



Australian Crime Commission Amendment Bill 2007

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Law and Bills Digest Section

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Australian Crime Commission Amendment Bill 2007

Date introduced: 18 September 2007

House: The Senate

Portfolio: Justice and Customs

Commencement: There are various commencement dates, see the table on page 2 of the Bill.

Links: The *relevant links* to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Disclaimer

This Bill was introduced to the Senate on 18 September 2007 and passed the Senate on that same date after suspension of the relevant standing orders. The Bill is listed for debate in the House of Representatives Main Committee on 20 September 2007. The unusually short time-frames involved in the passage of the Bill have therefore precluded the writing of a more comprehensive Digest. This interim Digest has been produced to allow publication before the debate in the House of Representatives.

Purpose

The Australian Crime Commission Amendment Bill 2007 (the Bill) would amend the *Australian Crime Commission Act 2002* (the ACC Act) to clarify that an ACC Examiner can record their reasons for issuing a summons or notice to produce documents before, at the same time as, or as soon as practicable after it has been issued. This is in response to a recent finding in the Victorian Supreme Court (*ACC v. Brereton*).¹ The Bill also proposes to amend the legislation to allow one examiner to issue a summons and then another to question the person.

1. [ACC v Brereton](#) [2007] VSC 297 (on appeal from Magistrate's Court, Melbourne).

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Background

The Australian Crime Commission

The [Australian Crime Commission](#) (the ACC) (formerly the National Crime Authority but with enhanced intelligence functions) commenced operations on 1 January 2003. According to the latest Annual Report, the aim of the ACC is to 'reduce the incidence and impact of serious and organised criminal activity on the Australian community' (see section 7A of the ACC Act).²

To achieve this aim, the ACC has a range of special coercive powers such as the capacity to compel attendance at examinations, production of documents and the answering of questions (similar to a Royal Commission). The ACC also has an intelligence-gathering capacity and a range of investigative powers common to law-enforcement agencies, such as the power to tap phones, use surveillance devices and participate in controlled operations.

Key activities of the ACC, as approved by its board, include Special Intelligence Operations, Special Investigations, and Task Forces. Current Special Intelligence Operations include:

- amphetamines and other synthetic drugs
- crime in the transport sector
- serious and organised fraud
- illicit firearm markets, and
- illegal marine importation and movement.

Current Special Investigations include:

- High Risk Crime Groups
- Money Laundering and Tax Fraud
- Wickenby Matters, and
- Established Criminal Networks.

For background on Project Wickenby, see Thomas John, 'Tax Laws Amendment (2007 Measures No. 1) Bill 2007', [Bills Digest no. 123 2006–07](#), 26 March 2007.

2. Australian Crime Commission, *Annual Report 2005-06*, at: http://www.crimecommission.gov.au/content/publications/annual_reports/2006/ACC_Annual_Report_2005-06.pdf, accessed 19 September 2007.

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Current Task Forces include the National Indigenous Violence and Child Abuse Intelligence Task Force,³ and the Outlaw Motorcycle Gangs National Intelligence Taskforce.⁴

Current ACC reviews and legislative amendments

When considering the changes made by the Bill, it is worth noting that it has been introduced in the context of some major amendments to the ACC Act in other Bills before the Parliament, plus the imminent tabling of two major reviews.

The Parliamentary Joint Committee on the Australian Crime Commission presented its report [*Inquiry into the future impact of serious and organised crime on Australian society*](#) on 19 September 2007 (the September Report). The September Report reviews the operation of the ACC in responding to present and future needs. In particular, the Committee noted problems with the current contempt arrangements.⁵ This report follows the previous [*Review of the Australian Crime Commission Act 2002*](#), which contains some interesting background on the scope and original rationale for the ACC examination powers.⁶

Mark Trowell QC is also conducting a [Review](#) of specific provisions of the *National Crime Authority Act 1984* and the *Australian Crime Commission Act 2002* for the Attorney-General's Department, a report that was due in April.

In the September Report, the Committee recommends that the issue of failure to cooperate with the Australian Crime Commission examination process be resolved immediately; and that the Commonwealth Government release the Trowell Report as a matter of priority.⁷

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3. For more information on the [National Indigenous Violence and Child Abuse Intelligence Task Force](#) (NIITF), see Sue Harris Rimmer, Bronwen Jagers, Diane Spooner, Kirsty Magarey, and Mary Anne Neilsen and John Gardiner-Garden, 'Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007', [Bills Digest no. 21 2007–08](#), 13 August 2007, p. 17.
 4. Australian Crime Commission: Profile, at: http://www.crimecommission.gov.au/content/about/ACC_PROFILE.pdf, accessed 19 September 2007.
 5. Parliamentary Joint Committee on the Australian Crime Commission, [*Inquiry into the future impact of serious and organised crime on Australian society*](#), 19 September 2007, at pp. 44-47.
 6. Parliamentary Joint Committee on the Australian Crime Commission [*Review of the Australian Crime Commission Act 2002*](#), 10 November 2005, Chapter 3.
 7. Parliamentary Joint Committee on the Australian Crime Commission, [*Inquiry into the future impact of serious and organised crime on Australian society*](#), 19 September 2007, p. 47.

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Bills before Parliament

- The ACC coercive powers will be expanded if the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 currently before the House of Representatives is passed by the Parliament (listed for debate in House of Representatives on 20 September 2007).⁸
- The Telecommunications (Interception and Access) Bill 2007, if passed, will deem all child-pornography offences to be serious offences for the purpose of obtaining a warrant to intercept phone calls, emails, and other forms of telecommunications.⁹ This Bill was debated in the Senate on 20 September 2007.
- The Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007 would amend the definition of 'serious and organised crime' in the *Australian Crime Commission Act 2002* to expressly include the existing child sex carriage service offences in the Criminal Code (**Schedule 1, item 1**), a codification of the December 2006 regulation. The Senate Selection of Bills Committee referred the provisions of this Bill to the Legal and Constitutional Affairs Committee for inquiry and report by 10 October 2007.¹⁰

Schedule 2 of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (part of the NT Bills package) recently amended the definition of 'serious and organised crime' in the ACC mandate to include Indigenous violence or child abuse. The amendments in **Division 2** would allow an ACC examiner to request or compel information, documents or things held by a state or territory agency that are relevant to an operation/investigation, provided an arrangement is in force between the Commonwealth and the state or territory. Presumably this will allow the ACC to compel information from the NT Government. The **Division 3** amendments would extend the term of appointment for ACC examiners from five to 10 years.¹¹

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8. See further Sue Harris Rimmer and Bronwen Jagers, 'Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006', [Bills Digest 110 2006-07](#), 1 March 2007.
 9. Bronwen Jagers, 'Telecommunications (Interception and Access) Amendment Bill 2007', [Bills Digest no. 10 2007-08](#), 3 August 2007.
 10. Sue Harris Rimmer, PaoYi Tan, and Roy Jordan, 'Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007', [Bills Digest 52 2007-08](#), 18 September 2007.
 11. See further Sue Harris Rimmer, Bronwen Jagers, Diane Spooner, Kirsty Magarey, and Mary Anne Neilsen and John Gardiner-Garden, 'Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007', [Bills Digest no. 21 2007-08](#), 13 August 2007, p. 17.

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ACC v Brereton

The measures in the Bill are in response to findings made by Justice Smith of the Victorian Supreme Court in [ACC v Brereton](#) [2007] VSC 297, which was handed down on 23 August 2007.

In this case, Melbourne lawyer Michael Brereton was issued a summons to appear before an ACC examiner on 6 March 2006. Mr Brereton attended to answer the summons but refused to be sworn or to make an affirmation. Two days later he was charged by the Director of Public Prosecutions under section 30 of the ACC Act in respect of that refusal.

Section 30 provides that a person who does any of the following is liable for a penalty of five years imprisonment or a fine of 200 penalty units:

- refuses to answer a question put by an ACC examiner; or
- refuses to take the oath or make an affirmation at an ACC examination; or
- fails to appear in response to a summons to an ACC examination; or
- fails to provide requested documents.¹²

At his committal hearing on 10 November 2006, Mr Brereton issued a subpoena directed at the ACC calling for two categories of documents:

1. Any document pursuant to section 28(1A) of the ACC Act which records or evidences that the examiner was satisfied that it was reasonable to issue an examination summons
2. Any document pursuant to section 28(1A) of the ACC Act which records the reasoning for the issue of the examination summons on Michael Brereton.

Section 28(1) provides:

An examiner may summon a person to appear before the examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.

(1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons.

At the committal proceedings on 10 November, counsel for the ACC applied to have both subpoenas struck out as an abuse of process on the grounds that they served no legitimate

12 *Australian Crime Commission Act 2002*, section 30.

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forensic purpose and constituted a mere fishing expedition. The Magistrate rejected the application to have the subpoena struck out. The Magistrate found:

To demand that a person, say, takes an oath or affirmation, but in the context of this proceeding, there must be, first, a summons properly issued in compliance with the powers pursuant to s. 28 of the Australian Crime Commission Act 2002. It is legitimate for a concern to be raised in relation to the exercise of that power, particularly when there is no record within the materials itself as to whether or not the examiner has put his reasons in writing.¹³

The ACC appealed this decision to the Victorian Supreme Court.

On 23 August 2007, Justice Smith handed down his decision, dismissing the appeal. Justice Smith found:

...counsel for the plaintiff [ACC] properly conceded in this proceeding, a condition precedent to the validity of the issuing of the examination summons - namely, the existence of a document recording the examiner's reasons for issuing the examination summons, **such document to be in existence before the examination summons was issued.** Ultimately, it mattered not whether this was a matter on which the prosecution or the defence bore the onus of proof. It was plain that Brereton chose to put in issue the question of whether that pre-condition had been satisfied. While the Act significantly qualifies the right to silence there is nothing in the Act which:

- prevents a person charged with the offence in question putting in issue the validity of the examination summons; or
- limits the ways in which that validity may be challenged.

The pre-conditions are no doubt specified because of the significant in-roads made to the right to silence and the need to ensure that the power is properly exercised.

Brereton was, therefore, entitled to put the pre-condition in issue on the basis that he did, namely, whether a document containing the reasons for issuing the examination summons was in existence at or prior to its issue.¹⁴

It is unclear what impact this legislation will have on Brereton's particular case. If Brereton is summoned again to attend an ACC examination, a refusal on his part to swear the oath this time may lead to a prosecution under section 30 outlined above. The constitutional validity of the Bill could be raised if the original summons is relied upon by the ACC.

13. [ACC v Brereton](#) [2007] VSC 297, 23 August 2007.

14. *ACC v Brereton*, op. cit., p. 6.

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Contempt issues

Media reports place Brereton's conduct in this case in the broader context of attempting to block access to client files and generally failing to comply with Federal Court orders relating to Wickenby investigations by the ACC.¹⁵ If the ACC does not appeal, Mr Brereton will face a committal hearing in the Magistrate's Court for refusing to swear an oath. He faces separate charges laid by the Australian Securities and Investments Commission (ASIC) on another matter.

The Parliamentary Joint Committee on the Australian Crime Commission has noted ongoing problems with the operation of section 30.

The committee was advised that this process is protracted and ineffective in leading to disclosure of the information sought or to a significant penalty for an examinee guilty of contempt. Mr William Boulton, an Australian Crime Commission examiner, argued that the efficiency of the ACC's examination process would be improved by changes to the current contempt provisions. Mr Boulton informed the committee that the significant delays in contempt matters being addressed by the courts were being used by witnesses to frustrate investigations.¹⁶

A Senate Estimates Committee heard evidence from the ACC on 25 May 2006 that 35 people preferred to be prosecuted under the ACC Act and face a jail term rather than comply with an ACC examination.¹⁷

Position of significant interest groups/press commentary

In the short time between tabling of the Bill and its passage through the Parliament only the Law Council of Australia has been reported as commenting on the Bill. The Law Council of Australia has been reported as being critical of the Bill, particularly in regard to its retrospective application, and impact on the right to silence.¹⁸

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15. Matthew Drummond, 'Wickenby: end sought to lawyer's suit', *Australian Financial Review*, 26 July 2007, p. 12; Matthew Drummond, 'Wickenby target draws judge's fire', *Australian Financial Review*, 24 July 2007, p. 7; Matthew Drummond, 'Brereton wins court case', *Australian Financial Review*, 24 August 2007, p. 6.
 16. Parliamentary Joint Committee on the Australian Crime Commission, *[Inquiry into the future impact of serious and organised crime on Australian society](#)*, 19 September 2007, para. 6.10, p. 44.
 17. Senate Legal and Constitutional Committee, [Estimates Hearing](#), 25 May 2006, p. 107.
 18. ABC Radio, AM, 18 September 2007, at: <http://abc.net.au/news/stories/2007/09/19/2037111.htm?section=australia>.

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Political parties views

The ALP supported the Bill in its passage through the Senate on 18 September 2007, while the Australian Democrats and the Australian Greens opposed the Bill. All three of these parties commented on the process by which the Bill is being passed. The Bill was introduced in the Senate on Tuesday 18 September and debated several hours later and passed. While the ALP supported the Bill, Senator Ludwig stated that it did not give the Bill unqualified support.¹⁹ Senator Stott Despoja for the Australian Democrats was particularly critical of the Parliamentary process:

It is not acceptable in this house as a house of review for Senators to receive legislation of a controversial, even urgent, nature at that time – we received it this morning and we received a briefing, for which we are thankful – and then have it exempt from the cut-off provision and debated the same day.²⁰

The Minister has indicated that the Bill will be referred to the Parliamentary Joint Committee on the Australian Crime Commission, but this will not occur prior to debate.²¹

Main provisions

Interchange of examiners

Items 1, 3, 4 and 6 seek to amend sections 28 and 29 in the ACC Act to allow one ACC examiner to issue a summons or notice to produce, and then a second examiner to actually question the person. Under the current legislation, the same examiner must issue a summons and then question that person. The Explanatory Memorandum states that this is problematic where the examiner who issued the summons or notice is on leave, ill, or otherwise unavailable.

Note that these proposed changes are not related to the *ACC v Brereton* case.

Recording of reasons for a summons

Existing subsections 28(1A) and 29(1A) of the ACC Act provide that an examiner must record in writing the reasons for the issue of the summons or notice. As outlined above, in *ACC v Brereton* Justice Smith has found that the reasons must be recorded prior to the issuing of the summons. The Explanatory Memorandum states that finding is problematic:

19. Senator Ludwig, Senate *Debates*, 18 September 2007, p. 61.

20. Senator Stott-Despoja, Senate *Debates*, 18 September 2007, p. 62.

21. Senator Johnson, Senate *Debates*, 18 September 2007, p. 66.

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...in circumstances where a summons or notice has to be issued urgently, or where a number of summonses or notices are being issued at the one time.²²

Item 2 proposes to add to subsection 28(1A) the clarification that the record is to be made

- (a) before the issue of the summons; or
- (b) at the same time as the issue of the summons; or
- (c) as soon as practicable after the issue of the summons.

Item 7 adds the same clarification to subsection 29(1A) of the Act regarding notices to produce.

Failure to comply with technical requirements

Item 5 proposes to add **new subsection 28(8)**, which will provide that a failure to comply with the requirements for issuing summons as set out in subsections 28(1A), 28(2), and 29A, does not affect the validity of a summons issued under subsection 28(1). The Explanatory Memorandum states that the provision does not apply to 'substantive procedural obligations', such as the requirements under subsection 28(1A) that the examiner must be satisfied that it is reasonable in all the circumstances to issue a summons.²³

Retrospective application

Item 10 provides that a summons issued under subsection 28(1) of the ACC Act prior to the commencement of item 10,²⁴ and which would be invalid because the record as required by subsection 28(1A) of that Act was made after the summons was issued, is valid, and taken to always have been valid. **Item 12** applies to notices to produce in the same way that item 10 relates to summons.

The Government concedes that the retrospective application of these provisions could be detrimental to persons who might otherwise have had scope to challenge the validity of a summons or notice to produce. However, the Government sees the changes as rectifying a 'technicality' and states:

...this is a just an appropriate outcome. It does not consider that a failure to record reasons for issuing a summons or notice prior to issue of the summons or notice

22. Explanatory Memorandum, p. 3.

23. *ibid.*, p. 4.

24. Item 10 commences on the day after Royal Assent.

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should give a person who would otherwise have been convicted of an offence technical grounds to challenge the admissibility of evidence or escape conviction.²⁵

The Law Council of Australia has been particularly critical of the retrospective application of the legislation. They are quoted as stating:

Parliament would send a very dangerous message if it rewarded agencies which ignore the requirements of the law by passing retrospective legislation which not only shields the offending agency from the consequences of their past non-compliance but reduces the safeguards they must comply with in the future.²⁶

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25. Explanatory Memorandum, p. 5.

26. Quoted by Senator Stott Despoja, *Senate Debates*, 18 September 2007, p. 63.

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