SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

OF

2000

Entry and Search Provisions in Commonwealth Legislation

6 April 2000

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 2000

The Committee presents its Fourth Report of 1999 to the Senate.

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LIST OF ACRONYMS

ACCI	Australian Chamber of Commerce and Industry
ACS	Australian Customs Service
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
AQIS	Australian Quarantine and Inspection Service
ASC	Australian Securities Commission
ASIC	Australian Securities and Investments Commission (previously Australian Securities Commission)
ASIO	Australian Security and Intelligence Organisation
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CFMEU	Construction, Forestry, Mining and Energy Union
DPP	Director of Public Prosecutions
DIMA	Department of Immigration and Multicultural Affairs
HIC	Health Insurance Commission
ICA	Institute of Chartered Accountants
MBA	Master Builders Australia
NCA	National Crime Authority
NICNAS	National Industrial Chemicals Notification and Assessment Scheme
NRA	National Registration Authority
OPC	Office of Parliamentary Counsel
RSPCA	Royal Society for the Prevention of Cruelty to Animals

EXECUTIVE SUMMARY

Introduction

At common law, every unauthorised entry onto private property is a trespass. The modern authority to enter and search premises is essentially a creation of statute. As such, it should always be regarded as an exceptional power, not a power granted as a matter of course, and any statutory provisions which authorise search and entry should conform with a set of principles.

These principles include the following:

Principles governing the grant of powers of entry and search by Parliament

- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;
- no person, group or body should intrude on these rights without good cause;
- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- powers to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;
- when granting powers to enter and search, Parliament should do so expressly, and through primary, not subordinate, legislation;
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required;
- in considering whether to grant a power to enter and search, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two – in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases;
- the criteria which individuals, groups and organisations must satisfy before they are allowed to enter and search premises should be consistent across all

jurisdictions – rights should not be inviolate in one jurisdiction but capable of being violated in another;

- consistency should be achieved by ensuring that all entry and search provisions conform to a set of guidelines or principles;
- those who seek search and entry powers which do not accord with this set of guidelines must justify why they are seeking, and why they should retain, such broader powers;
- legislation conferring a power of entry and search should specify the powers exercisable by the officials carrying out the action. It should preserve the right of occupiers not to incriminate themselves and, where applicable, their right to the protection of legal professional privilege;

Principles governing the authorisation of entry and search

- legislation should authorise entry onto, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for failure to comply;
- where legislation provides for entry and search with consent (or alternatively under a warrant), it should make clear that the consent must be a genuine and ongoing consent, and it should impose no penalty or disadvantage if an occupier fails to co-operate in the search, or subsequently withdraws consent – requiring an occupier to co-operate is inconsistent with the idea of consent;
- where legislation provides for entry and search, but does not contemplate the possibility of entry by force under warrant, then a refusal of entry should attract a penalty imposed by a court;
- the power to issue warrants to enter and search premises should only be conferred on judicial officers; justices of the peace should not have this power, nor should a Minister or departmental officer;
- to ensure consistency with warrants issued by judicial officers, where a statute authorises an entry and search by permit or for monitoring purposes without prior judicial approval, it should provide for an appeal to a judicial officer;
- circumstances may arise which may make it impractical to obtain a warrant before an effective entry and search can be made. Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer;

- simply because a person has received financial assistance from the Commonwealth, or is liable to pay a levy under legislation, it does not follow that that person has thereby consented to entry and search by officials seeking to monitor compliance with the legislation, and no such implication should be drawn unless those subject to entry and search in these circumstances were informed in writing in plain English about those powers when receiving the assistance or on becoming liable to pay the levy;

Principles governing the choice of people on whom the power is to be conferred

- a power to enter and search should be conferred only on those officials who are subject to obligations which make them accountable for the use and any misuse of the power;
- a power to enter and search should be conferred only on those officials who are of sufficient maturity to exercise it and who have received appropriate training. Legislation should not confer a power to enter and search on a recipient categorised simply as 'a person' or as a member of a particular Department or organisation;
- a power to enter and search should not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option;

Principles governing the extent of the power granted

- the extent of a power to enter and search will vary with the circumstances applicable, but the powers of entry and search given to the Australian Federal Police (AFP) under the *Crimes Act 1914* should be seen as a 'high water mark'. Officials in other organisations might be given lesser powers, but greater powers should be conferred only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny;
- officials should be given no greater power to enter and search premises than is necessary to carry out their duties;

Principles governing the kinds of matters which might attract the grant of the power

- the power to enter and search can properly be conferred in relation to both civil and criminal matters, but not as a matter of course, and only with provision for due process;

- it is appropriate to grant a power of entry and search to assist in the investigation of serious crime where the investigation is genuine and has a reasonable chance of success;
- it is appropriate to grant a power of entry and search to assist in the gathering of evidence to support a prosecution for a serious offence where the evidence sought is of significance and there is a reasonable chance that it will be found on the premises;
- it is appropriate to grant a power of entry and search to determine whether a person has complied with legislation under which that person has accepted a commercial benefit, subject to being monitored by entry and search;
- it is appropriate to grant a power of entry and search to determine whether a person has complied with legislation which imposes a commercial levy in relation to a serious matter, in circumstances where the legislation provides for this in specific terms;
- it is appropriate to grant a power of entry and search to monitor civil matters which are serious, cannot otherwise be checked, and where the powers are used with maturity and are proportionate to the benefit gained;

Principles governing the manner in which the power to enter and search is exercised

- the power of entry and search should be carried out in a manner consistent with human dignity and property rights;
- as a general rule, entry and search powers should be exercised during reasonable hours and on reasonable notice, unless this would defeat the legitimate purpose to be achieved by the exercise;
- where entry and search is likely to involve force or physical interference with people and their property, it is preferable that this power be exercised only by, or with the assistance of, police officers. If such a power is to be granted to people other than police officers in such circumstances, their maturity, training and experience should be comparable to that of the AFP;
- entry and search of premises, especially if carried out with the authority to use force, should be recorded on video or audio tape, unless this is impractical in all the circumstances;

Principles governing the provision of information to occupiers

- the occupier of premises which have been entered and searched should be:
  - given a copy of any relevant warrant;

- informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities under the relevant legislation; and
- given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search;

These requirements should be waived only where circumstances are critical, or where an official is threatened with violence, or where it is absolutely impractical to follow them;

- legislation conferring a power to seize documents or other articles should provide:
  - that any material seized be itemised;
  - that the occupier and any others affected be entitled to a copy of that itemised list and copies of any other business or personal records seized;
  - that the occupier and any others affected be entitled to receive copies of any video or audio tape recordings made, or transcripts of those recordings, within 7 days;
  - a procedure for dealing with disputed seizures; and
  - a time limit for the return of any material seized;

Principles ensuring that people carrying out entry and search are protected

- where people enter and search premises under a power that accords with the principles set out in this Report, and exercise that power appropriately and in accordance with due process, they are entitled to do so without being subject to violence, harassment or ridicule, and are entitled to the protection of the law and to respect as persons carrying out their duty on behalf of the community;

Principles relevant to judicial officers in the issue of warrants (as set out in *Tillett*'s case)

- when approached to issue a warrant, a judicial officer should act as an independent authority, exercising his or her own judgment and not automatically accepting the informant's claim;
- the judicial officer has a discretion which must be exercised judicially – to enable its proper exercise, the informant must put forward adequate sworn evidence;

- the warrant itself must clearly state the findings of the judicial officer;
- as a corollary of the power of seizure, a particular offence must be specified, both in the information and in the warrant – even where the statute simply uses the words "any offence" and makes no clear reference to a need to specify a particular offence;
- a warrant must not authorise the seizure of things in general, or things which are related to offences in general, but only the seizure of things by reference to the specified offence;
- a warrant may be struck down for going beyond the requirements of the occasion in the authority to search; and
- the time for execution of a warrant must be strictly adhered to;

Other general principles

- each agency which exercises entry and search powers should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.

Conclusions on the need for general principles

While powers of search and entry may be necessary for the effective administration of the law in certain circumstances, they remain inherently intrusive. One basic form of protection is to ensure that all such powers are drafted according to a set of principles along the lines of those set out above. These principles, which should apply both to existing search and entry provisions and to proposed new provisions, should be administered by the Attorney-General's Department, and should have statutory force.

Where greater powers of entry are proposed than are recognised in the principles, Parliament should acknowledge the exceptional circumstances that give rise to the proposal. The Explanatory Memorandum accompanying a bill should make the reasons for any departure from the guidelines explicit, and those greater powers should be made explicit in the bill itself. Where entry provisions have been granted, their exercise should be recorded, monitored and reported on, and the powers themselves should be subject to periodic long term review.

Recommendations (para 1.78)

1. The Committee recommends that all entry and search provisions in legislation including bills should have to conform with a set of fundamental principles rather than long-standing practice. These principles should be enshrined in stand-alone legislation based on the principles set out in this Report. This legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914 (Cth)*.

2. The Committee recommends that the entry and search powers available to the Australian Federal Police under the *Crimes Act 1914 (Cth)* should constitute the 'high-water mark' for such powers generally. By law, the powers of entry and search available to any other agency, person or organisation may be less than these, but should only exceed the powers available to the Australian Federal Police in exceptional and critical circumstances.

3. The Committee recommends that each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.

The purpose of search and entry provisions

Powers of search and entry are often included in the legislation establishing regulatory or investigatory agencies. These powers are included to assist such agencies in undertaking their statutory duties, or in enforcing the provisions of their legislation. Specifically, such powers assist agencies in gathering information, documents or other relevant things. Most agencies contend that such powers are essential to their effectiveness as regulators.

Powers of search and entry are included in legislation for two main purposes. Their traditional purpose is to enable the gathering of evidence of possible offences (offence-related warrants). However, they are also included to enable the monitoring of compliance with a statute (monitoring warrants). Most legislation dealing with compliance monitoring makes provision for entry under warrant where entry by consent is refused – entry without consent or a warrant remains an exception.

Monitoring warrants are generally easier to obtain than offence related warrants, but the powers available to officers exercising them are generally

more limited – inspections and audits are usually permitted, but seizures and arrest are not.

Where agencies use powers for both purposes, the legislation authorising the entry usually distinguishes between these purposes, or the agency distinguishes between them in the administrative practices which it follows.

Non-government officials

Some statutes confer powers of access to information on non-government organisations and their officials for defined purposes. For example, company auditors have a right of access to company records for the purposes of conducting an audit, and must report certain breaches of the law to the Australian Securities and Investments Commission (ASIC). The Official Receiver in Bankruptcy is entitled to access to the premises and books of a bankrupt for the purposes of the bankruptcy legislation. Under State law, RSPCA inspectors are entitled to access to premises for the purposes of legislation which prohibits cruelty to animals. And under the *Workplace Relations Act 1996*, certain trade union officials are entitled to enter premises where work is being performed, either to investigate suspected breaches of that Act, or to hold discussions with employees. The principles set out in this Report should apply to non-government officials who exercise statutory powers of entry and search as well as to government officials.

Conclusions on the purpose of search and entry provisions

With regard to search and entry provisions generally, the Committee accepts that such provisions are appropriate for the purpose of gathering intelligence or evidence, and also to monitor compliance with some statutes. In either case, the provisions should conform with the general principles set out in this Report.

Recommendation (para 2.18)

4. The Committee recommends that the principles set out in Chapter 1 of this Report should apply to both government and non-government agencies, persons and bodies which seek to enter and search premises by virtue of statutory authorisation.

Entry by trade union officials

As noted above, under Division 11A of Part IX of the *Workplace Relations Act 1996*, a union official who holds a permit under that Act may enter premises, on 24 hours notice, during normal working hours, and may hold discussions with employees during their meal time or other breaks. The union official is not entitled to enter any part of the premises that is used for residential purposes, and is required to act in a way which does not intentionally hinder or obstruct any employer or employee in their work.

The Committee received two submissions which contended that these provisions had been used in the building industry to harass employers, or as 'fishing expeditions' when no real breach of an Act or award was suspected, or to determine whether non-union members were working on a particular site. Neither submission objected to union officials having a power of entry, but each proposed that the exercise of the power be limited in various ways.

The Construction, Forestry, Mining and Energy Union (CFMEU) responded to these proposals by noting that union right of entry powers had already been limited; that entry permits could be revoked if used in an improper manner; that no applications to revoke CFMEU permits had been proceeded with; and that any further limitation of entry powers would contravene the International Labour Organisation Convention on Freedom of Association and Protection of the Right to Organise.

Conclusions on entry by trade union officials

With regard to the right of trade union officials to enter and inspect premises for the purposes set out in the Workplace Relations legislation, the Committee notes that it received evidence on this issue from a limited range of witnesses involved in the building industry. The Committee acknowledges that this matter is regulated by statute, and understands that the issue is currently before the Parliament as part of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. No evidence was put before the Committee to suggest that unions should not have a right to enter, but some dissatisfaction was expressed with the way in which the current provisions had operated on some occasions. Where practical difficulties such as these arise, they are better addressed through a voluntary code of practice developed between relevant employers and employees rather than through legislation.

Recommendation (para 2.26)

5. The Committee recommends that the right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of this Report.

The consistency of search and entry provisions

As noted in the general principles set out above, it is important that search and entry provisions should be as consistent as practicable across all agencies which exercise those powers. Consistency is an issue for occupiers, who may find themselves subject to different procedures and obligations depending on the agency which happens to be exercising its powers. It is similarly an issue for the agencies which exercise these powers, as they may find themselves administering, and having to train staff in the administration of, quite different provisions.

However, it should be emphasised that consistency here means consistency with principles rather than with long-standing precedents. The long-established existence of a power of entry in a particular form which does not conform with these principles cannot be used to justify its continued or extended use.

While consistency is a guiding principle, it should not be seen as absolute. There may be occasions when different powers may be required because different functions need to be performed.

Model search warrant provisions were included in the Crimes Act in 1994. Evidence to the Committee suggested that these provisions operated reasonably consistently.

The Attorney-General's Department also used a preferred model (currently Part 3 of the *Imported Food Control Act 1992)* where it was proposed to include monitoring warrant provisions in a bill.

Following recent changes to the search and entry powers exercisable by the Australian Customs Service (ACS), the major areas of inconsistency brought to the Committee's attention were:

- the access provisions administered by the Australian Taxation Office (ATO), which entitle the Commissioner, at all times, to "full and free access

to all buildings, places, books, documents and other papers" for any of the purposes of the tax legislation – there was no requirement that the Commissioner obtain a warrant in the absence of genuine consent;

- the entry powers administered by the Department of Immigration and Multicultural Affairs (DIMA), which empower the Secretary of the Department to authorise officers to enter and search any premises where they had reasonable cause to believe that they would find either unlawful non-citizens or persons in breach of their visa conditions, or relevant documents – again there was no requirement that a warrant be obtained from a judicial officer;
- the inspection powers exercised by the Australian Transaction Reports and Analysis Centre (AUSTRAC) which empower the Director of AUSTRAC to require certain defined persons to give authorised officers access to their business premises – again with no requirement that a warrant be obtained from a judicial officer in the absence of genuine consent; and
- the entry powers administered by the Australian Security and Intelligence Organisation (ASIO), and under the Defence (Areas Control) Regulations, which, in each case, empower the relevant Minister (rather than an independent judicial officer) to issue a warrant to enter and search.

Following the conferring of additional statutory functions on the ASIC, the various entry provisions exercisable by it were not consistent with each other, and certain other provisions also contained anomalies.

Conclusions on the consistency of entry provisions

The Committee considers that there ought be consistency in the legislative provisions granting powers of entry and search to all comparable authorities. All such provisions should accord with a common set of guidelines unless compelling reasons are advanced to justify a departure from them. The Committee accepts the view of the Acting Privacy Commissioner that, with some notable exceptions, most of the statutory provisions granting powers of entry and search appear to be consistent and broadly in accord with the existing indicative guidelines administered by the Attorney-General's Department.

However, the powers exercisable by DIMA, AUSTRAC, ASIO and Defence make no provision for any independent judicial oversight. There would seem to be no objection, in principle, to making such provision.

DIMA's powers have been reviewed by the Ombudsman who has noted their inconsistency, and found that they appear not to have been exercised fairly on all occasions. The Department apparently accepts that its powers should be brought into line with those exercised by other Departments and agencies.

Where AUSTRAC suspects that financial information is not being provided as required, it discusses the matter with the organisation concerned at various levels. Where it continues to suspect that it is still not receiving complete information, like all other agencies it should have to seek the approval of an independent judicial officer to enter and search premises where a suspected breach of the legislation has occurred.

The entry powers exercisable by ASIO under its legislation, and by the Minister for Defence under the Areas Control Regulations similarly make no provision for independent judicial oversight. In each case, a significant power of entry and search may be exercised on the authorisation of the Minister concerned. Unless there are demonstrably exceptional circumstances, these provisions should similarly be exercisable only after a warrant has been obtained from an independent judicial officer.

The ATO argues that its provisions are different. As a result of the self-assessment system of taxation it accepts taxpayers' statements of their taxable income, subject to a right to verify those statements subsequently. In addition, given the number of occasions on which the ATO seeks access to taxation records, requiring it to obtain a warrant on every occasion might prove impractical.

However, under self-assessment, the ATO seeks access to records essentially to monitor compliance with the relevant legislation – in the same manner as many other agencies. It obtains access with consent on most occasions, and will continue to do so in the same manner as most other agencies which monitor compliance. Where consent is refused, the ATO, like those other agencies, and in accordance with principle, should be required to obtain a warrant from a judicial officer. The Committee notes that this view was also put by the Joint Committee of Public Accounts in its 1993 Report *An Assessment of Tax*. In the words of the Acting Privacy Commissioner, "such a measure would be a welcome strengthening of privacy protection and would enhance the consistency and fairness of Commonwealth law".

Finally, the Committee considers that, just as the ATO randomly audits assessments of taxpayers' taxable income, so the Commonwealth Ombudsman

should randomly audit the ATO's use of its powers to enter and search premises.

Recommendations (para 3.67)

6. The Committee recommends that all existing entry and search provisions in legislation, including those contained in regulations, be reviewed and amended by 1 July 2001 to ensure that they conform with the principles set out in Chapter 1 of this Report.

7. As a priority, the Committee recommends that all entry and search powers that go beyond the entry powers in the Crimes Act, including the powers exercisable by the Australian Taxation Office, the Department of Immigration and Multicultural Affairs, the Australian Transaction Reports and Analysis Centre, the Australian Security Intelligence Organisation and the Minister for Defence under the Defence (Areas Control) Regulations, should be reviewed and amended so that they are consistent with the principles set out in Chapter 1 of this Report.

8. The Committee recommends that the Commonwealth Ombudsman undertake a regular, random "sample audit" of the exercise by the Australian Taxation Office of its entry and search powers to ensure that those powers have been exercised appropriately.

The fairness of search and entry provisions

Fairness is essentially a matter of how search and entry provisions are exercised. A provision may be 'fair' in its form, but administered in an 'unfair' manner. Or a provision may be 'unfair' in its form, but administered by the relevant agency in a way that renders it 'fair'.

In some circumstances, fairness is not an issue. Right of entry powers are exercised to obtain information from disinterested third parties such as financial institutions. These institutions invite the use of an agency's formal entry powers as almost a protective measure to overcome duties of client confidentiality.

Aspects of fairness are often addressed in the statute conferring a right of entry. Occupiers may be given specific rights (for example, to receive a copy of the

warrant, to observe the search, to be given a receipt for anything seized, and to be given a copy of anything seized).

One proposal for ensuring that warrants are properly and fairly executed is to require the return of the warrant to the court. The Committee was told that such a situation applies in Victoria, and in some other jurisdictions. It ensures that the person who issued the warrant is accountable for the execution of it.

Recommendation (para 4.16)

9. The Committee recommends that the procedure that is applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court which issued it.

Fairness is also addressed in other Commonwealth legislation, including the *Ombudsman Act 1976*, the *Privacy Act 1988* and the *Administrative Decisions (Judicial Review) Act 1977*. However, while statutory provisions for investigating and reviewing the exercise of search and entry powers are important, it should be noted that not everyone is aware of these provisions, and review often takes place some time after any mischief has occurred.

In certain circumstances, fairness is imposed by the courts, which interpret statutes which authorise entry and search strictly, and resolve any ambiguity in favour of the occupier. They also insist on strict compliance with the statute and the conditions on which a warrant is authorised. Through doctrines such as legal professional privilege, the courts also seek to impose restrictions on the categories of documents to which officials may gain access.

The Institute of Chartered Accountants in Australia (ICA), speaking on behalf of itself, the Australian Society of Certified Public Accountants and the Taxation Institute of Australia, proposed that there should be formal legislative recognition of a professional privilege for accountants and their clients co-extensive with that which operates in legal practice. Some restrictions on the Tax Commissioner's right of access to accountants' advice and working papers are currently set out in voluntary ATO Guidelines the boundaries of which, it was suggested, the Commissioner had now decided to test.

While there is some force in the argument that legal professional privilege should be extended to advice provided by some other professionals such as accountants, the Committee considers that, at this time, the problems referred to do not seem sufficiently widespread to warrant such an approach. The ICA

itself stated that there was no evidence of widespread abuse of the Guidelines, simply an apparently developing attitude regarding the boundaries of those Guidelines.

Fairness in administration is also a function of the procedures adopted by some agencies. Self-imposed procedural safeguards include notifying occupiers of an intention to enter premises; providing written information to occupiers about the powers and their rights and responsibilities; the training of officers; the use of the Commonwealth Director of Public Prosecutions (DPP) to oversee any proposed enforcement action; explicitly distinguishing between procedures adopted for monitoring warrants and offence-related warrants; and imposing other accountability mechanisms.

Conclusions as to the fairness of search and entry provisions

The Committee accepts that the majority of agencies exercise their entry powers fairly. Fairness is imposed on agencies by statute and by the courts. It is a product of the supervision over the warrant process which is exercised by the Commonwealth DPP. It also seems to have been deliberately pursued as part of the enforcement culture of some agencies, which have emphasised the training of officers and the drafting of internal manuals and guidelines. Given the involvement of the DPP and the demands of the courts, the procedures followed in obtaining and executing search warrants seem to be of a high standard. However there are a number of ways in which the exercise of entry provisions may be made fairer, principally by ensuring that all those who enter premises and search them have appropriate training, and that occupiers are informed of their rights, and are not further penalised by prejudicial publicity should they challenge the execution of a warrant.

Recommendations (para 4.76)

10. The Committee recommends that, unless there are exceptional circumstances involving clear physical danger, all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search. Occupiers should be informed that the proposed entry and search is either for the purpose of monitoring compliance with a statute, or for the purpose of enforcement or gaining evidence and possible prosecution, but not for both purposes.

11. Where search and entry powers are used by an investigative authority, the Committee recommends that:

- those who are being investigated should have an ongoing right to be informed of the current status of those investigations; and
- where an investigation has been concluded with no charges laid, those who have been investigated should have the right to be informed of this fact immediately; the right to have all seized material returned to them; and the right to compensation for any property damage and damage to reputation.

12. The Committee recommends that all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of those powers in enforcement and compliance manuals.

13. The Committee further recommends that, where practical, all executions of warrants are video-taped or tape-recorded, and that where the person is a suspect, a verbal caution is given and tape-recorded.

14. The Committee recommends that the Attorney-General implement a system enabling courts to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant.

The effectiveness of search and entry provisions

Like fairness, effectiveness is essentially a matter of administration. It raises issues such as whether search and entry powers are used, and whether their use achieves the purposes for which they were granted.

All agencies which made submissions to the inquiry used their entry powers, and felt that their work would be significantly impeded without them. The AFP told the Committee that the current search warrant provisions in the Crimes Act were both fair and effective, but suggested a number of specific improvements, including:

- recording verbal applications for warrants sought by telephone to reduce any concerns the judicial officer might have about whether an accurate record had been made of the application and the terms of any warrant issued;

- where searches take longer than the time specified in a warrant, authorising applications for an extension of time to be made by telephone;
- given that a warrant must specify the time within which it remains in force (eg 7 days from the date of issue), clarifying precisely when on the seventh day it ceases to be in force;
- addressing the issue of the right of Commonwealth officers executing a Commonwealth warrant to seize any evidence relevant to a State offence; and
- the right to conduct searches, under warrant, without first notifying the occupier (covert searches).

Similarly, the ACS told the Committee that its search and entry provisions could be made more effective by:

- extending the period for which evidential material might be retained;
- clarifying whether evidence of serious customs offences collected by means of a customs warrant may be used in a prosecution under the Crimes Act;
- clarifying the right to seize forfeited goods as evidence;
- reviewing the telephone warrant provisions of the Customs Act; and
- making a number of other minor amendments.

While the Committee is not in a position to definitively decide, many of these proposals would seem designed to make the administration of these search and entry provisions more effective without affecting the fair operation of those provisions. However, the Committee has reservations about authorising the AFP to conduct covert searches, which the AFP itself notes remains a "sensitive issue".

Recommendations (para 5.49)

15. The Committee recommends that the Attorney-General and the Minister for Justice and Customs examine the amendments to the *Crimes Act 1914* proposed by the AFP, and the amendments to the *Customs Act 1901* proposed by the Australian Customs Service, and introduce legislation to implement those amendments.

16. While aware that covert searches might make law enforcement easier, the risks are such that the Committee is opposed to recommending such searches.

CHAPTER 1

BACKGROUND AND PRINCIPLES

Introduction

1.1 The authority to enter and search premises is essentially a creation of statute. As such, it should always be regarded as an exceptional power, not a power granted as a matter of course. Were it not for parliaments and governments, officials would have few powers to enter and search the premises of other people.

Due process and competing public interests

1.2 Laws which prohibit or regulate search and entry are part of that regime of rules, restrictions and conventions which constitute due process. As such, they are related to measures which regulate the conduct of those who arrest, hold in custody, question, carry out body searches on, or take forensic samples from, others.

1.3 Due process is fundamental to a civil society. It involves the operation of proper and fair laws to control the actions of investigating and monitoring authorities.

1.4 It is often said that empowering such authorities to enter and search private premises involves striking a balance between two competing public interests.[1] There is a public interest in the effective administration of justice and government. However, there is also a public interest in preserving people's dignity and protecting them from arbitrary invasions of their property and privacy, and disruption to the proper functioning of their businesses and work. Neither of these interests can be insisted on to the exclusion of the other,[2] and proper and fair laws which authorise the entering and searching of premises can only be made where the right balance is struck between these two interests.

Untoward and arbitrary actions

1.5 In a similar way, laws dealing with entry and search may be seen as part of the community's regime for controlling actions which are untoward and arbitrary, whether those actions are taken for private or public purposes.

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1 See *George v Rockett* (1990) 170 CLR 104 at 110. See also Evidence, p 183 (Mr Firmstone).

2 *Lawrie v Muir* [1950] SLT 37.

1.6 A private person takes an untoward and arbitrary action when he or she imports illicit substances into Australia, or evades his or her lawful tax, or exports diseased produce, or fails to provide duly appointed authorities with information to which they are entitled, or pays wages below those set in accordance with the provisions of the Workplace Relations Act.

1.7 A public person takes an untoward and arbitrary action when he or she, without appropriate authority, forces entry into someone else's house or business premises, or takes copies of documents without proper permission, or boards an aircraft or ship without the owner's consent and contrary to due process.

1.8 In principle, the community should prevent the taking of any untoward and arbitrary action, whether taken for a public or private purpose. This is a principle which can safely operate without exception. It rests on the belief that no individual or organisation should be allowed to take an arbitrary action which will adversely affect another – whether that person or group or organisation operates in a public or private capacity.

1.9 The propriety of entry and search powers should be assessed against the test of whether they curb or enhance the ability of private and public persons to take arbitrary action to the prejudice of others. For example, federal authorities need to be able to gain access to material showing that someone may have conspired to defraud the Commonwealth of its revenues. At the same time those authorities must give full weight to the right and dignity of taxpayers and not prejudice them in a manner that is in any way capricious.

1.10 Laws which authorise entry and search should preserve and foster civil life. They should ensure that the community is fair, free and secure. Their aim should be the wellbeing of, and equity for, each and every member of the community.

1.11 Committing a crime; entering, without proper authority, onto the premises of others in an effort to find evidence of unlawful activity; bringing illicit objects into the country; exporting diseased produce; seizing goods in purported execution of public duty contrary to due process; evading the payment of taxes; denying an authority legitimate access to information in a person's possession; or taking records in an unauthorised manner from people for governmental purposes are all examples of ways in which some in the community may act wrongly towards others.

Structure of this Report

1.12 The purpose of this Chapter is to provide the common law background against which search and entry provisions have developed, and to set out some general principles which are relevant when considering how these provisions are developing.

1.13 Chapter 2 of this Report discusses the purpose of search and entry provisions, and Chapter 3 examines their consistency. The issue of fairness is dealt with in Chapter 4, and the issue of effectiveness is dealt with in Chapter 5.

Search and entry at common law

1.14 The common law has always seen the privacy, security and integrity of a person's home and possessions as fundamental principles, which are not to be violated without compelling reason.[3] Indeed, the inviolability of a person's home was historically recognised as equivalent to the inviolability of the person.[4] In *Semayne's Case*, in 1604, Sir Edward Coke affirmed this in saying "the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose".[5]

1.15 At common law, every unauthorised entry onto private property is a trespass. Thus, in 1765, in *Entick v Carrington*, Lord Camden LCJ observed that:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing … If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.[6]

1.16 The same general principal was expressed by William Pitt, First Earl of Chatham, in an address to Parliament in 1766 on general warrants:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the winds may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.[7]

1.17 This principle applies to officers of government as well as to private persons.[8] Thus, in 1921, in *Great Central Railway Company v Bates*, Lord Atkin considered the right of a police officer (who had the powers of a common law constable) to enter a warehouse after dark through an open door to see that everything was in order:

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3 Tronc, K, Crawford, C and Smith, D, *Search and Seizure in Australia and New Zealand* (LBC Information Services) (1996) p 1.

4 *Crowley v Murphy* (1981) 52 FLR 123 at 140 per Lockhart J.

5 (1604) 5 Co Rep 91a; 77 ER 194 at 195.

6 (1765) 19 St Tr 1029 at 1066.

7 Quoted with approval by Lord Denning MR in *Southam v Smout* [1964] 1 QB 308 at 320.

8 *Halliday v Nevill* (1984) 155 CLR 1 at 10 per Brennan J.

> Now it appears to me that he had no right to enter these premises at all … It can hardly be suggested that the right exists in respect of a dwelling house. If it did the privacy of an Englishman's dwelling house would be most materially curtailed. In view of the limitations that have been laid down over and over again as to the right of a constable to force a door, and as to the limitations of his powers unless he has a warrant, or in cases of felony, it appears to me quite impossible to suggest, merely because a constable may suspect there is something wrong, that he has a right to enter a dwelling house either by opening a door or by entering an open door or an open window and go into the house. It is true that a reasonable householder would not as a rule object if the matter was done bona fide and no nuisance was caused. But the question is whether the constable has the right to enter … It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority.[9]

1.18 At common law, a person might enter premises "in accordance with authority" where he or she had obtained the consent of the person in possession (or entitled to possession) of the land, or where he or she exercised an independent right to proceed on the land. Such a right arose only in limited circumstances – for example, where a warrant was issued to search a person's home for stolen goods.

1.19 Historically, the justification for limiting the power of search and entry was based on the rights of private property. In modern times, the justification has shifted more to the protection of privacy.[10] However, the judgments of courts are invariably conscious of the competing interests, and their sometimes uneasy balance. For example, in the 1980 English case of *IRC v Rossminster Ltd*, Lord Wilberforce stated that:

> The integrity and privacy of a man's home, and of his place of business, an important human right has, since the Second World War, been eroded by a number of statutes passed by Parliament in the belief, presumably, that this right of privacy ought in some cases to be overridden by the interest which the public has in preventing evasions of the law.
>
> A formidable number of officials now have powers to enter people's premises, and to take property away, and these powers are frequently exercised, sometimes on a large scale. Many people … think that this process has gone too far; that is an issue to be debated in Parliament and in the press.
>
> The courts have a duty to supervise, I would say critically, even jealously, the legality of any purported exercise of these powers. They are the guardians of the citizen's right to privacy. But they must do this in the context of the times, ie, of increasing parliamentary intervention and of the modern power of judicial review. In my respectful opinion appeals to 18th century precedents of arbitrary action by Secretaries of State and references to general warrants do nothing to throw light on the issue. Furthermore, while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of

9 [1921] 3 KB 578 at 581-2.

10 See *George v Rockett* (1990) 170 CLR 104 at 110.

> legislation, even of unpopular legislation; to do so would be to weaken rather than advance the democratic process.[11]

1.20 Given that it is properly the role of Parliament to justify powers of search and entry, this raises the question of the appropriate principles which ought guide the Parliament in that process.

Principles

1.21 In principle, all actions which trespass upon a person's body, dignity or property ought be carried out with due process. Entry and search provisions in Commonwealth, State and Territory legislation ought meet specific and common criteria. Some such criteria are currently applied to draft federal legislation, which is assessed to see whether it conforms with guidelines set out in a document called the Criminal Law Policy of the Commonwealth. This has been developed and is used by the Commonwealth Attorney-General's Department, and has now been published by the Office of Parliamentary Counsel (OPC) as *Drafting Direction No 2 of 1999*.

1.22 While this Policy is neither a binding nor a conclusive statement of Commonwealth policy in this area, it contains a number of important principles and "is meant to stand as a check and a coordinating influence on the rest of government".[12]

1.23 Again, relevant principles may be found in Federal instruments such as the Commonwealth Privacy Policy. And again, a number of relevant principles are contained in the Australian Law Reform Commission's (ALRC) report on *Privacy*. Other principles were advanced in evidence given to the Committee. These principles are discussed in detail in the remainder of this Chapter.

Principles governing the grant of powers of entry and search by Parliament

Individual's right to dignity and privacy

1.24 People have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society. No person, group or body should intrude on these rights without good cause.

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11 [1980] 1 All ER 80 at 82.

12 Evidence, p 10 (Mr Alderson).

1.25 Such intrusion is warranted only in specific circumstances where the public interest is objectively served. As the Attorney-General's Department told the Committee, there may be a need for powers of this type as "there are genuine and legitimate needs to be able to effectively administer legislation and ensure that money is being spent properly, that laws are being complied with".[13] However, even where such powers are warranted, no intrusion should take place without due process.

1.26 Powers to enter and search are clearly intrusive, and they should be conferred on authorities only where those authorities and the government to which they are responsible demonstrate the need for them at the time they are conferred, and subsequently that their retention remains necessary.

1.27 Powers to enter and search should only be included in legislation for compelling reasons; they should not be included as a matter of course or simply for reasons of administrative convenience. Referring to the principles set out in the Report of the Australian Law Reform Commission, the Acting Privacy Commissioner told the Committee that such powers should only be included after a clear weighing up of the detriment inflicted by granting them against the benefit achieved in doing so.[14]

1.28 Where powers to enter and search are included in legislation, civil life and liberty are best protected through the inclusion of appropriate checks and balances.

Entry powers should be conferred expressly

1.29 When granting powers to enter and search, Parliament should do so expressly, not by implication.[15]

1.30 Legislation conferring a power of entry and search should specify the powers exercisable by the officials carrying out the action. It should preserve the right of occupiers not to incriminate themselves and, where applicable, their right to the protection of legal professional privilege.

Entry powers should be conferred in primary legislation

1.31 Powers to enter and search should be conferred by an Act of Parliament, not in subordinate legislation. However, the Attorney-General's Department considers that the inclusion of such powers in subordinate legislation may be more readily considered appropriate where:

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13 Evidence, p 9.

14 Submission No 9, p 2 (Acting Privacy Commissioner).

15 Submission No 9, p 2 (Acting Privacy Commissioner); Submission No 17, p 10 (Attorney-General's Department).

- the parent legislation makes express provision for the creation of powers under regulation;
- the instructing Department can demonstrate that the objectives of the parent legislation will be frustrated unless such powers are created under legislation (eg, there are rapidly changing circumstances); or
- the proposed provisions comply with all other requirements of Commonwealth criminal law policy.[16]

Proportionality

1.32 A power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required.

1.33 In considering whether to grant such a power, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two – in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases.

Consistency

1.34 The criteria which individuals, groups and organisations must satisfy before they are allowed to enter and search should be consistent across all jurisdictions. Rights should not be inviolate in one jurisdiction but capable of being violated in another.

1.35 Consistency should be achieved by ensuring that all entry and search provisions conform to a set of principles or guidelines. Where particular provisions are not consistent with these guidelines, their inconsistency should be properly justified, and subject to periodic review in the long term.

Principles governing the authorisation of entry and search

Consent

1.36 Legislation should authorise entry onto, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory

16 Submission No 9, p 2 (Acting Privacy Commissioner); Submission No 17, p 10 (Attorney-General's Department).

instrument, or by providing for a penalty determined by a court for a failure to comply. Legislation should authorise entry onto premises in the absence of consent or a warrant only in situations of emergency or serious threat.[17]

1.37 Consent should, therefore, be a first prerequisite for entry to premises. While such a provision might seem redundant – simply stating the obvious – its inclusion enables legislation to address some related matters (for example, requiring those seeking entry by consent to produce an identity card, and dealing with situations where consent is withdrawn after a search has begun).[18]

1.38 Where legislation provides for entry and search with consent (or alternatively under a warrant) it should make clear that the consent must be a genuine, informed and ongoing consent, and it should impose no penalty or disadvantage if an occupier fails to co-operate in the search, or subsequently withdraws consent – requiring an occupier to co-operate is inconsistent with the idea of consent.[19]

1.39 Where legislation provides for entry and search, but does not contemplate the possibility of entry by force under warrant, then a refusal of entry should attract a penalty imposed by a court.

An implication of consent?

1.40 In principle, consent to an entry should be genuine, informed and explicit. There are two situations in which implied consent has been argued: entry to licensed or registered premises by inspectors to monitor compliance with any conditions in the licence or registration; and entry to the premises of a person in receipt of Government financial assistance (such as a payment of bounty), or who is required to pay a levy, in respect of any activity connected with premises.

1.41 However, simply because a person has received financial assistance from the Commonwealth, or is liable to pay a levy under legislation, it does not follow that that person has thereby consented to entry and search by officials seeking to monitor compliance with the legislation. No such implication of consent should be drawn unless those subject to entry and search in these circumstances were informed in writing in plain English about those powers when receiving the assistance or on becoming liable to pay the levy.

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17 Submission No 17, p 11 (Attorney-General's Department).

18 Evidence, pp 1-2 (Mr Alderson).

19 Office of Parliamentary Counsel, *Drafting Instruction No. 2 of 1999*.

1.42 Similarly, where a person has obtained a licence for, or registration of, premises, the possibility of inspection or monitoring must be made clear at the time of registration, or the licence must be made subject to a right to enter and search. In industries where registration is a prerequisite to participation, an argument based on implied consent is difficult to sustain.[20]

1.43 The OPC queries whether, in each of these situations, it may be appropriate to limit the times at which any power of entry may be exercised.[21]

Emergency or national security

1.44 As noted above, entry onto premises without consent may be reasonable in situations of emergency, serious danger to public health, or where national security is involved.[22] However, in such situations it is appropriate that a judicial officer, rather than a Minister or Departmental Secretary, should authorise that entry.

1.45 Where a statute applies different law or procedures to Australian residents or citizens and to non-citizens, the statute should clearly state this.

Impracticability

1.46 There may be circumstances in which it may be impracticable to obtain a warrant (even though warrants are now often obtained by telephone[23]). Therefore, some legislation makes special provision for the entry and search of some vehicles, ships or aircraft,[24] and for entry and search at certain locations (for example, by customs officers maintaining the integrity of national borders, or by investigators of air accidents seeking unhampered access to an accident site).

1.47 Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must, as soon as reasonably possible, then justify that action to a judicial officer.

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20 Submission No 9, p 7 (Acting Privacy Commissioner).

21 Office of Parliamentary Counsel, *Drafting Instruction No 5 of 1982*, para 7.

22 Submission No 9, p 2 (Acting Privacy Commissioner); Submission No 17, p 11 (Attorney-General's Department).

23 See *Crimes Act 1914 (Cth)* s 3R.

24 Submission No 17, p 11 (Attorney-General's Department). For example, *Crimes Act 1914 (Cth)* s 3T.

Entry under judicial warrant

1.48 In all other circumstances, entry onto premises should only occur where special judicial authorisation is first obtained (ie under a warrant). The power to issue warrants to enter and search premises should only be conferred on judges and magistrates (judicial officers); justices of the peace should not have this power, nor should a Minister or departmental officer.

1.49 Where a statute authorises an entry and search by permit or for monitoring purposes without prior judicial approval, it should provide for an appeal to a judicial officer.

Principles governing the choice of people on whom the power is to be conferred

1.50 A power to enter and search should be conferred only on those officials who are subject to obligations which make them accountable for the use and any misuse of the power. For example, government employees are subject to a range of accountability mechanisms which reduce the risk of abuse of their powers.[25] These mechanisms include internal disciplinary processes, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Privacy Act 1988* and the *Freedom of Information Act 1982*. Similar obligations should apply to any exercise of powers of entry and search by persons outside the public sector.

1.51 A power to enter and search should be conferred only on those officials who are of sufficient maturity to exercise it and who have received appropriate training. Legislation should not confer a power to enter and search on a recipient categorised simply as 'a person' or as a member of a particular Department or organisation. Appropriate limitations might be by reference to the attributes, qualifications or training which such a person should possess, or by reference to such persons as the holders of nominated offices or positions.

1.52 The power to authorise a person to exercise an entry power should only be exercisable by a senior officer at the level of a Departmental Secretary or equivalent, and there should be monitoring of the exercise of this power. Any authorisation should be in writing.

1.53 A power to enter and search should not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option.

25 Submission No 17, p 4 (Attorney-General's Department).

Principles governing the extent of the power granted

1.54 The extent of a power to enter and search will vary with the circumstances applicable, but the powers of entry and search given to the Australian Federal Police (AFP) under the *Crimes Act 1914* should be seen as a 'high water mark'.[26] Officials in other organisations might be given lesser powers, but greater powers should be conferred only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny. In principle, the powers given to those enforcing the civil law should not impose greater incursions on an individual's liberties than the powers given to those charged with investigating breaches of the criminal law.

1.55 Officials should be given no greater power to enter and search premises than is necessary to carry out their duties.

Principles governing the kinds of matters which might attract the grant of the power

1.56 The power to enter and search can properly be conferred in relation to both civil and criminal matters, but not as a matter of course, and only with provision for due process.

1.57 It is appropriate to grant a power of entry and search to assist in the investigation of serious crime where the investigation is genuine and has a reasonable chance of success.

1.58 It is appropriate to grant a power of entry and search to assist in the gathering of evidence to support a prosecution for a serious offence where the evidence sought is of significance and there is a reasonable chance that it will be found on the premises.

1.59 It is appropriate to grant a power of entry and search to determine whether a person has complied with legislation under which that person has accepted a commercial benefit, subject to being monitored by entry and search.

1.60 It is appropriate to grant a power of entry and search to determine whether a person has complied with legislation which imposes a commercial levy in relation to a serious matter, in circumstances where the legislation provides for this in specific terms.

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26 Evidence p 103 (Ms Hampel QC). See also Evidence, p 320 (Mr Taylor).

1.61 It is appropriate to grant a power of entry and search to monitor civil matters which are serious, cannot otherwise be checked, and where the powers are used with maturity and are proportionate to the benefit gained.

Principles governing the manner in which the power to enter and search is exercised

1.62 The power of entry and search should be carried out in a manner consistent with human dignity and property rights.

1.63 As a general rule, entry and search powers should be exercised during reasonable hours and on reasonable notice, unless this would defeat the legitimate purpose to be achieved by the exercise.[27]

1.64 Where entry and search is likely to involve force or physical interference with people and their property, it is preferable that this power be exercised only by, or with the assistance of, police officers. If such a power is to be granted to people other than police officers in such circumstances, their maturity, training and experience should be comparable to that of the AFP.[28]

1.65 In principle, an officer exercising a power of entry must use no more force than necessary. Forced entry should only be used where entry has been demanded and refused, or in critical circumstances (for example, where it is believed that if entry is not gained immediately evidence will be tampered with or destroyed).[29]

1.66 In exercising a power of entry, an officer should be required to show the occupier an identity card which incorporates a recent photograph of that officer.

1.67 Entry and search of premises, especially if carried out with the authority to use force, should be recorded on video or audio tape, unless this is impractical in all the circumstances.[30]

Principles governing the provision of information to occupiers

1.68 The occupier of premises which have been entered and searched should be:

- given a copy of any relevant warrant;

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27 Submission No 9, p 3 (Acting Privacy Commissioner).

28 An example was given of an RSPCA officer in Victoria who exercised a lawful power to enter premises: as his law enforcement role was not adequately recognised, he was challenged and shot by the occupier: Evidence, p 320 (Mr Taylor).

29 Submission No 28, p 2 (Commonwealth Director of Public Prosecutions).

- informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities under the relevant legislation; [31] and
- given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search.[32]

These requirements should be waived only where circumstances are critical, or where an official is threatened with violence, or where it is absolutely impractical to follow them.

1.69 Legislation conferring a power to seize documents or other articles should provide:

- that any material seized be itemised;
- that the occupier and any others affected be entitled to a copy of that itemised list and copies of any business or personal records seized;
- that the occupier and any other persons affected be entitled to receive copies of any video or audio tape recordings made, or transcripts of those recordings, within 7 days;
- a procedure for dealing with disputed seizures; and
- a time limit for the return of any material seized.

Principles ensuring that people carrying out entry and search are protected

1.70 Where people enter and search premises under a power that accords with the principles set out in this Report, and exercise that power appropriately and in accordance with due process, they are entitled to do so without being subject to violence, harassment or ridicule, and are entitled to the protection of the law and to respect as persons carrying out their duty on behalf of the community.

30 Submission No 28, p 2 (Commonwealth Director of Public Prosecutions).

31 The Australian Federal Police currently provides occupants with a document headed 'Rights of Occupiers'. In a similar manner, the Australian Taxation Office explains to taxpayers the legal context and limits of its rights of entry, its procedures for the exercise of those provisions, and the rights and obligations taxpayers have: Evidence, pp 82-3 (Mr Williamson); Submission No 10, p 4 (Australian Taxation Office).

32 Submission No 28, p 2 (Commonwealth Director of Public Prosecutions).

Other general principles

1.71 Each agency which exercises entry and search powers should maintain a centralised record of all occasions on which those powers are exercised, [33] and should report annually to the Parliament on the exercise of those powers.[34]

Conclusions

1.72 Entry powers may be necessary in certain circumstances for the effective administration of the law, but they remain inherently intrusive. In the words of Jacobs J in *Tran Nominees Pty Ltd v Scheffler*:

> There is, I think, no doubt about the guiding principles. The issue and execution of a warrant to enter, or to search and seize, or both, represents an invasion of the liberty of the subject, which was jealously protected by the common law, and the need for protection against abuse or unauthorised invasion is still a guiding principle when the authority to enter or search or seize is derived from statute …[35]

1.73 Such protection can be provided in a number of ways, some of which are discussed in Chapter 4 of this Report. However, one basic form of protection is to ensure that entry powers are drafted according to a set of guidelines or a "clearly enunciated legal framework".[36]

1.74 This legislative framework or set of principles should apply both to proposed new entry provisions and to existing provisions. The Committee notes that some agencies have already adopted this approach. For example, the Australian Customs Service conceded that its pre-1995 provisions "lacked appropriate safeguards" in the discretions that they provided:

> Distinctions which might have been made at one time to justify separate standards in legislation for Customs Warrants cannot now be made. It is now generally accepted that Customs Warrants ought to be consistent with those issuable to police authorities under the criminal law and involve application and consideration by a judicial officer.[37]

1.75 This legislative framework of principles should be more than indicative; it should be contained in stand-alone legislation based on the current guidelines and the

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33 Submission No 28, p 2 (Commonwealth Director of Public Prosecutions).

34 Such reporting requirements are currently imposed on the Health Insurance Commission under section 42(3A)(c) of the *Health Insurance Commission Act 1973*.

35 (1986) 20 A Crim R 287 at 294.

36 Evidence, p 125 (Mr McLeod).

37 Submission No 16, p 3 (Australian Customs Service).

principles set out above, and taking as its starting point the search warrant provisions in the *Crimes Act 1914*.

1.76 As one witness put it:

> The guidelines that the Attorney-General's Department have are generally good … but they are guidelines only and they are policy only. They are subject to change … without there being the need to legislate. I would like to see these guideline principles enshrined in legislation so that there must be proper parliamentary debate and voting on changing the principles in order to introduce legislation that intrudes on a person's rights to a greater extent than these principles.[38]

1.77 The Committee considers that the entry and search powers available to the AFP under the *Crimes Act 1914* should constitute the 'high water mark' for such powers generally. Lesser powers may be conferred on other individuals or agencies, but powers greater than those available to the AFP should only be conferred in exceptional or critical circumstances, and the reasons for conferring such powers should be made explicit both in the bill and in the Explanatory Memorandum accompanying it. Where more expansive entry provisions have been conferred, they should be subject to periodic long term review.

1.78 Finally, given the generally intrusive nature of powers of entry and search, the Committee considers that their use should be recorded and reported on in the way that is currently required of the Health Insurance Commission (HIC).

Recommendations

1. The Committee recommends that all entry and search provisions in legislation including bills should have to conform with a set of fundamental principles rather than long-standing practice. These principles should be enshrined in stand-alone legislation based on the principles set out in this Report. This legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914 (Cth)*.

2. The Committee recommends that the entry and search powers available to the Australian Federal Police under the *Crimes Act 1914 (Cth)* should constitute the 'high-water mark' for such powers generally. By law, the powers of entry and search available to any other agency, person or organisation may be less than these, but should only exceed the powers available to the Australian Federal Police in exceptional and critical circumstances.

38 Evidence, p 299 (Ms Hampel QC).

3. The Committee recommends that each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.

CHAPTER 2

THE PURPOSE OF ENTRY AND SEARCH PROVISIONS

General purpose of entry and search provisions

2.1 This Chapter considers the purpose underlying entry and search provisions.

2.2 In general terms, entry powers are often included in legislation which imposes obligations on people, and in the legislation which establishes regulatory or investigatory agencies. These powers are included to assist such agencies in undertaking their statutory duties (for example, to check that statutory obligations have been complied with). Where necessary, these powers are also included to assist agencies to enforce the provisions of their legislation (for example, through prosecution). Specifically, such powers assist agencies in gathering information, documents or other relevant things.[1] In this respect, readers are referred to the Committee's *Eighth Report of 1998 – The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996.*

2.3 Entry powers provide agencies with a valuable means of gathering physical evidence and related material. They are often accompanied by an additional power to require the provision of information. A number of agencies have still wider information gathering powers, including the power to compel answers to questions or the production of documents,[2] whether or not they may be incriminating or otherwise privileged. The exercise of these powers should also be reviewed, but detailed consideration of such powers is beyond the terms of reference of this current inquiry.

2.4 Not surprisingly, most agencies contend that search and entry powers are essential to their effectiveness. For example, the Australian Quarantine and Inspection Service (AQIS) told the Committee that its "credibility as a regulator" ultimately rested on its ability to take strong enforcement action where necessary, and, in that context, "search and entry powers are essential where efforts at encouraging voluntary compliance fail and … there is a need to deter non-compliant behaviour".[3] The National Crime Authority (NCA) stated such provisions were "essential to the effective implementation of Commonwealth regulatory and fiscal legislation and to investigating criminal offences".[4] Similar views were put by other agencies,

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1 Williams, DJP, *Investigations by Administrative Agencies*, (Law Book Co Ltd), Sydney, 1987, p 1.

2 For example, Evidence, p 258 (Mr Longo). See also *Trade Practices Act 1974* s 155.

3 Evidence, p 52 (Mr O'Connor).

4 Submission No 11, p 1 (National Crime Authority).

irrespective of whether the aim of an entry and search had civil or criminal objectives.[5]

Gathering evidence and monitoring compliance

2.5 The Attorney-General's Department pointed out that entry powers were included in legislation for two main purposes: to enable the gathering of evidence of an offence, and to enable the monitoring of compliance with a statute.[6] What any particular entry power should allow ought be influenced by the nature of the objectives pursued. The extent of the power conferred should be determined only after all the outcomes likely to flow from the grant were considered and balanced against each other.

2.6 Traditionally, the police and other investigatory bodies have been authorised to enter premises and search for evidence where they have information that an offence may have been committed. This power is usually exercisable only with the consent of the occupier, or by virtue of a warrant obtained from a judicial officer.

2.7 However, the activities of modern government (particularly in providing grants and subsidies, and in allowing revenue-related concessions) have now resulted in the inclusion of provisions authorising entry and search for the further purpose of monitoring compliance with legislation:

> Monitoring warrants are easier to obtain than the traditional warrant because you do not have to actually suspect an offence; all you have to show is that in order to monitor compliance with this legislation – say customs legislation that allows for subsidies for certain goods – you can go in and audit the books of the company. Those warrants are easier to get, but the trade-off is that the powers allowed under them are more limited. You are only allowed to go in and audit and inspect and check: you are not allowed to go in and start seizing things or arresting people on the premises as though you were a police officer investigating offences.[7]

2.8 A number of agencies exercise entry powers for both purposes. They state that they recognise the distinction between the two and act differently depending on the purpose they are pursuing. For example, the ATO states that it distinguishes between its access powers, which it uses for the purpose of ascertaining assessable income, and its information-gathering powers, which it uses when contemplating a prosecution:

> We have had a lot of court cases of recent times and all those cases have acknowledged the need for the commissioner's access powers … what the cases

5 For example, Submission No 4, p 3 (National Registration Authority); Submission No 25, p 1 (Australian Maritime Safety Authority).

6 Evidence, p 2 (Mr Alderson).

7 Evidence, pp 2-3 (Mr Alderson).

> say is that you have to have regard to the purpose for which our access powers are conferred. The purpose is the obligation to pay tax in accordance with the law and the collection of that tax …
>
> We have worked very hard with the tax profession and with the community to try to develop a rapport that allows us to go on the task of ascertaining assessable income in a way that will function differently from the criminal law function. We think that suggestions that every time we use our access powers we are looking from a criminal perspective are just counterproductive. The fact is that ATO officers do not use access powers for prosecution purposes.
>
> In the case of serious offences or fraud, a search warrant procedure is invariably followed … Usually when that happens, we do it in conjunction with the Australian Federal Police. [8]

2.9 For other agencies, differences in purpose are explicitly recognised in the relevant legislation. For example, under the *Industrial Chemicals (Notification and Assessment) Act 1989* the entry powers exercisable by the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) to enable compliance monitoring are covered by a separate statutory provision from those which permit entry for the gathering of evidence.

2.10 Similarly, the offence-related warrant provisions available to the AQIS under the *Quarantine Amendment Bill 1998*, the *Export Control Act 1982*, the *Imported Food Control Act 1992* and the *Australian Meat and Livestock Act 1997* are all closely based on the model warrant provisions of the *Crimes Act 1914*. AQIS also has access to monitoring warrant provisions under some of its legislation if it satisfies a magistrate, by information on oath, that an authorised officer should have access to premises for deciding whether to exercise a power under the legislation, or for finding out whether the legislation has been complied with.[9] AQIS reports that, in fact, it has not yet had recourse to a monitoring warrant "as generally entry and search is by consent".[10]

2.11 Interestingly, most legislation dealing with compliance monitoring still makes provision for entry under warrant where entry with consent cannot be obtained.

2.12 For some organisations, a distinction in purpose gives rise to a distinction in effect. For example, the Commonwealth Director of Public Prosecutions (DPP) stated that where criminal sanctions were likely – for example, where criminal offences were alleged as the basis for the issue of a warrant – then such a warrant should be issued by a judge or magistrate. Where administrative penalties or procedures were involved

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8 Evidence, p 29 (Mr D'Ascenzo).

9 Submission No 19, pp 9-10 (Australian Quarantine and Inspection Service).

10 Submission No 19, p 17 (Australian Quarantine and Inspection Service).

– for example, to ensure compliance with revenue legislation, the warrant might be issued by an officer of the agency.[11] A similar approach was suggested by the Ombudsman.[12]

2.13 Ms Felicity Hampel QC on behalf of Liberty Victoria drew a similar distinction:

> So far as anything criminal or regulatory – that is, exposing somebody to some sort of criminal or statutory sanction – I think that the powers of entry and search have to be either by consent or under a form of compulsion like a warrant. So far as monitoring is concerned, where you have, say, a self-regulation regime, I think there is a proper basis for saying there are circumstances where, absent consent, it still may be appropriate to have a power of entry without warrant. But that would have to be the sort of power of entry for audit purposes, to check the books to see whether you are complying with the statutory regime and, if it is not by consent, I would say it would have to be on reasonable notice and the refusal to consent or the refusal to allow entry on reasonable notice would then be a springboard perhaps for an application for a warrant …[13]

2.14 Where entry is sought for a purpose such as monitoring compliance or to audit "there should not be an unfettered right of entry without notice and for a general purpose". Observing that there were two bases upon which authorities might enter premises for audit purposes – either to resolve a suspicion of breach, or to carry out a routine inspection where there is self-regulation – Ms Hampel QC suggested that, in either case, the authorities ought to enter only during business hours and with consent, or on reasonable notice. The circumstances of each case would determine the 'reasonableness' of the notice.[14] For example, seeking access to voluminous documentation from a large corporation on a day's notice might well be unreasonable. In summary, entry to monitor compliance could occur by consent at any time within ordinary operating hours or upon reasonable notice, the reasonableness depending on the circumstances of each case.

2.15 Some statutes confer powers of access to information on non government officials for defined purposes. For example, company auditors have a right of access to company records for the purposes of conducting an audit, and must report certain breaches of the law to the Australian Securities and Investments Commission (ASIC). The Official Receiver in Bankruptcy is entitled to access to the premises and books of a bankrupt for the purposes of the bankruptcy legislation.

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11 Submission No 28, p 2 (Commonwealth Director of Public Prosecutions).

12 Evidence, p 309 (Mr Taylor).

13 Evidence, pp 304-5 (Ms Hampel QC).

14 Evidence, p 305 (Ms Hampel QC).

2.16 Under State law, RSPCA inspectors are entitled to access to premises for the purposes of legislation which prohibits cruelty to animals. And under the *Workplace Relations Act 1996*, certain trade union officials are entitled to enter premises where work is being performed either to investigate suspected breaches of that Act to hold discussions with employees. The principles set out in this Report should apply to non-government officials who exercise statutory powers of entry and search as well as to government officials.

2.17 Where authorities misuse their powers, issues of fairness arise. This matter is dealt with in further detail in Chapter 4 of this Report.

Conclusions

2.18 The Committee accepts that search and entry provisions may be appropriate to enable the gathering of intelligence or evidence of offences, and to monitor compliance with some statutes. In either case, the provisions should conform with the general principles set out in Chapter 1 of this Report, and, unless there are exceptional circumstances, entry should only be by consent or on production of a warrant.

Recommendation

4. The Committee recommends that the principles set out in Chapter 1 of this Report should apply to both government and non-government agencies, persons and bodies which seek to enter and search premises by virtue of statutory authorisation.

Entry by trade union officials

2.19 Submissions from Master Builders Australia (MBA) and the Australian Chamber of Commerce and Industry (ACCI) drew attention to the right of trade unions under the *Workplace Relations Act 1996* to enter premises where work is being performed, either to investigate suspected breaches of the Act or to hold discussions with employees.[15]

Current provisions under the Workplace Relations Act

2.20 Right of entry by union officials is comprehensively covered by the Workplace Relations Act. Currently, under Division 11A of Part IX of that Act, a

15 Submission No 6 (Australian Chamber of Commerce and Industry); No 26 (Master Builders Australia).

union official who holds a permit under the Act may only enter premises, on 24 hours notice, during normal working hours, and may only hold discussions with employees during their meal time or other breaks. The union official is not entitled to enter any part of the premises that is used for residential purposes, and is required to act in a way which does not intentionally hinder or obstruct any employer or employee in their work.

Criticisms of the current provisions

2.21 MBA contended that the current entry provisions were "far too general and therefore open to abuse".[16] Specifically it submitted that entry powers in its industry were used to harass employers, or as 'fishing expeditions' when no real breach of an Act or award was suspected, or to determine whether non-union members were working on a particular site.

2.22 MBA suggested a number of amendments to the exercise of this right. Specifically, it proposed that:

- an application for a permit to enter should disclose whether the applicant had previously had a permit revoked;
- in deciding whether to grant a permit application, the Registrar should have to be satisfied that the applicant was a fit and proper person;
- the Act should specify that a permit may be revoked on the ground that the holder has used it for purposes other than those intended by the Act;
- in revoking a permit, a Registrar should be required to specify a period of time during which the holder may not be issued with a further permit;
- the Employment Advocate should have power to apply to revoke a permit;
- the Act should require a permit holder who is investigating a suspected breach of the Act to specify to the employer the nature of the breach and the grounds on which that suspicion has been formed;
- the Act should restrict the access of a permit holder to those documents which contain details in relation to union members or other persons who have specifically authorised the permit holder to act on their behalf;
- a notice of intention to enter premises should specify a day on which entry is to be exercised, and the notice should not be valid on any other day;

16 Submission No 26, p 4 (Master Builders Australia).

- where a right of entry is to be exercised to hold discussions with employees, the notice of intention should specify the time at which it was intended to hold those discussions, and the notice should not be valid at any other time; and
- where a permit holder exercises a power to require an employer to produce documents, the Act should permit the documents to be produced at the place where they are kept, rather than require them to be produced at the place at which the employees work.

2.23 MBA acknowledged that disputes in the building and construction industry over the exercise of the union right of entry were "limited", and that, in principle, it had no objection to union officials having the power to enter premises where they believed that their members were being deprived of conditions to which they were entitled. However, it stated that entry provisions were "abused in times of industrial disputation where they are used for purposes other than those which are valid and prescribed by the Act".[17]

2.24 Broadly similar concerns were put by ACCI. Observing that trade union right of entry was "often a contentious issue", ACCI suggested that the power be qualified by:

- a provision enabling employers to direct the movements of union officials on their premises, for example, having regard to occupational health and safety concerns; and
- a provision restricting the activities of union officials to those relevant to the members request.

Support for the current provisions

2.25 The Construction, Forestry, Mining and Energy Union (CFMEU) responded to these proposals by noting that:

- the entry powers in the *Workplace Relations Act 1996* were more limited than the powers previously contained in the *Industrial Relations Act 1988*;
- under the Act, an entry permit may be revoked on the ground that the holder intentionally hindered or obstructed an employer or employee or otherwise acted in an improper manner;

17 Submission No 26, p 6 (Master Builders Australia).

- to date, no applications to revoke CFMEU permits had been proceeded with, either by the MBA or any of its members;
- the MBA submission had failed to make out any need for the amendments proposed, or to provide any evidence that they had been abused; and
- any further limitation of union entry powers would contravene Article 11 of the International Labour Organisation Convention 87 on Freedom of Association and Protection of the Right to Organise.[18]

Conclusions

2.26 With regard to the right of trade union officials to enter and inspect premises for the purposes set out in the Workplace Relations legislation, the Committee notes that it received evidence on this issue from a limited range of witnesses involved in the building industry. The Committee acknowledges that this matter is regulated by statute, and understands that the issue is currently before the Parliament as part of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. No evidence was put before the Committee to suggest that unions should not have a right to enter, but some dissatisfaction was expressed with the way in which the current provisions had operated on some occasions. Where practical difficulties such as these arise, they are better addressed through a voluntary code of practice developed between relevant employers and employees rather than through legislation.

Recommendation

5. The Committee recommends that the right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of this Report.

18 Submission No 31, p 1 (Construction, Forestry, Mining and Energy Union).

CHAPTER 3

THE CONSISTENCY OF RIGHT OF ENTRY PROVISIONS

Introduction

3.1 This Chapter examines the consistency of entry and search provisions in Commonwealth legislation. Before moving to a more detailed examination of these provisions, a number of preliminary points should be made. First, to comprehensively set out all search and entry provisions in Commonwealth legislation is beyond the resources of the Committee, which has drawn on information provided by the Commonwealth Ombudsman, the Acting Privacy Commissioner and the Commonwealth Attorney-General's Department in preparing the material in this Chapter. The Committee wishes to thank those organisations for this information.

3.2 Secondly, it should be noted that, in addition to Commonwealth provisions, there are numerous search and entry provisions in State and Territory legislation. Among other things, these provisions authorise:

- police in the ACT who reasonably suspect that a hawker is breaching the hawkers legislation to, without a warrant, "examine and search the person, pack or vehicle" of the hawker;[1]
- a Departmental inspector or member of the Victorian police to enter and search "at any time of the day or night … any place whatsoever at which there is good cause to suspect that stolen cattle have been slaughtered or are intended to be slaughtered";[2]
- a police officer or ranger in Tasmania to enter, at all reasonable times, without warrant, "any premises, conveyance or container" and search for documents or records "relating to trade in wildlife or other wildlife matters" or that appear to indicate that an offence has been committed;[3] and
- an authorised police officer in Queensland who reasonably suspects the commission of an offence against the second-hand dealers legislation to demand, "at any time by day or night" entry into "a dealer's premises or location where the business of a dealer is carried on and if admittance is

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1 *Hawkers Act 1936 (ACT)* s 24.

2 *Summary Offences Act 1966 (Vic)* s 30.

3 *National Parks and Wildlife Act 1970 (Tas)* s 42.

> refused or unreasonably delayed may use such force as is necessary to enter those premises or location".[4]

3.3 Given that the Committee's terms of reference are restricted to Commonwealth legislation, the consistency of related State and Territory provisions are beyond the scope of this inquiry, although the principles in this Report should apply to all legislation, Commonwealth or not. It is highly desirable that high and common standards of civil life and liberty apply throughout Australia.

3.4 Thirdly, the inclusion of search and entry provisions in any particular Commonwealth Act may raise an issue of policy – for example, it may be thought unnecessary that a particular Department or agency should have the right to exercise a right of entry. In accordance with its normal practice, the Committee does not propose to look at such policy considerations in relation to individual agencies in this Report.

The need for consistency

3.5 As noted in Chapter 1 of this Report, it is important that entry and search provisions should be as consistent as practicable across all agencies which exercise those powers. Greater consistency means that both officials and members of the public have some consistent expectation of what might happen during an entry and search.[5] Consistency here refers to consistency in the effect and application of provisions rather than merely consistency in their wording.

3.6 The need for consistency is, therefore, an issue for occupiers, who may otherwise find themselves subject to different procedures and obligations depending on the agency or the government which happens to be exercising its powers. It is similarly an issue for agencies exercising those powers as they may find themselves administering, and training staff in the administration of, quite different provisions. Noting that the ASIC had recently been given an extended range of functions and responsibilities under a number of different Acts, and exercised differing entry powers under some of those Acts, Mr Joseph Longo observed:

> [I]t makes sense that, in the day-to-day information gathering and enforcement and regulatory work that goes on, there is a single set of powers to operate from. So harmonisation is important, just from the point of view of efficiency and good administration. I think that is a worthy goal in itself …[6]

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4 *Second-hand Dealers and Collectors Act 1984 (Qld)* s 57

5 Submission No 8, p 8 (Commonwealth Ombudsman).

6 Evidence, p 268 (Mr Longo).

3.7 It should also be emphasised that consistency here means consistency with fundamental principles rather than with long-standing precedents. The long established existence of a power of entry in a particular form which does not conform with fundamental principles cannot be used to justify its continued use or extended use.

When inconsistency is justified

3.8 While consistency is a guiding principle, it should not be seen as absolute. There will obviously be occasions when a particular entry provision need not conform with the standard approach in every respect. For example, the general access power exercised by the ATO does not include a power of seizure, as this is not required by officers who are checking on the calculation of taxable income. However, the access power exercisable by the ATO under the sales tax law does include such a power as officers need to take goods to be analysed, tested and classified. Different powers are required because different functions are being performed.[7]

3.9 Similarly, the ATO's access powers under the child support legislation are exercisable only against employers. For the purposes of that Act, there is no need to have access to people's homes or businesses, but only to the employment records of employers to ensure that they were withholding the relevant amount of child support on behalf of custodial parents.[8]

Model provisions

Model search warrant provision

3.10 Evidence to the Committee suggested that Commonwealth search warrant provisions operated reasonably consistently.[9] As noted in Chapter 1, the Attorney-General's Department and the Office of Parliamentary Counsel examine proposed entry provisions against a set of Guidelines which have now been incorporated in *Drafting Direction No 2 of 1999*. This has led to the development of de facto model provisions which are used to assist in the drafting of new provisions.

3.11 The Attorney-General's Department told the Committee that the preferred model for search warrant provisions is Part 1AA of the *Crimes Act 1914,* subject to

7 Evidence, p 37 (Mr D'Ascenzo).

8 Evidence, p 37 (Mr Forsyth).

9 For example, Evidence p 326 (Mr Rozenes QC).

the proviso that not all of the powers and restrictions in Part 1AA may be appropriate where search warrants are enforced by officers other than police.[10]

3.12 The characteristics of the preferred model for search warrant provisions are:

- where persons other than police officers are authorised to execute a search warrant, the power to issue the warrant should only be conferred on a magistrate;
- the officers empowered to apply for the warrant should be the same officers who may execute it;
- the warrant must show on its face that the magistrate was satisfied by information on oath that there were reasonable grounds to suspect that, in the premises named in the warrant, there were the things described in the warrant which would afford evidence of a Commonwealth offence identified in the warrant;
- the 'things' to be searched for need not be itemised or specifically described, but the thing or class of thing must be delimited with reasonable certainty;
- the powers that may be exercised (including any power of seizure) should be set out in the warrant provision and in the warrant itself – documents to which legal profession privilege applies are not subject to seizure; and
- there should be an upper limit of 60 days on the retention of seized items, subject to extension in appropriate cases – a longer period may be acceptable if a clear need can be demonstrated (eg a retention period of 180 days was accepted in the case of the Customs Amendment Bill 1998 (No 3)).

3.13 The AFP told the Committee that, in addition to the model search warrant provisions in Part 1AA of the Crimes Act, it also regularly used:

- the four search warrant provisions in the *Proceeds of Crime Act 1987;*[11]
- section 22 of the *National Crime Authority Act 1984*, which enabled a member of the NCA to apply for a warrant to search for things relevant to an NCA special investigation;

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10 Submission No 17, p 7 (Attorney-General's Department).

11 Section 36 (searches for tainted property); section 71 (searches for property-tracking documents); and sections 42 and 72 (searches for tainted property and property-tracking documents in relation to foreign offences).

- sections 14 and 31 of the *Extradition Act 1988*, which enabled a magistrate to issue a search warrant when a provisional arrest warrant had been issued in Australia or an extradition request had been received; and
- section 38C of the *Mutual Assistance in Criminal Matters Act 1987*, which provides for search warrants to obtain evidence at the request of a foreign country.

3.14 However, it observed that more than 50 other Commonwealth Acts also contained search warrant provisions:

> Many of these provisions are dissimilar in terms to the Part 1AA search warrant provision in the Act. In the second reading speech given at the time the new Part 1AA was debated it was noted that existing laws were to be carefully examined and brought into line with the provisions proposed in [the] bill. It [was] intended to ensure that other officers, particularly those not subject to the training, discipline and accountability of members of a police force, have no greater powers than police. Until that review [was] completed, those laws which relate to the investigation of specific offences against Commonwealth laws such as customs, quarantine and fisheries offences [were to] continue to operate for police and inspectors appointed under those acts."
>
> Since the new Part 1AA has been enacted the review of existing laws has been ongoing, with some specific search and seizure laws now changed to reflect the approach established in the new Part.[12]

3.15 Part 1AA was included in the Crimes Act in 1994. It would greatly aid consistency in this area of the law if the continuing review of search warrant provisions in other legislation were now to be finalised.

Model monitoring warrant provision

3.16 The Attorney-General's Department told the Committee that the preferred model for monitoring warrant provisions has traditionally been Part 3 of the *Imported Food Control Act 1992*. However, Part 8 of the ACIS Administration Bill 1999, which was more clearly structured and did not contain some of the minor anomalies of the other provision may now become the preferred precedent.

3.17 The characteristics of the preferred model for monitoring warrant provisions are:

- only a magistrate should be empowered to issue a monitoring warrant;
- the magistrate should be empowered to issue a monitoring warrant where he or she is satisfied that it is reasonably necessary for an authorised officer

12 Submission No 12, p 3 (Australian Federal Police).

to have access to the premises to monitor compliance with the relevant legislation;

- monitoring warrant provisions should only allow entry to premises where the justification for monitoring is demonstrable;
- the powers exercisable under a monitoring warrant may include the power to enter premises and to search for relevant records – additional powers should be limited to those for which there is a demonstrable need in the interests of effective monitoring;
- the power to enter vehicles, vessels or aircraft should be subject to the same grounds as powers to enter premises; and
- the power to seize evidence of an offence found in the course of executing a monitoring warrant should only be available where an inspector or authorised officer has reasonable grounds to believe that the evidence would be lost, destroyed or tampered with by the time a search warrant was obtained.[13]

3.18 The Acting Privacy Commissioner has examined the more significant entry and search provisions in Commonwealth legislation, categorised them by reference to their general purpose, and analysed their consistency within each of these categories. The following paragraphs draw on this analysis.

Legislation for revenue collection

3.19 Entry powers in this broad area are generally exercisable by officers administering taxation and customs law. The Acting Privacy Commissioner observed that "the safeguards attaching to the exercise of the powers vary significantly".[14] He drew particular attention to the various provisions conferring power on the Commissioner for Taxation, instancing section 263 of the *Income Tax Assessment Act 1936*, and concluded:

> Such provisions concern me, in that they do not contain a similar level of privacy protection as those requiring consent or a warrant. The protection of public revenue is vitally important to the national polity and civic life. So too, however, is the protection of the individual's right to privacy.[15]

13 Submission No 17, p 8 (Attorney-General's Department).

14 Submission No 9, p 4 (Acting Privacy Commissioner).

15 Submission No 9, p 4 (Acting Privacy Commissioner).

3.20 The entry powers of the Australian Taxation Office (ATO) are considered further at para 3.36.

3.21 With regard to powers under customs law, the Australian Customs Service (ACS) told the Committee that it now recognised that, prior to 1995, its powers had "lacked appropriate safeguards" in the discretions given to Customs officers. Following an extensive review, its powers were amended in 1995 to make them consistent with other search warrant provisions in Commonwealth law such as those arising under the *Crimes Act 1914*:

> Distinctions which might have been made at one time to justify separate standards in legislation for Customs Warrants cannot now be made. It is now generally accepted that Customs Warrants ought to be consistent with those issuable to police authorities under the criminal law and involve application and consideration by a judicial officer.[16]

3.22 While the Acting Privacy Commission did not examine all Regulations dealing with access to property and revenue collection, those that were examined "all dealt with formal or incidental matters, rather than conferring powers".[17]

Legislation covering revenue disbursement

3.23 Typically these powers permit entry to registered premises or non-residential premises on which articles are stored in respect of which bounty had been claimed or was likely to be claimable. The only explicit restriction on the exercise of these entry powers was that entry must occur at reasonable times. Some provisions specified that an authorised person might only enter with consent or, in certain circumstances related to the purposes of the Act, with a warrant issued by a Justice of the Peace.[18]

Conservation and environmental legislation

3.24 Most of the provisions in this category appeared to be "consistent, fair and to offer adequate protection of privacy rights".[19] Most of the powers (which included powers to enter not only land and buildings but also ships and aircraft) required consent or a warrant issued by a magistrate or a justice of the peace. Moreover, the Acting Privacy Commissioner concluded that "it is unlikely that issues of personal

16 Submission No 16, pp 2-3 (Australian Customs Service).

17 Submission No 9, p 5 (Acting Privacy Commissioner).

18 Submission No 9, p 5 (Acting Privacy Commissioner).

19 Submission No 9, p 5 (Acting Privacy Commissioner).

privacy would arise in this area unless documents containing personal information were to be seized".[20]

Social benefit and welfare legislation

3.25 It was suggested that "most of these provisions are unexceptional – they require consent or a warrant before entry".[21] However, section 91.1 of the *Aged Care Act 1997* gave an 'authorised officer' power to enter premises to monitor compliance with the occupier's consent. However section 91.1(4) provides that an approved provider who does not consent to an entry, or who withdraws their consent, may not be complying with their statutory responsibility to co-operate. Failure to comply with that statutory responsibility might result in a sanction being imposed on the occupier.

3.26 The Acting Privacy Commissioner notes that the objects of this Act are to promote high quality care and accommodation for, and to protect the health and well-being of, recipients of aged care services. Thus, there may be arguments which justify the compulsory inspection of premises. However, for reasons of fairness, "a more transparent process would be preferable".[22]

Legislation for public health and safety

3.27 The powers in this category were conferred for a variety of reasons, from monitoring air safety to preventing medical fraud and overservicing. Most of the provisions are consistent with the guidelines "in that they require the consent of the occupier or a warrant prior to entry" and "where this standard is not met, it is generally for well justified public interest reasons, to prevent imminent threats to life, health or safety" (eg *Space Activities Act 1999* s 99; *Road Transport Reform (Dangerous Goods) Act 1995* ss 18, 20 and 32).[23] Where particularly sensitive material in involved (for example, medical records), "suitable provisions apply".

3.28 However, concern was expressed that a number of Regulations in this area grant powers of entry (for example, Navigation (Marine Casualty) Regulations (No 257 of 1990), regs 12, 26.

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20 Submission No 9, p 6 (Acting Privacy Commissioner).

21 Submission No 9, p 6 (Acting Privacy Commissioner).

22 Submission No 9, p 6 (Acting Privacy Commissioner).

23 Submission No 9, p 6 (Acting Privacy Commissioner).

Occupational and commercial legislation

3.29 Powers of entry under the legislation in this category are exercisable for a diverse range of purposes, from the assessment and collection of levies, to monitoring compliance with workplace agreements. It is suggested that "most of the provisions contain appropriate safeguards, with a requirement for consent or a warrant".[24] A number of provisions are said to draw a distinction between premises registered under legislative instruments and other premises, with a right of entry without consent to the former, provided the premises are not residential. It is also suggested that this is a category in which issues of personal privacy are unlikely to arise, unless items containing personal information are seized.

3.30 In at least one instance, powers of entry are contained in Regulations rather than in primary legislation.[25]

Law enforcement

3.31 Most of the provisions in this category are also said to be "reasonable and necessary" requiring consent or a warrant except in emergency situations.[26] Provisions which do not conform include:

- sections 25 and 27 of the *Australian Security Intelligence Organization Act 1979*, where warrants are issued not by a court but by the Minister on receipt of a request from the Director-General; and
- section 27E of the *Financial Transaction Reports Act 1988*, where a written access notice may be given to a cash dealer or other defined recipient by the Director.

3.32 In each case, the Acting Privacy Commissioner observes that, while certain limits and safeguards apply "it is a matter of some concern that no judicial oversight applies".[27]

Defence and national security

3.33 It is suggested that all of the provisions in this category "contain appropriate safeguards and appear consistent and fair".[28]

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24 Submission No 9, p 7 (Acting Privacy Commissioner).

25 Wool Marketing Regulations, reg 23.

26 Submission No 9, p 7 (Acting Privacy Commissioner).

27 Submission No 9, p 7 (Acting Privacy Commissioner).

28 Submission No 9, p 7 (Acting Privacy Commissioner).

Miscellaneous legislation

3.34 It is suggested that, with one or two exceptions, most of the provisions in this category are also "reasonable and consistent".[29] Concerns are expressed about:

- section 251 of the *Migration Act 1958*, which provides very broad powers of search and entry of premises with few, if any, safeguards; and
- section 14 of the *Ombudsman Act 1976* and section 155 of the *Trade Practices Act 1974*, which both provide broad information-gathering powers, whereas section 68 of the *Privacy Act 1988* requires consent or a warrant before officers of the Office of the Privacy Commissioner can enter or search premises.

Issues of inconsistency

3.35 The Acting Privacy Commissioner concludes that "most statutory provisions granting powers of search and entry appear to be fair and consistent".[30] However, there are areas of concern. These areas are addressed below.

Powers of the Australian Taxation Office

3.36 Concern about the apparently anomalous nature of the provisions administered by the ATO was expressed by the Acting Privacy Commissioner, the Attorney-General's Department and Liberty Victoria.[31]

3.37 The 'model' ATO access provision is section 263 of the *Income Tax Assessment Act 1936*. This section provides, in part, that the Commissioner of Taxation, or any authorised officer, "shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers". The other access provisions administered by the ATO[32] are

29 Submission No 9, p 8 (Acting Privacy Commissioner).

30 Submission No 9, p 8 (Acting Privacy Commissioner).

31 Submission No 1, p 1 (Attorney-General's Department); Evidence p 102 (Ms Hampel QC).

32 The more significant of these include *Child Support (Registration and Collection) Act 1988* s 61; *Customs Act 1901* ss 91 and 164AC; *Debits Tax Administration Act 1982* s 58; *Distillation Act 1901* s 60; *Excise Act 1901* ss 50(2), 78AD, 86, 87A and 87B; *Fringe Benefits Tax Assessment Act 1986* s 127; *Fuel (Penalty Surcharges) Administration Act 1997* ss 22, 23, 24, 27, 28, 29 and 30; *Petroleum Resource Rent Tax Assessment Act 1987* s 107; *Spirits Act 1906* s 22; *Stevedoring Industry Charge Assessment Act 1947* s 61; *Superannuation Guarantee (Administration) Act 1992* s 76; *Taxation Administration Act 1953* s 13F; *Taxation (Unpaid Company Tax) Assessment Act 1982* s 4.

generally similar to this provision, although there are differences that reflect "the different natures of the Acts and changes in drafting style and language".[33]

3.38 Notably, the ATO's general entry provisions are not conditional on obtaining any prior independent authorisation from a judge or magistrate. While the power is expressed widely, the ATO told the Committee that it is, in practice, subject to a series of explanatory documents, internal controls, review mechanisms and claims for legal professional privilege. These are discussed in more detail in Chapter 4.

3.39 Section 263 was reviewed by the Joint Committee of Public Accounts in 1993. Commenting on the "exceptional powers of access" afforded by that section, that Committee took the view that there was no identifiable reason why the ATO should have a status greater than any other enforcement body:

> While administrative practice may act as a check on unwarranted access to personal property, it does not provide any form of guarantee. The Committee considered it is therefore necessary to impose upon the ATO the same limitations on access as apply to other arms of government.[34]

3.40 Therefore, the Public Accounts Committee recommended that section 263 should be amended to require the ATO to show just cause before being granted a warrant by an appropriate judicial officer to access or enter the private property of a taxpayer without permission. Just cause might be shown by evidence of reasonable attempts by the ATO to gain information voluntarily, or by the ATO demonstrating that there were reasonable grounds for believing the revenue of the Commonwealth would be at risk if access were not obtained immediately.[35]

3.41 The then Privacy Commissioner strongly supported this view.[36]

3.42 The then government did not support the recommendation.

3.43 In response to these concerns, the ATO stated that the variation in the powers it held compared to those held by other authorities was justified because their purposes differed. Moreover, there were practical reasons for not requiring judicial oversight of the power. Specifically, the ATO said:

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33 Submission No 10, p 2 (Australian Taxation Office). For example, section 263 does not authorise seizure whereas provisions under the *Excise Act 1901* do.

34 Joint Committee of Public Accounts, Report No 326, *An Assessment of Tax* (November 1993) AGPS, p 263.

35 Ibid, pp 263-4

36 Submission No 9, p 5 (Acting Privacy Commissioner).

- in excess of 280,000 access visits occurred each year – it would be impractical to require it to get a warrant on each such occasion;[37]
- access powers are provided to support the self-assessment system, under which taxpayers are required to lodge minimal information with their tax return, but are required to keep that information should access be sought to verify the truth of statements made in the return; and
- requiring it to obtain a warrant would change what was currently an approach based on co-operation to an adversarial approach – the purpose for which it used these powers was not a criminal enforcement purpose, but to determine taxable income.

Conclusions

3.44 The Committee considers that the ATO's powers are anomalous and not in keeping with the principles set out in this Report. Notwithstanding the procedural limitations which the ATO has imposed on itself, it is a matter of concern that there is no independent oversight of the use of a power which is expressed in such broad terms. There is no way in which the Parliament, or the public, can determine whether the ATO's access system is operating fairly.

Powers of the Department of Immigration and Multicultural Affairs

3.45 Concern about the apparently anomalous powers exercisable by the Department of Immigration and Multicultural Affairs (DIMA) was expressed by the Acting Privacy Commissioner, the Commonwealth Ombudsman and the Commonwealth Attorney-General's Department.[38]

3.46 In general terms, subsections 251(4) to (6) of the *Migration Act 1958* empower the Secretary of the DIMA to authorise officers to enter and search any premises where they have reasonable cause to believe that they will find either unlawful non-citizens, persons who are in breach of their visa conditions or certain types of documents, principally those related to the entry of unlawful non-citizens into Australia. The Commonwealth Ombudsman notes that the power was enacted in 1958 and has not been significantly amended since then, nor has it been the subject of significant judicial, parliamentary or policy review.[39]

37 Submission No 21, p 3 (Australian Taxation Office).

38 Evidence, p 7 (Mr Alderson); Submission No 8, pp 6-7 (Commonwealth Ombudsman).

39 Submission No 8, p 6 (Commonwealth Ombudsman).

3.47 The exercise of this power was reviewed by the Ombudsman in 1997. This is discussed in relation to the fairness of entry powers in Chapter 4 of this Report. However, the Ombudsman also recommended that the provision itself should be amended "so that search warrant powers reflect contemporary law and community expectations".[40] The Ombudsman stated that DIMA supported the general thrust of his recommendations.

3.48 DIMA told the Committee that:[41]

- as a matter of practice, it required a field officer to seek a 'warrant' to enter premises from a Departmental officer at the Executive Level 1 or above;
- it recognised that its powers might be too wide in extending to premises where the officer believed that there was a person holding a temporary visa which was subject to conditions;
- its power to enter business premises (including sweatshops) was conditional on obtaining a warrant, whereas many other departments had recourse to powers of inspection;
- it sought a warrant from a magistrate where it proposed to investigate an offence under the Crimes Act or the Migration Act (for example, people trafficking, contrived marriage offences, submitting false documents in support of an application and escaping from custody);
- it had an additional power to detain someone believed to be subject to visa cancellation for up to four hours, subject to various conditions, to question them about why their visa might be subject to cancellation;
- under section 189 of the *Migration Act 1958*, Departmental officers had an obligation to detain any person who they reasonably suspected was an unlawful non-citizen;
- Departmental officers had power to inspect documents or things without the person being present; and
- in exercising its entry power, the Department was not undertaking a monitoring role – in 80% of cases, it was seeking a specifically named person, and in 20% of cases it was responding to an allegation that a person who was not fully identified was on those premises and was unlawful or in breach of their visa conditions.

40 Submission No 8, p 7 (Commonwealth Ombudsman).

41 Evidence, pp 170-73 (Mr Roxbee).

3.49 The entry powers exercised by DIMA are anomalous. The Commonwealth Ombudsman has proposed that they be redrafted to better reflect contemporary law and community expectations and the Department seems to support the general thrust of the Ombudsman's proposals.[42]

Powers of the Australian Transaction Reports and Analysis Centre

3.50 The Australian Transaction Reports and Analysis Centre (AUSTRAC) is established under the *Financial Transaction Reports Act 1988* (FTR Act) to receive, collect, retain, compile, analyse and disseminate information about "significant" or "suspect" financial transactions.[43] The FTR Act places an obligation on cash dealers to report this information, which AUSTRAC makes available to a limited group of law enforcement and revenue agencies specified in the FTR Act. AUSTRAC therefore has both a regulatory compliance role and a role in assisting in law enforcement.

3.51 Sections 27A-27E of the FTR Act provide AUSTRAC with "inspection powers" to facilitate its regulatory compliance role. The provisions enable the Director to approve authorised officers to undertake inspections. Under section 27E; the Director may issue a written notice to a cash dealer or other defined recipient to give the authorised officer access to their business premises on the day and during the business hours stated in the notice. AUSTRAC told the Committee that its powers were for the purpose of monitoring compliance with the legislation, that it undertook desk audits, compliance audits and joint studies, and that its approach had always been to first seek an appointment – "we do not just go and knock on the door and go into the organisation":

> The first desk audit is all done over the phone. It is a matter of phoning up and speaking to a specific officer, a compliance officer who has been nominated by the cash dealer themselves. We would deal through that person. With the desk audit we phone up and try to rectify the problem over the phone.
>
> Both a compliance audit and a joint study will be initiated by a phone call, probably followed by a meeting. For a joint study there would be an initial meeting but with a compliance audit it might be a phone call asking for an appointment to be able to inspect the records. It will then be followed by a letter specifying the dates and times that we would like to come along and inspect the records and the authority under which we are seeking to do that …
>
> The reason we get a positive response is that we are there trying to help them to make sure that their systems are doing what they are required to do under the legislation. So it is a mutual position, if you like. We are both working to the same end.[44]

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42 Submission No 8, p 7 (Commonwealth Ombudsman).

43 Evidence, p 277 (Mr Jensen). A significant cash transaction is one of more than $10,000.

44 Evidence, p 282-3 (Mr Jensen).

3.52 AUSTRAC stated that it had never had a request to enter rejected, nor had it received a complaint about the exercise of its entry powers.[45]

3.53 Notwithstanding that the entry powers available to AUSTRAC seem to have been exercised responsibly, the form of those powers is anomalous. Were those provisions to be recast in the model form (to require consent or a warrant) it is unlikely that AUSTRAC's work would be affected. It could still pursue its co-operative approach, only needing to approach a judicial officer for a monitoring warrant where an organisation refused to comply with that co-operative approach.

Powers of other organisations

3.54 Section 25 of the *Australian Security Intelligence Organization Act 1979* empowers the Minister administering that Act to issue a warrant authorising ASIO to enter and search and premises (among other things) in relation to a security matter. No provision is made for the involvement of a judicial officer.

3.55 Similarly, Regulation 15 of the Defence (Areas Control) Regulations empowers the Minister administering those regulations to authorise "a person" to enter on any land or premises to ascertain whether the provisions of those regulations are being complied with, or for related purposes. In addition, the Minister may authorise "any person" to take "any specified action", including "the marking, seizure, removal or destruction of any thing and the use of any reasonable force required for the purpose of preventing a contravention of, or securing compliance with, those regulations." Again, no provision is made for the involvement of a judicial officer. Notably, these provisions are contained in subordinate legislation.

3.56 A number of other entry provisions may be found in subordinate legislation.[46]

3.57 Some entry provisions make the withdrawal of consent to entry an offence.[47]

3.58 A significant number of entry provisions authorise a justice of the peace to issue a warrant.[48]

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45 Evidence, p 284 (Mr Jensen).

46 For example, Navigation (Marine Casualty) Regulations (No 257 of 1990) regs 12, 26; Wool Marketing Regulations reg 23.

47 See, for example, the Note to *Aged Care Act 1997* s 91.1(4).

48 For example, *Apple and Pear Export Underwriting Act 1981* s 19(2); *Canberra Water Supply (Googong Dam) Act 1874* s 10; *Dairy Industry Assistance Act 1977* s 15; *Environment Protection (Sea Dumping) Act 1981* s 30; *Historic Shipwrecks Act 1976* s 23(2); *Insurance Act 1973* s 115A; *Liquid Fuel Emergency Act 1984* s 31(3); *Meat Inspection Act 1983* s 25(5); *National Health Act 1953* s 61D; *Stevedoring Levy (Collection) Act 1998* s 14; *Torres Strait Fisheries Act 1984* s 42(3).

3.59 In addition, the powers administered by some agencies (for example, the Australian Securities and Investments Commission) are not consistent across all the legislation administered by those agencies.

Conclusions

3.60 The Committee accepts the view of the Acting Privacy Commissioner that, with some notable exceptions, most of the statutory provisions granting powers of search and entry appear to be consistent and broadly in accord with the Guidelines administered by the Attorney-General's Department.

3.61 However, some existing entry provisions are not consistent with principle or with the provisions administered by other similar agencies. Powers exercisable by DIMA, AUSTRAC, ASIO and Defence make no provision for any independent judicial oversight. It would seem that there is no objection in principle to making such provision. There is a requirement to provide financial information to AUSTRAC. Where AUSTRAC suspects that information is not being provided as required, it discusses the matter with the organisation concerned. Where it continues to suspect that, in spite of information about those obligations, discussions and joint studies, it is still not receiving complete information, like all other agencies, in the absence of genuine consent, it should have to seek the approval of an independent judicial officer to enter and search premises where a suspected breach of the legislation has occurred.

3.62 DIMA's powers have been reviewed by the Ombudsman. He has pointed out that they are inconsistent with those of other authorities carrying out comparable duties. Further, he found that there were occasions when they appear not to have been exercised fairly. The Department apparently accepts that its powers should be brought into line with those exercised by other Departments and agencies.

3.63 The Act giving ASIO powers of entry and search makes no provision for independent judicial oversight of their exercise. Nor do those held by the Minister for Defence under the Areas Control Regulations. In each case, a significant power of entry and search may be exercised on the authorisation of the relevant Minister alone. Unless there are clearly defined and exceptional circumstances, these provisions should similarly be exercisable only after a warrant has been obtained from an independent judicial officer.

3.64 The ATO argues that its position is different from other authorities. Accordingly, it needs different powers. Taxation is levied on the basis of the statements taxpayers make in their returns, subject to the right of the ATO to verify these statements later. Because of this, the ATO argues that it should not be required to seek permission from outside the Department before it enters premises to inspect relevant documents. Moreover, the number of times it needs access to taxpayers'

records to maintain the integrity of the system makes obtaining such authority impractical.

3.65 However, under self-assessment, the ATO seeks access to records essentially to monitor compliance with the relevant legislation – in the same manner as many other agencies. It obtains access with consent on most occasions, and will continue to do so, in the same manner as most other agencies which monitor compliance. Where consent is refused, the ATO, like those other agencies, and in accordance with principle, should be required to obtain a warrant from a judicial officer. The Committee notes that this view was also put by the Joint Committee of Public Accounts in its 1993 Report *An Assessment of Tax.* In the words of the Acting Privacy Commissioner, "such a measure would be a welcome strengthening of privacy protection and would enhance the consistency and fairness of Commonwealth law".[49]

3.66 Finally, the Committee considers that, just as the ATO randomly audits assessments of taxpayers' taxable income, so the Commonwealth Ombudsman should randomly audit the ATO's use of its powers to enter and search premises.

3.67 The Committee considers that there ought be consistency in the legislative provisions granting powers of entry and search to all comparable authorities. All such provisions should accord with a common set of guidelines unless compelling reasons are advanced to justify a departure from them.

Recommendations

6. The Committee recommends that all existing entry and search provisions in legislation, including those contained in regulations, be reviewed and amended by 1 July 2001 to ensure that they conform with the principles set out in Chapter 1 of this Report.

7. As a priority, the Committee recommends that all entry and search powers that go beyond the entry powers in the Crimes Act, including the powers exercisable by the Australian Taxation Office, the Department of Immigration and Multicultural Affairs, the Australian Transaction Reports and Analysis Centre, the Australian Security Intelligence Organisation and the Minister for Defence under the Defence (Areas Control) Regulations, should be reviewed and amended so that they are consistent with the principles set out in Chapter 1 of this Report.

49 Submission No 9, p 5 (Acting Privacy Commissioner).

8. The Committee recommends that the Commonwealth Ombudsman undertake a regular, random "sample audit" of the exercise by the ATO of its entry and search powers to ensure that those powers have been exercised appropriately.

CHAPTER 4

THE FAIRNESS OF RIGHT OF ENTRY PROVISIONS

Introduction

4.1 The fairness or otherwise of right of entry provisions may be a matter of the terms of those provisions – whether they adequately balance competing interests and whether they are consistent with generally acceptable principles. Where the principles set out in Chapter 1 are observed, then, as a matter of form, a provision is likely to be as fair as the various competing interests will allow it to be. Fairness in this sense is canvassed in Chapters 1 and 3 of this Report.

4.2 However, fairness is more often a matter of how entry provisions are exercised. A provision may be fair in its terms, but administered in an unfair manner. Or a provision may be 'unfair' in its terms, but administered by the relevant agency in a way that renders it 'fair'. This Chapter looks at fairness in this sense.

4.3 Speaking generally of the exercise of investigative powers, one commentator has observed:

> [I]t is probably fair comment that, in the past, the enormously wide powers conferred upon agencies have been, on the whole, exercised in a reasonable manner having particular regard to the purpose for which they were conferred. There have been occasions when the powers have been exercised in an unreasonable manner and even rare occasions when the powers have been exercised in a reprehensible manner. However, to date, these occasions have been deviations from the norm, rather than a clear change of direction by agencies at large. Notwithstanding this, it must be recognised that the past tradition of propriety and reasonableness is no guarantee that this will continue to be the case in the future. In some agencies there are strong indications that the bonds of propriety may fall away at any moment thereby exposing particular members of the public to onerous obligations or morally unjustified breaches of their civil liberties.[1]

4.4 Interestingly, this commentator concludes, that, in a society which operates through a series of checks and balances, "in many cases it is very difficult for someone who has been abused by the improper exercise of information-gathering powers to gain immediate and effective relief and redress".[2]

4.5 One measure of the fairness of such provisions is the extent to which they are challenged. Referring to the many challenges to search warrants executed as part of

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1 Williams DJP, *Investigations by Administrative Agencies*, (Law Book Co), Sydney, 1987, p 3.

2 Id.

investigations into tax fraud and bottom-of the-harbour schemes during the 1980s, Mr Michael Rozenes QC stated that most of these challenges seemed to have been "motivated by a desperate need to find out what the investigator had and knew, rather than any real concern about the way in which [the warrants] had been executed":

> What was being sought was the information that lay behind the warrant to see just how far the investigator had got in the process, what information had been found and how much at risk, if you like, various defendants were. After that, and with the introduction of what was called the three condition warrant, again I now suspect that much of the litigation about warrants is not so much their execution or their width and breadth but rather whether legal professional privilege lies or does not lie with respect to any group of documents.[3]

Fairness as a non-issue

Third parties

4.6 In some circumstances, fairness was declared to be not a major administrative issue. Here, entry powers are exercised not against suspects but on disinterested third parties. For example, the ATO stated that:

> [W]e often use our access powers, not because we want to get in there and get the information in dealing with crooks, but because we want to protect the rights of third parties. Often we go to get information from, say, financial institutions and banks so that we can check whether or not the amount of, let us say, interest that has been put in the returns is the right amount. The banks have rights of confidentiality under contract. They need some protection to be able to provide us that information.[4]

4.7 In a similar manner, the AFP stated that some third party holders of information, such as banks, will often request that it use its search warrant power to access information where the institution was concerned about its privacy obligations to clients. In this context, formal entry and search provisions (particularly those providing for a warrant) are seen as protective devices.[5] Interestingly, AUSTRAC, which similarly seeks access to information held by third party financial institutions, does not see a need for the 'protective' dimension of a warrant obtained from a judicial officer.

Powers recently reviewed

4.8 The entry powers exercisable by some other agencies have recently been reviewed to make them more fair. For example, the ACS told the Committee that its

3 Evidence, p 326 (Mr Rozenes QC).

4 Evidence, p 30 (Mr D'Ascenzo).

5 Evidence, p 81 (Mr Atkins).

entry powers had been substantially amended in 1995 following the tabling of the *Review of the Australian Customs Service*.

4.9 Prior to these amendments, the authority Customs had to enter premises to search and seize had been provided by a Writ of Assistance or a Customs Warrant. These were simply issued on application by a Customs officer to a Collector of Customs, with no requirement to apply to a judicial officer. The Act also contained a separate provision to enable entry to premises to search for documentary evidence of offences. Again, a Collector of Customs could, in certain circumstances, authorise the issue of a Customs Warrant, again with no requirement to apply to a judicial officer. However, this provision did not entitle Customs to seize any goods even where they evidenced fraud, nor could it be used to secure evidence of Customs offences from persons other than the "owner" of the goods.[6] Neither provision complied with Commonwealth policy.

4.10 The entry powers now exercisable by Customs were based on those available to the AFP under the *Crimes Act 1914*, which reflected more recent policy on the terms of such provisions, and hence were more 'fair'. As Customs put it:

> There is no doubt that the search warrant provisions of the Customs Act represent a vast improvement in relation to protection of civil liberties compared to the earlier Act. In most respects they reflect current Commonwealth standards that apply which gives some degree of certainty to officers who must use them and in the same way the persons (or their legal representatives) who are subject to them.[7]

4.11 The remainder of this Chapter discusses fairness in administration. The issue of fairness may arise as a result of statutory limitations on the exercise of search and entry powers; it may arise as a result of limitations imposed by the courts; and it may arise as a result of procedures and limitations which agencies have imposed on themselves in an effort to ensure fair administration.

Fairness as a matter of statute

4.12 The occupiers of premises being searched may have specific statutory rights. These rights might be provided by the statute authorising the entry. For example, under section 3H of the *Crimes Act 1914* an occupier must be given a copy of the warrant being executed. Under section 3Q an occupier is entitled to a receipt for anything seized under the warrant, and, under section 3N, an occupier who so requests must be given a copy of any document, thing or information seized. Under section 3P

6 Submission No 16, p 3 (Australian Customs Service).

7 Submission No 16, p 6 (Australian Customs Service).

an occupier who is present at premises being searched is entitled to observe the search then being conducted.

4.13 In its submission the Australian Customs Service set out the rights and obligations attached to the execution of a search warrant under its legislation, concluding that, in practice, the rights of an occupier were set out in detail in the warrant itself, as were the rights which applied in respect of documents that may be subject to legal professional privilege.[8]

Accountability

4.14 One proposal for ensuring that warrants are properly and fairly exercised is to require the return of the warrant to the court. Such a situation applies in Victoria under subsection 57(10) of the Magistrates Court Act 1989 (Vic).

4.15 To similar effect, section 21 of the *Search Warrants Act 1985 (NSW)*, requires the person to whom a search warrant is issued, within 10 days of the execution or expiry of that warrant, to "furnish a report in writing" to the authorised justice who issued the warrant stating whether or not the warrant was executed, setting out the result of the execution (including a brief description of anything seized and whether or not an occupier's notice was served) or setting out the reasons why the warrant was not executed. The Committee is not aware of any similar provision in the *Crimes Act 1914 (Cth)*.

4.16 Such "returns" ensure that there is some independent supervision after the execution of a warrant. As put by Mr Rozenes:

> It would be nice to have a mechanism where the person who issued the warrant is accountable for the execution of it. At the moment, the issuer of the warrant signs a piece of paper and to all intents and purposes that is the end of it. There is no check … to see if the warrant has been properly executed. If the person whose house is being searched is present and understands the warrant and the warrant is specific enough for that person to be able to make an informed judgment as to what is covered by the warrant, that is fine. But if the person is not there, if it is a covert execution, who supervises what the police take?[9]

8 Submission No 16, p 6 (Australian Customs Service).

9 Evidence, p 331 (Mr Rozenes QC).

Recommendation

9. The Committee recommends that the procedure that is applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court which issued it.

The Ombudsman

4.17 Occupiers may have rights under other Commonwealth legislation. For example, under section 5 of the *Ombudsman Act 1976*, the Ombudsman is empowered to investigate complaints concerning actions which relate to a matter of administration by a Department or a prescribed authority. The Ombudsman may also commence such investigations of his own motion. He has joint responsibility with the AFP's Internal Investigations division for the investigation of complaints about the AFP.

4.18 The Ombudsman states that complaints about the exercise of police search powers continue to be a source of concern.[10] During 1997-98, out of a total of 1110 complaints, 83 (approximately 7%) concerned searches generally, with the majority of these to do with search warrants. Between July 1998 and February 1999, 56 complaints were received about AFP searches – again, the majority concerning the execution of search warrants. The Ombudsman told the Committee:

> Comment on complaints about the AFP's execution of search warrants has been a regular theme in Ombudsman's annual reports. The Ombudsman has commented unfavourably on AFP officers' understanding of their search powers on many occasions. In previous years, Ombudsman recommendations have resulted in large compensation payments for people who have been unlawfully detained during searches.
>
> A continuing theme of Ombudsman recommendations has been the need for the AFP to address the need for AFP members understanding their powers when executing search warrants, or in searching persons present on premises entered by police in the execution of a search warrant. However, it is clear from the continuing complaints that the AFP has made little progress in this important area of police training.[11]

4.19 The AFP stated that it welcomed the supervision and oversight of both the Ombudsman and the Privacy Commissioner. Such oversight was seen as a protective measure for the organisation. Interestingly, the Australian Federal Police Association (AFPA) stated that it had not had to spend much time in defending its members from

10 Submission No 8, p 5 (Commonwealth Ombudsman).

11 Submission No 8, p 4 (Commonwealth Ombudsman).

complaints about abuses of search warrants. The AFPA stressed that this was not a result of failing to defend its members, but because very few complaints were received.[12]

4.20 The Ombudsman's statutory jurisdiction extends beyond complaints about police searches. Following a number of complaints about the exercise of search and entry powers by the DIMA, the Ombudsman commenced an own motion investigation in 1997:

> The investigation raised concerns about the use of DIMA search powers for more than the purpose prescribed in the Migration Act. Case studies identified risks of invading individual's privacy and property without proper authority; the risk of serious challenge to the legitimacy and reasonableness of DIMA compliance activity; and the risk of court challenges to evidence obtained.
>
> In a number of cases DIMA search powers were used for purposes other than the location of unlawful non-citizens, both by external law enforcement agencies and within DIMA, where, for example, the power was used to obtain evidence of breaches of the Migration Act. In one case a National Crime Authority (NCA) officer confirmed that the focus of a search was to locate and interview a person in relation to their links to organised crime. The evidence indicated that the DIMA warrant in this case was used by NCA officers primarily to gain intelligence and, if possible, evidence in relation to organised crime activity.[13]

4.21 The report was made available to DIMA, which had responded in writing that it had already adopted a number of the recommendations, and recognised that, to fully implement them, would require changes to the Migration Act. The Department was briefing the Minister with a view to implementing these changes. [14]

4.22 With regard to complaints about search and entry by the Tax Office, the Ombudsman noted that:

- there was now a specific position of Taxation Ombudsman, assisted by a special tax adviser and a small team of officers;
- specific funding had been received to deal with tax complaints;
- tax complaints represented "a growing area within our complaints handling"; and
- the Office provided the ATO with regular feedback on complaints issues.[15]

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12 Evidence, p 218 (Mr Phelan).

13 Submission No 8, pp 6-7 (Commonwealth Ombudsman).

14 Evidence, p 309 (Mr Taylor).

15 Evidence, p 319 (Mr Taylor).

4.23 Subsequently the Ombudsman confirmed that, since 1990, he had received a total of 57 such complaints. In 1998-99 a total of 2201 complaints concerning tax issues were received – 9 of these concerned search and entry. An analysis of the complaints "does not disclose any discernible pattern of systemic defective administration on the issue of search and entry".[16] Relatively few complaints had been received about Customs' use of search powers.[17]

4.24 Other relevant statutory controls over the exercise of certain powers of entry and search include the *Privacy Act 1988*, and the availability of judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

4.25 While statutory rights for investigating and reviewing the exercise of entry and search powers are important, it should be noted that not everyone is aware of them, and review often takes place some time after the mischief has occurred.

Fairness as a matter for the courts

4.26 The courts are frequently called on to adjudicate on the propriety of the execution of a warrant. The courts interpret statutes which authorise search and entry strictly, resolving any ambiguity in favour of the occupier. They also insist on strict compliance with the statute and the conditions on which a warrant is authorised.[18] Through doctrines such as legal professional privilege, the courts also seek to impose restrictions on the categories of documents to which officials may gain access.

Strict compliance

4.27 In *R v Tillett*, Fox J, in interpreting a statutory provision authorising the issue of a search warrant, observed that:

> [this section] confers upon a justice of the peace a grave and extraordinary power which can and should be exercised only if and when the requirements for its exercise as set out in that section are clearly fulfilled. The reason, of course, is that this statutory right to search is a derogation from common law rights which protect the subject's home and property from intrusion by anyone.[19]

4.28 In *Tillett's* case, Fox J laid down a number of guidelines which emphasise the strict statutory compliance usually insisted on by the courts:

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16 Submission No 28, p 1 (Commonwealth Ombudsman).

17 Submission No 8, p 7 (Commonwealth Ombudsman).

18 *Tran Nominees Pty Ltd v Scheffler* (1986) 20 A Crim R 287 at 294 per Jacobs J; Evidence, p 221 (Mr Delaney).

19 (1969) 14 FLR 101 at 108.

- when approached to issue a warrant, the justice must act as an independent authority, exercising his or her own judgment and not automatically accepting the informant's claim;
- the justice has a discretion which he must exercise judicially – to enable this discretion to be properly exercised, the informant must put forward adequate sworn evidence;
- the warrant itself must clearly state the findings of the justice;
- as a corollary of the power of seizure, a particular offence must be specified, both in the information and in the warrant – this is so even where the statute simply uses the words "any offence" and makes no clear reference to a need to specify a particular offence;
- the warrant must not authorise the seizure of things in general, or things which are related to offences in general, but should only authorise the seizure of things by reference to the specified offence;
- the warrant may be struck down for going beyond the requirements of the occasion in the authority to search; and
- the time for execution of the warrant must be strictly adhered to.[20]

4.29 Warrants have been held to be invalid where:

- the applicant has failed to fully disclose all material facts;[21]
- the warrant incorrectly sets out the jurisdictional grounds for its grant;[22] or
- the searcher undertakes a wholesale random seizure of items which could not reasonably be thought to fall within the terms of the warrant.[23]

4.30 However, the courts have not allowed a strict approach to produce absurd results. Thus in *Bradrose Pty Ltd v Commissioner of Police (Qld),*[24] a search warrant was not invalidated because of its incorrect reference to a non-existent offence of

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20 See Tronc, K, *Search and Seizure in Australia and New Zealand*, (LBC Information Services, 1996) p 321.

21 *Lego Australia Pty Ltd v Paraggio* (1993) 44 FCR 151; Submission No 28, p 3 (Commonwealth Ombudsman)

22 *Tran Nominees Pty Ltd v Scheffler* (1986) 20 A Crim R 287.

23 *Bartlett v Weir* (1994) 72 A Crim R 511 (police officers seized a large number of floppy disks although they had no idea what was on the disks or whether they came within the terms of the warrant).

24 [1989] 2 Qd r 304.

'false pretences'. In *Parker v Churchill*[25] a warrant was not invalidated where the material seized by police included irrelevant material such as children's colouring books – the court ordering that the irrelevant material be returned to its owners.

4.31 If a warrant is defective in form (for example, if it is too wide or too general) or if the procedure followed in applying for it is flawed, it may be quashed. The fact that it has already been executed does not prevent the making of such an order.[26] Where only part of a warrant is invalid, the court may sever that part.[27]

Discretion to exclude evidence

4.32 The other judicial sanction where evidence is obtained in breach of a warrant, or in any illegal manner, is the exercise of a discretion to exclude that evidence.[28] As Barwick CJ observed:

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so, in my opinion, whether the unlawfulness derives from the common law or from statute. But it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion; or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms. On the other hand, evidence of facts of things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidence were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand, there is the public need to bring to conviction those who commit criminal offences. On the other hand, there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.[29]

4.33 In *Bunning v Cross*[30] the High Court set out a number of specific criteria which courts should have regard to in deciding whether or not to exclude illegally or unfairly obtained evidence:

- did the officials who obtained the evidence consciously engage in unfair or unlawful conduct, or was the wrongdoing inadvertent?;

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25 (1985) 9 FCR 316.

26 *ABC v Cloran* (1984) 4 FCR 151. See also Evidence, p 90 (Mr Williamson).

27 *Coward v Allen* (1984) 52 ALR 320 at 334; *Beneficial Finance Corp v Commissioner of Australian Federal Police* (1991) 31 FCR 523.

28 See now *Evidence Act 1995 (Cth)* Part 3.11.

29 *R v Ireland* (1970) 44 ALJR 263.

30 (1978) 141 CLR 54.

- how cogent is the evidence?;
- how easily might the law have been complied with in obtaining the evidence – a deliberate 'cutting of corners' might more readily lead to the exclusion of the evidence;
- the nature and seriousness of the offence charged; and
- the degree to which the Parliament intended to narrow the power available to the law enforcement authority.[31]

4.34 Additional criteria are set out in section 138 of the Commonwealth *Evidence Act 1995*. At present, the courts exercise a discretion to exclude evidence obtained illegally or unfairly. The DPP suggested that this approach was preferable to automatic exclusion, which was a possible alternative approach. Whilst it was hard to think of other sanctions, the public interest was not served "when admissibility is denied in a serious prosecution because of a technical breach".[32]

4.35 Technical breaches occasionally produced difficult decisions even under the current discretionary approach. The DPP instanced a prosecution for a major drug importation in Western Australia where all the evidence was excluded because a telephone interception warrant had not been dated. Similarly, the evidence obtained under a warrant executed by a South Australian police officer attached to the NCA was rejected because the Commissioner of Police had not signed a document.[33]

4.36 The AFP told the Committee that the discretionary exclusion of evidence provided a considerable incentive for fairness in the exercise of its entry powers, and, as a result, it followed guidelines issued by the DPP. Even where the evidence was ultimately admitted, the cost of the litigation to achieve admissibility represented another curb on any unfairness:

> Apart from the financial cost, which is not small, you have your investigators tied up in litigation and they are not doing the investigation … The Federal Court is fairly strict on it now – both ways: if we get it wrong, it will be thrown out, and they are also fairly definite on litigants. But it still a major incentive to get it right because if you do get it wrong, particularly on things like frauds and tax cases, you can say good bye to it for a long, long time. The material is locked away, you do not see it and your investigators are tied up. It is a major impost.[34]

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31 See generally Tronc, K, *Search and Seizure in Australia and New Zealand*, (LBC Information Services, 1996) p 330.

32 Evidence, p 225 (Mr Delaney).

33 Evidence, p 226-7 (Mr Gray).

34 Evidence, p 90 (Mr Atkins).

Legal professional privilege

4.37 Legal professional privilege is a rule of law which protects certain communications between clients and their legal advisers. In general terms, communications are protected where they:

- are made between a person and their legal adviser, who is acting in the capacity of a legal adviser;
- involve the seeking or providing of legal advice, whether general legal advice or advice in relation specifically to current or possible future litigation; and
- are of a confidential nature and not merely about public matters.[35]

4.38 Such communications need not be given in evidence or otherwise disclosed by the client, and may not be given in evidence or disclosed by the legal adviser unless the client consents.[36]

4.39 The privilege, which does not apply to documents connected with a fraud or illegal purpose, prevails over any obligation to produce documents under a warrant or on subpoena unless the privilege is excluded or cut down by a clear statutory provision.[37] It is the lawyer's duty to claim the privilege on behalf of the client for all documents believed to be privileged, and the claim must be made at the time a search warrant is executed.[38]

4.40 The privilege does not entitle a legal adviser to refuse to provide the name of a client, except where disclosure of the name will result in the disclosure of legal advice or an otherwise privileged communication.[39]

4.41 By protecting the confidentiality of communications between lawyers and their clients, legal professional privilege "protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law, and, where necessary, take action on their behalf to defend or enforce those rights".[40]

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35 See generally *Carter v The Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 159-60 per McHugh J.

36 *Cross on Evidence* (3rd ed), p 635.

37 See *Baker v Campbell* (1983) 153 CLR 52.

38 See *Arno v Forsyth* (1986) 9 FCR 576.

39 *Deloitte Touche Tohmatsu v DCT* (1998) 98 ATC 5192 at 5211 per Goldberg J.

40 See *Carter v The Managing Partner* (1995) 183 CLR 121 at 161 per McHugh J.

4.42 Legal professional privilege has been applied in tax investigations,[41] and in hearings of the NCA,[42] and it has been conceded in investigations by the Trade Practices Commission.[43] However, the High Court recently held that the privilege did not apply to the obligation of an officer of a corporation to produce books to, or answer questions from, the Australian Securities Commission.[44]

4.43 Some agencies referred to legal professional privilege as a 'check' on the exercise of their powers. For example, the ATO stated that where privilege attaches to documents the subject of either a search warrant or a formal access request, "those documents would not be accessible".[45] ATO access to papers prepared by professional accounting advisers was covered by similar restrictions in ATO Access Guidelines which were prepared in consultation with the professional accounting bodies.[46]

Extending professional privilege to accountants

4.44 The Institute of Chartered Accountants in Australia (ICA), speaking also on behalf of the Australian Society of Certified Public Accountants and the Taxation Institute of Australia, took issue with the non-legislative effect of these Guidelines.

4.45 The accountancy bodies had, in the 1980s, sought formal legislative recognition of a privilege for accountants similar to that enjoyed by the clients of lawyers. The accountancy bodies had ultimately accepted voluntary Guidelines on the basis that the Commissioner would apply both their terms and spirit. However, the Commissioner was now "testing the boundaries" of, and 'stepping over', those Guidelines in a significant way.[47]

> For us, it is a question that, while lawyers are able to speak candidly with their clients and give advice, and the information which they have in their possession is protected as a consequence, accountants have something similar but it is not legally enforceable. If the commissioner wants to test the boundaries of legal professional privilege, he can do that, but an adjudicator comes into play. The courts can adjudicate and decide whether or not he is acting appropriately and whether or not what the commissioner is trying to do is within or outside the boundaries.

41 *FCT v Citibank Ltd* (1989) 85 ALR 588; *Allen, Allen & Hemsley v DCT* (1989) 86 ALR 597.

42 *NCA v S* (1991) 100 ALR 151 at 156.

43 *Shanahan v TPC* (1991) ATPR 41, 115.

44 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

45 Submission No 21, p 6 (Australian Taxation Office).

46 Included as part of Submission No 22 (Australian Taxation Office).

47 Evidence, pp 184-5 (Mr Firmstone).

> The problem with our voluntary code is that there is no adjudicator. There is no-one, other than the commissioner, to say whether or not he is acting within or outside the boundaries.[48]

4.46 The Institute proposed that an 'accountants' privilege, or 'other professionals' privilege, should be codified or given statutory effect.

4.47 In response, the ATO observed that:

- the issue of whether the Guidelines should have legislative force was ultimately an issue for government;
- in the one case in which the Guidelines were raised, the judge said taxpayers had a "reasonable expectation" at law that the ATO would operate in accordance with those Guidelines, and this provided "some judicial enforceability" in this area;[49] and
- in a case referred to and examined by the Ombudsman, he concluded that the ATO "had been more than reasonable and that it actually had given the taxpayer, the adviser and the clients every opportunity to provide information to verify their claims" and had been "disparaging about the accountant" concerned who had attempted to use the Guidelines to frustrate processes rather than assisting them.

4.48 Mr Michael Rozenes QC stated that there were special historical reasons for the development of legal professional privilege and that he would be cautious about extending it.[50]

4.49 While there is some force in the argument that legal professional privilege should be extended to advice provided by some other professionals such as accountants, the Committee considers that, at this time, the problems referred to do not seem sufficiently widespread to warrant such an approach. The ICA itself stated:

> We are not really talking about abuse of the guidelines because we have no evidence that they are being widely abused. We have a lot of evidence, though, that the commissioner is developing an attitude regarding the boundaries of the guidelines, and he is trying to push them out.[51]

48 Evidence, p 185 (Mr Firmstone).

49 Evidence, p 236 (Mr D'Ascenzo).

50 Evidence, p 329 (Mr Rozenes).

51 Evidence, p 186 (Mr Firmstone).

4.50 While the Committee would be concerned if the Commissioner of Taxation were to repudiate or challenge his own Access Guidelines, the evidence at this time does not suggest that this is occurring.

Other judicial controls

4.51 Outside the area of searches under warrant, the courts have insisted that entry powers must be exercised bona fide for the purposes of administering the relevant Act, and have also considered the effect of public interest immunity on the issue of search warrants.[52]

Fairness as a matter of internal procedures

4.52 A number of agencies which exercise entry powers attempt to ensure that their administration of those powers is fair by imposing various safeguards on themselves. As ASIC noted:

> You have got to be very careful executing a warrant – firstly, in how you apply for the warrant to ensure that it is in proper form and substance, that there is no overreaching, and that it will withstand a collateral attack; and secondly, that it is done properly when you go to execute it. Very often, if there are children or family involved, we do our homework. We try to make sure that there is counselling going on while we are trying to execute the warrant. A lot of judgment has got to be applied to do them properly.[53]

4.53 Self-imposed procedural safeguards include: notifying occupiers of an intention to enter premises, providing written information to occupiers about the powers and their rights and responsibilities; formal and informal liaison with certain occupiers; and explicitly distinguishing between procedures adopted for monitoring warrants and offence-related warrants. These matters are discussed in further detail below.

Notification

4.54 A number of agencies, as a policy measure, particularly when entering premises to monitor compliance, provided occupiers with advance notice of their intention to enter. These agencies included the ATO, AQIS and AUSTRAC.[54] Advance notice was particularly common where warrants were served on 'friendly'

52 *Jacobsen v Rogers* (1995) 69 ALJR at 141 per McHugh J.

53 Evidence, pp 264-5 (Mr Longo).

54 Evidence, p 30 (Mr D'Ascenzo); p 58 (Mr O'Connor); pp 279-80 (Mr Jensen).

third parties such as banks – a failure to give such notice both disrupted the business of the bank and made locating the required information almost impossible.[55]

4.55 For obvious reasons, prior notice was rare in the exercise of offence-related warrants.

Written information

4.56 A number of agencies currently provide occupiers of premises entered under compulsion with written information as to their rights and responsibilities. For example, the AFP provides all occupants of premises being searched with a document headed 'Rights of occupiers'. In addition to this document, there is a verbal caution, which is tape recorded, where the person is a suspect.[56]

4.57 Similarly, when executing a warrant, the Australian Customs Service hands over a document that set out a statement of rights for occupiers, and, as a matter of practice, tape records all warrant executions.[57]

4.58 The ATO provides copies of booklets concerning its access powers to people being audited. The booklets inform taxpayers of their rights, obligations and entitlements under the law, and outline avenues of complaint, both within the ATO, and outside.[58]

4.59 ASIC also provides explanatory material as to the rights of occupiers – this is "routinely attached to a notice requiring compliance".[59]

4.60 AQIS said that such a procedure was not necessary under its legislation as its compliance monitoring activities were non-adversarial – occupiers were "willing participants" in an activity that helped underpin the integrity of Australia's export certification system.[60] When executing a warrant the usual practice was to phone, inform the occupier of an intention to search and advise them to contact their legal adviser.[61]

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55 Evidence, p 233 (Mr Delaney).

56 Evidence, pp 82-3 (Mr Williamson).

57 Evidence, p 152 (Mr Burns).

58 Evidence, p 31 (Mr D'Ascenzo); Submission No 10, p 4 (Australian Taxation Office).

59 Evidence, p 268 (Mr Longo).

60 Evidence, p 59 (Mr O'Connor).

61 Evidence, p 60 (Mr O'Connor).

Training and procedural manuals

4.61 The Commonwealth Ombudsman stated that the training of law enforcement officers in their powers and responsibilities in relation to searches represented a "key element" in ensuring that searches were conducted in a lawful and professional manner.[62]

4.62 A number of organisations - including the AFP, ATO, AQIS and Customs - told the Committee that their compliance or enforcement officers were highly trained in the exercise of these powers, and that appropriate procedures for the exercise of these powers were laid out in detailed compliance manuals.[63] Surveyors acting on behalf of the Australian Maritime Safety Authority are "extensively trained and conduct inspections in accordance with national and international guidelines" and "are guided by a set of 'Instructions to Surveyors', based on resolutions promulgated by both the International Maritime Organisation and the International Labour Organization".[64]

Oversight of warrants by the DPP

4.63 Training and education was supported by the close supervisory involvement of the DPP in any proposed enforcement action. The DPP told the Committee that it had produced a manual on search warrants which was provided to all law enforcement agencies or departments having a law enforcement function. It had also produced a set of guidelines covering dealings between Commonwealth investigators and the DPP. Among these guidelines was a requirement for Commonwealth investigators to consult with the DPP before issuing warrants.[65] In this way, the DPP exercises a general supervisory role in attempting to ensure compliance with the "rather rigorous" provisions covering search and entry.

Separating the compliance and enforcement functions.

4.64 A number of organisations explicitly separate their compliance monitoring and enforcement functions. For example, AQIS told the Committee:

> One of the things that we stress to our officers is that, if they use a monitoring power or announce themselves as going in for the purposes of monitoring, they do not change hats halfway through and then launch into a prosecution and give a

62 Submission No 8, p 8 (Commonwealth Ombudsman).

63 Evidence, pp 32-3 (Mr D'Ascenzo); pp 52-3 (Mr O'Connor); pp 150-1 (Mr Burns); pp 222-3 (Mr Delaney).

64 Submission No 25, p 1 (Australian Maritime Safety Authority).

65 Evidence, p 221 (Mr Delaney).

> person a warning. We have said in our manuals that, if somebody is there for a compliance monitoring audit and there is some evidence there that might be prima facie evidence of a breach of the legislation, they should withdraw and as a separate exercise at a later date go back and properly warn the person.[66]

4.65 The ATO said that it adopted a similar approach

> There are situations where we might have gathered information through our access powers for the purpose of ascertaining taxable income which is relevant to prosecutions that might have been commenced by others or ourselves through the Director of Public prosecutions. When that occurs, because the information was obtained for different purposes, then the court has a discretion to exclude that information. So by the end of the day, the courts are the arbiters in that sense.[67]

4.66 Elsewhere the ATO was less sure:

> But I cannot be categorical – and I have to be honest with you – there might be some information that we have obtained bona fide for the purposes of the Act early in the piece that may somehow find its way into some of those activities. The fact that we know the information already puts us on a better footing than if we did not know it.[68]

4.67 However others cast doubt on whether ATO did separate its compliance and enforcement functions in practice. For example, the ICA observed that the ATO was now testing the boundaries of its Guidelines:

> [T]he commissioner is now calling on people in a way which is different to what the guidelines suggest. He is calling on people unannounced. He is calling on them under the guise of conducting general inquiries when it is plain that what he is really doing is seeking information for the purpose of commencing an audit. We are getting a bit concerned that some of that behaviour is also pushing out the boundaries as to what his own guidelines say is really beyond what his people should be doing.[69]

4.68 And Mr Michael Rozenes QC stated that he was involved in two cases where material provided to the ATO by taxpayers voluntarily without caution subsequently ended up being used in a prosecution:

> The one that has concluded was in Western Australia; it was a massive tax fraud. In my opinion, it was clear from the very beginning that it would be a fraud trial. A task force was set up to deal with it and lots of interviews were held; not a caution administered anywhere. All the interviews were led at the trial".[70]

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66 Evidence, p 58 (Mr O'Connor).

67 Evidence, p 29 (Mr D'Ascenzo).

68 Evidence, p 250 (Mr D'Ascenzo).

69 Evidence, p 185 (Mr Firmstone).

70 Evidence p 334 (Mr Rozenes QC).

4.69 The ATO also told the Committee that it deliberately interprets its general powers with fairness in mind. For example, section 263 of the *Income Tax Assessment Act 1936* makes no reference to entry at a reasonable time. However, the ATO stated that that it reads this requirement into the provision "because we believe if we did exercise the power unreasonably then, with the developments that have occurred in administrative law since 1936, the courts would simply say that we had exercised the power invalidly anyway".[71]

Other accountability mechanisms

4.70 Some agencies referred to the work of the Australian National Audit Office (ANAO) as an additional source of accountability. For example, Audit Report No 24 of 1995-96 specifically concerned the investigatory powers of the Health Insurance Commission and the impact on those powers of the statutory sunset clause.

4.71 The HIC is also directly accountable to the Parliament through a mandatory annual report on its use of its investigatory and entry powers.[72]

Fairness and the procedures followed by non-governmental agencies

4.72 The internal procedures referred to above have been introduced by a number of governmental agencies in an attempt to ensure that their search and entry powers are exercised fairly. The Committee received no evidence that similar procedures have been introduced by non-governmental organisations which exercise such powers (such as trade union or RSPCA inspectors). For example, it is not clear what training officers from such organisations receive in the exercise of these powers. It is not clear whether such officers are required to possess specific qualifications or expertise. It is not clear whether they advise occupiers of their rights under the relevant legislation or what rights occupiers have under that legislation should they be dissatisfied with the conduct of an inspection. As a matter of practice, such procedures should be adopted by all agencies which are authorised to exercise such powers.

Fairness towards those executing entry powers

4.73 A number of agencies expressed concern at aspects of the conduct of those whose premises had been entered and searched. In some cases, officers executing an entry warrant were physically intimidated. For example, the ACS told the Committee that occupiers had threatened to kill officers and had used dogs to intimidate officers.

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71 Evidence, p 37 (Mr Forsyth).

72 *Health Insurance Commission Act 1973*, s 42(3A)(c); Submission No 7, p 6 (Health Insurance Commission).

As Customs searches were essentially document-based searches, the ACS proposed that they have power to order people to remain in the same room.[73]

4.74 Other agencies expressed concern at tactics employed by those whose premises had been entered and, as a result, had had documents seized. The NCA noted that "search warrants are frequently subject to collateral attacks during and preceding criminal trials".[74] Such legal challenges might delay an investigation for lengthy periods while the issues were heard and subsequent appeals determined. For example, in one NCA investigation, search warrants which were issued on 23 October 1997 were unsuccessfully challenged in the Federal Court; this decision was unsuccessfully appealed to the Full Federal Court and an application to the High Court seeking special leave to appeal was ultimately refused on 11 December 1998.

> Though all the judgments were in favour of the Authority as the challenges were taken through the courts, the subject documents remained in sealed boxes during that critical stage in the investigation.
>
> As illustrated by the above case, search warrants have become a fertile ground for legal challenge. There appears to be ample scope for and practical examples of judicial and administrative review of search warrants and of the exercise of powers pursuant to the warrant.[75]

Other aspects of unfairness

4.75 In principle, court proceedings should be open. This guarantees that justice may be seen to be done. However, this necessary and important principle may have an unfortunate ramification in legal challenges to the execution of warrants. An application for a warrant is not a public proceeding. The execution of a warrant is not a public matter, unless that information is maliciously leaked to the media. However, a legal challenge to the execution of a warrant inevitably becomes a public proceeding. In this sense, one can only correct a private 'embarrassment' by making it public. There may be an unwitting unfairness in this situation to those seeking to challenge the exercise of entry powers.[76]

Conclusions

4.76 The Committee accepts that the majority of agencies exercise their entry powers fairly. Fairness is imposed on agencies by statute and by the courts. It is a product of the supervision over the warrant process which is exercised by the

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73 Evidence, pp 152-3 (Mr Burns).

74 Submission No 11, p 2 (National Crime Authority).

75 Submission No 11, p 2 (National Crime Authority).

76 See, generally, Evidence, pp 271-3.

Commonwealth DPP. It also seems to have been deliberately pursued as part of the enforcement culture of some agencies, which have emphasised the training of officers and the drafting of internal manuals and guidelines. Given the involvement of the DPP and the demands of the courts, the procedures followed in obtaining and executing search warrants seem of a high standard. However there are a number of ways in which the exercise of entry provisions may be made fairer, principally by ensuring that all those whose premises are searched are informed of their rights and the status of any inquiries which affect them.

Recommendations

10. The Committee recommends that, unless there are exceptional circumstances involving clear physical danger, all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search. Occupiers should be informed that the proposed entry and search is either for the purpose of monitoring compliance with a statute, or for the purpose of enforcement or gaining evidence and possible prosecution, but not for both purposes.

11. Where search and entry powers are used by an investigative authority, the Committee recommends that:

- those who are being investigated should have an ongoing right to be informed of the current status of those investigations; and
- where an investigation has been concluded with no charges laid, those who have been investigated should have the right to be informed of this fact immediately; the right to have all seized material returned to them; and the right to compensation for any property damage and damage to reputation.

12. The Committee recommends that all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of these powers in enforcement and compliance manuals.

13. The Committee further recommends that, where practical, all executions of warrants are video-taped or tape-recorded, and that where the person is a suspect, a verbal caution is given and tape recorded.

14. The Committee recommends that the Attorney-General implement a system enabling courts to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant.

CHAPTER 5

THE EFFECTIVENESS OF RIGHT OF ENTRY PROVISIONS

Introduction

5.1 This Chapter looks at the effectiveness of right of entry provisions. Like fairness, effectiveness is essentially a matter of administration. It raises issues such as whether entry powers are used, and whether their use achieves the purpose for which they have been granted.

5.2 The Committee was told that effectiveness had two aspects – whether the entry powers were effective in obtaining access and information; and whether there was any effective review of the exercise of the power and any effective remedy for abuse.[1] The Committee considers the effectiveness of review under the head of fairness in Chapter 4.

Effectiveness for agencies

5.3 All agencies which made submissions to the inquiry used their entry powers, and felt that their work would be impeded without them.

Australian Federal Police and Commonwealth Director of Public Prosecutions

5.4 Both the AFP and the Commonwealth DPP – as the agencies responsible for seeking the issue of search warrants and making use of any evidentiary material obtained – considered that the current provisions in Pt 1AA of the Crimes Act were sound and operated effectively.[2]

Australian Taxation Office

5.5 The ATO also used its entry powers extensively, though it was not possible to nominate an exact number of occasions. However, an estimate could be made based on approximately 1200 field staff seeking access to premises once a day. On this basis, more than 280,000 access visits occurred each year,[3] and this figure was likely to increase substantially following the introduction of the Goods and Services Tax and

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1 Evidence, p 103 (Ms Hampel QC).

2 Submission No 12, p 3 (Australian Federal Police); Submission No 18, p 1 (Commonwealth Director of Public Prosecutions)

3 Submission No 21, p 3 (Australian Taxation Office).

the addition of some 3000 extra field staff. The majority of these visits were informal and involved the other party's consent:

> The ATO principally uses access powers to ensure that the business records of taxpayers accurately reflect their business activities. Access for this purpose includes review of documents held by third parties. Checks conducted with banks and other financial institutions represent the main use of access powers. Other tasks can include gathering strategic intelligence, undertaking risk assessment, improving current and future compliance with the tax laws, and undertaking case selection and enforcement activities. The Courts have noted that the ATO may need to use access powers to gather information long before any specific issue of fact arises between the ATO and a taxpayer. Also, access in relation to the ascertainment of the taxable income of large companies is invariably limited to the business premises or those of the company's advisers.[4]

5.6 The ATO also pointed out that its access powers were an integral part of the operation of the self-assessment approach to taxation:

> Under self-assessment, taxpayers are obliged to ensure that tax returns accurately reflect earnings and outgoings. When the returns are lodged, a statement is signed attesting that the information contained in the return is accurate and that records are available for the ATO to confirm that the return is an accurate record. Taxation laws impose obligations on taxpayers to retain such records for minimum periods of time. In the scheme of things it is intended that we have access to these records wherever they are located. Access is only sought to check the truth of these statements by taxpayers.[5]

5.7 The ATO stated that an alternative approach to self-assessment would involve compelling taxpayers to substantiate all claims with every return.[6]

Australian Quarantine and Inspection Service

5.8 AQIS stated that it exercised its search and seizure powers "with prudence", and wherever possible sought entry by consent, particularly to registered or approved premises. It had sought search warrants as an investigative device on ten occasions over the previous three years, and on six occasions had actually enforced those warrants. On the other four occasions, the warrants had been returned to court.[7]

National Registration Authority

5.9 NRA stated that, without its 'offence-related' entry provisions "vital evidence necessary to secure effective prosecution of offenders would be missed".[8] In the six

4 Submission No 21, p 3 (Australian Taxation Office).

5 Submission No 21, p 3 (Australian Taxation Office).

6 Evidence, p 239 (Mr D'Ascenzo).

7 Evidence, p 52 (Mr O'Connor).

8 Submission No 2, p 3 (National Registration Authority).

months to March 1999, it completed six successful prosecutions relating to the illegal importation and supply of unregistered agricultural chemical products, unregistered veterinary vaccines and the unauthorised supply of veterinary chemical products.

> Every one of these prosecutions relied heavily on evidence which was obtained under the NRA's powers of search, entry and seizure. Each of these prosecutions related to practices which posed substantial risks to one or more of human health and safety, Australia's international trade, the environment, and crops or livestock.[9]

National Industrial Chemicals Notification and Assessment Scheme

5.10 NICNAS stated that it used its compliance entry provisions, on average, on two occasions a month. On these occasions, there was often no search of the premises, with the visit used as an opportunity for NICNAS to express concerns, provide information and ensure compliance through voluntary remediation.

5.11 NICNAS had obtained a warrant to search premises on three occasions since the commencement of its legislation in 1990. It stated that the only clear and definitive record of the chemicals introduced by a company lay within that company's own records. "Legally appropriate (and enforceable, if necessary) access to these records is necessary for NICNAS to be able to continue to ensure safe chemical use."[10]

Other agencies

5.12 Both ASIC and the HIC suggested that their entry powers were used much less frequently than their power to issue a notice for the production of documents. ASIC, for example, stated that it would almost invariably issue such a notice as a first step. Then, based on the documents produced, it would question the person concerned. While it did apply for search warrants, it was usually "in circumstances where the investigation is sufficiently progressed to justify their use", or where there was a real concern about the destruction of evidence once ASIC's interest in a matter became known.[11]

5.13 A broadly similar approach is utilised by the HIC.[12] HIC pointed out that the operation and conduct of its entry provisions had been audited by the Australian National Audit Office (ANAO) in 1995-96. ANAO concluded that:

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9 Submission No 2, p 3 (National Registration Authority).

10 Submission No 5, p 3 (National Industrial Chemicals Notification and Assessment Scheme).

11 Evidence, p 261 (Mr Longo).

12 Evidence, p 206 (Mr Brandt).

- HIC's enhanced powers to investigate fraud and excessive servicing have improved the Commission's ability to conduct investigations and prepare prosecutions;
- without powers of this kind the ability of the Commission to conduct investigations and prepare prosecutions would be impaired; and
- HIC was using the enhanced powers in accordance with the legislation and in a professional manner.[13]

5.14 On the evidence available to the Committee, it concludes that, in general terms, entry and search powers are being used effectively. While broad opposition has been expressed to any extension to such provisions,[14] some agencies suggested that their powers might be amended to make them more effective in various ways.

Making the warrant provisions in the Crimes Act more effective

5.15 The AFP told the Committee that the current Crimes Act provisions in relation to search warrants were, in general, both fair to occupiers and provided an effective mechanism for the gathering of evidence. However, it proposed a number of specific procedural improvements to these provisions. These improvements, which were supported by the Commonwealth Director of Public Prosecutions,[15] and the AFPA,[16] and, in part, by Mr Michael Rozenes QC,[17] are discussed below.

Telephone warrants

5.16 Under section 3R of the *Crimes Act 1914,* an application for a warrant may be made by "telephone, telex, facsimile or other electronic means". Such warrants may only be issued to police officers in urgent cases, and an application must include all of the information that would ordinarily be provided in support of a warrant, although the information need not be sworn. If the issuing officer were satisfied that a warrant should be issued, he or she would sign a warrant in the normal form and inform the applicant of the terms of the warrant. The applicant was then required to complete a form of warrant reflecting the terms described by the issuing officer, and the officer who executed the warrant must send a copy of the warrant and a sworn copy of the information to the issuing officer within 1 day of executing the warrant. Obtaining a

13 Submission No 7, p 5 (Health Insurance Commission).

14 Submission No 2, p 1 (Australian Family Party).

15 Submission No 18, p 2 (Commonwealth Director of Public Prosecutions).

16 Evidence, pp 211-213 (Mr Phelan).

17 Evidence, pp 331-333 (Mr Rozenes QC).

telephone warrant was intended to cover situations where delay could frustrate the execution of the warrant.

5.17 However, it was the experience of AFP members that section 3R was not operating as intended:

> In many instances an issuing officer will not take verbal information and insists on a written application, requiring AFP members to type up the information and send it via facsimile to that issuing officer. This can be very time consuming and does not provide the AFP with the ability to utilise this valuable tool in the manner intended.[18]

5.18 The AFP proposed that any doubts underlying the grant of telephone warrants could be reduced by providing for verbal applications for warrants to be recorded. This would reduce any concerns an issuing officer might have about whether an accurate record had been made of the application and the terms of any warrant issued. All questions put, answers provided, and the terms imposed on police would be recorded. A copy of the transcript of the record of the application and the terms of the warrant issued could then be made available to the issuing officer within the relevant time.[19]

5.19 Such a change would enable police to obtain search warrants quickly in circumstances of urgency. At present it could take up to 2 hours to obtain a warrant by facsimile, and this delay might defeat the intent of the provision.

5.20 On this issue, Mr Michael Rozenes QC stated that he was generally in favour of facilitating the warrant process by electronic means "provided proper information is made available to a properly instructed judicial officer whose conduct is accountable and in circumstances where the product of the search is properly identified and … supervised thereafter".[20]

Searches outside specified hours

5.21 Section 3F(3) of the *Crimes Act 1914* provides that, if a warrant states that it may be executed only during specified hours, it must not be executed outside those hours. This may lead to difficulties if a search takes longer than expected (for example, if it unearths a wealth of material, or if too few officers are sent to undertake the search):

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18 Submission No 12, p 4 (Australian Federal Police).

19 Submission No 12, p 4 (Australian Federal Police).

20 Evidence, p 331 (Mr Rozenes QC).

> The Commonwealth Director of Public Prosecutions has advised the AFP that if a warrant states that it can only be executed between the hours of 9am and 5pm, then the search must end at 5pm even if it has not been completed, unless the occupier gives informed consent for the search to continue. This is an outcome which has frustrated the effective execution of search warrants and leads to the potential for the loss or destruction of evidence …
>
> At present, in cases where the executing officer is almost out of time within which to execute a warrant, that officer often has no other option other than to seize documents in bulk rather than taking the necessary time to determine whilst executing the warrant, precisely which documents are required as evidential material.[21]

5.22 The AFP pointed out that such an approach often resulted in inconvenience to occupiers through the seizure of documents not necessarily required for an investigation. While an officer could seek the issue of a further search warrant prior to the expiry of the warrant being executed, this was considered "too time-consuming" and a cause of further delay.

5.23 The AFP suggested that it would be far simpler, and more consistent with the effective conclusion of a search instituted under warrant, for an application for an extension of time to be made by telephone. A similar approach could be taken to that presently provided in Part 1C of the Act in relation to the extension of an investigation period.[22]

Clarification of when a warrant ceases to be in force

5.24 Section 3E(5)(e) of the *Crimes Act 1914* provides that the period for which a warrant remains in force must be specified in the warrant, and must not be more than 7 days. Where a warrant is issued for a set number of days, the time at which it ceases to be in force is currently unclear.

5.25 For example, a warrant issued at 10am on the first day of the month for a period of 7 days might cease to be in force at midnight on the 8th day of that month; or at 10am on the 8th day of that month; or at midnight on the 7th day of that month.

5.26 Section 36 of the *Acts Interpretation Act 1901* provides that, where a period of time is calculated from a given act (for example, the issue of a warrant) then, unless a contrary intention appears, that time should be calculated excluding the day of that given act. This would seem to suggest the first approach noted above. However, the DPP has advised that caution should be used and the third approach noted above

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21 Submission No 12, pp 4-5 (Australian Federal Police).

22 Submission No 12, p 5 (Australian Federal Police). See also Submission No 18, p 2 (Commonwealth Director of Public Prosecutions).

adopted. The AFP proposes that the legislation be amended to make the position clear, and the DPP states that it is undesirable that that there should be uncertainty on such a basic issue as when a search warrant is actually in force.[23]

Seizure of material relevant to State and Territory offences

5.27 It is common for AFP members, while executing Part 1AA warrants, to discover evidence of offences against State or Territory laws. This situation often arises in relation to narcotic investigations.

5.28 Under sections 3F(1)(d) and 3F(2)(c) of the *Crimes Act 1914*, an officer executing a Commonwealth warrant can seize a 'thing' that falls outside the terms of that warrant if the officer believes on reasonable grounds that it will provide evidence of an offence against Commonwealth law and there is a risk of its loss if it is not seized. However, the officer in these circumstances cannot seize a 'thing' that will provide evidence against a State law – the officer is only able to notify the relevant State or Territory police and hope that they might attend with a warrant before the evidence is lost.[24]

5.29 A corresponding difficulty arises under section 3F(5). This provision gives the officer executing a Commonwealth warrant the power to make things seized available to officers of other (Commonwealth) agencies if it is necessary for the purpose of investigating or prosecuting offences to which the things relate. There is no corresponding statutory power to make things seized under a Part 1AA warrant available to State police or officers of State agencies. The AFP observes that this result "is clearly at odds with the reality of how modern criminals engage in criminal activity". Criminals do not confine their unlawful activities to conduct which constitutes offences in only one jurisdiction".[25]

5.30 An example of the anomalous operation of the existing provision was provided by the AFPA:

> We were executing a search warrant in relation to social security offences. We went into the premises, we conducted our search and, towards the end of the search, we went out to the backyard and noticed that there were between 15 and 20 marijuana plants that were about six foot high. We had just read the latest advice from the Director of Public Prosecutions that said we could not seize those items under the warrant. So, as the next best thing, we called the local state police and arranged for them to get a search warrant. I despatched the majority of my team away from the premises because they were still conducting the social security investigation … and I and another person stayed on hand and waited for the state

23 Submission No 18, p 2 (Commonwealth Director of Public Prosecutions).

24 Submission No 12, p 7 (Australian Federal Police).

25 Submission No 12, p 8 (Australian Federal Police).

> police to come. It took about 2½ to three hours for them to come because they had to go and obtain another search warrant under their state legislation.[26]

5.31 In order to improve the effectiveness of these provisions, the AFP sought a provision expressly authorising an executing officer to seize material relevant to a State or Territory offence where there were reasonable grounds for believing that the material was at risk of loss or destruction.

5.32 The DPP proposed allowing AFP officers to apply for search warrants under State law in cases where the AFP was investigating an offence under State law as part of its role to safeguard Commonwealth interests.[27]

5.33 There was a suggestion that some of these proposals might face a constitutional difficulty. For example, the DPP stated that constitutional advice which had been obtained by the Attorney-General's Department indicated that the Commonwealth could not enact a provision allowing a Commonwealth officer to seize evidence relating to state offences. While not agreeing with this advice, efforts by the DPP to seek a review of the matter by the Attorney-General's Department had not so far succeeded.[28]

Covert searches

5.34 Prior to the passage of the new Part 1AA of the *Crimes Act 1914*, it had been lawful for members of the AFP to conduct searches of premises, under warrant, without first notifying the owner/occupier of the search. The AFP also referred to cases in which police wished to execute a search warrant without the knowledge of an occupier of premises. In such cases, AFP officers would find it useful to be able to enter premises covertly to take photographs or fingerprints or obtain other secondary evidence of criminal conduct.[29] This approach was currently prevented by the requirement that an occupier be given a copy of the search warrant and a receipt for any items removed during the search.[30] There was also a presumption that an occupier should, if practicable, be present during the execution of a warrant.[31]

5.35 The AFP proposed that the Act contain a provision which would authorise police to conduct covert searches, under warrant, with the knowledge and authority of

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26 Evidence, p 212 (Mr Phelan).

27 Submission No 18, p 2 (Commonwealth Director of Public Prosecutions).

28 Evidence, p 230 (Mr Gray).

29 Submission No 12, pp 6-7 (Australian Federal Police).

30 *Crimes Act 1914*, ss 3H, 3Q.

31 *Crimes Act 1914*, s 3P.

the issuing officer, subject to appropriate safeguards.[32] Two safeguards suggested included a requirement that the covert search be undertaken in the presence of an AFP member who was independent of the investigation, and notifying the occupier of the details of any covert search once charges were preferred, or an investigation finalised, or the reasons for the investigation remaining covert no longer applied.

5.36 In advancing this proposal, the AFP noted that this was "clearly a sensitive issue in which the community interest in effective law enforcement must be balanced against individual rights and freedoms".[33]

5.37 The AFPA supported this proposal.[34]

5.38 Mr Michael Rozenes QC affirmed that the execution of a warrant covertly was probably an important part of the modern law enforcement process:

> It just needs to be supervised. I do not mean supervised by some independent police officer, that is not supervision in which the community will have any confidence at all. The judicial office holder who issues the warrant and permits a covert execution of it in terms ought to be responsible for what is done there. Whether that means that you take the magistrate on the bust or the raid, I do not know. There has to be some accountability for what is done covertly, as there is, is there not, some provision in the Commonwealth listening device law that brings the product back to the court in some way? [35]

Making the warrant provisions in the Customs Act more effective

5.39 The ACS told the Committee that, in 1998-99, it had made 195 applications for warrants under the *Customs Act 1901* (involving 516 premises); 23 applications for warrants under the *Crimes Act 1914* (involving 106 premises), and 8 applications under the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (involving 10 premises).[36]

5.40 ACS stated that, although its 1995 search, entry and seizure scheme had "generally worked satisfactorily and is well accepted by Customs officers", various practical and legal difficulties had arisen.[37] These difficulties had arisen through a combination of the complexity of the 1995 amendments together with a number of

32 Submission No 12, p 7 (Australian Federal Police).

33 Submission No 12, p 7 (Australian Federal Police).

34 Evidence, p 211 (Mr Phelan).

35 Evidence, p 332 (Mr Rozenes QC).

36 Submission No 16, p 9 (Australian Customs Service).

37 Submission No 16, p 8 (Australian Customs Service).

unforeseen legal and practical circumstances. Some of these difficulties echoed those experienced by the AFP, referred to above.[38] Other difficulties are outlined below.

Retention of evidential material

5.41 Where evidential material is being assembled for a prosecution under the Crimes Act, the Customs Act did not enable that material to be retained for more than 60 days. Provisions enabling an extension of time are currently limited to matters involving offences only under the Customs Act. Consequently, where the DPP considers that the suspected offences should be prosecuted as criminal offences (for example, under section 29D of the Crimes Act), and the material needs to be retained for more than 60 days, ACS finds it necessary either to seek a Crimes Act warrant (and a constable to execute it), or to ask the AFP to seize the material from Customs to bring it within the less restrictive retention provisions of the Crimes Act. ACS states that the Attorney-General's Department agrees that this provision requires amendment.

5.42 Secondly, the 60 day retention period was said to be too short. In the majority of cases involving fraud, it was necessary to seek an extension. Although an extension was invariably granted, there was considerable cost to all parties, and significant delays in completing the investigation. ACS states that the Law Council of Australia acknowledged that this was a problem, and the Attorney-General's Department agreed that this provision required amendment.[39]

Collection of evidence of criminal offences

5.43 ACS states that, at the time its 1995 provisions were drafted, it was generally accepted that evidence of serious Customs offences collected by means of a Customs warrant could be used in a prosecution under the Crimes Act. There were now serious doubts about this, and "the DPP has advised that if serious offences are under investigation the safe course is to use a Crimes Act warrant to secure evidence". This requires the co-operation of police to make an officer available to execute the warrant, even though the application is sworn by a Customs officer and the search team is comprised of Customs officers.[40]

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38 Customs also suggests that an executing officer should be entitled to continue a search that takes longer than the time limited in the warrant, and that the Customs Act should contain a provision authorising Customs to provide relevant evidential material seized under warrant to other agencies (eg, the AFP).

39 Submission No 16, p 10 (Australian Customs Service).

40 Submission No 16, p 10 (Australian Customs Service).

Forfeited goods seized as evidential material

5.44 ACS notes that current provisions draw a distinction between forfeited goods and evidence. This does not permit the seizure of goods as evidence where they are also forfeited goods. The only alternative is to seize the goods outright, or, if feasible, to use a Crimes Act warrant. Legal advice is that "seizure for evidential purposes does not fall within the criteria for demonstrating a necessity for seizure," and therefore cannot be used. ACS proposes an ability to hold goods purely as evidence.[41]

5.45 It also proposes the insertion of a provision permitting Customs to dispose of abandoned forfeited goods, whether the goods were seized as evidence or as forfeited goods.

Other amendments

5.46 ACS also proposes that:[42]

- the telephone warrant provisions of the Customs Act, and other Commonwealth Acts, are complex and difficult to apply in practice, and should be reviewed to make them more effective;
- publication of a notice of seizure in a newspaper should not have to be in the same format as the usual seizure notice - printing the formal notice is expensive, and it should be able to use a briefer format without damaging the rights of any relevant party;
- when special forfeited goods (including narcotic goods) are seized, the outside packaging should also be seized along with the goods – the current provisions mean that narcotics can be seized without warrant, but any wrapping must be the subject of an application for a section 203 seizure warrant, because it is forfeited goods, but not special forfeited goods; and
- the definition of a "person assisting" in section 183UA of the Customs Act should be amended to specifically include police officers, and provide for standing authorisations to be granted in respect of certain specialist assistants (such as locksmiths, forensic experts and computer experts), and to enable the executing officer to authorise persons to assist.

41 Submission No 16, p 11 (Australian Customs Service).

42 Submission No 16, pp 11-13 (Australian Customs Service).

Conclusions

5.47 While the Committee is not in a position to definitively decide, many of the above proposals put forward by the AFP and ACS would seem designed to make the administration of their search and entry provisions more effective without affecting the fair operation of those provisions.

5.48 However, the Committee has reservations about authorising the AFP to conduct covert searches, which, as the AFP itself observes, remains "a sensitive issue" involving a balance between effective law enforcement and the right not to have an otherwise illegal act performed on one's property. It is well to remember the words of the Vice Chancellor, Sir JL Knight Bruce in *Pearse v Pearse* that:

> the discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them … Truth like all other good things, may be loved unwisely – may be pursued too keenly, may cost too much.[43]

5.49 With that reservation, the Committee considers that the Attorney-General and the Minister for Justice and Customs should examine the feasibility and the ramifications of the other proposals put.

Recommendations

15. The Committee recommends that the Attorney-General and the Minister for Justice and Customs examine the amendments to the *Crimes Act 1914* proposed by the AFP, and the amendments to the *Customs Act 1901* proposed by the Australian Customs Service, and introduce legislation to implement those amendments.

16. While aware that covert searches might make law enforcement easier, the risks are such that the Committee is opposed to recommending such searches.

Senator Barney Cooney

Chairman

43 (1846) 1 De G & SM at 19-20.

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS WHO PRESENTED WRITTEN PUBLIC SUBMISSIONS AND ADDITIONAL INFORMATION TO THE INQUIRY

1. Attorney-General's Department
2. The Australian Family Party
3. NSW Farmers' Association
4. National Registration Authority
5. The National Industrial Chemicals Notification and Assessment Scheme
6. Australian Chamber of Commerce and Industry
7. Health Insurance Commission
8. Commonwealth Ombudsman **(Pt Confidential)**
9. Acting Federal Privacy Commissioner, Human Rights and Equal Opportunity Commission
10. Commissioner of Taxation
11. National Crime Authority
12. Australian Federal Police
13. Australian Securities & Investment Commission **(Confdential)**
14. AQIS, Department of Agriculture
15. Robert Lovren, M.I.A.M.E.
16. Australian Customs Service
17. Attorney-General's Department **(Supplementary)**
18. Director of Public Prosecutions
19. AQIS, Department of Agriculture **(Supplementary**
20. Institute of Chartered Accountants
21. Commissioner of Taxation **(Supplementary No. 1)**
22. Commissioner of Taxation **(Supplementary No. 2)**
23. Australian Securities & Investments Commission **(Supplementary)**
24. Australian Chamber of Commerce and Industry **(Supplementary)**
25. Australian Maritime Safety Authority

26. Master Builders Australia
27. Australian Transaction Reports and Analysis Centre
28. Commonwealth Ombudsman
29. Australian Taxation Office **(Supplementary No. 3)**
30. Australian Federal Police **(Supplementary-Pt Confidential)**
31 Construction, Forestry, Mining and Energy Union

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE AT HEARINGS

Tuesday, 22 June 1999, Committee Room 1S5, Parliament House, Canberra

Ms Laurel Johnson, Assistant Secretary, Criminal Justice Branch
Mr Karl Alderson, Principal Legal Officer, Criminal Justice Branch

Tuesday 3 August 1999, Committee Room 1S6, Parliament House, Canberra

Australian Taxation Office

Mr Michael D'Ascenzo, Second Commissioner
Mr Stuart Forsyth, Acting Assistant Commissioner, Small Business
Mr Wilfred Duda, Legislation Officer
Mr Bruce Thompson, Assistant Commissioner, Excise
Mr Thomas Pearce, International Tax Division
Mr Mark Darmody, Large Business and International

Australian Quarantine and Inspection Service

Mr Greg O'Connor, Assistant Director, Compliance, Legal and Evaluation Branch
Mr Barry Shirley, Compliance Operations Coordinator

National Registration Authority

Dr Joe Smith, Manager Quality Assurance and Compliance
Mr James Suter, Corporate Legal Manager

Wednesday 4 August, Committee Room 1S6, Parliament House, Canberra

Australian Federal Police

Mr Gordon Williamson, Acting Director, Intelligence and Operations Support
Mr Michael Atkins, Principal Legal Policy Adviser
Mr Mark Crooks, Federal Agent, Legal Policy

Liberty Victoria

Ms Felicity Hampel QC, President, The Victorian Council for Civil Liberties

Commonwealth Ombudsman

Mr Ron McLeod, Commonwealth Ombudsman
Mr John Taylor, Senior Assistant Ombudsman, Southern Region
Mr Peter Hassell, Senior Investigation Officer

Australian Chamber of Commerce and Industry

Mr Reg Hamilton, Manager, Labour Relations

Australian Customs Service

Mr Peter Naylor, National Manager, Investigations
Mr Phil Burns, National Manager, Imports/Exports Management
Mr Paul Lonergan, Assistant Director, Investigation Policy

Department of Immigration and Multicultural Affairs

Mr Garry Roxbee, Acting Director, Enforcement Section, Border Protection Branch, Border Control and Compliance Division

Monday 13 September 1999, Committee Room 1S2, Parliament House

Institute of Chartered Accountants

Mr Brian Shepherd, Taxation Manager
Mr Adrian Firmstone, National Indirect Tax Committee

Health Insurance Commission

Mr Sean Gath, Legal Practice Manager
Mr Peter Brandt, Manager, Compliance Branch

Australian Federal Police Association

Mr Mike Phelan, National Secretary

Commonwealth DPP

Mr Geoffrey Gray, Assistant Director, Criminal Assets
Mr Grahame Delaney, Principal Adviser, Commercial Prosecutions and Policy

Australian Taxation Office

Mr Michael D'Ascenzo, Second Commissioner
Mr Iain Anderson, Solicitor
Mr Bruce Thompson, Assistant Commissioner
Mr Thomas Pearce, International Tax Division
Mr Wil Duda, Legislation Officer
Mr Mark Darmody, Strategic Management Technical, Large Business and International

Australian Securities and Investments Commission

Mr Joseph Longo, National Director, Enforcement

Tuesday 14 September 1999, Legislative Council Committee Room, State Parliament House, Melbourne

AUSTRAC

Mr Neil Jensen, Deputy Director, Money Laundering Deterrence

Liberty Victoria

Ms Felicity Hampel QC, President, Victorian Council for Civil Liberties

Commonwealth Ombudsman

Mr John Taylor, Senior Assistant Ombudsman
Mr Peter Hassell, Senior Investigation Officer

Mr Michael Rozenes QC

APPENDIX 3

TERMS OF REFERENCE

On 10 December 1998 the Senate referred the following matter to the Standing Committee for the Scrutiny of Bills for inquiry and report:

> A review of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation authorising persons to enter and search premises.