerr and Mr Somlyay

Senators and members in attendance: Senators George Campbell, Ferris *(Subcommittee Chair)* and Stott Despoja and Mr Edwards, Mr Hardgrave, Mr Kerr and Mr Nugent

Terms of reference for the inquiry:

(a) the extent and manner in which the NCA engages in controlled operations;

(b) the appropriateness of the approvals process for the NCA's involvement in controlled operations;

(c) the civil liberties implications; and

(d) the adequacy of relevant national and state legislation in relation to the conduct of controlled operations by the NCA.

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Subcommittee met at 9.07 a.m.

BRONITT, Mr Simon (Private capacity)

ROCHE, Mr Declan John (Private capacity)

CHAIR—I declare open this fourth public hearing of the parliamentary Joint Committee on the National Crime Authority's inquiry into the involvement of the NCA in controlled operations. The hearing today will be conducted by a subcommittee to which I have been appointed as chair. The committee chair, Mr Nugent, is also present, and he will take part in the proceedings. Welcome, Mr Nugent.

Mr NUGENT—Thank you.

CHAIR—The committee expects that today's hearing will conclude its program of hearings because, once we have heard from today's witnesses, we will have taken evidence from a wide range of experts on the topic of controlled operations, including from law enforcement agencies, police federations, civil liberties groups and academic commentators. It is then intended that we will distil all of the evidence in a report for presentation to the parliament by late October.

We are starting today's hearings with Mr Simon Bronitt and Mr Declan Roche, who will bring the perspective of academic commentators to the issue of controlled operations. Gentlemen, the committee prefers that all evidence be given in public, but you may at any time request that an answer to a question that we put to you or some part of your answer be given in private—that is, in camera—and we will consider such a request. The committee has received your submission and has already published it. Copies can be obtained by observers from the secretariat officer, who is seated on my right. Would either of you like to make an opening statement at this point?

Mr Roche—We would both like to make a brief opening statement. First of all, we would like at the outset to acknowledge the need for controlled operations to detect and prosecute some forms of criminal activity, in particular, some consensual crimes, including large-scale drug importation. We can also imagine a need might arise in situations where the victims of crime are unwilling to assist authorities or perhaps are even unaware that they are victims. However, there are serious civil liberties implications in using controlled operations. My colleague Simon Bronitt will speak about those. I would like to speak briefly about the adequacy of the existing legislation governing controlled operations. We think there is a definite need for legislation to regulate this area. In fact, we are now more inclined to that view than we were when we wrote our submission to the committee. We articulate our position in an article we have written since that submission. We can hand up a copy of that article to the committee.

Whilst we think there is a need for legislation governing controlled operations, we would question the assumptions on which the legislation was based. Namely, we would question the assumption that the High Court's decision in Ridgeway made it too difficult for law enforcement agencies to conduct controlled operations. We would say that Ridgeway was an extreme case and an extreme form of controlled operation. As you will be aware, Ridgeway

was charged with an offence, an element of which the police themselves had committed. This involved the police and a police informer going up into the Malaysian highlands, buying a quantity of heroin—presumably with government money—bringing that heroin across two national borders and then selling it to Ridgeway.

Reading between the lines of the High Court judgment, I think you can assume that the police had to work pretty hard to convince Ridgeway to buy the drugs. The High Court judgment says that the original asking price was $A65,000, but eventually the police agreed to sell it for $9,000. As Justice Gaudron's judgment notes, it was common ground between the defence and the prosecution that that was much less than the drugs were worth. We would say that the police action in Ridgeway was unacceptable, but we would say the legislation is necessary to prevent cases like Ridgeway, not to facilitate them.

I would like to briefly look at the process of authorising controlled operations. We both think it is excellent that there is a process which requires pre-trial authorisation to use controlled operations. I would like to briefly address two aspects of this authorisation process—namely, who authorises the controlled operations and the grounds on which authorisation is given. First of all, I will look at the question of who authorises controlled operations. Currently, as you know, senior members of law enforcement agencies are able to authorise their own controlled operations. We would like to see the approval process in the hands of someone more independent. We were interested in the evidence of the public interest monitor given to this committee earlier this week. We would support a move to involve someone like the public interest monitor to make the process a bit more independent and accountable.

In terms of the grounds on which authorisation is given, section 15M of the Commonwealth legislation, as you will know, governs when a controlled operation will be authorised. I notice in the submissions to the joint committee that the NCA has reservations about those grounds, in particular, the ground that 15M(b) is a bit onerous on law enforcement agencies. It states:

> . . . the person targeted by the operation is likely to commit an offence against section 233B of the Customs Act 1901 or an associated offence whether or not the operation takes place . . .

We think it is worth pointing out that 15M(b) is the only condition which really constrains controlled operations in any way. The other requirements in section 15M are very easily met by law enforcement agencies. For instance, 15M(c) says there is a requirement that:

> . . . the operation will make it much easier to obtain evidence . . .

It is hard to imagine circumstances in which that will not be the case.

We would argue that the conditions for granting authorisation should be stricter, and we would look to the New South Wales legislation to provide some guidance on how that might be done. In relation to the New South Wales legislation, we make it clear that we do not support retrospective authorisation. On page 135 of our submission, we outline some of the dangers in allowing retrospective authorisation. In particular, there is a scenario quoted from a recent book called *Drug Law in New South Wales*. It contemplates:

> . . . the shooting of an innocent bystander who is rendered a quadriplegic by shots unlawfully fired by a participant in a police controlled operation, whether that participant is an officer or an informant, may otherwise give rise to a charge of assault occasioning grievous bodily harm. However, if the commissioner gives a retrospective authority, the participant is shielded from criminal and civil consequences of his or her action.

For those sorts of reasons, we do not support retrospective authorisation.

Lastly, I would like to look at when the certificate authorising a controlled operation will protect law enforcement officers. At the moment, that is governed by section 15I of the Commonwealth legislation. That says that a law enforcement officer will be protected unless—and here I am looking at section 15I(2)(a) and (b):

> (a) the conduct of the officer involves intentionally inducing the person targeted by the operation to commit an offence . . . ; and,
>
> (b) the person would not otherwise have had the intent to commit that offence or an offence of that kind.

We are unhappy about that second condition—namely, that for an officer to lose the protection of the certificate, it has to be shown that the person would not otherwise have had the intent. We do not favour an approach that assesses the appropriateness of police action or law enforcement action by reference to a defendant's subjective characteristics—their state of mind. We say that that requirement, section 15I(2)(b), could be taken out and the legislation improved by taking it out. You only need to look at the failings of the subjective approach in some American courts to understand why we have that position.

I will offer a couple of brief examples—

CHAIR—I do not want to constrain you, but we have a tight timetable. If your colleague is going to make introductory remarks, it will reduce the amount of time we have for questions. Just bear that in mind as you are completing your remarks.

Mr Roche—Briefly, Ridgeway is an example of a situation which shows this aspect of the legislation is unacceptable. Under this section, the law enforcement officers in Ridgeway would have been able to show that Ridgeway had the intent and therefore that their actions were covered by a certificate. I can also point you to an article by Geoffrey Robertson QC which talks about the failings of the subjective approach in a recent American case called Jacobson.

Mr Bronitt—I specifically want to address the civil liberties implications of the practice of using controlled operations, specifically controlled deliveries. The NCA submission addresses this on pages 95 to 96 of volume 1 of the submissions. Interestingly, they address the question recognising the issue that these operations intrude into the privacy of citizens and that it is a question of balance. I want to come back and make the suggestion that balance is the wrong approach in relation to weighing up the needs of crime control on one hand and the need to advance and protect human rights on the other.

We do not have an absolute right to privacy: it is qualified. The state has the right to violate a suspect's right to privacy in the public interest of detecting crime though, within that framework, issues of proportionality and necessity need to be addressed. Our article

addresses this. The prior authorisation scheme which the Commonwealth and New South Wales legislation anticipates is able to address some of those concerns about unwarranted intrusions into privacy.

The second issue which I think has been entirely neglected in relation to the impact of controlled operations is the negative impact that this method of collecting evidence has on the right to a fair trial. I am quite dismayed to see that so many lawyers have written so many submissions and none of them has addressed the very significant recent decision from the European Court of Human Rights that is directly on the issue of entrapment and the right to a fair trial. That decision is Teixeira de Castro v. Portugal. It is a very straightforward case of entrapment—the kind of operation that occurs every day in Australia, I suspect.

If you turn to page 127 of the submissions, you will see there is a discussion of the case. I will refer to a quote from the court when they examined the impact of using entrapment on the right to a fair trial. The court draws a distinction between legitimate undercover operations and police incitement. While they acknowledge that the use of deception, subterfuge and trickery is a legitimate ruse in pursuing serious criminals, they nevertheless recognise that the right to a fair trial is a fundamental value. There is no exclusion in relation to the right to a fair trial because it is drugs. They come to the conclusion on page 128:

The public interest cannot justify the use of evidence obtained as a result of police incitement—

incitement being the instigation of another person to commit a crime.

This is an interesting development in the context of international human rights law because it recognises the right to a fair trial not just in the proceedings themselves but beyond the trial to an earlier stage to cover the way in which evidence is gathered. It seems to me that this is a very important decision that any legislation which is enacted by this parliament or any other parliament in Australia should take into account quite simply because the international covenant has exactly the same provision. When the human rights committee of the United Nations comes to consider the issue of entrapment, I am sure this case Teixeira de Castro would be followed.

This is a very important question of compliance, ensuring that any legislative regime for controlled operations meets with the international standards laid down in that case. The question is not if such a challenge occurs but rather when. I think the NCA's idea of balancing crime control and human rights is a utilitarian approach which could lead to more and more extraordinary powers granted to the state to investigate serious crimes. The difficulty with that approach is that the balance inevitably tilts in favour of crime control. It is really a zero sum game. As the seriousness of the alleged criminal activity increases, so does our need to uphold fundamental human rights. I oppose using any kind of idea of balancing as the basis of such legislation. It is about ensuring that, in the intrusion into the suspect's rights to privacy and fair trial, we give utmost respect for those rights.

CHAIR—I will just ask one question before I move to my colleagues. I know they will all have questions for you. Going to the question of the public interest monitor which you referred to, we got some very useful evidence from Mr Perry earlier in the week. Two

questions arise in my mind, though, in relation to the appeal of the public interest monitor. The first is a question of how it would be structured. We have a public interest monitor in this country at the moment only in Queensland. If the National Crime Authority were to adopt some sort of structure which involved the use of a public interest monitor, how would you see that working on a state-by-state basis where the state jurisdictions may not have a public interest monitor of their own?

Secondly, in terms of effectiveness and efficiency, if the NCA were to be wanting to run a managed operation somewhere in a regional part of Australia—say, Mildura or Albury or one of the western regional towns of New South Wales—how would you see the effectiveness of a public interest monitor to argue the public interest working in that way? Would you see it as being a telecommunications issue or would it be something that would have to be done out of the cities, face to face? In Queensland, we are talking about face-to-face meetings generally. How do you think that would operate? Those are two questions which, despite the very compelling arguments put by Mr Perry, still concern me—and, I think, several of my colleagues.

Mr Roche—On the second question, I would not have thought the geographical problems would be insurmountable. The committee has probably given it more thought than we have, but my own feeling is that telephone link-ups and things like that would be a reasonable way of doing it.

CHAIR—It does involve the transmission of pretty sensitive material by perhaps fax machine or whatever.

Mr Roche—Presumably that already happens in controlled operations.

CHAIR—I am not sure about that.

Mr Roche—On the first question, I do not really have any suggestions about that.

CHAIR—Do you think the principle of a public interest monitor in each state is a commendable provision? I see Mr Bronitt nodding his head. Perhaps he might like to answer that.

Mr Bronitt—I would not necessarily put the responsibility on this particular body for taking on that responsibility. To me, the problem is that the model of accountability that we have is entirely internal in the sense that the decisions made to authorise these operations are made by senior police management. The opportunities for review of that decision are very limited pre-trial.

I would rather see a tribunal model established whereby a body, perhaps comprised of lawyers and lay individuals appropriately qualified—perhaps ex-police, et cetera—could form a panel to which police had to go and establish that they have met the criteria in the legislation. That is a more appropriate model and, in fact, is what is required under international human rights law. It is not necessary that it has to be a judge that grants permission. That is very clear from the international case law on the privacy right, but it has to be a system of administrative control which is reviewable. I think the current model we

have is deficient in that regard. I think third party agencies, human rights organisations, can play a role, perhaps, but I would rather see those interests represented on the decision-making panel rather than as parties making submissions for and against a particular operation.

Mr KERR—Going back to the fundamental point that you started with about the Ridgeway decision and its alleged unfairness, it seems to me that we are bundling together a whole range of different considerations. My recall of the Ridgeway situation is, essentially, that a man was released from an Australian prison; one of his first acts was to ring another person in a second country who, to his misfortune, was a police informant, and he requested that person to supply drugs to him. So, in those circumstances, the fact that the supply was occasioned was not an entrapment, it was his direct act. I am wondering how you derive any unfairness from the process when this person, himself, solicits this importation. It would seem to me that, were it refused, the likelihood was that drugs would be obtained from another party. What should the police do in an incidence like that?

Mr Roche—I am not sure that your assumption that he would have been able to get them somewhere else is necessarily borne out by the facts. More importantly, if you look at what had to be done from the point in time when he showed interest in buying drugs, from there onwards everything that was done was done by police, including the purchase of the drugs, bringing them across the border and then bringing them to Ridgeway in Australia. Without that extensive involvement of the police, Ridgeway would not have committed the offence. Indeed, to prove that he had in his possession an illegally imported substance, they had to prove that the police themselves had illegally imported the substance.

Mr KERR—Let us take the border issue out. Let us say that villain X rings someone who, to their misfortune, happens to be an undercover police operative. Surely you would expect that undercover operative to go along with the deception. There is no unfairness in that, is there?

Mr Bronitt—It seems to me that a key distinction which is now emerging in the international human rights arena is this distinction between creating an opportunity for someone to commit a crime which they otherwise would not have committed, which is legitimate and acceptable and does not definitively deprive a person of their right to a fair trial, and active steps taken towards inducing a person who otherwise would not be predisposed to commit the offence. In Ridgeway, it is further complicated because the High Court really was not concerned with the act of incitement there. That was not the main reason the evidence was excluded.

Mr KERR—I understand.

Mr Bronitt—It was in relation to the illegality of their actions.

Mr KERR—I understand what you are saying—that it was on a technical point that the High Court decided on the importation issue. I am trying to get beyond that. I am trying to ask a question. You start out with the proposition that Ridgeway was an exceptional case that was unfair per se. I am asking you to test that hypothesis against the facts.

Mr Bronitt—In fact, the facts of Ridgeway may not be a case where, if you applied the test of fairness, you would necessarily exclude the evidence. There are other considerations related to the rule of law and the importance of the police, who swear an oath, upholding the law and respecting it during an investigation. It seems to me that legality rather than fairness is the key issue in Ridgeway. The difficulty with the case is that the facts span both dimensions. There was some degree of instigation, although there was predisposition on the part of the accused.

Mr KERR—Where is the instigation?

Mr Bronitt—The instigation is in relation to that offence, which is the offence of possessing imported drugs. The drugs were imported by the police for a specific purpose.

Mr KERR—That is not an instigation; that is an act. Tell me what was instigated in this instance.

Mr Bronitt—The offence of possession of a prohibited import. Not the possession of drugs—

Mr KERR—But the man rang somebody outside—

Mr NUGENT—Can I help? Let me put it another way. What if, during the tea break this morning, I say to Mr Kerr that I want to buy some drugs. You are a police informer and you overhear that conversation. You then proceed to arrange a contact with me at lunchtime and say, 'I can help you here.' In this case, I am the one who has instigated the act. Assuming you have gone through the proper processes, you then sell me some drugs and arrest me for having them. The point I think Mr Kerr is making is that I would actually have instigated that particular action, which is what happened with Ridgeway. Whether it crossed borders or not is a red herring in that context.

Mr Bronitt—It is not a red herring in the context of the offence with which he was charged. That is the point that was reiterated by the majority in the High Court. If he had been charged with possession of drugs, under the state criminal laws, it would have been an acceptable conviction in everyone's mind. But he was not. He was charged with a much more serious offence relating to possession of trafficked drugs. I think that is the point that has been lost.

Mr KERR—The other point you raised was the question of a utilitarian division, the balancing exercise. I do not mind that point being made because I am not a utilitarian; I tend to focus more on rules in these issues. But I still come to the same conclusion as you have: that, from whatever framework you start with, we are not talking about rights that are absolute. You accept that the right to privacy is a conditional right that is subject to certain restrictions. Presumably, there are a number of other rights in relation to this area which we also would accept have to be subject to the state's broader imperatives. If you criticise the utilitarian perspective and say we should approach this on a different basis, what perspective are you suggesting?

Mr Bronitt—The article we have tabled here is a 35-page manifesto drawing on republican theory, using John Braithwaite and Phillip Pettit's ideas on republicanism—not in the political sense, but in the philosophical sense of a social form of freedom. It would require a lecture of about two or three hours to explain the background to those academic ideas. It seems to me there are alternative approaches to just balancing—in a discretion left either to a judge or a senior police officer to weigh up the countervailing interests of crime control, human rights or due process. In relation to that balance at the moment, our empirical research seems to suggest that, overwhelmingly, notwithstanding the moral panic about Ridgeway, the discretion is exercised in favour of admission of evidence obtained by entrapment. In fact, I can only find one case—

Mr KERR—You keep using this word 'entrapment'. In most instances, to the best of my knowledge, entrapment is not an issue. The legislation that exists at the Commonwealth and state levels currently prohibits entrapment. Even prior to the legislation, the usual sorts of operations that the police involved themselves in were criticised to the extent that they involved an element of entrapment. I am sure that, as in all instances, you would not want to say that police never sought to entrap anybody. I would be naive to put that proposition to you, but I do not think there were ever any authorised standing orders in any police system or any arrangement that sought to facilitate that. Indeed, the whole idea of entrapment was one that was highly discouraged.

I do not think there is any difference between what the European Human Rights Commission has determined as a matter of human rights law and that which we understood to be the practice in Australia previously, although, yes, it was breached from time to time. Where is this list of cases that were thrown out of court because of entrapment or where entrapment was raised?

Mr Bronitt—I am just trying to find it. We have done a study monitoring them, and it is interesting that the other submissions make the suggestion that there is a fear in relation to the exclusion of evidence under the application of Bunning and Cross and Ridgeway. It is on page 14 of our article.

CHAIR—I am sorry you did not bring copies of that for us. It is too big for us to copy, and it does make it more difficult for us to question you.

Mr Roche—I have one copy for the committee.

CHAIR—But you do not have a copy for each of us.

Mr Roche—I am sorry about that.

CHAIR—It makes it difficult when you bring along a fairly substantial research document like that if we have not had a chance to look at it.

Mr Bronitt—It has only just been completed.

Senator STOTT DESPOJA—If they bring one copy to the committee, we have the resources available to photocopy it 20 times.

CHAIR—We could have, if we had had it earlier in the week.

Mr Roche—In our defence, we have just finished the article.

Mr KERR—I wonder if we are confusing two things. I am certain there are many instances where Bunning and Cross type discretions have been raised and rejected. But I am not certain that there are large numbers of instances where they have been rejected where there was what I would describe as entrapment.

Mr Bronitt—Because Ridgeway is such a narrow decision confined to its fact, it is distinguished among those cases. In fact, the only case I could find where the decision was applied was a case called Dau and Emmanuele in 1995 in the Federal Court. Because of the nature of the discretion, it is concerned with the issues of police committing a crime to supply the basic ingredients of the offence with which the accused is later charged.

It is an extremely narrow decision. I think there is a degree of unnecessary anxiety about Ridgeway that has led to, if you like, an ambit claim in relation to law enforcement agencies to create a widespread immunity from the law that now extends not only to serious drug offences but to any crime or corrupt activity in the course of undercover operations. There is a function creep thereby, a creeping consequentialism, in which you start by dealing with an exceptional case.

I appeared before the Senate legal committee in 1996 on the bill and at that time it was argued very strongly by all the law enforcement agencies that this was a technical piece of legislation—we were not licensing more widespread illegality or corrupt behaviour by the police—and I am back four years later and, without any significant change or empirical evidence to suggest they really need this, we have legislation which is moving towards the New South Wales model. I find that very worrying from a rule of law perspective and from a human rights perspective.

Mr KERR—I am interested in this analysis because you start by saying that non-incitement undercover operations are legitimate—'we say they are not subject to the Ridgeway discretion'. If the post-Ridgeway legislative processes, though, are attaching to those things which do not require those authorisations and forcing people to think about what they are doing and to go through those forms, how is that a social disadvantage? How is that function creep?

Isn't it, in a sense, people being a little frightened that, if they work on areas that are not absolutely certain, they will get whacked in the courts and some bad guy will get off for an entirely technical and spurious reason? Therefore they will be more cautious than they need to be and they will work through these things. How does this show an erosion of the citizen's rights? Isn't it tending to show more the conservatism of police who are unwilling, quite legitimately and understandably, to test the full range of the rights they already have?

Mr Roche—Going back to your analysis of Ridgeway, I think what seems to play a large part in your thinking is that he did have this intent to commit an offence. The point we make is simply because someone has an intent to commit an offence that does not justify any state action that is taken to bring about the commission of that offence. We think that

focusing on the intent of a suspect to determine whether or not a law enforcement agency has acted appropriately is not the way to assess the appropriateness of state law enforcement action. Again, I would refer you to the Geoffrey Robertson article. Unfortunately, I did not bring 10 copies but I have one copy which I can hand up to the committee. It is an excellent article which addresses some of these points.

Mr Bronitt—I can address your question, Mr Kerr. We are not opposed to legislation, and there are some good features about both the New South Wales and Commonwealth legislation. It is good to see that the police are cautious, perhaps over-cautious, in relation to the undercover operations that they are now seeking approval for.

But the legislation was remedial, designed to overcome a particular decision. It was not, in my view, a comprehensive legislative framework attempting to draw up a regulatory framework for undercover operations generally. So I am not opposed to it; I can see it having some beneficial effects in relation to privacy specifically. But, in relation to the tests of when legitimate police undercover operations go beyond that thin line, I admit that sometimes it is going to be ambiguous. It is in relation to that ability to draw that distinction that we need to pay more attention to the international human rights jurisprudence.

Mr KERR—I wish to say two things. One is that I accept your first proposition: it was remedial legislation and it was done quickly. But I suspect none of us anticipated how conservative some of our police forces would be and how, in fact, the fear of the Ridgeway situation actually led, quite understandably, to a change in conduct.

If you were going to be subject to the same kinds of criticisms that were directed towards the police for carrying out, as I think they did, their functions entirely properly—they got the most extraordinary criticism from the High Court for following what I thought to be a perfectly sensible course of conduct—while I am not certain what that would do to your career prospects, I am certain I would not want to be the person pursuing that sort of course. So it has understandably had a very conservative influence on how people respond.

The second point concerns the question of intent. I agree with you that mere intent is not sufficient, but in Ridgeway it was not mere intent—there was action; it was not pub talk. He actually rang somebody in a place where drugs are grown, supplied and imported in large amounts whom he thought to be a person from whom he could obtain drugs. It was a positive, purposeful act. In that sense, I wonder how you can make the case that there is any manifest unfairness; it is mere inferred intent. If it were 'this guy is a bad guy—he has done it before—and we will set him up,' I would agree with you, but it was not like that.

Mr Roche—But section 15(i) seems to contemplate that the police, provided they can show the person did have the intent to commit an offence, will never lose the protection of a certificate authorising a controlled operation.

Mr EDWARDS—Mr Bronitt, in response to Senator Ferris's question, you mentioned a tribunal. Have you expanded on that tribunal in the document that you have?

Mr Bronitt—Yes. One model of accountability would be to move to an external oversight body. There are many precedents for that in other places. We have the

constitutional complexity of the decision in Grollo, which means that judges cannot exercise non-judicial power—they cannot exercise administrative power—so you have to use retired judges. There is a model of accountability that you could set up similar to the telecommunications interception framework, where you have independent people to whom you have to go and make a submission, rather than it being a senior police decision. I would be very surprised if any operational decision making would be refused under an internal accountability model.

Senator STOTT DESPOJA—Mr Bronitt, can I clarify the situation in relation to, I think, the second to last question from Mr Kerr. You said that you acknowledge a need for the legislation. Clearly, you would prefer narrow parameters in relation to this kind of protection; you would not extend it to civilians. Would narcotics offences be the kinds of ones you think it would be appropriate for? You say illegality by law enforcement officials should not be tolerated, except where investigative methods are impractical or ineffective. How clearly can you define for us where it is appropriate and when those methods are ineffective?

Mr Bronitt—That raises a big philosophical question about the way we treat drugs in society, which would be another inquiry for another commission. It would be a very difficult question to answer but, broadly speaking, one thing that our article does seize upon is that we may look at a different list of what would be regarded as dangerous or serious offences. If we policed white-collar crime—tax offences, money laundering not necessarily related to drugs but to other types of fraud, such as fraud on the Commonwealth—using entrapment, I am sure that would raise some very interesting perspectives on the use of entrapment or any covert operations using deception.

It seems to me that the issue does get caught up in the war against drugs, and these are extraordinary measures that are taken to deal with one particular crime. There is, as I see it now, a danger of this being expanded into any crime that is regarded as difficult. It is not so long ago—and our research is uncovering that it still goes on in some jurisdictions—that homosexuals were entrapped into committing acts of public indecency in order to prosecute them with homosexual offences. We may not now regard those with the degree of seriousness that the police once did. I suppose the category of seriousness in relation to criminal conduct is highly contingent historically and politically, so I would not see this legislation as dealing just with drugs but in relation to those situations where the police do need extraordinary powers.

CHAIR—Do you think it should be limited to particular areas of the law, or do you think it should be up to argument? For example, motorcycle gangs are a community debate at the moment, particularly in my and Senator Stott Despoja's state of South Australia. Do you think it should be something where undercover operations are permitted without question?

Mr Bronitt—I am not sure that it should be without question. I would doubt that.

CHAIR—In terms of definition.

Mr Bronitt—I would be opposed to putting great fetters on ordinary undercover operations. The difficulty is that entrapment is not a term of art. We do not have legislation dealing with entrapment; we have legislation regularising some aspects of controlled operations in which the police commit technical legality. The difficulty here is that we are trying create legislation which covers a whole range of legal issues. It seems to me that, with undercover operations in the existing Commonwealth system, police are free to do anything as long as they do not break the law. It is as simple as that. They can be deceptive; they can engage in trickery or subterfuge as they see fit, up to the point that the law will say that that is legal. So I would not necessarily think that, every time a police officer is engaged in an undercover operation, it needs necessarily to be authorised by a tribunal but, in relation to certain types of covert operations in which the police participate in criminal gains to infiltrate them to gather evidence, then there may need to be some form of regulation.

Senator STOTT DESPOJA—You would have a problem, clearly, with the idea not only of the extension of that protection to civilians or informers but in relation to the retrospective nature of the New South Wales legislation?

Mr Bronitt—Yes.

Mr Roche—We addressed that in the submission. I think that provision requires justification because it has a very far-reaching effect. I would be interested to know whether it has been positively justified by any of the other people who have given evidence to this committee, because the dangers of that sort of provision are quite apparent.

Mr Bronitt—It leads to retrospective tailoring on the part of the law enforcement agencies. With what they uncover, they can say when submitting their application, 'Look, we had suspicion that there would be XYZ,' because that is what they found. The whole framework of accountability and restrictions on police disappears with retrospective accountability. Yes, we would oppose retrospective provisions.

Senator STOTT DESPOJA—Mr Bronitt, you have commented about being here a number of years ago for a comparable inquiry. More generally, I am curious about how you see this. Is this part of a so-called expansion of police powers or is it intrusive provisions in law? Are we giving more power than is warranted to our law enforcement officials, be it through the National Crime Authority or the expansion of ASIO powers? Is that part of your concern, or is that not a legitimate position?

Mr Bronitt—That is my position. I coined the phrase 'normalisation of extraordinary powers'. It follows the trend in England, which enacted special legislation to deal with Irish terrorists. It has been confined to Northern Ireland but, within 10 years, it is no longer just terrorism, it applies to all crimes. They abolished the right to silence in Northern Ireland to deal with special crimes, and 10 years later they have abolished the right to silence. There is the same trend here. You introduced telecommunications interception to deal with narcotics; now it covers everything, more or less.

Senator STOTT DESPOJA—Is it time we had an investigation or some kind of inquiry into telecommunications interception laws?

Mr Bronitt—The telecommunications interception regulation is under constant review. There are some weaknesses in it, from my perspective as a human rights lawyer and a criminal lawyer, but it is not a bad model in terms of accountability, the warrant system and the accountability regime, which is not inherent in the controlled operations system. If you compared the two, you would notice. Most recently the legislation has enacted a civil right of compensation for individuals who have had their privacy wrongfully and unlawfully intruded upon. There is no similar provision in relation to people wrongfully targeted by undercover controlled operations.

Senator STOTT DESPOJA—Do you have any sympathy for an organisation like the National Crime Authority, which has difficulties in that it is involved in so many competing and differing jurisdictions? That is one of the justifications that is put forward for normalising or standardising some of the powers. Do you have any sympathy for that particular perspective?

Mr Bronitt—I do, and I certainly would be looking to Canada. Canada has the same problems of provincial and federal distinctions in relation to law enforcement. They have enacted a single law governing electronic surveillance and covert operations. I saw on the news a riot in the Japanese parliament recently over their organised crime bill. That riot was in fact about extending powers to the police in relation to the undercover investigation and telecommunications interception, which had not previously been permitted in Japan. It seems to me that there is a need for a broader umbrella legislation to deal with this. I am not in favour of a highly differentiated approach—but that is federalism, really, and there is not much you can do about that in relation to law enforcement.

Certainly, because of the privacy implications, there could be a constitutional angle to this that would justify federal regulation of intrusive criminal investigation. This is a very academic point, and I am sure it is politically entirely unrealistic, but you could enact legislation to cover the ground in relation to investigation of crime to the extent that it intrudes upon privacy because of the International Covenant on Civil and Political Rights.

Senator STOTT DESPOJA—Mr Roche, do you want to add anything?

Mr Roche—No.

Mr EDWARDS—It seems to me that it would make your job much easier, Mr Bronitt, as a criminal lawyer if police were forced to sit on their hands and, perhaps, deal with 1990s style crime with 1950s style operations and legislation. Is that fair comment?

Mr Bronitt—No. That is a rhetorical question.

Mr EDWARDS—I reckon it is not a bad one, though.

Mr Bronitt—It is interesting. To me part of policing is not just about crime control, it is about protecting human rights. The United Nations code of conduct—

Mr EDWARDS—I did not ask the question in terms of human rights; I asked it in terms of your profession as a criminal lawyer. I think there is a bit of a difference.

Mr Bronitt—It seems to me that the police have a mandate not only to repress crime but also to uphold human rights. And that is a very important dimension to which we need to pay attention here. I think that, rather than balancing, it is possible to promote human rights and promote effective policing. The current regimes may not be effective. There is no empirical work done on the operation of Ridgeway. I am an associate of the Institute of Criminology, and it seems to me that a body like that would be appropriate to investigate and do research into the actual operation of covert controlled operations and also to undertake empirical research in the trials to see the extent to which this evidence is actually excluded, rather than having ambit legislation always being enacted on fears, some of which are unsubstantiated, that policing is hampered.

Policing is undoubtedly hampered by the lack of clear information it has about the limits of policing powers in this area, that I would entirely agree with. We do need legislation that communicates both to citizens and to the police the limits of their powers. A state of uncertainty that, some time down the track, in 18 months, the evidence obtained may be excluded by a particular trial judge but might be admitted by another one is clearly not an acceptable situation for the police to be in.

CHAIR—Can I ask for your comments on a proposition in which a managed operation takes place, some evidence is gathered that is useful in pursuing the particular reason for the operation but, along the way, some information is also gathered on another very serious crime. What should happen to that evidence if it is decided that that particular aspect of the interception should not proceed? I suppose I am talking about telephone interception. If material is gathered on a second serious misdemeanour that the police were unaware of, what should happen to that evidence if in fact they decide not to proceed at that stage? Should it be allowed to remain on a police file or should there be a compulsion for destruction? I am raising the issue in terms of privacy and civil liberties, and I thought you might have a view on it.

Mr Roche—Simon may, but I do not.

Mr Bronitt—This is the problem of the police pursuing one investigation in which they uncover evidence in relation to another. Ordinarily, that does not raise evidential or procedural questions.

CHAIR—That was not my question. My question was: should that material be allowed to remain on a police file?

Mr Bronitt—I have not thought about it.

Mr KERR—In your evidence I think you said that you had not heard the rationale for the retrospective application of approvals. I must say that I am tossing up that rationale, but I have heard it so I might as well toss it over to you for your comment. The rationale was, essentially, that in any undercover operation, be it a controlled operation or an undercover operation that would not require approval here, instances may emerge where somebody is tested in an unpredictable way. You do not gain the confidence of people in serious criminal circles simply by going up to them and saying, ‘When are you doing your next job?’ You usually have to inveigle yourself into their confidence, do some things around the edges and

become part of the scene. In becoming part of the scene you may have a series of unpredictable propositions put to you, and some may be outside the terms of whatever was the first reason for the undercover operation or the controlled operation. In that sense, then, you either have to walk away from the operation or proceed with it. The argument put was that there should be a capacity to recognise that these unpredictable situations arise and to deal with them if they do.

That is the proposition, and I would appreciate your comments. I suppose that, from your framework, if you accept that there may be some legitimacy in that you might want to say, 'Well, that goes even further than our normal concern about approvals, and perhaps those are the sorts of approvals that should only be given by the DPP or someone of that nature.' You might say, 'Having heard that rationale, we understand and we accept that it may be legitimate, but it requires a higher level of authorisation.' I do not know. I am tossing it over to you to perhaps come back to us with whatever view you think might be appropriate.

Mr Bronitt—That scenario seems to me one where there is an ongoing operation where there is a need to make a quick decision to perhaps extend the operation. You are investigating crime X and in the context of that something else comes up in relation to different people and different crimes. What you need there is, if you like, a fast-track procedure for authorisation, and certainly you have that in the telecommunications interception area. You have the ability to make telephone applications very quickly.

Mr KERR—I understand that, but I do not think it is even that. You have got somebody on the ground and they are not going to be able to go out and say, 'Look, I'm going to go and make a phone call to the commissioner here.' They are actually in there with the bad guys; they are in a car off to do a bank job or something. Are they going to sit in the car and be the getaway driver and continue a controlled operation or are they going to do something else? These are hard calls. If it was at that stage an armed robbery, you would probably expect them to walk away.

Mr Roche—That is right. Say no and walk away.

Mr KERR—I am putting this extreme situation to you, but there may be a number of circumstances. Their life might be imperilled by walking away, or they may be confident that they are on the verge of breaking some major crime operation. In all those contexts I can understand why you would say that the normal operational approvals are not appropriate. In such cases at the moment what we rely on in practice is the discretionary decision of the DPP not to prosecute that person for participation—

Mr Roche—Or the defence of necessity or duress.

Mr KERR—Those sorts of things, plus we rely on the courts to use the Bunning and Cross type approaches. I put that hypothesis to you. Does it seem to you not an unreasonable situation to say that there may be some case for retrospective approval but it has to be exercised in the same sort of way at a higher level? I do not know; I am just putting it to you.

Mr Roche—I would still favour prospective authorisation. In the situation you are describing, if it does come down to that choice, where you have not had an opportunity to gain urgent prospective authorisation, then I would prefer the person to walk away or, if they proceed, to take their chances with relying on a defence in that situation. That is not a firm opinion but that is my tentative one.

Mr Bronitt—And it is the negative effect of police officers having in the back of their mind that they can always get retrospective authorisation that will really put enormous holes in the whole regulatory regime. That would be my concern, that if they have in their mind-set that they can always fix it up later—

Mr KERR—They may be able to.

Mr Bronitt—They may.

Mr KERR—Just as they may now be immunised, they may now be given protection from any civil suit. It is a terrible position to be in, whatever the process outcome is. You have not got a clean decision, whatever mechanism you put up. I am just trying to compare this mechanism that is being proposed to the existing mechanisms. I am a bit cautious about the New South Wales retrospective mechanism, but I can see a case at least on that logic of having something that is better than what currently exists. I am just trying to tease that out.

Mr Bronitt—I suppose I would want to see that there was real evidence that this was causing operational constraints rather than an assertion that police officers have this fear that their operations would not be able to operate in that situation.

Mr KERR—We did get that evidence. How often it would happen is a matter of some conjecture but you can imagine, and I do not think it is implausible, that we would accept that evidence, that there will be instances from time to time when people are tested in unpredictable circumstances simply because they are dealing in an undercover environment with people who do unpredictable and bad things.

Mr Bronitt—Yes.

CHAIR—Mr Nugent has the final question.

Mr NUGENT—Unlike Mr Kerr, who is a former distinguished Minister for Justice, and Mr Edwards, who is a former distinguished minister for police, I am a simple soul and my question I think is quite simple. I hear your concerns about what could happen or might happen. You have quoted some instances where you think things have happened. Has your research given you any information, evidence or feel for how widespread a problem we may have? In other words, in relation to the deficiencies that you identify, you are saying, 'Well, in the circumstances such and such a bad thing could happen,' but do you have a feel for whether it is happening on a widespread basis, or are we talking about a one in a million situation?

Mr Roche—It is quite hard outside a law enforcement context to be knowledgeable about what the situation is. We are largely reliant upon what comes to court. A lot of people

will plead guilty and never go to trial, and even in those cases that do go to trial the evidence may never come to light. In that respect Ridgeway was a quite unusual case. So it is hard to be certain how widespread these practices are, and the dangers as well.

Mr Bronitt—I might make a statement about the level of undercover and electronic surveillance in Australia. This research is through comparing with data in America and Canada. We have a very good accountability regime in the sense that we publish a lot of information about the number of wire taps in Australia. We have more wire taps conducted here than in the United States and it is increasing.

Mr KERR—Per capita?

Mr Bronitt—Just straight; full stop. The point is that we do not collect data about undercover policing. Parliaments are not always informed about the level of expenditure on undercover policing. I do not want to generate a moral panic about it, but it may be the fact that a lot of covert surveillance in Canada, America and the UK is not simply transparent. We may seem to have high levels compared to other jurisdictions of a similar type because we actually have a very strong accountability regime. In England they never admit to the fact that they use wire-tapping or entrapment in the same way when it may come to court. Our disclosure rules are very strong and I think our police are very ethical, largely. Those factors are very significant. But I think there is an information deficit in relation to controlled operations and undercover policing more generally. It is difficult doing research in the area because you always run up against the public interest in secrecy line, so we have difficulty accessing information about this stuff other than through official reports.

CHAIR—Just to clarify, Mr Roche, we did not expect you to bring 10 copies. We like to receive one copy in time to make 10 copies.

Mr Roche—I understand, thank you.

CHAIR—Thank you Mr Roche and Mr Bronitt for your evidence this morning.

[10.08 a.m.]

ATKINS, Mr Michael Francis Charles, Principal Legal Policy Adviser, Australian Federal Police

BROWN, Mr Paul Joseph, Federal Agent, Australian Federal Police

KEELTY, Assistant Commissioner Michael Joseph, General Manager National Operations, Australian Federal Police

CHAIR—Welcome, gentlemen. The committee prefers that we receive all evidence in public, but if at any time we ask you a question the answer to which you would prefer to give in private, that is in camera, please ask and we will make a decision about that request. We have received your submission, which has already been published by the committee. Would you like to make an introductory comment this morning?

Mr Keelty—Yes please, Chair. The AFP appreciates the opportunity to appear before this inquiry into the involvement of the National Crime Authority in controlled operations. As the committee is aware, we have been involved ourselves in the conduct of controlled operations under the provisions of part 1AB of the Crimes Act since its introduction in July 1996. As indicated in our submission, the AFP and the National Crime Authority operate in a strategic alliance in terms of our respective roles and functions under the Australian Federal Police Act and the National Crime Authority Act.

AFP seconded personnel comprise a significant complement of the NCA investigative staff. In relation to narcotic drug enforcement at the federal level, the AFP, the NCA and the Australian Customs Service work in the context of the ministerial agreement adopted in June 1987. While consideration is being given to the need for some adjustments to that document, nevertheless it remains the underlying administrative arrangement between the three agencies. Primary responsibility for drug law enforcement within the Commonwealth is vested with the AFP. Effectively we have been responsible for all decisions in respect of drug seizures and arrests at the Customs barrier, as well as investigations which arise out of such drug seizures. The NCA exercises its responsibility for decisions in respect of drug seizures, arrests and prosecutions in relation to investigations conducted under its legislation.

As part of the implementation process for part 1AB provisions, the AFP introduced detailed internal guidelines setting out the procedures to be adopted in investigations relating to the importation and trafficking of narcotic goods which involved a controlled operation. They replaced the previous internal guidelines which applied and prior to the High Court's decision in Ridgeway. The guidelines include considerations to be taken into account when members are contemplating or carrying out a controlled operation, procedures to be followed in applying for a certificate, notification requirements to Customs, reporting obligations, drug substitution arrangements, occupational health and safety issues and relevant documentation. Separate guidelines have also been adopted which outline the approach to be adopted to requests from state police services seeking to conduct controlled operations under part 1AB. These are referred to in our written submission.

The most recent ministerial direction under the Australian Federal Police Act requires the AFP to give special emphasis to a number of matters. These include countering and otherwise investigating illicit drug trafficking, organised crime, money laundering and the interception of assets involved in or derived from these activities. From the outset of part 1AB provisions, the AFP has recognised the significance and consequences which the legislation has created in terms of exempting law enforcement officers from criminal activity for certain conduct engaged in or during the course of their duty in relation to narcotic investigations.

The AFP considers that its approach to implementation of the legislation and its internal guidelines have combined to ensure that the controlled operation provisions have been applied and carried out with the stringency inherent in part 1AB of the legislation. In terms of activity under the controlled operations legislation, our written submission indicates that 68 certificates were issued in the first year of operation, 70 in the second year and for the year ending 30 June 1999 they were 47 certificates issued. Use of the controlled operations legislation has contributed significantly to and become a central ingredient of the AFP objective in dismantling and disrupting major syndicates involved in drug trafficking in Australia. Our submission shows that considerable seizures of drugs have occurred, particularly in heroin and cocaine. We have also alluded to the cautious view which has been taken as to the circumstances in which the protection of a controlled operation certificate should be obtained, resulting in a greater than anticipated use of the procedures of part 1AB.

There are also a range of circumstances where controlled operations certificates have been issued for the purpose of obtaining evidence that may lead to the prosecution of a person. These include where narcotic goods are imported into Australia with the participation of law enforcement agencies and officers, that is, to counter the Ridgeway decision; where narcotic goods are reported into Australia without the knowledge or participation of law enforcement officers, are seized by Customs upon entry—for example, import, seaport, international postal exchange—and are then permitted to move from Customs control to the intended recipient; where law enforcement officers have prior knowledge of the possible importation of narcotic goods and the narcotic goods are imported into Australia without the participation of law enforcement officers and are permitted to pass through Customs unimpeded; and finally, where law enforcement officers, in an undercover capacity, endeavour to acquire narcotic goods.

The AFP actively participated in the initial development phase of the controlled operations legislation in conjunction with the Attorney-General's Department. We are also actively contributing to the current review of the legislation. In our view, there are a number of factors which need to be taken into account in this process. These include: the legislation enacted in other states—for example, in New South Wales and South Australia—to address controlled operations provides a more flexible, broadly based and less complex regime than that applying under part 1A(B); the sophistication and globalisation of organised crime, particularly at the international level, has created a requirement for controlled operations to be utilised and applied against a range of criminal activity outside the limitations of part 1A(B); the increasing expectation for more concerted action against the international supply of drugs, including areas such as money laundering and associated criminality; the constraints on AFP participation under the existing provisions of part 1A(B) in partnership with overseas law enforcement agencies in large-scale international money laundering

operations; and, finally, the lack of protection under the existing law from state and territory offences and the lack of coverage to those assisting police in the conduct of a controlled operation—for example, civilians, public officials and informers.

CHAIR—Thank you, Mr Keelty. Mr Brown and Mr Atkins, do you have any introductory comments?

Mr Atkins—No.

CHAIR—I would like your comments on some evidence that we have received. You may have been here when the previous witnesses were giving their comments on retrospectivity approvals. A proposition was put to these witnesses by Mr Kerr that the undercover officers could be in a situation where their lives were in danger—I think the example he gave was of an armed hold-up—and that this particular undercover action had not been approved. The previous witnesses suggested that the officer should then walk away. Can you give us any examples of situations where the argument for retrospectivity could be strengthened?

Mr Keelty—From an operational perspective, the way that the legislation and the guidelines are used in the AFP is that the officers are required to plan extensively on the possible adversary courses that may arise during the operation. Our requirement for retrospectivity really has, to my knowledge, been minimal. Having said that, I understand the tenor of the discussion from the previous witnesses. There are occasions where crimes will unpredictably occur in the course of a more major operation. I suspect that, without going into the policy area, the best and the most pragmatic way for that to be addressed is not through legislation but through conducting the investigation or the operation in the normal course, and then testing the admissibility of what has occurred in any proceedings that might follow on.

I think it is very difficult in pragmatic terms to legislate for every possible and conceivable incident that might arise during an operation; hence, the requirement of our officers to do significant planning in the application process for one of these controlled operations certificates.

CHAIR—Without going into detail, would you argue that there is a strong case for retrospectivity in these operations?

Mr Keelty—I certainly would not. The reason being that, as I just pointed out, to get retrospectivity really defeats the purpose of the act in the first place. The retrospectivity should be up to a more independent tribunal, in my view, because the actions of the officers will need to be judged in the circumstances. I would suggest to you that it undermines the intention of the legislation. We see nothing wrong with the legislation in terms of its intent; our difficulty is with its narrowness.

CHAIR—Are you aware of the evidence that we received earlier in the week from the public interest monitor in Queensland, Mr Perry?

Mr Keelty—I have been made aware of that this morning.

CHAIR—Are there any comments you would like to make on the proposition that a public interest monitor be engaged as part of the process for controlled operations by the National Crime Authority?

Mr Keelty—All I would say on that is that we do have a regime in place already in the sense of the role of the Commonwealth Ombudsman should matters arise where activity undertaken by the AFP might be questioned.

CHAIR—Yes, but the public interest monitor's role is to be a part of the process, not a part of the post-operation review. It may be that you would like to consider Mr Perry's evidence and come back to us with a comment on that. I appreciate that you may not have had an opportunity to review it.

Mr Keelty—I think Mr Atkins might want to give you an answer.

Mr Atkins—Luckily, I actually read that bit of it this morning. Any comment we make, of course, is guided by the fact that this matter is yet to go to government, and there is no government view on it as yet. The observation I will make is that mechanisms that work at the state level will work for one jurisdiction but they will not necessarily work for another jurisdiction. It is a creature not known in the Commonwealth arena. I think Mr Keelty's comments about the Ombudsman are pertinent. You need to look at the whole accountability mechanism to which the AFP is subject—and at the moment we are just talking about the AFP—in terms of the Ombudsman in his general role or in his complaints role, the Privacy Commissioner whose role has a significant impact on us, and the normal standard public sector accountabilities—the ANAO—and our own legislation. To have a doubling up in a way, as they do in Queensland, of a monitor appearing notionally for the person you are investigating may work there, but I do not know whether it is appropriate at the Commonwealth level. There are pragmatics too: you have an organisation spread nationally.

CHAIR—Nevertheless, the principle remains—and it is one that I would like to explore; Mr Kerr might take this up when he asks questions—of having a representative of the public interest when the determination is made to approve an undercover operation. The evidence from Mr Perry was that, as a result of his activity and role as the public interest monitor, by the time he gets to sit in on the process there is a greater strength of argument and degree of transparency about the planned operation than there was when he first took up his position in the state of Queensland.

Mr Atkins—Can I suggest that to some extent that is driven by the particular legislation that you are working with in that jurisdiction.

CHAIR—There is not any legislation that covers controlled operations in Queensland.

Mr Atkins—No, I am talking about the monitor's role.

CHAIR—Sure.

Mr Atkins—The other observation that is pertinent, I think—and it is an interesting one—is when you want transparency. Do you want it at the application stage, which

effectively is a series of ticking boxes—whether it is a controlled operation, a telecommunications interception warrant, a normal search warrant, what have you—or do you want the transparency during the process. Which is the more—

CHAIR—Clearly not; that is not the role of the public interest monitor. I will not take up any more time. Senator Campbell can perhaps pick that up.

Senator GEORGE CAMPBELL—Can I just extend on that argument and ask you what you are—

Senator STOTT DESPOJA—He has not finished.

CHAIR—I thought he had finished.

Mr Atkins—That is all right.

Senator GEORGE CAMPBELL—and ask you what your views are on, one, whether or not controlled operations should be subject to some independent form of accountability, two, what the nature of that accountability should be and, three, in the context of having accountability, given that many of these controlled operations go across more than one police force, how you deal with the multiplicity of systems in the process of that accountability.

Mr Keelty—We can only answer about the role and accountability of the AFP, but the fact remains that the tribunal which may consider any prosecution is the ultimate tribunal to decide whether or not the actions of the police have been appropriate or otherwise, and that is a public tribunal. Secondly, all of the controlled operations certificates that are issued by the Australian Federal Police are reported under the legislation to the minister responsible and, through that mechanism, undergo the scrutiny of this very parliament.

I think Mr Atkins was making a very good point in his last response, and that is that it is a matter of where the scrutiny occurs and what value, what sanction, might be placed at the time that scrutiny occurs and just how pragmatic that would be. For example, while we are sitting here giving evidence to you this morning, it might be that my officers have received a call from Sydney airport to say a person has been stopped by Customs with a quantity of narcotics. The way that the narcotics industry works is that, in more cases than not, somebody would already be waiting for that person to come to the other side of the Customs barrier. Delays are critical in terms of obtaining the ultimate goal, and the ultimate goal is not only the seizure of the drugs and prosecution of any persons in possession of the drugs; it is to dismantle the syndicates that are responsible for bringing the drugs into the country.

I have to say to you that the involvement of other people at the point where decisions need to be made very quickly, where applications need to be made and controlled operations need to occur in a very short period is not very pragmatic in terms of the ultimate goal—of certainly this government—under the National Illicit Drugs Strategy that we should remain tough on drugs and that we should be seizing every opportunity to prevent drugs from getting to street level.

Senator GEORGE CAMPBELL—That does not really answer my questions about the form of public accountability and, secondly, the issue of multiplicity of systems.

Mr Atkins—I might attempt to answer the first; the second, I think, is more problematic, certainly in terms of the existing legislation—of course, we have problems talking about proposed legislation. In terms of accountability, I would invite you to consider the telecommunications interception regime. That has its faults. To my mind, one of its great virtues is the compliance monitoring role that the Ombudsman has after the issue of the warrant. Warrants are a very useful device for ensuring that, yes, the boxes are ticked. Very few warrants are rejected. For agencies to know that there is an independent body that can step in and check during and after the life of the thing that, yes, the commission has been used lawfully and properly is a very powerful accountability mechanism. That does not occur so much under the current scheme, although there are elements of that there. The fact that you have to report and you have to report a completion are powerful elements.

The New South Wales regime has the Ombudsman involvement as an ongoing compliance mechanism. They have some restrictions on what the Ombudsman can do, but it is still there. We know if you act unlawfully and improperly not only are you going to be held to account at the end of the process if it gets to court but you may well be held to account during the process.

The AFP has constantly said the sort of accountability in bodies like this and in those elsewhere is welcomed. It protects the agency, it protects our members who act lawfully and appropriately and it protects the public, and you are ultimately talking about the same interests there. So in terms of accountability, whatever mechanism is used has to be effective, and the most effective mechanism is one that acts as part of the normal process, one that everyone knows is there, one that is a disincentive for people to try to push the limit too far, and one that gives assurance to the parliament, to the executive and to the public that if something does go wrong the chances are it is going to be detected.

The multiplicity of jurisdictions is a fact of life in this country. Given the limited nature of our scheme, we cannot comment usefully on the complexities that arise from jurisdiction to jurisdiction in regard to the schemes you are talking about. I think it is a matter for the government to address when it considers the outcome of the current review processes. But it clearly is an issue; it is a very live issue.

Senator STOTT DESPOJA—I am curious as to how you would describe the conditions, including the reintegration programs, for coverts that operate in this country. The impression I get from evidence we received in Queensland is that, over the last few years, there seems to have been an incredible movement to provide additional training and ensure that perhaps some of the concerns of the past are ameliorated.

Mr Keelty—A point of clarification: are you talking about the police operatives?

Senator STOTT DESPOJA—Yes.

Mr Keelty—The AFP does not have an undercover police operation program in terms of its similarity to what is commonly used by the states. We have made that decision on

purpose, given our knowledge of the limitations that undercover operations have had internationally, to recognise the ongoing effects, issues and problems that arise from undercover operations that you have alluded to. We have drafted an undercover policy for implementation, but we will not implement it until we get the management and training schemes in place. We are cognisant of the downside of undercover operations.

One of the misnomers of this legislation is that an undercover operation does not necessarily have to follow through this legislation. This legislation really enables a police officer to conduct himself or herself in a way that would otherwise be unlawful. I know that there is frequent use of the word 'undercover', but this is not the sort of undercover where you set up a shopfront and have special legislation to allow special taxation dispensations and operations to occur over a large number of years. We have purposely steered away from that sort of operation because, at the end of the day, it does need a significant amount of management, resources and legislative support, which at this stage we do not have.

Senator STOTT DESPOJA—You make it quite clear in your submission that you are cognisant of civil liberties implications. You state:

There have been no significant expressions of concern raised with the AFP to suggest the practical operation of the legislation by the AFP has itself generated civil liberties implications.

Would you care to expand on that? When you say 'no significant expressions of concern', does that mean that no complaints or queries that are particularly concerning or significant have been raised? That is on page 5 of your submission.

Mr Keelty—We have not had any concerns raised with us about the civil liberties aspects of what we have done. It probably reflects the limited application that we have had in terms of the way we have applied the legislation.

Senator STOTT DESPOJA—Could you provide your perspective on providing protection for civilians, please?

Mr Keelty—Certainly. Oftentimes, we find ourselves in the situation where a person—the example I gave earlier was of a person who is stopped at the customs barrier as a passenger off an airline flight to Australia—will be offered the opportunity to participate or not in a controlled operation. Once that person participates and agrees to provide us with information in terms of the network to which they belong, whether there are other passengers on the same flight who have narcotics in their possession and to whom the narcotics are to be delivered, we cannot use that person under the current legislation as the police officer, because police officers are the only ones who are covered under the legislation. That is a good example of where the legislation is deficient.

Mr KERR—Sorry, I did not quite understand that.

Mr Keelty—In the sense of allowing that person to participate further in an undercover capacity on behalf of the AFP, because they are not a law enforcement officer under the legislation. Also, oftentimes, when a person is facing a prosecution, they may decide to cooperate with the authorities in divulging the network to which they belong and offering to

engage in activity to allow us to obtain further intelligence about the operations of a particular network or syndicate. That, too, may involve the person becoming involved in what would otherwise be unlawful activity. The unlawful activity by someone in that situation is always going to be unlawful, unless we can find some legislation that makes their activities lawful by virtue of the fact that they are acting on behalf of, or as an agent for, the police.

Senator STOTT DESPOJA—How would you respond to a comment in the previous submission that we have had where the authors state:

> The extension of immunity to informers is problematic—informers are not sworn officers who are obliged to uphold the law, but rather members of the criminal underworld who may be motivated by fear, distrust and money. They are clearly not accountable to the law for their decision to commit offences . . .

In relation to civilian informants, would you have some sympathy for that argument?

Mr Keelty—Certainly. If you go back to the previous discussion we had about the undercover police operations that are expensive and have occupational health and safety ramifications, one of the alternative ways to infiltrate the higher level of a syndicate—this is not about street level; this is about getting to dismantle the organised crime networks—unless you put an undercover police operative in, is to indoctrinate someone who is already part of the syndicate and have them working on your behalf. That is probably the better alternative.

Of course, one of the difficulties that faces either an undercover police operative or a person who is engaged by the police to work on behalf of, or as an agent for, the police is that we are talking about organisations that are inherently unlawful. Therefore, it is reasonable to anticipate that they would be required to engage in unlawful activities. There is some sympathy for that. It is a viable alternative to a very extensive undercover police operation. You have in an informer someone who is already an agent of the syndicate, involved in the syndicate or known to the syndicate and has credibility with the syndicate. He or she can really cut to the chase in terms of the cost and overall length of an operation. If properly managed, that can really save on the resources of the police in terms of getting to the core of the problem very quickly.

Mr Atkins—There is another aspect to the use of non-police officers. It is traditional to think of undercover officers using informers who are criminals. There is also the point of engaging cooperative civilians who are in no way involved in crimes and providing them with some protection for assisting the police. That becomes quite significant in, particularly, things like money laundering and the disposal of assets. That is an observation that will be reflected in the—

Mr KERR—I was going to explore this business of informants because it is probably the hardest issue. Presently, if you make an offer to an informant, I understand you indicate that you will make certain recommendations in relation to the future conduct of the matter to the commissioner in the first instance and then to the Director of Public Prosecutions, but that you cannot offer immunity. You would indicate that your recommendation would be subject to them undertaking their conduct in accordance with an agreed protocol that you would then settle with them. Is that the way it works?

Mr Keelty—That is correct.

Mr KERR—For a range of different reasons, the DPP does not allow themselves to sign up to a prospective undertaking not to prosecute. I am not certain whether, in Australia, such an undertaking would be lawful if it were given. I do not know; that is something I have not looked at for a while. In a situation like this, the fear has been expressed to us—and I suppose this is in all our minds—that you are giving immunity to somebody, who is probably a seriously bad guy to be in the middle of one of these operations in the first place, and that they may go feral and use you as part of what they are doing—to protect themselves, to wreak vengeance on group X or to set up circumstances with group Y, as it may be in their interest to pull down one group with your assistance—and so they are pursuing their interests and not the larger community's interests.

How should we balance these things? Is there a case for us to not give the power, in this case, to a controlled operation in the ordinary sense where the commissioner would authorise it, or whatever other mechanism, but to perhaps legislate to give it to the DPP or somebody like that? You would recognise that you are dealing with a different set of circumstances from when you deal with somebody who has sworn to uphold the law—albeit somebody who is allowed, in this instance, to make technical breaches of the law because of that task. It is a very different situation when a criminal is tasked, normally under duress, to undertake this operation. That is the one thing I am sceptical about with the New South Wales approach. I am wondering what your view is in relation to that.

Mr Keelty—They are very good questions on the pragmatic problems that arise in conducting these sorts of operations. We separate the two types of informers. There is the non-criminal informer, which Mr Atkins just alluded to, who might be someone working in a bank who comes forward and requires some protection to allow the criminal process to continue. There is then the criminal informer. Having a background of extensive involvement in this type of operation, I agree with the DPP's proposition. You can get an informer who will conditionally cooperate with the law enforcement agency on the basis that they are given an indemnity. Often, you do not know enough at that point in time about their complicity in not only that crime but perhaps many other crimes. Indemnities are problematic for that very reason.

The better way to approach the indemnity situation, in our view, would be to offer support at the time of sentencing. You say to an informer, 'We, as police officers, cannot condone your criminal behaviour, nor are we authorised—nor should we be authorised—to provide you with an indemnity for your criminal behaviour. However, should you cooperate with us in bringing the principals to justice, we are prepared to recognise that by way of a letter to the court at the time of your sentencing.' That then gets over the problem of that blanket indemnity, which I agree is a very difficult and very dangerous area for anyone to get involved in. As one of the other committee members mentioned earlier, you are quite often not sure of the motivation of the informant until much later in the piece and having dealt with the informant.

On the question of how you address the problem from a legislative perspective, that is very difficult. You are right. It would need to be graded in one sense on the crime that is being investigated, the nature of the role to be undertaken by the informant and, therefore,

whether it would be appropriate for the commissioner or his delegate to provide appropriate sanctions for the involvement of the informant in what is essentially a police operation, or whether it needs to go to some external body.

I guess it is difficult in the context of this sort of committee to come up with a solution to that, but the problems are not easy ones to address because some operations are far simpler than others, of course. There is the example of the courier who was stopped at the barrier. Really, by and large, couriers are persons who are down on their luck, who are vulnerable, and who see an opportunity to either continue their own drug habit or perhaps make a lot of money in a very short period of time that might mean a lot to them from their country of origin. That is a very simple and probably easy issue to deal with in terms of an extension to this legislation.

The other type of case that you are talking about—the long-term alternative to an undercover police operation—does require more careful consideration and probably independent consideration about how an undercover operation might be structured and what the roles of the various law enforcement participants might be. In those more protracted investigations such as the ones that we see in places like the United States which might go for two or three years, it might be there that an independent body like the DPP ought to be consulted in the role that is being performed by persons in those sorts of investigations. There I am talking about the classic Italian organised crime type investigation where some of the publicised successes of the US law enforcement agencies obviously indicate that roles are being performed with the sanction of the government. It is a difficult area. There are those grades, which might be the most pragmatic way of dealing with the issue from a legislative perspective. I will ask Mr Atkins if he has anything he wants to add to that.

Mr Atkins—That is right. It is an incredibly complex area generally because you really are giving a permission to do something at large, and you have this tension between a legislative mechanism which has to be effective, which is not going to be counterproductive. There is no point having processes which are stringent, strict and very detailed that do not actually achieve a protection. You want the protection to be real.

Once you get into the realms of having people whom you know to be criminal remaining in a group and doing criminal things, so that you can get a law enforcement result at the end of the day—whether it is a prosecution or not because some law enforcement results may not end up being prosecutions; it is extremely problematic—Mick is right: there has to be some grading or some capacity to say, ‘Okay, this is too hard. Conceptually, the enforcement agency should not be making this decision; it should be being made over there’, or, ‘You simply can’t do that.’ Maybe they are issues that the government will have to grapple with once we have gone through the process of looking at the current scheme.

I do not know whether the New South Wales balance is right. I have some views about that. Silence on the issue or not addressing the issue is not right either; it has to be dealt with.

Mr KERR—I have no final views, but I suppose one of the things the DPP squibs is not being willing to address some of these harder issues. There may be some instances where, if it were constitutionally lawful, they could say, ‘With conduct prescribed in this particular

way for this particular operation at this particular time, I will undertake—provided you do nothing else other than these things—not to proceed against you.' If someone was brave enough to take that up-front, in practice that may be a legitimate course to undertake. But I understand also why DPPs would be very wary of that because, having made such a decision, if it does go off the rails, their judgment and competence will be questioned. I do not think it is a police decision there.

Mr Atkins—I think that is right. One of the problems with involving the DPP is that, once you make them a formal participant in the investigative process, in the trial their investigative involvement becomes part of the trial process.

Mr KERR—Yes, that is true.

Mr Atkins—Perhaps the responsibility can be given to another body, whichever independent—

Mr NUGENT—Could there be a role for a public monitor in this sense?

Mr Atkins—An ombudsman or public monitor. The term I am thinking of is independent auditor or independent audit body, however you describe it, however you characterise it.

Mr NUGENT—I took Mr Keelty's point earlier—and I apologise for interrupting—that there are clearly practical operational situations where it is not reasonable to go and find the public monitor or to involve them up-front. Clearly, you cannot do that as a matter of routine. But in the sort of situation that we are talking about there probably would be time to go and talk to somebody else. If it should not be the DPP, could it be somebody like the public monitor?

Mr Atkins—As Mr Keelty said before, all of our operations are very carefully planned. Certainly this sort of operation would be extremely carefully planned so that problem would not arise there. As I said, I do not know whether it is the public monitor or some audit function given to some public body other than the police, and I suspect other than the DPP.

Mr KERR—I suppose in the constitutional framework the DPP really is the Attorney-General.

Mr Atkins—Yes.

Mr KERR—The Attorney-General in our legal system, or the Minister for Justice and Customs. Essentially, it is the Attorney exercising a legislatively delegated task through the Director of Public Prosecutions. I do not believe it is inconsistent with the Attorney's task to have both responsibility for the investigation and management of law enforcement and prosecutorial functions because, until we made that statutory provision, that was inherent.

Mr Atkins—That is right.

Mr KERR—I am not certain that the point you make is one that is decisive. I think we are all trying to tease through how to best address this.

Mr Atkins—I do not think it is a constitutional problem. I think it a pragmatic problem that, in trial, the fact is the defence sees the bundle of papers and sees the DPP's involvement, and that is another issue that gets caught up in the trial. You have the DPP in the uncomfortable position of possibly having to put its officers into a witness box, its officers giving evidence. I think it would be an uncomfortable situation to be in. Perhaps their mechanism is to say, 'Yes, this is the mechanism that you should adopt, but have the decision made elsewhere—but other than the police.'

Mr KERR—Am I also correct that we may be exhausting a huge amount of energy on something that is not all that common?

Mr Atkins—For us it is not common at the moment.

Mr KERR—I am certain that there are instances where you, in a sense, 'let run' somebody under those constraints. You make those judgments and you proceed in that way. But again, from our point of view, we should have some appreciation of whether this is something that is a high-order concern or a fairly modest level of concern.

CHAIR—Or whether it is a concern in principle only.

Mr Keelty—Which is why, of course, I prefer to be a practitioner rather than a legislator. There are a couple of issues that arise out of it though. Perhaps it is not uncommon, in the sense that we have—at the Commonwealth level—witness protection legislation to allow us to put witnesses under protection. Invariably, those witnesses have cooperated in the manner that you have outlined. The DPP, of course, is a major stakeholder in the sense that, in any decision about immunity from prosecution or involvement in a criminal enterprise, someone has to weigh up the potential value of evidence and a comparison needs to be made about those prosecuted and those not prosecuted. From experience, there are often times where you get caught out in these situations. Although it has not happened often, an example is where the person who you have given immunity to—or attempted to give immunity to—is probably more complicit in other crimes, or more of a criminal in the community sense, than some of the people who are ultimately prosecuted and have been opportunistic or entrepreneurial about the way that they have come into their involvement with the police.

All these things, as Mr Atkins said, make it a very complex issue to work through. But I do not know if it is uncommon and—dare I say it—should this legislation be extended in the way that we would like to see it extended—whilst we are still in public, I will not give you examples, but there are very telling examples of where we missed out on major operations quite clearly because we have not had the extension into the money-laundering side of this legislation—we are going to have potentially more people arise in the way that you have described. It is not an academic argument at all.

Mr KERR—If no-one objects, I would appreciate having that evidence.

CHAIR—We can go in camera if there are no further questions.

Mr KERR—That would help to put it into the framework of what we are actually talking about.

Mr NUGENT—I have one general question.

CHAIR—Mr Nugent has a question, and then we will go in camera to complete the witnesses' evidence.

Mr NUGENT—You mentioned the number of certificates issued over a three-year period—about 68, 70 and 47. I did not write the numbers down, but I think that was the order of magnitude. There is quite a significant variation between the first two years compared to the third year. Can you give us a feel for the range of different types or categories of investigation you had that would be covered by those certificates. Were they all drugs related or were they related to other types of crime? Is there a particular reason why the number went down so dramatically in the third year?

Mr Keelty—For the record and to put the question in context, there were 68 certificates in the first year of operation, 70 in the second year and 47 to 30 June 1999. A couple of things have impacted on that. For example, the certificates are used for the major operations that you would see reported in the public arena, like the 400 kilos of heroin that arrived off the east coast of New South Wales in October last year. Similarly, they are issued for those scenarios that I spelled out to you earlier, where the couriers who come in through the airport are dealt with.

There are two reasons for the variation. Firstly, we have been quite stringent in our application of the legislation in terms of the seriousness of the crime to which these matters apply. Secondly, if you look at the figures contained in our submission of the overall drugs seized, there have been, for example, 121 kilos of heroin seized in 1996-97, which is the first year of the certificates; 114 in the second year; but 498 in the year just ended. Cocaine went from 28 kilos in the first year of operation of the legislation to 38 kilos in the second year of operation and to 237 kilos in this year of operation just completed. So, in terms of hard drug use, the application of the legislation has been towards the higher level of the sophisticated criminal elements.

Mr NUGENT—You are giving credit—

Mr Keelty—We have been more discerning about its use, and our resources are taken up in those major operations. Therefore with the lower levels of drugs, we have made a conscious decision not to invoke the legislation, and perhaps to deal with the courier where we see that the results at the other end might not be all that beneficial; so we might just seize the drug and deal with the courier. We have been a little more practised, too, about what presents the best prospects for a successful prosecution at the end of the day.

Mr NUGENT—That makes sense. Thank you.

Evidence was then taken in camera, but later resumed in public—

[11.15 a.m.]

PHELAN, Mr Michael Anthony, National Secretary, Australian Federal Police Association

ACTING CHAIR (Mr Nugent)—Welcome, Mr Phelan. The committee prefers that all evidence be given in public, but you may at any time request that your evidence, part of your evidence or answers to specific questions be given in camera and the committee will consider any such request. I understand that you have not prepared a submission, but you have agreed to make yourself available to answer the committee's questions. We thank you for your time. Would you like to make a brief opening statement?

Mr Phelan—I would like to thank the committee for giving the association the opportunity to address it on controlled operations as they affect the National Crime Authority. By way of brief introduction, the majority of the investigators at the National Crime Authority are members of the Australian Federal Police and, subsequent to that, the majority of those members—about 98 per cent—are members of our association, so we represent their professional interests within the workplace.

In relation to controlled operations, we are keen to protect the legal interests of our members and to look after their professional and integrity issues. What I mean by that is that often with criminal activity an investigation goes wrong or the case is thrown out of court for one reason or other, perhaps on a legal technicality. A little bit of a stigma is attached to those officers who were involved in the investigation, albeit they did the investigation to the absolute best of their ability and within the letter of the law. They acted under directions and did everything in good faith, for example the Ridgeway decision. That is where we are coming from.

The association is unable to comment directly on the operation of the National Crime Authority because we do not have that information available to us, but I think I am in a reasonably good position to comment on the generality of the legislation, and particularly part 1AB as it affects the members of the Australian Federal Police, those attached to the National Crime Authority and also those within the organisation. To that end, I have studied a number of the submissions; indeed, when I was in the organisation I had a part in working with the legislation itself, and I have seen its limitations as well as its benefits. We support most of the submissions that have been made to the committee, particularly in relation to expanding the terms of the legislation to cover not only narcotics investigations but also other types of serious criminal activity, in particular money laundering and other sorts of property crimes.

As we gallop towards the 21st century, a lot of these crimes that are committed, particular money laundering and so forth, go hand in hand with narcotics investigations and, as technology gallops ahead, it is very hard for us as investigators to get hold of either the assets or indeed to trace the evidence, particularly with e-commerce. Transactions now occur in a millisecond, and it could well be in future that the only way to get those proceeds of crime, or the elements involved within the criminal activity, is to be a part of the criminal

activity in some form, whether it be to set up a front bank or to place people within the criminal enterprise itself. Invariably they would be conducting unlawful activities, and certainly they need to be protected. To that end, we would also seek that the legislation to be extended to civilians.

I had the benefit of listening to Mr Keelty give his evidence in that respect. Not only do we have criminals involved in the organisation that perhaps need to be protected in part but also, to my mind, in the future it will be more and more prevalent that we will have to protect professional people whom we call in to help us in these investigations. Whether they be bank officers, accountants or lawyers, we will need civilians to assist for us to gather evidence and take possession of proceeds of crime. In a nutshell, that is where we are coming from. I have probably missed a couple of points, but I am only too willing to elaborate when answering questions.

ACTING CHAIR—You mentioned that a concern of your members is that if an operation for no reason or fault of their own goes wrong—my words—that there could be some unfortunate adverse career implications, perhaps. Have you got any evidence, or have there ever been suggestions, that that has actually happened?

Mr Phelan—No, I do not. I am simply saying that it is a possibility in the future, given that we do work within a human environment. Invariably, when a lot of money is spent on an operation over a long period of time and it is thrown out of court at the end of the day, sometimes someone has to pay. We do not want that to be our members. I am being purely speculative in that regard.

ACTING CHAIR—You mentioned that you had looked at a lot of the submissions. You may be aware, therefore, that, in one of the submissions that has come before the committee, there is a suggestion that there should be a public interest monitor involved at a stage when certificates are being issued—rather than just having accountability after the event, that somebody from outside is a part of the process to give it more accountability and perhaps a different perspective when that judgment is being made, because if it is only the police, perhaps it is fairly incestuous. Would your members have a view on that?

Mr Phelan—I tend to agree with part of the AFP's submission in that regard. I can see that there would be some very practical problems with regard to very quick-time response jobs. For example, when something does come in at the airport and you have a courier you want to do a controlled delivery on to another person or in fact keep on going, I can see that there would be very hard practical implications in that. But, from another aspect, the ability of police to conduct their investigations, and in fact what investigations they choose to do and how they do them, is in our view basically a matter of a statutory right for police not to have their activities interfered with. Adding in someone at that phase who perhaps is not involved in the whole process could have the possibility of fettering the discretion of police as to what matters they should investigate and how they should investigate them.

I can also see some practical problems where, perhaps at the time of issuing a certificate, there could be sufficient information for the authorised officer to issue a certificate, and that they would do that as a matter of course, but things could happen later on which could change what the original intention of the certificate was. It could well be that the

independent person who was there in the beginning could be caught up in what you actually authorised not being what happened in the end, and they may not be privy to all of the facts later on. I do not know what sorts of practical problems could occur, but you can see how that could perhaps embarrass that person, or something similar.

Mr EDWARDS—Michael, just generally, do your members feel that, on the job, they have the legislative support they require? Do they feel they have the confidence that governments will stand behind them should they in good faith in the course of their duty infringe in some way or other? Is there a general feeling of confidence and, if not, does this in any way inhibit them in the way they do their job?

Mr Phelan—I could not bring up specific circumstances or events where that has occurred. But, generally speaking, the members at the moment are happy with the legislative instruments they have to do their job. Some of them are very prescriptive, but I suppose in this day and age we accept that. There is no way that this organisation, or its members, in any way condones corrupt activities or activities that are done to deliberately circumvent the law. Our members work within the law to get the job done properly. Certainly we do not see it as our members' right to go outside the law. It is the parliament that makes the laws and it is up to us to enforce them and to work within them. In a general sense, if our members do, say, breach the law in a technical sense—I could not give any instances where members have been summarily charged or anything like that if they have been operating under direction. Does that answer your question?

Mr EDWARDS—So they generally have the confidence that their superiors will stand by them?

Mr Phelan—No, that is not always the case. Certainly, as I alluded to earlier, when something goes wrong there is always someone who has to get the blame, invariably. No, the members do not always have the support of the senior management, but that is very much an overgeneralisation. Sometimes they do and sometimes they do not; it really depends on the circumstances and it would be very hard to pinpoint an exact circumstance.

Mr EDWARDS—I will clarify that a bit more. Members do not go about their daily jobs with a view that someone is looking over their shoulder in the sense of just wanting to make sure they are doing everything by the book.

Mr Phelan—To be quite honest, I would say that the working environment within the Australian Federal Police has moved away a lot from command and control. The members are now a lot more empowered to conduct operations as they see fit. The commissioner has said on a number of occasions that, if members act in good faith in the way they exercise their duties, they will be treated fairly, they will not be punished as long as they act within the law. Sometimes there are indiscretions and people make mistakes. The commissioner has said on a number of occasions, both in print and in speeches, that those members will not be unduly punished.

Having said that, the employment regime we work within in the Australian Federal Police is a little different from most of the other state police forces. We have statutory fixed term appointments under the act. I do not like to use the word 'contract', because it is not

quite a contract. The way in which those fixed term appointments are now being utilised is somewhat different from five to seven years ago, when they first came in in 1990. The first round of renewals came up in 1995. They are being used somewhat differently now and minor indiscretions in the past that members perhaps may have been exonerated for are turning up in their dismissal notices or non-renewal notices. There certainly have been occasions where members have done something wrong and been punished for it—had disciplinary action or had a caution—and it has come back to bite them four years later in their renewal process. So there is not a lot of confidence at the moment in our renewal process in terms of protection from senior management.

Senator GEORGE CAMPBELL—Mr Phelan, going to a slightly different aspect, we were given evidence at another part of this hearing about extensive training and psychological assessment that is conducted and also about the program of withdrawal of officers who are involved in controlled operations. It raised a range of health and safety issues related to people involved in this aspect of policing. Can you describe for us what happens to AFP people who are involved in controlled operations or undercover work? Is there a similar type of detailed assessment done of them?

Mr Phelan—The AFP does very little undercover work as such compared to our colleagues in the state police. That is generally due to the nature of the work we do. We are involved a lot more in narcotics importations and organised crime rather than, say, street level buy busts. That is not to denigrate that level, because certainly in street level buy busts with undercover operatives involved you can be talking multi-kilo seizures and so forth. But generally speaking our members do not get involved at that level. The utilisation of controlled operations so far as the AFP is concerned, certainly in my opinion, is more to facilitate the bringing of the narcotics into the country and the ability to then lawfully move those narcotics through the customs barrier to their ultimate delivery point with a view to dismantling that criminal enterprise. So in a sense we do not have our undercover people deep within criminal organisations. To a very minor extent we might have people who would somehow take part in the delivery itself, but it would be a very minor role.

In terms of training, the association would be of the strong view, based on OH&S, that we would not allow a general undercover program to be operative within the Australian Federal Police until we had very stringent training programs and analysis based on overseas experience and all the OH&S standards were adhered to.

Mr HARDGRAVE—I just want to clarify that your organisation actually covers the federal police involved in the NCA.

Mr Phelan—Yes, we do.

Mr HARDGRAVE—You talked before about the general principle that it is undesirable for police officers to commit criminal acts. What is your view on where you draw the line on these things?

Mr Phelan—In a personal perspective, prior to this legislation coming in in 1996 it was never considered a criminal act to allow the narcotics to come into the country and deliver it to the eventual recipient. So it was never the members' view, nor the legislators' view, that

that was a criminal act. We only regard those as criminal now following the decision of Ridgeway. In terms of drawing the line on what it is to take part in an unlawful activity, I am really talking about regulatory breaches, things like setting up a false company for the purpose of conducting a money laundering sting or an operation. I suppose I would limit the unlawful activity to the administrative unlawfulness of actually letting narcotics go through the barrier without filling in a form to allow it to come through and without having permission under the act. I hope that answers your question. I am sorry for being vague.

Mr HARDGRAVE—That is okay. I was trying to get any personal misgivings or perspective on what is acceptable and unacceptable police behaviour. Some would have us question police officers making the determination of what is reasonable or otherwise in the conduct of some controlled operation. Perhaps in undercover work a member of your association may have to almost prove their bona fides to those that they are working with in the criminal world as a result of this controlled operation, and this proving of bona fides could extend to the use of illegal narcotics, belting the living daylights out of somebody or perhaps even worse. One wonders whether in fact those sorts of things could have happened in the past, and if a bigger fish is fried that is okay. Do you have any views, given that sort of background?

Mr Phelan—My view is that it is a very subjective question. I know that is pretty much a non answer, but where do you draw the line between the police car that perhaps speeds without its lights and sirens on, and therefore is breaking the law, and someone who, as you said, to prove their bona fides does a serious assault? I do not for one moment condone the latter, but certainly the first instance, speeding to do something, is inherently unlawful but required in order to get the job done. So it is hard to draw that line, and I do not think I would be qualified to be able to draw that line.

Mr HARDGRAVE—What about from a viewpoint of protection of your members? As long as it is an established paper trail of activity, that matters are understood to have taken place, that there is almost a disclosure of certain activity—'In order to do this I had to do that'—is that a reasonable thing? We have been told of instances where undercover operatives have literally taken out litigation as a result of some sort of injury or harm afforded them as a result of their activities. How do we protect individual police officers in the circumstances of a controlled operation?

Mr Phelan—Being inherently distrustful sometimes of some mechanisms within organisations in terms of protection of their members, I would be going for the highest level of accountability possible, and that means complete documentation of every event that has taken place. I would think that is the best way we could afford protection to the members. They need to know that they are not out on a limb making their own objective judgments at the time that could somehow later on be scrutinised by someone else and be deemed to be beyond the line that we were talking about earlier on.

Mr HARDGRAVE—You are saying that the public interest monitor concept really would not work hand in glove with that kind of disclosure procedure, then.

Mr Phelan—I tend to agree with Mr Atkins's submission before. We basically go under this environment when we talk about telephone intercept product and listening device

product, as to how we look after the product, who it goes to and whatnot. The Commonwealth Ombudsman looks after that and has a very intrusive role into the organisation as to record keeping and so forth. So perhaps there is a role for someone to do that in that function, but by the same token you have to weigh that up against the operational imperatives of perhaps fettering the individual's discretion in the way they carry out operations. It is a difficult question and not one that I can answer with a lot of authority.

Mr HARDGRAVE—To have one last go at this general area, are you satisfied that the chain of command is sufficiently focused in on not dropping a particular member down a hole as a sacrifice for something that is approved that goes wrong? In other words, is there sufficient documentation, is this sufficient good judgment, to make sure that activities undertaken in a controlled operation are reasonable and justified and are not putting members in a parlous state as far as their standing is concerned?

Mr Phelan—As an operational practitioner in the organisation—I have been a police officer for 14 years and have worked on a number of narcotics investigations—the way the AFP conducts its investigations now is very much as Mr Keelty said: they are well planned beforehand and extremely well documented along the way. The types of investigations that we do invariably end up in the highest courts—they are District Court and Supreme Court matters. Our defendants are defended by senior counsel. Most of the time they call for things in court, for the running sheets and everything else. They are all well documented and our members know well and truly the value of having all their actions recorded as they go along. I would think this would just be an extension of that. I would be quite confident, if you were to pull up any controlled operation done by the Australian Federal Police, that you would find in the running sheets that most of the things you have been talking about would have been covered, certainly those primary decisions based on whether or not we undertake some sort of unlawful activity.

Mr HARDGRAVE—So you do not know of any instances when members are sacrificed off the end of the chain?

Mr Phelan—No, I could not give you an example.

Mr KERR—I have now had most of my questions asked. The only thing left is the length of the operation, currently 30 days. You were involved in the design of the legislation. Do you think, reflecting on it now, you would extend the length of that operation?

Mr Phelan—Yes, it would be appropriate. Sometimes it might be just as easy to get an extension, similar to other legislative provisions. The National Crime Authority certainly do a lot more of those types of operations then we would—controlled delivery straight from the airport.

Mr KERR—You are mainly just getting the drugs on the run.

Mr Phelan—Yes, but that is not to say that we do not carry on some major protracted inquiries that perhaps have their genesis overseas and take a long time to get to Australia. So yes, they would take longer than 30 days, and there is scope to extend that.

Mr EDWARDS—Would you agree that it would be advantageous to have uniform legislation across Australia for this issue?

Mr Phelan—I would think it is an imperative for us in the federal jurisdiction and particularly for our members in the National Crime Authority. At the moment, the controlled operations legislation under the Crimes Act 1914 lends itself only to narcotics offences under the Customs Act and protection from possession. We also have people who, under the National Crime Authority Act, have the ability to utilise state legislation. I gather from time to time the National Crime Authority will be using the New South Wales legislation.

I do not think it is appropriate for agencies to 'legislation shop', for want of a better word. What they should do is have consistent legislation across the whole country. Not only does it give a little bit of certainty, particularly for our members who work within a number of jurisdictions—our members are in all different states—but currently the legislation protects them from the Customs Act provisions and possession. Technically it does not protect them from trafficking in the state legislation in which they work. It could be a nullity, because I doubt whether anyone would seek to prosecute, but it is still there, so our members are not protected from the actual trafficking.

One could argue that, if you go from one courier to the next step and followed the next step, you are actually involved in a traffic and, therefore, are not protected if you are involved in that operation. To that extent, the legislation has a number of shortcomings. If we did have uniform legislation across the country, I would think that would be a step in the right direction.

ACTING CHAIR—Thank you very much indeed, Mr Phelan.

Mr Phelan—Thank you for the opportunity.

Sitting suspended from 11.43 a.m. to 11.57 a.m.

DELANEY, Mr Grahame, Principal Advisor (Commercial Prosecutions and Policy), Commonwealth Director of Public Prosecutions

McCARTHY, Mr Justin William, Senior Assistant Director (Policy), Commonwealth Director of Public Prosecutions

ACTING CHAIR—I now welcome representatives of the Commonwealth Director of Public Prosecutions, Mr Justin McCarthy, Senior Assistant Director (Policy) and Mr Grahame Delaney, First Deputy Director.

The committee prefers that all evidence be given in public but you may at any time request that your evidence, part of your evidence or answers to specific questions be given in camera, and the committee will consider any such request. As public servants you will not, of course, be required to answer questions which seek your opinion on the merits of government policy. We have received the Acting Director of Public Prosecution's submission, which has been published by the committee. I invite you to make a short opening statement to the committee, and then we will move to questions.

Mr Delaney—I thank the committee for the opportunity to appear and to put the DPP's position on this issue. Can I just correct the record before doing that. I am described as 'First Deputy Director' in the material before the committee. That is what I was at the time that the submission was submitted, between the last and the present Directors of Public Prosecutions. I am now Principal Advisor (Commercial Prosecutions and Policy).

Our comments are confined to the adequacy of relevant national and state legislation in relation to the conduct of controlled operations by the NCA, and that is the issue we will proceed to address. I think it is probably best to start by saying that the DPP considers that it is timely and appropriate that the present part 1AB be subject to revision. That is at the Commonwealth level, of course. We believe also that it is desirable that those state jurisdictions that have not done so should put in place legislation governing controlled operations in their jurisdictions.

As to the issue of the revision of part 1A(B), perhaps I could deal first with the scope of controlled operations. The DPP is of the view that the present legislative restriction of controlled operations to Commonwealth drug offences is too narrow. For example, often investigations into the drug trade will reveal other serious crimes—in particular, evidence of money laundering, tax evasion, bribery, forgery and corruption type offences. That is, there will often be Commonwealth and state offences involved with those who participate in that trade. Confining the scope of Commonwealth controlled operations has a number of adverse consequences, in our view.

Potentially, it can put in contest in a resulting prosecution the admissibility of evidence of any offences that arise from, but are not authorised in, the controlled operation. Secondly, it can place the investigator in the position of having to choose whether to act unlawfully or to abandon the pursuit of evidence of serious offending. Finally, it can place the DPP's office in an invidious position in that an investigator may seek some indication that he or she will not be prosecuted for possible involvement in offences that are not authorised under part

1A(B). It really is a difficult call to give that sort of indication about offences that might be committed in the future.

In terms of the present scope of part 1A(B) and its application to state offences, we would make the point, in particular, that it does not provide any immunity for involvement by Commonwealth investigators in state supply offences but is restricted to offences involving possession. For those reasons, we would therefore support an extension of the ambit of controlled operations so that they cover all Commonwealth offences in order that a Commonwealth investigator involved in the technical commission of such an offence would not be acting unlawfully. As will be clear from our written submission, we also support the extension of immunity to civilian participants in controlled operations.

Because present-day investigations can frequently be joint investigations between Commonwealth and state investigators and because, by arrangement with state DPPs, the Commonwealth DPP frequently prosecutes joint indictments containing both state and Commonwealth offences, we would see it as important that those states that have not done so yet pass complementary legislation to cover state investigators and provide immunity to them. The consequence of not having that sort of scheme is that arguments over the admissibility of evidence in prosecutions that result from those investigations will continue, and the effectiveness and efficiency of prosecutions can be adversely affected in that way. They were the comments that we wished to make in opening to the committee. We would be happy to take questions on them.

ACTING CHAIR—One of the suggestions that have come up in evidence which has certainly had some potential appeal and which we have been testing out for reaction from other witnesses is the proposal that a public interest monitor should be involved in the process of issuing certificates for controlled operations rather than it being done in-house in terms of the police. In other words, you have an independent body there to look at it in advance rather than somebody just sorting out problems afterwards, the object being to have greater accountability and so on. There are obviously practical problems with that on some occasions. Would you have a view on that?

Mr Delaney—Off the top of my head, probably not. I can see that it would really depend on what the requirements were for obtaining authorisation. I think I could foresee that, unless the procedures were very streamlined, such a proposal could have the potential to inhibit investigators in the pursuit of their investigations. I do not think I could go much further than that. I am not sure whether my colleague could elaborate.

Mr McCarthy—I suppose there would be the potential for security considerations. I assume this person would not be part of law enforcement but perhaps be a barrister. I could understand the police having some concerns about the potential security considerations. There would also be practical considerations. For example, the need for certificates can arise very quickly. Would such a person be available at short notice? I am not too sure whose interests such a person would have regard to. Would it be the public interest, or rather the interest of the target of the proposed operation?

ACTING CHAIR—My understanding is that it would be intended to serve the broader public interest by making sure that, when certificates were authorised, they were not

authorised too lightly. It is an accountability mechanism, as I understand it. I was not in Queensland when we had the hearings there, but I understand it operates in Queensland. That is where the suggestion came from.

Mr KERR—I have a couple of questions, particularly about your support for the immunity of civilians in controlled operations. I am not certain whether Australian constitutional law prohibits, through some standing instructions or for some other reason, you as the Director of Public Prosecutions giving a prospective undertaking that, if somebody acts in accordance with an agreed set of arrangements, you will not proceed in relation to them. If you are advocating the availability of a prospective immunisation of civilian participation in controlled operations, I am wondering why you thought it improper for you to exercise that role given that you, I think, superficially have the power to do it.

Mr Delaney—It is the difficulty of giving a statutory immunity on the basis of a hypothetical situation or, to put it another way, in the expectation that certain events might unfold. It is also linked to the fact that operations can often unfold in ways that are quite different from those initially expected.

Mr KERR—But if that is a reason for you not to do it, isn't it equally a reason for it not to be done at all?

Mr Delaney—The prosecution function and the investigation function are very separate functions. My initial response to—

Mr KERR—I understand that entirely. But the function of immunising somebody—that is, giving them a guarantee that, if they conduct themselves in accordance with a certain agreed pro forma of arrangements, they will not be prosecuted—is equally described as a prosecutorial decision, although it may be necessary in relation to an investigation. You make it, by the way, at the moment, discretionarily after the event.

Mr Delaney—Yes.

Mr KERR—So you make it.

Mr Delaney—That is true. But we make it on fairly tight guidelines that require, for example, a statement from the prospective witness seeking immunity, the views of investigators as to credibility issues and the importance of the evidence in the overall scheme of the particular prosecution. I would make the point that we do not give them lightly. We would have to change our present method of operation to a substantial extent.

Mr KERR—Is there anything in Australian constitutional law that would prevent you from giving a binding undertaking at an earlier stage?

Mr McCarthy—At the moment, under our legislation we cannot do so. There was a case in Queensland arising out of Operation Trident or D'Arigo where the Queensland Court of Criminal Appeal said that no immunity can be conferred in futura. I assume there would be no constitutional objection to such powers being conferred on, for example, a DPP.

Mr KERR—What troubles me about this idea of support for a civilian immunity is that there is a range of different operational circumstances. There is the circumstance that the AFP has described to us of a courier coming through the barrier who is essentially a low level desperado who has been taken advantage of as much as he is taking advantage of the situation. They let them run. They participate to a very small degree in criminal activity. The National Crime Authority has some longer standing operations where they engage informants in long-term operations internally. These people often have significant criminal backgrounds. I asked the question of some of the witnesses, 'Isn't it just as likely that these people would be seeking to use you for their reasons as to be used themselves?'

With all the reasons that you have put for your caution about giving any undertakings in relation to that, why shouldn't we as parliamentarians be cautious about giving a power to a police officer to give an undertaking at a very early stage, when they may not know what is going to happen, to immunise something that will unfold at a future date. If it is so important that you are cautious about it now, shouldn't we devise a different stratagem for addressing it from the normal arrangement where we are dealing with people who are sworn to uphold the law in the normal course but who have, for obvious reasons, been given specific immunities in relation to technical breaches in undertaking that task? It is a very different situation from that of a criminal who may be quite happy, for example, to tear down another organisation to build up his own organisation and who loves the protection that he has been given at the time.

Mr McCarthy—Aren't we really talking about having sufficient controls in place to ensure that decision makers in the sort of case that concerns you will ensure that exemptions from criminal liability will only be conferred in appropriate cases? I would assume from what you are saying that, in the case of the low-level courier who is coming through customs, is detected and then agrees to cooperate with the police, you would have no difficulty exempting that person from any criminal liability that they might incur in conducting the controlled operation.

Mr KERR—I think the circumstances of the facts are almost unlimited here. Someone who is entirely innocent—for example, the bank teller who becomes aware that somebody is making structured deposits into an account—may need to be the subject of some protection if you ask them to go along with something that they understand to be a criminal enterprise. I can understand that. But what you have proposed in your submission seems to be very general: you extend this for all civilians. A lot of people involved in controlled operations who would be called civilians are informants, people with a significant criminal involvement in the organisations.

If we are going to protect them from the consequences of that action, I do not know why we should not confer that power, for example—not on a police officer to make a judgment about—in the same sense that the DPP would exercise the same sorts of cautions that they do now, and confine that in the appropriate way that the community would have some confidence in.

Mr Delaney—I suppose there are practical operational issues as well in terms of making investigative decisions within short time frames that might make the sort of proposal you are suggesting quite difficult in practice. I could imagine there may be some reluctance on the

part of investigators to outline—at least in fulsome terms—the nature of the operation, the extent to which it has gone and the prospective way in which they hope it will go. I suppose that is another way of saying that we have really kept our distance from investigations and confined our role to advising on legal questions. So this proposal would take us a lot further than we have been in the past in that regard.

Mr KERR—Perhaps you are not in a position now, but maybe you could reflect on it in time to come. I am simply raising this issue because I can see a legitimate case for addressing the participation of civilians in controlled operations. Of all the criticisms, I also think it is probably the most powerful to say, 'Hang on, who are you really protecting here?' If you are saying, 'You come aboard. You now have a certificate that you can rely on, that you have in your hand now, that says, "Any future unlawful conduct that you undertake in these areas will not be the subject of prosecution"', and you are giving that out to somebody of some standing in the criminal world, I think people would want to be pretty convinced that this was being exercised in the public interest and perhaps with greater safeguards than when it is saying to a sworn police officer, 'You go in and investigate this organisation and impersonate a bad guy for a while'—which is a different situation entirely.

Mr Delaney—All right. Perhaps we can take all that on board and give some consideration to what has been suggested.

Mr HARDGRAVE—I just want to ask some questions, probably in a similar vein, about the decision making that takes place for controlled operations. From your perspective as prosecutors, you would want to be certain—and are you certain—of satisfaction with the ability of the chain of command and the law enforcement officers to make the right decisions to authorise certain activities for controlled operations. Secondly, are you happy that the disclosure mechanisms for that decision making—the accountability, if you like of that decision making—is adequate and is not actually preventing a mistake causing an obvious criminal to escape prosecution? What is your view as far as that is concerned?

Mr Delaney—Taking the second point first, I do not know that we could be confident, under the present part 1AB, that investigators might not be somewhat inhibited in pursuing offences that fall outside the ambit of 1AB. As I mentioned in my opening remarks, the investigator might be placed in a position where he or she has to choose whether to act unlawfully or to actually abandon parts of the investigative process that might involve him or her in unlawful conduct. But I do not have any firm evidence that that is occurring or has occurred.

Mr HARDGRAVE—Are you satisfied the chain of command gets it right?

Mr Delaney—I do not have any reason to believe it has not. I do not know whether my colleague has any different perception of that.

Mr McCarthy—No, certainly not. Although I think police approach controlled operations from a different perspective. We are there to prosecute. Our concern is to ensure that evidence that is available is admissible. I think our perspective is a little bit different from those of, say, law enforcement generally.

Mr HARDGRAVE—What is acceptable and unacceptable as far as the conduct of police is concerned in a controlled operation? Do you have views on where the lines are drawn on this sort of conduct? How far does a police officer have to go in order to get sufficient evidence to offer to you to send to trial? Do they have to squeeze heroin into their veins or participate in the bashing of somebody to prove they are bona fide when they are undercover? Do they have to engage in those sorts of activities? Is that acceptable or unacceptable?

Mr Delaney—That has not occurred in my experience. Nor would I, in normal circumstances, expect it to be required of the police investigators.

Mr McCarthy—I think a guiding principle might be that nothing occurs which results in the social harm that the police are seeking to avoid.

Mr HARDGRAVE—Does anything occur that is not disclosed at some stage later? I guess ultimately the accountability is in the court, isn't it?

Mr Delaney—Yes, it is. The DPP has fairly comprehensive disclosure guidelines in place. We are, at the implementation stage of those guidelines, seeking to ensure that all Commonwealth investigators are aware of their responsibilities under them.

Mr HARDGRAVE—What if it goes wrong and it does not even end up in court? We have disclosure of activities. You cannot have police officers hung out to dry as a result of doing something that is illegal but for a reason, then nothing ever eventuates from that activity. Are we ending up knowing—is it on the record—that this particular operation, although it went bad, did occur? Do we have records of this? I guess the civil liberties point of view is this: none of us here would subscribe to anything else other than someone is innocent until proven guilty but, likewise, we do not want to see people within the system using the circumstance of a controlled operation or the guise of a controlled operation to actually run something under the surface either. I think disclosure and accountability are very important. Are we seeing anything that is not being disclosed? I suppose that is a silly question because you would not know it existed if we were.

Mr Delaney—It is a difficult question for us to answer because we can only act on what is referred. Certainly, in terms of what is referred, we seek to ensure that our guidelines are met. If we suspect they are not, we will certainly say so. If there is evidence that the investigator says he does not want disclosed, the choice may, in the end, be one of not proceeding at all.

Mr HARDGRAVE—It is the admissible or non-admissible evidence that you make a judgment on as well when you are beginning to prosecute.

Mr Delaney—Yes.

Mr HARDGRAVE—If there are circumstances, as one witness in Sydney the other day suggested, where in the past there have been entrepreneurs amongst police that have had to come up with creative ways in order to go around things to ultimately get evidence, there is a fair chance you would know about that. If there was any sort of institutionalised

entrapment, you would know about that, too, and you would rule that in or out of the court and seek evidence regardless.

Mr Delaney—Yes, once a matter is referred, we would be asking the appropriate questions. If we are not getting what we believe are the right answers or the appropriate answers, we would then act in accordance with the Commonwealth prosecution policy.

Mr HARDGRAVE—When you have seen something in a controlled operation sense or the use of an excuse for a controlled operation that is clearly a foul-up, do you make an observation to the officers that they have really let the side down by this particular thing, or do you find that there is no need to and that, essentially, those who bring evidence to you get it right and do not make these foul-ups?

Mr Delaney—This is going to have to be a very general answer.

Mr HARDGRAVE—I am quite happy with a general answer.

Mr Delaney—I think generally, yes, it is quite right.

Mr HARDGRAVE—In general terms, have they got it wrong on occasions too?

Mr Delaney—There have been occasions, yes, and we say so.

Mr HARDGRAVE—So you do offer feedback to them?

Mr Delaney—Yes.

Mr HARDGRAVE—Would you rely on the police force involved bringing that information to you and, through their chain of command, reorganising practices and disciplining the officers involved?

Mr Delaney—There is an ongoing process like that. An example of that is in the proceeds of crime area. We are about to sit down with the AFP and have a look at a recent case to see what we did right and what we could do better. That sort of review occurs.

Mr HARDGRAVE—Is there a temptation to consider prosecution of a well intentioned but badly operated circumstance, or is it just one of those hit-and-miss things?

Mr Delaney—Sorry?

Mr HARDGRAVE—If you see something that has gone awfully awry despite the best of intentions, do you say, 'Actually this person has done something wrong but, because of their status of being a police officer, they will not face the prospect of prosecution for that activity because their intention was to try and trap somebody'? Have you had that kind of circumstance ever develop where you do not even consider a prosecution because it is a police officer who has tried to do something and it did not work; nevertheless, they have done something illegal in the process?

Mr Delaney—I cannot say that I have personally come across that situation.

Mr EDWARDS—Grahame, you indicated that those states that do not have complementary legislation should introduce complementary legislation. I think we would agree with that. My understanding is that it is only New South Wales and South Australia that have complementary legislation. Is that correct?

Mr Delaney—Yes. Victoria has some legislation as well.

Mr McCarthy—Just in relation to drugs.

Mr Delaney—Yes.

Mr EDWARDS—Would it not be advantageous for there to be uniform legislation across Australia? Do you think it is in the interests of crime fighting in Australia for us to push for uniform legislation, or should we simply be encouraging states to introduce at least something to provide the cover that is required?

Mr Delaney—I do not really think I am in a position to talk about what is politically feasible or possible.

Mr EDWARDS—I am not really asking for your political opinion; I am asking for your opinion based on your experience.

Mr Delaney—Ideally, uniform legislation would be a very good thing. I suppose what I am saying is that I do not know whether that is realistically achievable. Certainly, it would be a very good thing if states at least had legislation that addressed the issues, even if it was in somewhat dissimilar terms.

Mr EDWARDS—So, in practical terms, legislation first and uniformity after?

Mr Delaney—Perhaps so, yes.

ACTING CHAIR—Any more questions? Gentlemen, thank you very much indeed.

[12.31 p.m.]

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Justice Branch, Commonwealth Attorney-General's Department

ATKINS, Ms Liz, Assistant Secretary, Law Enforcement Coordination Division, Commonwealth Attorney-General's Department

WILLIAMS, Ms Kelly Jane, Acting Assistant Secretary, Criminal Justice Branch, Criminal Law Division, Commonwealth Attorney-General's Department

ACTING CHAIR—Welcome. The subcommittee prefers that all evidence be given in public but you may at any time request that your evidence, part of your evidence or answers to specific questions be given in camera and the subcommittee will consider such a request. As public servants, you will not be required to answer questions which seek your opinion on the merits of government policy. We have received the department's submission, which has been published by the subcommittee. I invite you to make a short opening statement before we move to questions.

Mr Alderson—Thank you. By way of an opening statement I thought I would briefly cover three points: some history of the existing Commonwealth legislation, an overview of some of the key features of the existing legislation and some comments on recent developments. Prior to 1995 Commonwealth law enforcement agencies relied on the common law and ministerial arrangements to engage in controlled operations.

In 1995, however, the High Court handed down its decision in Ridgeway. By a majority of six justices to one, the High Court held that where law enforcement officials use a controlled operation during an investigation and, as a result of their conduct, commit an element of the offence for which a defendant is later charged, as a general rule a court should refuse to admit that element of the offence. The basic reasoning was that, if law enforcement officers have been involved in committing an element of the offence for which a person is charged, that evidence should not be admitted.

In the Ridgeway case the end result was that the defendant's conviction was overturned. More broadly, in the Ridgeway case some members of the High Court indicated that, if law enforcement officers were to engage in unlawful conduct in the course of investigations, a legislative scheme authorising such conduct would be the appropriate course.

The Commonwealth's legislative response to this decision was the enactment of part 1AB of the Crimes Act, which commenced on 8 July 1996. I draw particular attention, in terms of the content of the existing part 1AB, to section 15G, which sets out and explicitly identifies the objectives of these provisions, which are threefold. These objectives are to exempt law enforcement officers from criminal liability in certain circumstances; to require the making of reports to the responsible minister and to the parliament concerning requests to conduct operations and on the operations themselves; and, finally, to preserve the admissibility of evidence in certain cases where the procedures that were accepted before the Ridgeway decision had been followed.

The legislation also defines a controlled operation, for the purpose of this legislation—although in practice you can use different definitions—as an operation that involves the participation of law enforcement officers that may lead to a prosecution of a person for an offence against the Commonwealth drug trafficking provisions—which are in 233B of the Customs Act—and which may involve a law enforcement officer engaging in conduct that would, apart from these provisions, constitute a narcotic goods offence. One of the key features of the legislation is that the authorisation of these operations under the scheme vests in members of the National Crime Authority and in the Commissioner, Deputy Commissioner and assistant commissioners of the Australian Federal Police.

I mentioned earlier the reporting requirements, which are a central feature of these provisions. Where an NCA member or one of those senior officers of the AFP has granted or refused an application for a certificate authorising an operation, the AFP Commissioner or the NCA Chairperson—depending on which agency is involved—must, as soon as practicable, inform the minister of that decision to grant or refuse and of the reasons for that decision.

Within three months of a certificate authorising an operation having been issued, the AFP Commissioner or the NCA Chairperson—once again, depending on which is relevant—must give the minister a written report stating whether or not the operation was carried out and giving certain details about the operation if it was in fact carried out. Information about the authorisation and conduct of operations must be set out in an annual report to parliament. To date, two annual reports have been presented to parliament and we are coming up, in a couple of months, to the timing for the third annual report.

The legislation has been in force for three years and a range of parties have suggested areas where amendments to part 1AB might be appropriate in the light of experience since that time. Many of these suggestions have been raised, of course, in the hearings of this committee. The government has decided to enact improved controlled operations provisions in the context of the national illicit drugs strategy, and all aspects of the existing legislation are under review. Consultation has taken place but the government has not yet made any decision as to the form amendments might take.

The other issue where there is some development is that the government has decided to pursue increased consistency between Commonwealth, state and territory controlled operations law—a matter that was raised only a few minutes ago. There is a recognised need to deal with the fact that organised crime crosses jurisdictional boundaries. Increasingly, law enforcement agencies need to be able to operate across jurisdictional boundaries and it is desirable that technical and jurisdictional barriers be removed where possible in the interests of uniformity and more effective operations. On that note I would like to conclude our opening remarks and invite questions from the committee.

ACTING CHAIR—I understand that there is an informal arrangement between our secretariat and your department that I ask you a question that you are going to take on notice. I will do that now to get that out of the way. The committee has been told, by the Hon. Tom Barton in submission 7 on page 2, that the ability of a state parliament to include the NCA within a controlled operations legislative scheme appears to be limited by section 55A—Operation of State Laws—of the NCA Act. According to Mr Barton, section 55A

seems to prevent a state parliament conferring a power or imposing a safeguard on the NCA unless it is a power or duty similarly conferred or imposed by the NCA Act. Representatives of the Queensland Police Service raised the same point in evidence. See the transcript on page 111. Could you please take this question on notice and provide the committee with your advice in due course?

Mr Alderson—Yes.

ACTING CHAIR—Now we will go to real-life questions. I suppose there are two questions I would like to ask up-front. One is the proposition—you may have heard us talking about this with the previous witnesses—that at the time a certificate is issued for a controlled operation, rather than it being purely within the NCA type camp, there ought to be some external involvement—a public interest monitor is the term that has been used. I understand that such a scheme actually operates in Queensland for some of their activities. The idea is that you would have more accountability, more external scrutiny, if you like, before the event rather than just having that scrutiny after the event and that that could forestall potential difficulties. It has also been put to us that, were you to do that, there might be some practical operational difficulties in just being able to implement it. If somebody comes through the customs barrier at Sydney airport, you pick him up with drugs and, after some discussion, you want to let him run in order to see where it is going to lead, you may not have the time to get a public interest monitor person involved. I just wondered whether that sort of proposal had been considered at any stage by the department and what the views may be.

Mr Alderson—I guess we are unable to comment on the merits of that proposal, except to say that it is a matter that is being and will be taken into account as part of the process of reviewing the existing provisions.

Mr EDWARDS—Can I ask why?

Mr Alderson—Why we are unable to?

Mr EDWARDS—Yes.

Mr Alderson—Essentially, the merits of that proposal are a policy decision for the government. So we are not in a position to pre-empt the view the government may take on the merit of that proposal.

Mr Edwards—I find that a bit extraordinary.

Mr HARDGRAVE—What advice would you give government on the concept of a public interest monitor? What are the technical aspects and the interruption it imposes upon operations now—and I guess potentially if we had a regime operating in Queensland similar to what you have in New South Wales? What is the impact of a public interest monitor?

ACTING CHAIR—What would you see as the pros and cons?

Mr Alderson—I guess it is a proposal that will be receiving further consideration.

Ms Williams—They are looking at it in more detail. We have read the evidence from Monday's hearing in Brisbane. That was the first time we have become aware of it. Obviously, in advice to government we would be putting pros and cons of that proposal, but that has not been done as yet.

Mr HARDGRAVE—Would it possible, when that is done, to perhaps consider letting this committee know what the Attorney-General's view would be of this public interest monitor concept as it operates?

Ms Williams—That would be a matter for the Minister for Justice and Customs.

ACTING CHAIR—When do you expect that they would start? What time frame are we talking about?

Mr Alderson—Proposals are being considered and worked on at present as a matter of high priority, but the timing of any decision, because of the range of factors involved—the consultation and the decision making that the minister will go through—it is impossible for us to state a time frame for the minister to have made a decision.

ACTING CHAIR—We will not pursue it further now, but I would make the comment that it seems to me that if the parliament is conducting an inquiry into this sort of activity clearly the Attorney-General's Department should be a major contributor. And not to be able to get a view on that sort of thing from the department, I think, is very disappointing, and I would appreciate it if you would convey that to the minister.

Mr HARDGRAVE—Could I add to that. While I accept that you may be under instruction from the minister to provide a paper on the public interest monitor matter, I think the fact that this committee has actually asked for Attorney-General's opinion on how the Queensland model works—an opinion in the sense of any work you have done on it and what its application or impact may be across the jurisdiction that we are inquiring into, for instance—should mean that it is a matter that can come to the committee without reference to the minister. That would be my view on it.

ACTING CHAIR—Let me ask another question. A number of witnesses have suggested to us that they would like to see the immunity that police enjoy under the legislation in controlled operations extended to civilians. There are a number of issues associated with that and, again, you may have heard some of it in the debate with the previous witnesses. I think Mr Kerr was pursuing this. For example, you may have a bank official who becomes aware that there is a particular pattern to transactions and alerts the police, and it may well be that a decision is made to let it run, looking for bigger fish down the track obviously, or to see where it leads. Clearly, in those circumstances, if the bank official does not have immunity there are ramifications.

But, on the other hand, if you have somebody who is a courier coming through Sydney airport with drugs, you decide to get them involved and a deal is done, or the implication of a deal done, for them to continue on their way to see where that leads, that is a different kettle of fish altogether. One is really somebody trying to uphold the law and the other one is that they are doing a deal for all sorts of nefarious reasons, perhaps. So there are various

pros and cons to the argument, and I wonder if the Attorney-General's Department has a view on whether that immunity should be extended to civilians rather than just to police.

Mr Alderson—The one comment I can make is that our written submission does canvass the point raised earlier today that, if there is to be a measure to extend immunity beyond law enforcement officers, one of the issues that needs to be addressed is the appropriate means to control the scope of that, given that law enforcement officers have duties and they are subject to disciplinary procedures that private citizens are not. So that is certainly one of the challenges that will have to be addressed in formulating proposals. But, in terms of a concluded view as to whether the proposal should be pursued or how it should be framed, once again, I am afraid it is a matter on which we are not in a position to comment because the government will be considering proposals in due course.

Mr EDWARDS—In your submission you say:

The Government has also decided to pursue increased consistency in law enforcement legislation . . .

Are you able to tell us whether or not that increased consistency means uniform legislation, or are you simply going for increased consistency?

Mr Alderson—The Standing Committee of Attorneys-General has decided to take on a project of pursuing uniformity in this area of the law. So I guess the objective and the desirable goal is uniformity in Commonwealth, state and territory controlled operations.

Mr EDWARDS—That possibly answers my second question, which is: how are you pursuing that increased consistency? Is it through the Police Ministers Council as well as the Attorneys-General?

Ms Atkins—Yes, it is being pursued in the Australasian Police Ministers Council as well but, at this stage, the majority of the work is being focused on in SCAG. If you like, the two committees are working in tandem.

Mr EDWARDS—The other thing I would like to know is, in practical terms, where a certificate is issued authorising a controlled operation under federal law and there is an existing legislation on controlled operations within a state, say, in South Australia, and you are conducting an operation in that state, does simply issuing a certificate under federal law grant you that immunity under that state law, or do you need to get a complementary certificate from that state?

Mr Alderson—That, essentially, depends on the particular facts of the operation. The Commonwealth legislation does provide immunity from state and territory drug trafficking laws. For example, if you had a Commonwealth agency involved in an operation in South Australia that was going to involve contraventions of both Commonwealth and South Australian drug trafficking laws but no other contraventions, then a certificate under the Commonwealth legislation alone would give you the immunity you required. On the other hand, an authorisation under the South Australian legislation confers immunity in relation to all indictable offences, not just the drug trafficking area. So if there were an operation in South Australia in which South Australian police were going to require some other form of

smuggling, or other range of offences, there would be a need for a separate certificate under the South Australian law, and the Commonwealth legislation would not cover all activity that was proposed.

Mr EDWARDS—Would it be desirable to have some sort of reciprocal arrangement in any legislation that is proposed, with some appropriate reporting mechanisms to both state and federal ministers?

Mr Alderson—Certainly within the project of uniformity, removing discrepancies and differences is a central part of that objective. The second thing is that the scheme of the existing Commonwealth legislation, given that it applies to state officers involved in Commonwealth operations and to state laws, reflects an intention that there be not just a complete division between Commonwealth and state operations but that they be able to be brought together. As to whether there should be explicit rules about reciprocity that an authorisation under one piece of legislation automatically gives you immunity under another piece of legislation, that is a specific matter that needs to be pursued in terms of the uniformity objective.

Mr EDWARDS—Ms Atkins, do you have anything you want to add to that?

Ms Atkins—No, not at present.

Mr HARDGRAVE—What do you consider to be the main competing interests, from the civil liberties point of view, with regard to the use of these controlled operations?

Mr Alderson—When this legislation was enacted, the second reading speech of the Attorney-General identified some of the key civil libertarian interests in terms of privacy. The legislation has been explicitly framed to not allow entrapment, and this has been one of the central objectives. It is in the interests of all citizens that they be protected from improper law enforcement conduct.

Mr HARDGRAVE—Are you satisfied that the decision making capabilities within the chain of command inside the law enforcement agencies are sufficient and that the disclosure measures are adequate if some entrepreneurs within the system bring about some form of entrapment in their attempts to try to bring about a charge against an alleged offender? Essentially, my question is: are you satisfied the system works?

Ms Atkins—I think the department would take the view that, yes, we are satisfied the system works. Clearly, in reviewing the legislation and developing new provisions, we are going to be also looking at whether there should be tighter safeguards at different stages of the process.

Mr HARDGRAVE—Would we be looking then at retrospective authorisations of something that has occurred—that someone may say, ‘Oops, I should have got some authority for that, but here is what I have managed to get’?

Ms Atkins—I do not think anything is off the table in terms of reviewing the legislation. We have not reached views on anything yet, but we have sought proposals from the agencies that work with this legislation and we will be considering what they put forward.

Mr HARDGRAVE—In part, the proposals are before you. Considering that you have seen those proposals, what is the basic mark on acceptable and unacceptable behaviour as far as law enforcement officers are concerned? How far should they or can they go? Are they authorised to disclose after they have gone, in order to make the best use of a controlled operation?

Mr Alderson—I guess the rationale for the existing legislation is that, given the unusual nature of these things, it is desirable that, if law enforcement officers are to be authorised to engage in unlawful conduct, that needs to be matched by an appropriate accountability framework and appropriate limitations and controls within the legislation, though the need to properly match powers as against limitations and accountability will be carried through into any review and development of further legislation.

Mr HARDGRAVE—What do we have now? Are they appropriate?

Mr Alderson—The legislation is considered to have operated within its parameters. Essentially, the question of whether there ought to be additional different accountability measures in the legislation is one of the central questions to be addressed in the review and development of proposals.

Mr HARDGRAVE—What about the training of the officers involved in these processes—both the operatives in a controlled operation and those making the decisions? Are you satisfied that they are well qualified to make those decisions and be part of those operations?

Ms Atkins—The training is a matter for those agencies. Yes, we have an interest in ensuring that the legislation is complied with. The accountability mechanisms are intended for us to be able to tell whether the legislation has been complied with. I do not know that we know of any instances where any weaknesses in training have been shown up.

Mr Alderson—No. One of the things that has come from this legislation is detailed reports, which do not exist in many other law enforcement contexts. Those reports have been the subject of continued discussions between the agencies, the minister and the department acting on behalf of the minister. To my knowledge, they have not disclosed major problems in the way that operations have been conducted.

Mr HARDGRAVE—So you would be happy or satisfied therefore that, as things stand, officers are well protected by the system, in that they are involved in things that are authorised and understood, that they are not involved in activities that could be misrepresented by others, that they understand their limitations and why they are doing things, and that they are not being tempted to do something under the guise of a controlled operation? You are satisfied the system works with safeguards now?

Mr Alderson—Going by the overt material we have in terms of those, on a fundamental level it seems, within those confines, to have operated well, but the question as to 'temptation' within agencies is a difficult thing for us to comment on.

ACTING CHAIR—Given that crime is becoming more and more international, would the Commonwealth have the authority, say, under the heads of power agreement or whatever the technical term is, to in fact override states in this area?

Mr Alderson—The scheme of the existing legislation is not to create any conflict between the Commonwealth and states or to try to override them, but it is designed to try to mesh together the Commonwealth and the states—

ACTING CHAIR—I understand what the existing legislation is trying to do. What I am saying is, given that we live in a developing environment and with increasing internationalisation of crime, if you cannot get the states on board in some areas where we might want to change it, does the Commonwealth have the power to override?

Mr Alderson—As a legal question, our legal advice on this legislation and the legal view that was taken was that the Commonwealth had the constitutional power to immunise Commonwealth and state officers from state law. I guess that leaves the major question as a political one.

ACTING CHAIR—I understand the politics. This may seem a silly question, but who is the senior person among the three of you?

Ms Atkins—Me.

ACTING CHAIR—I would like you, as the senior person, to convey to your minister that the committee is disappointed that, given that the department has responsibility for this legislation, which has been in operation for some time, the department has not been able to assist the committee more by giving us some of your views on the sorts of matters that we have been asking questions on. I do not think it is acceptable, frankly, that a parliamentary committee is told to so many questions that it asks, 'This is under review, we are considering it.' You have the legislative responsibility in this area and I think we are entitled as the parliament to have your views on some of these matters.

Mr HARDGRAVE—Hear, hear!

Mr EDWARDS—Absolutely.

ACTING CHAIR—You may or may not agree with my view, but what I am saying is that that is my request to you, to convey that to your minister. The committee may well deliberate and decide to write to the minister to ask for a further hearing where we may hopefully make some further progress.

Ms Atkins—Could I just say in relation to a couple of those instances that I think the problem is that perhaps we do not have formed views. For instance, on the public interest monitor question we have not even had a look closely yet at the pros and cons. We have

received submissions, if you like to call them that, from the various agencies, but work is not at the stage necessarily where we could comment. We probably can in some instances take some of those issues on notice away with us to give you some views on the pros and cons, without, of course, a concluded view on what government policy might be.

ACTING CHAIR—We understand.

Ms Atkins—Would that satisfy the committee in relation to some of those issues that have been raised?

ACTING CHAIR—What we are trying to do is draw on your expertise.

Mr HARDGRAVE—We should also add that the public interest monitor has in fact being going since March of 1998, has tabled a partial annual report, as I understand it, for that operating period until June 1998 and has just presented a complete annual report for the 1998-99 year. What I am saying is that it is surprising that your department would not have had a more comprehensive understanding of the issue rather than calling for submissions 18 months into its operations.

ACTING CHAIR—We will leave that question with you. Thank you very much.

Proceedings suspended from 1.04 p.m. to 1.51 p.m.

BROOME, Mr John Harold, Chairperson, National Crime Authority

IRWIN, Mr Marshall Philip, Member, National Crime Authority

MELICK, Mr Aziz Gregory, Member, National Crime Authority

ACTING CHAIR—I welcome members of the NCA who been invited back today to enable us to clarify any matters that may have arisen during our hearings. The committee prefers all evidence to be given in public but you may at any time request that your evidence, part of your evidence or answers to specific questions be given in camera and the committee will consider any such request. I understand you wish to give some of your evidence in camera at the end of the public session. Is that correct?

Mr Broome—Yes.

ACTING CHAIR—Are there any introductory comments which you wish to make?

Mr Broome—Just very brief ones. In the written submission to the committee, we raised the question of whether or not it would be preferable to move to a more generalised reporting on particular operations to the parliament, perhaps through a statistical summary approach similar to that which operates in relation to telephone interception. That was in fact a reaction to some practical difficulties which we encountered arising from the potential for information contained in the certificates to be disclosed prematurely—that is, perhaps before court proceedings had been completed—or in some way which may have some potentially prejudicial information contained in them.

On reflection, our view is that we would prefer to leave the reporting obligations as they are and to deal with the administrative difficulties as they should be between us and those who publish the material. We can probably overcome the difficulties, providing there is adequate consultation. We had a problem in the past, but I think we can overcome that. So for our part we are quite content to leave those arrangements as they are in place at present. That is just a point of clarification we want to make.

There were a number of comments made in the evidence which has been received by the committee to date, most of which I suspect will come up in issues that you want to clarify—accountability mechanisms, and so on. There were, however, a number of observations made by Mr O'Gorman which I do want to specifically correct on the record. My colleagues might want to join me in picking up some points there as well.

The first is to say again for the record, in the context of this subcommittee's hearing, that the NCA has consistently—and quite contrary to Mr O'Gorman's assertions—argued for accountability mechanisms to be put in place. We want, we have asked the government to provide, we have told the committee we support, the operation of the Ombudsman or the Inspector General of Security—appropriately retitled for the NCA—to have a complaint-handling function. I wish that people who know better, like Mr O'Gorman, would not keep going around saying things which they know to be simply wrong.

In the same vein, there are comments about what he describes as the NCA's practice of briefing QCs to object to the disclosure of information, in the context of controlled delivery certificates. We have never been in court anywhere objecting to the disclosure of information relating to controlled delivery certificates by QCs or anybody else. That is simply not true. Other agencies may have, and Mr O'Gorman may have had experience of such challenges. We have had experience of litigation involving Mr O'Gorman on a number of occasions, where he seeks—through very wide-ranging subpoenas which are best described as fishing expeditions—to obtain information that is often not about a single operation but about every operation conducted under a reference, for example. They are resisted and they are resisted with some strength, almost always by the employed solicitors who work for us—not by silks and usually not even by outside barristers. It is a part of the poetic license that seems to pepper Mr O'Gorman's evidence.

There may be some other specific points which my colleagues would like to pick up from his evidence. While I note that he has indicated that he agrees that controlled operations are an essential and necessary element of law enforcement, I am concerned about some of the other things he says about the way we, in particular, and perhaps other agencies deal with these issues. It is tantamount to conceding on the one hand and building up an argument against on the other. That is why I want to get it straight.

Mr Irwin—I might reiterate those comments because, coming from Queensland, I have some experience of appearing over a number of years against Mr O'Gorman and against counsel briefed by him for a number of different agencies and in the role of Crown Prosecutor. Certainly the observations that the chairman makes are historically and presently correct as far as the type of wide-ranging subpoenas that are issued are concerned. These, almost invariably, lead to an objection from the DPP, the Criminal Justice Commission or other people who receive them that they are wide, fishing, oppressive and are for no legitimate forensic purpose.

As far as the proposition that the QCs come along to argue these matters is concerned, Mr O'Gorman's main experience of the NCA, I would have thought, was in Queensland. I occupy an office within the Brisbane office of the National Crime Authority and I can say that, in the past 12 months, there has been one private barrister briefed to my knowledge, in one matter involving legal professional privilege. This was a matter where all the other legal staff within our office had been involved in making the claim of legal professional privilege and it was improper for them to argue it. That will be reflected in the figures that we provide in our forthcoming annual report, where, as you know, we set out the people that we brief and how much they are paid. My recollection as far as Brisbane is concerned—and as last year's annual report will also indicate—is that one barrister was briefed. In neither case was the barrister a QC. The evidence is on the record that there is no such thing happening in the jurisdiction that Mr O'Gorman has most experience with.

Mr Melick—The problem I have is that, ever since I joined this organisation, I have been attacked at conferences and at seminars about what a pack of rednecks we are—

CHAIR—Welcome to the club, Mr Melick!

Mr Melick—and how we are continually breaching the rules and trampling on people's rights et cetera. I make a fool of myself by standing up and saying, 'I am sick of hearing this. Could someone give me a concrete example?' You have had a whole crowd of people clapping and cheering the previous speaker and then there is stunned silence. I am saying, 'Put up or shut up.'

I suggest that you should probably start doing that to people like Mr O'Gorman—because, as far as I am aware, there has not been much in the way of judicial criticism, if any, of the way in which we have operated, and our operations get scrutinised very significantly. In the past 3½ years, we have probably been involved in more litigation than in the previous 10 years put together and we have won the overall majority of the cases. What has happened is that we have been insisting that people comply with the law when dealing with us. If we get a summons saying, 'Produce this evidence,' and there is no legitimate forensic purpose and no legitimate reason to hand it over, we resist it.

People are starting to resent it because we take them to court and we win. From time to time we brief senior counsel. It depends what is happening, where we are at, and the nature of the counsel on the other side; but, as a general rule, the matters are dealt with—since I have been with the authority—by authority staff. I have taken the view, and it has been supported by other members of the authority, that they are lawyers and they are employed by us to do legal matters and that we should not be wasting the government's money getting lawyers from outside to do matters which could be dealt with by in-house counsel.

ACTING CHAIR—Just for Mr Melick's edification, I was not at the Queensland hearing, and so I did not see Mr O'Gorman, but some of the witnesses earlier today who made certain suggestions were actually asked specifically to produce chapter and verse.

Mr Melick—I look forward to reading the transcript.

Mr Broome—If I could just make it clear for the transcript, I would say that the particular passage to which I referred is found at page 101 of the committee's transcript of Tuesday, 17 August 1999, where Mr O'Gorman says:

> The NCA particularly are notorious for sending QCs along to argue, even at committal level, against any opportunity for the defence to ask questions about controlled operations, either how the certificate was issued or how it operated, by constantly throwing up public interest immunity arguments which magistrates quite readily accede to.

ACTING CHAIR—I think that we understand what you were saying.

Mr Broome—Sorry to labour it; but just occasionally I think it is worth making the point about some of those who then seek to have credibility in relation to some of the other comments they make.

ACTING CHAIR—We are in open session. Any other questions?

Mr HARDGRAVE—Could I just follow on from that, Chairman? One of the things we would like to get on to the record follows on from Terry O'Gorman's observation, where he described the NCA as being 'resistant' to external scrutiny. I think you have touched on that

in some of your comments, Mr Broome. What is the NCA's attitude to external scrutiny, for the record?

Mr Broome—'When do we want it? Now! How much do we want? Complete, full and open!' How often do I have to say it? The relevant reference to Mr O'Gorman's comments in that regard is page 102 of the transcript.

ACTING CHAIR—Any other questions, before we go into in camera?

CHAIR—Yes; I have a couple. I would be interested in comments that you, Mr Irwin, as a Queenslander, might have on the Public Interest Monitor. I imagine that by now you have had an opportunity to read Mr Perry's evidence to us on Monday. As somebody who has operated in that environment, can you just take us through what you see the strengths and weaknesses of that role to be?

Mr Irwin—Firstly, I agree with those who have said before the committee—knowing Mr Perry, having worked with him, having had feedback from people who have worked with him and knowing other people who have been his deputies—that the system in Queensland for the purpose it was established has worked well. I think that Mr Perry has to be given a considerable amount of credit for that and for the way in which he has conducted himself.

However, my observation would be that, firstly, positions like that very much depend—I suppose, like any position—on the beliefs and attitudes of the person who fills them. The attitudes of the next Public Interest Monitor and his cooperation with law enforcement may not necessarily be the same as Mr Perry's—much as I give, as I say, Mr Perry credit for the way in which he has helped this system to work in Queensland.

The other proposition that I would make is that my perspective is that the area in which the Public Interest Monitor operates in Queensland, which is basically as he told you—with covert search warrants and surveillance warrants for listening devices and so on—is considerably different from the situation that would occur in the context of asking for a controlled operations certificate. I believe that the areas are quite different. The difference has been well spelled out by Mr Perry himself in arguing that if there were to be a Public Interest Monitor type of regime set up as part of controlled operations legislation, it would be inappropriate for a judicial officer to exercise any role. As he says at page 125 of the transcript, in the last three lines:

> When you are okaying a surveillance warrant, you are doing it in fairly confined circumstances: here are the facts; this is why we think it meets the statutory criteria; yes, I will okay the surveillance warrant.

So it is essentially very much a procedural thing governed by familiar legal concepts, such as whether there are reasonable grounds for suspicion or for belief that criteria have been established which would justify the warrant being issued. And that can largely be done, as Mr Perry explained to you—as I understand his evidence—by reading the affidavit material and having some conversations with the lawyers who were representing the various law enforcement agencies.

He also said at page 126, about halfway down the first paragraph on that page:

These certificates are a bit different. What you are considering here is the appropriateness of conduct which would otherwise be illegal. That requires some value judgments about the investigative process itself. My concern would be that, if you framed an appropriate approval system which required some degree of involvement from the issuer or the approver and that person was a judge, you run smack into the Kable proposition, et cetera.

I think the point that can be derived from that generally is that, as Mr Perry himself recognises, controlled operations and controlled operation certificates are totally different from the more procedural approach to agreeing with the issue of listening devices or search warrants. It involves making value judgments about the operation, having a thorough understanding of the operation to a much greater extent than would be involved in putting an affidavit before the court and effectively rolling up your sleeves and almost becoming part of the investigative team if you have to make those sorts of value judgments on a day-to-day basis. For those reasons, my observation would be that there are considerable dangers in getting somebody like a public interest monitor involved in decisions which are quite often made on a very subjective basis, based on the feel that the agency has for the way that an operation is operating.

CHAIR—What do you say then to the argument that there should be a public interest principle at stake when the process for controlled operations is being established? By way of assistance, the AFP's evidence was that they believed the Ombudsman was a satisfactory third party, but of course the Ombudsman would not be part of the process. He would be after the process in the event that then required some scrutiny. We have had argument—and I am sure you are aware—that the New South Wales Law Society is opposed even to what you have now and would prefer to go back to pre-Ridgeway.

Mr Broome—That is a curious proposition from those who are opposed to controlled operations. With due respect, they have their law fundamentally wrong. What they are complaining about and are saying is that legislation which controls the scope of controlled operations should be removed and we should go back to the uncontrolled common law provisions which applied previously. It is a fallacious argument that is based on a misapplication and a misunderstanding of the law.

CHAIR—It certainly puzzled me. I am interested in this question—and Mr Broome may also have a comment to make on it—of whether there should be, and whether it would be desirable to have, that third party public interest argument during the discussion process for controlled operations. In terms of efficiency, what would you see as its weakness?

Mr Irwin—Can I firstly say that much of my answer would be predicated on what Mr Broome has already said. In fact, what law enforcement is arguing for here consistently with the New South Wales legislation is greater accountability than previously existed at common law. When that accountability is brought into the system, it means that there are criteria that have to be met by law enforcement. In the issue of a controlled operation certificate which can be subject to the supervision of a court at trial, there is a very real possibility that, as occurs at the present time with search warrants, even if there is a technical deficiency on the face of the certificate that is issued, the evidence that has been obtained as a result can be lost. That is a significant sanction on law enforcement, in my view. In those circumstances, the role of the Ombudsman is a satisfactory accountability mechanism.

The weaknesses that I see in the system are really trying to come to grips with how it would work. Where is the public interest monitor to be involved in the process? On one view, is he to come into the agency and make submissions directly to the chairperson or member who might be making the decision about the issuing of the certificate? That clearly would not be practical. The suggestion that Mr O'Gorman made was that the public interest monitor should appear before a judicial officer. For reasons that Mr Perry quite rightly gave, and which I think the committee had recognised itself in discussing the matter with Mr O'Gorman, there are some considerable dangers with that having regard to various decisions of the High Court because it directly involves the court in making decisions about the investigation.

The other argument which I think has been put forward by Mr Perry is that the application could be made to some bodies such as the AAT where the public interest monitor could appear and make submissions. But, even at that level, both the public interest monitor and the AAT or whatever other body might be put in this position are being asked to make them a part of the investigation.

In my view, the only way that a proper decision could be made about the granting of one of these certificates is if the tribunal and, indeed, the public interest monitor had sufficient familiarity with the whole operation—it might have been going on for many years; certainly for many months—so that they could make the sort of value judgments that Mr Perry accepts have to be made in these areas. I consider that that is a real weakness in the system. Indeed, in cases where something went wrong, it could leave the public interest monitor in a situation where he would be liable to be called as a witness. He may even be liable to civil suit if something went wrong in the course of one of these operations. I think that is a fairly good indication of the problems of involving the public interest monitor at that level rather than leaving it to the additional accountability which has been provided.

As you would be aware from Mr Carmody and Mr Butler, the New South Wales type legislation has been argued for in Queensland by the agencies there and supported by the NCA in Queensland. There is the very real sanction that, at the end of the day, if you do not fulfil the procedures which are set down and there are errors on the face of the certificate, the evidence will be excluded from the proceedings.

Mr Melick—I have similar problems to Marshall. A lot of people do not understand that a controlled operation is a very fluid matter. Once you sign a certificate, and especially when the drugs are getting close or coming into the country, you have to be kept informed because you are the person responsible. You have certified that you are satisfied that they are going to be under the control of the law enforcement agency officer at the end of the operation. When you have an organisation such as ours which is supervised by a minister, an IGC, a parliamentary joint committee and, when the legislation comes in, either an inspector-general or an ombudsman, and you appoint three people who are very experienced and supposed to be moderate and reasonable people—we like to think we are; we have not been found to be otherwise—I cannot see why we need an additional layer or an embuggerance sitting in our office at 2 o'clock in the morning when the drugs are landing on the port and deciding whether the certificate should remain in force or whether the drugs should be pulled in and all the rest of it. That person probably will not have the relevant experience. It has even been

mentioned in the submissions that they may not have any criminal experience. They just have to be a lawyer with some sort of general ability.

Mr KERR—Could I ask a question which may put a different approach into the discussion on this subject. We assume that we pay members of the National Crime Authority, and senior police who have that capacity in the AFP, to make responsible law enforcement decisions. There nonetheless remains within the community a body of opinion, perhaps unjustified but no doubt widely held, that law enforcement can go off the rails. There has been enough history of it going off the rails from time to time to make that quite a justifiable opinion for people to have. Would you have any objection to the Ombudsman having not only a mechanism to deal with complaints but also a self-starting process which would operate a random audit process or require you to advise them of the issuing of such certificates so they could, in the course of the year, examine what is occurring either before somebody becomes aware of it and complains or before it gets to a court and is assessed, so you could say that there is some independent, outside examiner?

Mr Melick—I do not have an objection to that sort of system, bearing in mind that some controlled operations may come up immediately and the operation may be over and done with within 24 hours.

Mr KERR—Absolutely.

Mr Melick—It then becomes a real problem if you have to get a public interest monitor in. As it is, with three members of authority it is difficult at times to get us in a timely manner either for a controlled operations certificate or to sign the warrant for a listening device. If you then got a fourth person involved, it could make life a bit difficult. I do not have problems with a supervisory role in an audit type situation. I do have a problem in an on the ground and operational sense. You should be able to trust the people you have put in those positions, bearing in mind also that, when it gets to court and we are using evidence such as a certificate, the certificate itself is tendered and the court can scrutinise the procedures, et cetera, if they consider it appropriate. I do not personally have a problem with the scenario you put. I have not discussed it with John or Marshall.

Senator STOTT DESPOJA—I will start with the issue of retrospective authorisations. Mr Broome, in your submission you talk about having comparable provisions to those of the New South Wales legislation. Can I just clarify this. You are talking about retrospective authorisation in emergency situations only. You define them as presumably life threatening circumstances.

Mr Broome—Yes. The New South Wales legislation has identified circumstances where the nature of the way the operation is to be progressed has been changed in the course of the operation because it was threatening the safety of either those involved in the operation or perhaps members of the public, and so on. In those circumstances, the legislation provides a capacity for the agency head or the relevant person with the power to issue the certificates to retrospectively authorise that. It clearly raises some issues. One of the problems is whether, after the event, there is a real discretion to say no. That said, bearing in mind the points we have been making about subsequent scrutiny—particularly in the context of prosecutions—if there are any doubts about whether that retrospective authority were appropriately given, one

could almost make a fairly large wager that the process would be the subject of extensive debate in the course of the prosecution and so on.

It is a very limited set of circumstances, but I think it was put into the New South Wales legislation to recognise the reality of these kinds of activities. Things do not always go according to plan, and this perhaps identifies why you have to have something like retrospective validation. This is not about giving law enforcement officials a carte blanche to break the law. It is about a procedure which has the consequence of allowing evidence obtained through a controlled operation to be admissible. The device which has been used to achieve that result is to immunise the conduct of the police officers from its consequences of being criminal. It does not always follow that in a controlled operation any law enforcement officer will necessarily commit any unlawful act at all. I noticed that some of the submissions have postulated the proposition that this is all about letting police break the law. It is not all about that at all. It is about ensuring that, if some breach of the law is technically committed, the evidence is not lost for that reason.

One of the examples—which, I think the DPP in Queensland gave—was that where, in a courtroom, people hand around drug exhibits, the counsel is technically in possession of the drugs. In strict liability offences, they are committing an offence—even the judge. No-one ever prosecutes, but there is the potential to say there was some technical breach. In other cases there will be quite specific conduct which will be related to and, indeed, part of the criminal conduct. It may well be that the undercover officer is physically transporting drugs from point A to point B, but that is not always going to be the case.

If things go differently from what was planned—and in the course of giving confidential evidence, we would like to talk to you about some of the practical difficulties with the present legislative framework in this context and why some of those emergency circumstances arise—it seems to me, on balance, to be reasonable to ensure that one of us can exercise the discretion to validate the evidence that has been obtained by issuing that retrospective approval. It is a difficult question to deal with. I think the focus needs to be on the purpose of controlled delivery certificates, and the purpose is not to let the police break the law.

Senator STOTT DESPOJA—You are aware of the review of the New South Wales act—

Mr Broome—Yes, we participated in that review.

Senator STOTT DESPOJA—which recommends against expansion of that particular provision—

Mr Broome—It recommends keeping it.

Senator STOTT DESPOJA—but obviously feels that one is appropriate. You are happy with that, and that is, presumably, why you suggest emergency situations only and not a more expansive provision.

Mr Broome—I am happy with that. Can I say that the New South Wales process was a delight to be part of. It occurred on time, it was conducted competently and quickly. It produced recommendations which have been put to the New South Wales government and are being considered. I would expect to see decisions and legislation very quickly. It was a classic case study of how one should go about introducing legislation of this kind, reviewing it in the light of experience and then making changes which, in this case, were suggested by an independent reviewer—a former judge—and which the government has been able to take forward. Both its content and the processes were admirable.

Senator STOTT DESPOJA—That is something for us to live up to!

Mr Broome—I was thinking more of—

Senator STOTT DESPOJA—No, no. We heard your delightful comments yesterday evening, so it was not taken as an implication.

Mr Broome—That was not directed at the committee; it was directed at others.

Senator STOTT DESPOJA—I return to Mr O'Gorman's evidence. I am aware of the quote to which you were referring—I have the *Hansard* in front of me. It was obviously in the context of a discussion about subpoenas as a defence lawyer. Do you think he was misrepresenting the number of applications that he or a defence lawyer makes that get knocked back? Do you think that was inappropriate?

Mr Broome—There were two issues. He was quite clearly misrepresenting the circumstances which he alleged—that is, that we have frequently done something we have in fact never done. We have never had anybody make an objection to disclosure in the context of a controlled delivery certificate—full stop, no exceptions, not just in Queensland, but anywhere in the country. He may be referring to his experience of other agencies, and he may be referring to experience where he has had applications made for access to certain material. I would suggest he routinely makes them in circumstances in which he knows as well as we do that the courts will routinely—after due consideration, but almost always—dismiss at least the vast majority of what he asks for.

It is a bit of a judicial game that gets played. A classic example, in the case of listening device certificates, is that there is usually an application—at least, by some defence lawyers—for the affidavit behind the listening device certificate or the affidavit behind the telephone interception certificate. It is well established that that is not something which will be released other than in the most exceptional circumstances. But they keep making the applications. If they lose them, they can hardly complain that what is happening is that well-established legal principles are being upheld—and not just in cases in which we are involved. In fact, in the vast majority of cases, it will not be the investigative agency that will be resisting, it will be the DPP.

Often, we get involved only when the issues are sufficiently large and the documentation is sufficiently extensive. We have had experience—not necessarily with Mr O'Gorman—of where, in relation to operations as extensive as Cerberus of a few years ago, which addressed Italo-Australian organised crime activities, something like 1,500 people were part of that task

force across the country over a three- or four-year period, and more than 700 people were charged. In cases like these, we have had subpoenas which have sought, if not the entire holdings that arose from that reference, then vast parts of it, most of which have no relevance whatsoever to the particular prosecution.

Of course we resist those, because to disclose would involve an enormous amount of work to no forensic purpose and to no proper purpose. This becomes our resistance to disclosure. We will disclose, in accordance with the relevant requirements of the respective DPPs—and they vary—what the prosecution is required to disclose to the defence—no more and no less.

Mr Melick—We usually disclose to DPPs more than they are entitled to go to defence with and usually put a rider on it saying that we do not want it to go to defence without prior consultation, and they disclose what they think is relevant. There are well-formulated laws of disclosure. There are a lot of lawyers around the country who think those laws are wrong, and there are a lot of judges and magistrates who continually ignore those laws. A classic case was Elliott. One of reasons the Elliott case went off the rails was that we were served with a third-party subpoena that sought documents—enormous quantities of documents—which had absolutely nothing to do with any of the issues before the court.

If you look at the Victorian full court decision, it makes it quite clear. Not only did that extend the trial by several weeks, it led to an incorrect judicial ruling on inappropriate materials which were not relevant. We were criticised, both by the defence and the prosecution, for wanting to resist that subpoena on the basis there was no legitimate forensic purpose. As far as I am concerned, we will continue to resist. When there is no legitimate forensic purpose we will keep the documents. The defence will continually use subpoenas to try to find out about related operations, bearing in mind that if you have got a solicitor who is acting for one part of a drug cartel he will want to get the information about the rest of the operation to find out what you know about the rest of his clients so he can go and inform them. We are very well aware of what we have to disclose and, at times, we disclose the defence material—which I think strictly according to the law we are not entitled to—but we like to think we have an overriding sense of fairness and, if there is any doubt about the material, we disclose it.

Senator STOTT DESPOJA—Mr Irwin, did you want to add to that as well?

Mr Irwin—I was just going to say, again somewhat along the lines that Greg Melick has just referred to, this issue that Mr O'Gorman talks about, as the chairperson has said, has not arisen. Certainly it has not arisen in Queensland in the context of controlled operations certificates. Mr O'Gorman may be talking about cases where objections to producing material on the grounds of public interest immunity are involved. But again, if lawyers wish to engage in issuing wide-ranging general subpoenas of the type that have been referred to, they can expect that those subpoenas will be objected to and will not be supported by the courts.

The fact is that where an organisation—whether it be the authority or anybody else—raises an objection to producing material on the grounds of public interest immunity, ultimately that is determined on well-established principles, and it is decided by the courts

applying those principles and, frequently, by looking at the documents in question and weighing up the competing public interests. So it is not a matter of the authority or any other similar organisation illegitimately, as a matter of course, objecting to producing material because the objection will only be done on the basis of proper principles that have been established by the courts and which ultimately will be determined by the courts in those cases. Certainly, from my perspective—and I am sure the other members of the authority take the same view—when we are considering whether or not to make claims on that basis, we give the matters considerable, anxious consideration.

Mr Melick—And in consultation with the prosecution. We do not do it independently. We do not hide anything from the prosecutor. At the end of the day, they have got a disclosure requirement as well, and we do not want to tie their hands. We are not telling them what might be available around the edges. We give them the lot and say, 'We object to this for the following reasons', and it is up to them.

Mr Broome—As a matter of internal procedure, any of those objections come before a member of the authority to consider. There would be very few law enforcement agencies where those decisions would be made at that level. They are not made by junior officers in the organisation. They are referred to us to make sure that only appropriate cases are taken.

Senator STOTT DESPOJA—I will be very quick because I know I am taking up the time of the committee. We have heard a lot about function creep. This is partly related to Mr O'Gorman's evidence, but has the NCA moved from an intelligence organisation to a sort of ground arrest agency? Is this part of expanding powers for police and law enforcement agencies in this country, this proposed legislation?

Mr Broome—I think facts creep is more insidious than function creep, but can I say the NCA has not moved anywhere. Mr O'Gorman, as he points out in the evidence, says, 'The NCA should have remained as it was intended.' Yes, Costigan argued before the legislation was enacted by the parliament for a body which was essentially intelligence driven. That is not what the parliament enacted. And I am sorry, whether Mr O'Gorman or Frank Costigan or anybody else likes it not, we do what the law authorises us to do. That battle, that argument was lost in 1984, and it continually gets run out as if the NCA's role of actually being involved in investigating relevant criminal activity—and, in appropriate cases, arresting people who it believes are guilty of that activity, preparing briefs and giving them to prosecutors—is fundamentally the role that was conferred on us. That is not function creep; that is just doing your statutory responsibility.

In terms of expanding the powers and functions of law enforcement agencies, as we have seen in the case of Ridgeway, that was not function creep; that was function retrograde in a big way. We went from what agencies were perfectly entitled to do and did do. For example, in New South Wales, post-Ridgeway, there was advice by the then Solicitor-General that basically said, 'Nothing in Ridgeway changes what we have been doing in New South Wales and should continue to do.' But, everybody knows that the reality is that, once you get a case like Ridgeway, the prosecutors want to see clarity in what agencies are allowed to do. They get very jittery about the continuation of what was in fact the status quo. The result then is legislation, and if the legislation is in fact much narrower that is then seen to be an expansion of powers when it is in fact a contraction of powers. There are lots of incredibly

appalling intellectual considerations of many of these issues. There really is a failure to just understand the fundamental law and the facts involved, and from that develops a whole range of myth, innuendo and allegation which needs a little bit of sunlight being cast upon it to show it for what it really is.

Mr Melick—In fact, if my memory serves me correctly, in the Ridgeway decision the High Court indicated that the matter could be dealt with by the South Australian courts for state offences rather than federal offences.

Mr EDWARDS—Mr Broome, when do you cease your duties as chairperson of the National Crime Authority?

Mr Broome—On 17 September.

Mr EDWARDS—How much of an opportunity have you had for a handover-takeover brief with your successor? How much of a discussion have you had with him on these issues?

Mr Broome—No opportunity and none, because at this stage there has been no announcement made of whom the government intends to appoint.

ACTING CHAIR—I do not think this is strictly within the scope of the matter that we are inquiring into.

Mr EDWARDS—The arguments are about continuity. It seems to me that these are arguments where there should be some continuity.

Mr Broome—My colleagues will survive after the 17th.

Mr EDWARDS—Fair enough, Mr Broome. I will not pursue that.

ACTING CHAIR—Can I say from the chair that that matter has been considered by the committee in private and the committee has taken certain action on that. I think, therefore, that it is not something that would be appropriate to pursue in this particular forum. I am aware that the witnesses want to present some evidence in camera, but before they do Senator Ferris would like to make a statement.

CHAIR—As the former chair of the National Crime Authority committee and as chair of the subcommittee, I would like to place on the public record my personal appreciation for the very professional advice and assistance that you gave me during that period of time. I appreciated very much the way in which you worked very hard to build bridges with this committee during some quite difficult times in the last year or two. I wish you well in the future.

Mr Broome—Thank you very much.

Mr NUGENT—Those comments would be shared by the committee. The reason that Senator Ferris made them was that she has probably been here longer than most of us in

terms of being on this committee. Certainly, I am a relative newcomer to this committee but I am sure we all agree on those comments.

Evidence was then taken in camera—

Subcommittee adjourned at 3.22 p.m.