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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Reference: Australian Crime Commission Establishment Bill 2002

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Thursday, 17 October 2002

Members: Mr Baird (*Chair*), Mr Sercombe (*Deputy Chair*) Senators Denman, Ferris, Greig, Hutchins and McGauran and Mr Dutton, Mr Kerr and Mr Cameron Thompson

Senators and members in attendance: Senators Hutchins and McGauran and Mr Baird, Mr Dutton, Mr Kerr, Mr Sercombe and Mr Cameron Thompson

Terms of reference for the inquiry:

Australian Crime Commission Establishment Bill 2002

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FORD, Mr Peter Malcolm, Acting General Manager, Criminal Justice and Security Group, Attorney-General's Department	181
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Committee met at 8.34 a.m.

FORD, Mr Peter Malcolm, Acting General Manager, Criminal Justice and Security Group, Attorney-General's Department

MEANEY, Mr Christopher William, Assistant Secretary, Criminal Justice Division, Attorney-General's Department

OVERLAND, Mr Simon, Implementation Manager, Australian Crime Commission, Attorney-General's Department

SELLICK, Ms Suesan Maree, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

CHAIR—Welcome. As you know, we have the ability to proceed in camera, but I think that is unlikely today. We are trying to focus on the issues and we have had some discussions. At this stage you probably prefer to respond to questions but I invite you to make an opening statement.

Mr Ford—On Monday evening we commenced with a very brief opening statement and then moved quickly to detailed discussion on a wide range of issues. I might take a few moments, on the resumption of our evidence, to step back and address some basic issues. We have tended to focus on ways in which the ACC will be different from the NCA but it is equally important that we ensure that the committee is aware of those areas where things remain the same. We have not spelt them out in detail to date but there are a number of existing safeguards that will be preserved.

In relation to accountability we have spoken of the different roles that the board and the CEO will have in the ACC compared with the role of the authority in the National Crime Authority Act. We have also set that out in our submission, and to assist the committee we have tabled some diagrams that set out the governance and accountability regimes and the responsibilities of the CEO and will be happy to discuss those further with the committee if it wishes to do so. The board, like the authority, will be responsible to the intergovernmental committee and to this committee. The Ombudsman will continue to have the same role in relation to the ACC as now in relation to the NCA; that is, while the distribution of functions within the organisation changes, the existing oversight mechanisms are preserved. Moreover, the examiners will be very similar to the existing members of the authority, with one key difference: the examiner will not have statutory responsibility for an investigation. That, the governments of Australia agree, is more appropriate to a highly skilled specialist detective or investigator. But in relation to the exercise of independent statutory functions the role is almost identical.

It is proposed that the examiners have the same powers as members currently have. While it is true that the bill does not spell out criteria to guide examiners, neither does the NCA Act spell out criteria to guide members of the authority. The intention is that the same rules that apply now to the members of the NCA would apply to examiners in the ACC. Prior to coming before the committee we were not aware that there were any difficulties with those arrangements or that there had been any suggestion that criteria should be included in the NCA Act to guide members.

Contrary to assertions made to the committee, we do not believe that there will be any greater difficulty in recruiting examiners than there is now in recruiting members. As outlined in our submission, there is a deliberate decision by all Australian governments from both sides of politics to move away from a lawyer-dominated independent body to one where investigations are under the control of highly skilled professional investigators and the organisation complements rather than competes with existing police forces and law enforcement agencies. The governments do not say that there is no place for lawyers but they do say that their role should not be to have responsibility for investigations. Under the proposed model the examiners will in fact constitute an additional safeguard because they will be better placed to objectively assess whether the coercive powers should be called into play.

Australia is, of course, a federal system and we need to ensure that the ACC plays a pivotal role in national law enforcement. Australia does not need another independent body asserting its independence. What is needed is a more focused and cooperative approach to tackling the big issues in organised and serious crime in Australia. That complementarity is to be achieved under this model, through the ACC's role in investigations and operations being agreed in a collegiate way by the heads of Australia's key law enforcement agencies. It will provide a national criminal intelligence facility second to none that will provide a significant resource to law enforcement agencies generally. That is the vision agreed by all Australian governments.

In the course of hearings before this committee, the debate quickly polarised. Put bluntly, the police and governments support the proposal but the lawyers oppose it. There have been extravagant claims made about the consequences of permitting the board in particular—

CHAIR—Who do you claim is in favour of it?

Mr Ford—Police and governments.

Mr KERR—But we have not heard from any of them.

Mr Ford—Right.

CHAIR—So how can you make that comment?

Mr KERR—I am saying that this is an analysis of the evidence before us, and I think it does seem to be a fairly bold assertion on the evidence that has been put before us.

CHAIR—Moving right along.

Mr Ford—There have been extravagant claims made about the consequences of permitting the board—in particular, police commissioners—to authorise the use of coercive powers. The test to be applied by the board is exactly the same as that now used by the IGC when it considers whether to grant a reference. There is no change in the statutory criteria; the change is in the body which is to take that decision.

We have heard that ministers in the IGC have relied heavily on the advice of their police commissioners when granting references under the current arrangements. To compare and contrast, the current regime consists of ministers relying on the advice of police commissioners granting references. The proposed regime consists of the board, which includes the same

commissioners, taking authorisation decisions against the same criteria and being responsible for those decisions to ministers. It has been put to the committee by eminent lawyers that this shift would have dire consequences. After 18 years of experience with the current reference process, it is the judgment of ministers—the very same ministers that the lawyers are prepared to trust implicitly with the granting of references—that this is not the case.

CHAIR—Thank you for your input. Colleagues, do you propose that we proceed with the discussion points that the secretary has circulated to us as a basis, or do you want to zero in on any issues?

Senator HUTCHINS—Can I just ask a question, Mr Chair?

CHAIR—Yes.

Senator HUTCHINS—I am aware that there is a process of premiers and the Prime Minister coming together and then there is another meeting of the police ministers, not attorneys-general. This question may go to Simon, as the implementation officer: once all those in-principle agreements have been reached, have you been tick-tacking with the ministerial officers in the states and territories on the actual nuts and bolts of this legislation?

Mr Overland—On the nuts and bolts of the legislation—

Senator HUTCHINS—For example, as you may have seen from the *Hansard* or even our questions the other day, this chief executive officer.

Mr Overland—A steering committee has been put in place to oversee the implementation process. That consists of the commissioners of the South Australian, Tasmanian and New South Wales police forces and the AFP. It also includes the chair of ASIC, Mr David Knott, and two senior bureaucrats from New South Wales and Victoria, Mr Peter Harmsworth and Mr Les Tree. There is also an observer from Victoria, from the Department of Premier and Cabinet, who sits on that steering committee and provides linkage back into the various Premier and Cabinet departments around Australia. That has been the mechanism we have used to consult on a wide range of matters, including the legislation.

There are a number of parallel processes going on with the legislation with the Attorney-General's Department, which primarily has carriage for the legislation, dealing with its contacts in the various jurisdictions. But in terms of finalising the agreed legislation, that was done through the steering committee which had broad representation from the states and territories but also connections in those states and territories that were not directly represented on the steering committee. There were a number of meetings of the steering committee and Commonwealth officers, and it was through that process that we arrived at an agreed draft bill.

Implicitly in that, of course, the representatives from the various jurisdictions were talking to a wide range of stakeholders within their own jurisdictions. That has been one of the real challenges of this exercise—that is, that there are many stakeholders involved in the process, including within jurisdictions, between jurisdictions, in the Commonwealth-state-territory dialogue that goes on and in the interests within the affected organisations. It has actually been quite a difficult process to manage because there are just so many stakeholders involved and there is not always clear agreement, particularly when it comes to points of detail. It is quite

easy to get to agreement in principle; although there have been some challenges with that, we were able to get to agreement in principle. A lot of work has needed to be done to get to agreement on the detail.

Senator HUTCHINS—On the chief executive officer role and whom he or she reports to and all that sort of stuff, was that part of the discussion with the—what did you call that committee again?

Mr Overland—It is the ACC steering committee. And yes, very much so. In fact, it was a point of discussion right through this process starting with the meetings that followed the leaders summit in April. It was certainly the subject of discussion at the intergovernmental committee meeting in Darwin on 17 July. It is perhaps important to restate in case there is some misunderstanding of what we think is envisaged for the CEO: the CEO will be responsible for the running of the ACC.

Senator HUTCHINS—What does that mean?

Mr Overland—The way the bill works, the board has a key and pivotal role in terms of overall governance of the organisation. It really needs to have that because one of the fundamental changes being made in this process is this: at the moment, the NCA is really a Commonwealth organisation, and Commonwealth legislation will establish the ACC, but the fundamental change is that the states and territories now have much more control over what happens in the organisation. That is deliberate and it is by design. One of the criticisms that has been made of the NCA is its failure to adequately consult and respond to its constituency around the country and its constituency is law enforcement. The answer to that has been to very much involve law enforcement in the governance arrangements for the ACC and that is through—

CHAIR—I thought its constituency was predominantly the provision of criminal intelligence and not law enforcement. That is part of the problem. If you say that it is predominantly law enforcement, it becomes another police force.

Mr Overland—It is not intended to become another police force. Its function and focus is on intelligence, but its constituency is still really Australian law enforcement. It is about providing better strategic operational and tactical intelligence for law enforcement in Australia. That is its focus.

Senator McGAURAN—So its focus is back to the original criticism. You are saying it is just about collecting data—

Mr Overland—No.

Senator McGAURAN—From my point of view, my early criticism of the changes related to the fact that it was not operational; it was not going out there and carrying out surveillance work on the ground.

Mr Overland—Yes, absolutely it will be, but again it is about—

Senator McGAURAN—What is its primary function—collecting intelligence or carrying out surveillance?

Mr Overland—Both, because you will need to carry out surveillance for the purpose of developing intelligence. The idea behind—

Senator McGAURAN—Are you collecting intelligence for the state bodies?

Mr Overland—No, you are collecting intelligence for the ACC for a number of purposes, one of which will be to better target criminal activity in Australia. Of course, it is an important role of the organisation to target criminals and to arrest them, but one of the challenges in this environment is that it is very easy to go out and mount an investigation and arrest someone, the question really is: are you targeting the right someone? That is the challenge for law enforcement. There is more than enough work out there for law enforcement to do and it is very easy for law enforcement to go out and be incredibly busy. The question that remains is: are you really targeting the right people and the right areas? That is why intelligence is so important. If you get your intelligence process right, you are much more likely to focus your investigative effort against the right targets.

CHAIR—I think we all understand that, Simon. Could we return to the question about the role of the CEO because in informed discussions with my colleagues, nobody is terribly impressed with the way you have got it—with an impotent CEO who has no powers.

Mr SERCOMBE—Mr Chair, to focus on your point I go back to the point made by Senator Hutchins about the centrality of the intergovernmental agreements in relation to this package. All of us would recognise that if there is a cross-government agreement about matters, it is very difficult for a parliamentary committee to be fundamentally assaulting that agreement. My question goes to the extent to which there are provisions in the bill in relation to the CEO, the CEO's relationships to other people within the organisation including the board and the CEO's relationship to the task force heads. Do any aspects of the agreement between the Commonwealth and the states go to those sorts of issues in such a way that this committee can make suggestions? To endorse what is in the bill would tend to undermine the Commonwealth-state agreement. I cannot see that the Commonwealth-state agreement goes to that level of specificity or detail. Are you able to enlighten us as to whether there are any components of the Commonwealth-state agreement that we ought to take account of in considering any suggestions we want to make about the role of the CEO? I cannot see that that level of detail is contained in the agreement.

Mr Meaney—The last time we came here we launched almost immediately into detail and perhaps did not paint a big enough picture so that people could appreciate the overall view. I might be able to paint that bigger picture. The key changes that are being made between the NCA, as it stands at the moment, and the ACC can be understood as a four-step process and there are four key issues. It should be assumed that the functions and accountability of the rest of the organisation remain unchanged—apart from these four key changes which are changes that build on the existing structure. The first issue that has been around for some time, as we have discussed, is the question of the perceived problems with the management of the NCA. The authority, comprising the chair and the two members—the authority in the strict sense, not the whole lot—has two key responsibilities. The first is an independent statutory responsibility in relation to the exercise of coercive powers to determine whether or not they should be exercised. The second is the management responsibilities including the management of operations. These key responsibilities coalesce in the authority.

The first step was to review that and to say that, under the ACC model, the function of the independent statutory office, which was performed by the members, is to be put with the examiners. As Peter said earlier, the difference between examiners and members is that the examiners have the same independent statutory role minus the management responsibilities for managing the operations, giving directions and the management of the organisation. They are split into independent examiners and a CEO to manage the organisation. That is the first step. In relation to the second step—

CHAIR—Plus you have got the task force heads.

Mr Meaney—We have that now, this is where we may have delved too quickly into detail.

Mr KERR—The point that the chair, Mr Sercombe and other members raised is that you are making an assertion that the CEO is to manage the operations. Yet all the evidence we have heard thus far is that the strategic decisions for the appointment of heads of task forces, the direction of those task forces and the like are not subject to the control of the CEO.

Mr Meaney—I will take the appointment process first. The board makes the appointments. The rationale for the board appointing the heads of the task force is that, unlike an organisation that has all its resources within its four walls where you would expect a CEO to pick employee X to do a job, the resources for heading these teams will come from police forces. If you already have people in the organisation presumably they will mostly be working on existing work. If you have a new reference or a new authorisation, you will need new people. They will come from outside the organisation.

Mr SERCOMBE—I understand the argument that you are mounting, but my query was: does this issue go to the essence of the agreement between the Commonwealth and the states or is it essentially peripheral to that?

Mr Overland—No, it is actually a central part of the agreement between the Commonwealth and the states.

Mr DUTTON—Can you point to where it is? Is it with the steering committee? Is that something that has been arrived at as part of that process? Is that what you are saying?

Mr Overland—It has been part of the dialogue that has led to the drafting of the bill.

Mr SERCOMBE—But was it dialogue at heads of government level or at the operating level?

Mr Overland—No, the dialogue was in terms of the negotiation between the Commonwealth, states and territories in arriving at—

CHAIR—Those are the working groups. What about the actual heads of government agreement? Did they sit in with the CEO?

Mr Overland—No, it did not get down to that level.

Mr Meaney—It did not address that.

Mr Overland—It was a high-level in-principle agreement and there was agreement on the detail that needed to be worked through—

Mr SERCOMBE—That answers my question.

Mr Meaney—I am not too sure, but if what is being suggested by the committee is that the CEO—

Senator HUTCHINS—We are just trying to get from A to B. Somewhere in your submission you say, as I recall—and this is off the CEO issue—that the states do not have to give information to the ACC. Is it something like that, agreed to at this ministerial level, or is that at the steering committee level?

Mr Meaney—It is not a question of whether it is constitutionally possible for the Commonwealth to impose obligations of that kind on the states. It is inherent in the cooperative agreement that they will.

Senator HUTCHINS—Page 13 of your submission says:

There are no provisions compelling State authorities to provide information to the NCA (or ACC).

Is that part of the ministerial—

Mr Meaney—That just recognises the constitutional position of the Commonwealth. It is certainly not a prohibition on doing it. Back to the point, Mr Chairman, if the committee were suggesting that the mechanism be changed—for example, if the CEO were to recommend to the board an appointment—that would not, I believe, fundamentally violate the agreement. I am not in a position to speak for all the states and territories.

Mr Overland—I would like to make one point. One issue that has come up in the various discussions that have taken place and that is yet to be resolved is it may well be that most of the heads of task forces are actually ACC staff. There is a view amongst some commissioners that it is an appropriate skill, if you like, that the ACC ought to possess, and that, in establishing task forces, ordinarily you would expect an ACC employee to head that task force because of their skill, ability and expertise in the area of organised and serious crime.

CHAIR—The problem is that you still do not have the responsibility with the CEO. If the appointment of the task force is not via the CEO and he does not have a role in terms of the use of coercive powers, you really have an emasculated CEO.

Mr KERR—It is not a job I would like to do.

Mr Overland—No, but this reflects some of the tension in terms of—

Mr KERR—I understand.

Mr Overland—a true Commonwealth-state—

Mr KERR—Looking at the reference group of three state police commissioners, the Federal Police Commissioner, corporations and a couple of state bureaucrats, I can understand you have been trying to herd cats. If the outcome sometimes looks a bit messy from our point of view, you might understand that we could be quite a useful check on the silliness, perhaps, of some of the necessary compromises that would have emerged from the herding process.

Mr SERCOMBE—Please understand that I certainly I would not deign to prejudge where this committee might go or whether or not this committee's views will be taken into serious consideration, but we have been given a task to report. It is very helpful for us to understand at what level your propositions are going. Are your propositions going to the essence of the Commonwealth-state agreements or are they developments subsequent to that? Then we can properly evaluate where they sit in the pecking order.

Mr Overland—They were not dealt with specifically by the leaders because it was at a level of detail that the leaders simply did not turn their minds to.

Mr SERCOMBE—Or the state police ministers?

Mr Overland—No. The state police ministers did turn their minds to the issue of the CEO and the role of the CEO—very much so.

CHAIR—It concerns me, though, when you say just that. It is precisely for that reason. Why wouldn't they want the police commissioners to have a powerless CEO? I do not think that is helpful.

Mr Overland—Clause 46A spells out what the CEO is to do. Subclause (1) states:

The CEO must manage the day-to-day administration of the ACC in accordance with the policy of, and any directions given by, the Board.

Subclause (2) states:

The CEO must also co-ordinate ACC operations/investigations.

So there is a role there for the CEO.

CHAIR—But that is stationary—

Mr Overland—No. It will not work that way because the board will expect the CEO to run the organisation and to run the investigations.

CHAIR—We have talked about the CEO but there has been a suggestion that, instead of the referencing and the decision on the use of coercive powers being entirely with the board, some independent group such as the existing IGC or the council of ministers should endorse that. What would you see as the upsides or downsides of that suggestion?

Mr Overland—That is a fundamental point that the leaders did talk about. One of the drivers in this change was the need to streamline the authorisation of coercive powers.

Mr KERR—Should there be streamlining, is there any reason why you would not have a process that requires ultimate tick-off against a group of ministers who are politically accountable for the decisions?

Mr Meaney—Do you mean that the board would formally need to make a recommendation to the IGC or would the committee be prepared to consider the fact that the IGC must be informed but have a right of veto?

Mr KERR—I think that all these things could be on the table but it may be possible in urgent circumstances to allow commissioners to make such a determination but it must be ratified within a subsequent period of time. Everything is on the table but some of my colleagues and I are trying to explore ways of preventing a circumstance where coercive powers are not authorised by somebody who is ultimately politically responsible to a group who are politically responsible to their various parliaments.

Mr Overland—I think the trade-off there is to make the authorisation process much more responsive to the environment that we now find ourselves in, which is the idea behind the streamlining of the powers. At the moment, references are very broad and very general and they cover a lot of activity. But even they sometimes do not cover all the activity that suddenly you need to go off and investigate, and you need to have access to coercive powers. There is then the time delay inherent—

Mr KERR—We need to try and find some mechanism to accommodate that.

Mr Overland—That is the trick. Perhaps there is capacity for the board to make a decision and get on with it and have some right of veto with the IGC. If you are going to go that way, that would be a better way to go and it would accommodate the tension between the need to get on with things, but at the same time be sensitive to the accountability concerns that you obviously have.

CHAIR—It also relates to the involvement of the CEO in terms of the use of coercive powers because—

Mr Meaney—I hear what you are saying about the management issue but in relation to the coercive powers there really is quite a conscious decision to ensure that the examiners are independent and that they exercise independent discretion. You will note in the legislation that the CEO is employed on the usual terms for a public sector manager. The examiners are appointed for a specified term.

CHAIR—How long is that likely to be?

Mr Meaney—It would be for up to five years. It would be by negotiation with the individuals. NCA members, for example, at the moment can be appointed for up to four years—sometimes they like three years, sometimes they like four—but it is not renewable. There really is a fundamental question. We have, as I mentioned, one fundamental first step—namely, to separate out the independent statutory functions. The question of whether the CEO crosses over into that is, I think, a question of independence and it goes to the quality of the safeguard it is supposed to provide.

Mr KERR—I am prepared to accept that that decision was made at a top level. I think that is inherent in the decision to make this a law enforcement-led organisation rather than a lawyer-led organisation. I accept that as a high order.

CHAIR—Perhaps you can continue you on with your points because we need to go into session.

Mr Meaney—I will speak very briefly about the other three steps that were agreed to. These are the fundamentals, the core things that give effect to the agreement. The first was the establishment of a board. The purpose of that was to provide a more collegiate response in a federal system so that there are inputs and you do not have an independent body doing independent things. Given that the board is to have this strategic focus, in addition to the operational capacity that the NCA has and not as a substitution of that capacity, step three was a strategic and criminal intelligence capacity to support the board and inform its decision making. As a subset of that there is the issue of coercive powers in support of intelligence, but that is its purpose. The final point is the one that we have just been discussing, namely the board having the responsibility for deciding authorisation. Those are the steps in the process. Other than those, it is assumed that all of the existing constraints, practices, safeguards and operational capacity will remain.

Mr KERR—Is there any high-level reason why AUSTRAC could not be on the board?

Mr Meaney—The initial suggestion was that AUSTRAC ought to be rolled into the intelligence capacity of the ACC—that is, part of the intelligence base. The nature of AUSTRAC was such that it was decided that it should remain a separate specialist intelligence type agency. Really, it is part of the intelligence aspect and it is certainly the intention of the ACC that we will have a very close working relationship.

Mr KERR—That is not an answer to the question. Is there any high-level reason why it cannot be rolled into the board?

Mr Overland—The answer to the question is the tension between having an inclusive board of a workable size. Implicit in that process is that some potential players have missed out. Equally, there have been arguments about whether the tax commissioner ought to be there. There has been consideration about all of that.

Mr KERR—That is a different role there, though.

Mr Overland—The difficulty we are faced with is that if we open the constitution of the board, the Commonwealth is seen to have reopened the constitution of the board, the states will want to reopen the constitution of the board and we will finish up with potentially a board of 26 people.

Mr KERR—What if we swapped ASIO for AUSTRAC? What is the reason for ASIO being there?

Mr Overland—ASIO is there to provide better linkages between criminal intelligence and national security intelligence within the limits that affect all the operations.

Mr KERR—Is there any operational exchange intended?

Mr Meaney—No, it is about high-level strategy. It is not about operations.

Mr KERR—That was my question: whether it would impinge on the two accountability regimes.

Mr Meaney—Under the ASIO legislation at the moment, there are provisions for ASIO to provide information to law enforcement agencies where they come across information in their intelligence stuff that is about law enforcement issues.

Mr KERR—I am aware of that. I was just worried that you might have some—

Mr Meaney—That is all that that is trying to finesse.

Mr Overland—It is more a strategic connection between the two by having the head of ASIO there.

Mr KERR—It seems to me dramatically surprising that you would not have AUSTRAC.

Mr Meaney—The nature of AUSTRAC is such that it is a service and intelligence agency that provides advice to the law enforcement community. The board is the law enforcement community.

Mr Overland—The other point to be made is that you will have a board operating at this level. There will need to be a number of subcommittees that operate underneath the board providing it with advice. AUSTRAC would certainly connect in at that level. AUSTRAC are seen as being key players in this area. It is just really a question of where you plug them in to the process.

Mr Meaney—AUSTRAC, and CrimTrac is the other one.

CHAIR—I think we had better wind it up. We want to go into discussions because we have time pressures in this area. Would you mind getting that typed up for us so we could circulate it?

Mr Meaney—Perhaps I will email it across to Maureen.

CHAIR—Thank you for your input.

Mr Meaney—Chair, at the start of the last meeting you gave on notice a list of issues. We did some notes in response to those issues. I would like to table those to provide you with that information.

CHAIR—Yes. Could someone move and second the motion that the documents be tabled?

Mr SERCOMBE—I move that the notes be tabled.

Mr DUTTON—I second that.

CHAIR—It is so ordered.

Mr KERR—This is very difficult because of the time lines. You have been subjected to what that judge said is more than the customary rough handling. That is not through any wilfulness on our part. It is just that I think all of us are struggling to address very substantial changes that have been put together in a very short time through processes that are not transparent to us and which we are expected to report on in a short period.

CHAIR—Also, one would normally assume that you would have an inquiry to decide what you should be doing and then make recommendations and people would come back. However, in this case other people have made the decisions and we are at the end of the agenda. But, thank you all for your input. We may be talking to you again.

Mr Meaney—With regard to your suggestion that we might want to explore options, can I leave it with the committee that somebody will contact us if you want some help?

CHAIR—Yes, we may well do that. Thanks for coming.

Committee adjourned at 9.10 a.m.