



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## **SENATE**

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ESTIMATES

**(Additional Estimates)**

MONDAY, 27 FEBRUARY 2006

CANBERRA

BY AUTHORITY OF THE SENATE



## **INTERNET**

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:  
**<http://parlinfoweb.aph.gov.au>**



---

**SENATE****LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Monday, 27 February 2006**

**Members:** Senator Payne (*Chair*), Senator Crossin (*Deputy Chair*), Senators Bartlet, Kirk, Mason and Scullion

**Senators in attendance:** Senator Payne (*Chair*), Senator Fierravanti-Wells and Ludwig

**Committee met at 8.37 pm**

**ATTORNEY-GENERAL'S PORTFOLIO**

Consideration resumed from 17 February

**In Attendance**

Senator Ellison, Minister for Justice and Customs

**Attorney-General's Department  
Management and Accountability**

Mr Robert Cornall AO, Secretary

Mr Miles Jordana, Deputy Secretary, Criminal Justice and Security

**Commonwealth Director of Public Prosecutions**

Mr Damian Bugg AM QC, Director of Public Prosecutions

Mr John Thornton, Acting First Deputy Director

Ms Stela Walker, Deputy Director Corporate Management

**Office of the Commonwealth Director of Public Prosecutions**

**CHAIR (Senator Payne)**—I declare open this public meeting of the Senate Legal and Constitutional Legislation Committee. This evening the committee will continue its examination of the Attorney-General's portfolio additional estimates. The committee will begin, and conclude, with questions to the Office of the Commonwealth Director of Public Prosecutions. The committee has authorised the recording and rebroadcasting of its proceedings, in accordance with the rules contained in the order of the Senate dated 31 August 1999. As advised at previous hearings, the committee has agreed to the date of 31 March 2006 for receipt of answers to questions taken on notice and additional information. The committee requests that answers be provided to the secretariat in electronic format where possible.

I welcome Senator the Hon. Chris Ellison, the Minister for Justice and Customs and Minister representing the Attorney-General; Mr Robert Cornall, Secretary of the Attorney-General's Department; and officers of the Attorney-General's portfolio. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided otherwise. I also draw to the attention of witnesses the resolutions agreed to by the Senate on 25 February 1998, 'Procedures to be observed by Senate committees for the protection of witnesses', and, in particular, to resolution 1(10) which states in part:

Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken.

I also draw your attention to resolution 1(16), which states:

An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

Evidence given to the committee is protected by parliamentary privilege. I also remind you that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Minister, do you or Mr Cornall wish to make an opening statement?

**Senator Ellison**—None from me, Madam Chair.

**Mr Cornall**—No, Madam Chair.

**Senator LUDWIG**—In terms of when you assess briefs from departments that send them to you—I assume we call them briefs at that point, or are they referred to by some other name—

**Mr Bugg**—It depends on the form in which they come to us. ‘Brief’ is the term used. It may be a partial brief where the agency is seeking some indication of our likely position and we may not be able to deal with it because it is not a complete brief. It may be a partial brief or an incomplete brief, but ‘brief’ is a term that we use—

**Senator LUDWIG**—Do you assess those equally against some criteria or checklist as to whether you can then take them on?

**Mr Bugg**—Obviously, if it is regarded as a complete or final brief we will examine the evidence that is available and apparent from the brief. If it is not, and our assessment of it indicates or discloses that there are areas that need to be further clarified, we will contact the department or agency and ask them to undertake further inquiries or complete the brief.

**Senator LUDWIG**—Are they judged according to a checklist or some criteria or do you rely on the same test of reasonable prospect of success?

**Mr Bugg**—We apply the prosecution policy guidelines of reasonable prospect of conviction equally and consistently to all briefs. We published, with the endorsement of all HOCLEA agencies, a guideline on the presentation of briefs to the office. That is an available public document.

**Senator LUDWIG**—So there is no other checklist? That is the guideline upon which you judge whether you will take on a case and pursue it?

**Mr Bugg**—No, it is a guideline of how we would like to have the brief presented to us so that if it is a complex and detailed brief it comes in an orderly fashion. The standard of brief presentation can vary quite significantly from within an agency and from agency to agency depending on the proficiency of the case officer who presents the brief to us. That is sometimes a difficulty and it causes us to go back and ask further questions about it.

**Senator LUDWIG**—Is that the only criterion—reasonable prospect of success—that you would use, or are there other criteria that you would use to determine whether you would take on a brief and prosecute a case?

**Mr Bugg**—The prosecution policy is a three-stage test and the first stage is: is there a prima facie case? Then it is a qualitative analysis of the evidence that establishes that prima facie case: are there reasonable prospects of conviction? You are looking at the credibility of witnesses and a whole range of issues. If you determine that there are reasonable prospects of conviction then you consider whether a prosecution is warranted in the public interest, and there is a whole range of public interest factors in the published document. This is the Commonwealth policy and it applies to all agencies. It may determine that you will not prosecute but it would be a rare situation where we would say, ‘It is not in the public interest that we should prosecute this matter.’ We would then go back to the agency and say, ‘There is a case there but it is really not in the public interest. It is 10 years old and it is only a minor matter and the courts are likely to deal with it under section 19B of the Crimes Act. It will be a non-conviction outcome and there are other more deserving matters to focus the resources on.’

**Senator LUDWIG**—So effectively it becomes a three-stage test as well. It has got to pass all three for it to continue?

**Mr Bugg**—Yes.

**Senator LUDWIG**—And the third test is the least often used? Is that a fair summary?

**Mr Bugg**—That is a fair summary. Most of the substantial agencies deal with serious matters. They might have, for instance, an alternative regulatory procedure available to them. The tax office and ASIC are good examples, where they have civil regulatory avenues available to them. The serious matters are referred to us. If it is a serious matter, it is highly unlikely that you would consider in the public interest not proceeding with it.

**Senator LUDWIG**—What happens in the second test, where there may not be sufficient evidence? Do they get returned to the agency for more evidence, if it is available?

**Mr Bugg**—That is an issue which we would canvass at a regional level with the agency. We would say, ‘Look, we have examined the brief. As it currently stands, it is our view there are no reasonable prospects of conviction. The area of weakness in the brief is that we don’t have any evidence from which a jury could infer a criminal intent or could establish that there was an intention to defraud the Commonwealth’—or something along those lines. That is just a simple illustration. However, we may say, ‘Could you look at it and see whether or not in these areas you may be able to glean that evidence.’ You normally do not issue a death certificate on it straightaway; you would say, ‘Is there any prospect we can get this other evidence?’ There is dialogue between the agencies.

**Senator LUDWIG**—Are the resources you have and costs you might incur considerations at any of those three stages?

**Mr Bugg**—At stages 1 and 2, no. At stage 3 it may be, if it fits into the public interest—where the likely outcome makes it hard to justify the continued expenditure of public funds. In terms of a budget message from my office, in the 6½ years I have been director, I cannot

think of a matter where there has been a reasonable prospect of conviction and we have decided not to prosecute it because of a cost factor. It is fair to say that our budget is a finite amount, but usually what you would see is a prioritising of matters rather than: 'We haven't got the funds to do this; we won't do it.' It just means that something might be dealt with, shall we say, less quickly than it might otherwise have been. You would say: 'This branch of that particular office in whatever region it is has got to prosecute this serious tax fraud first. That less serious tax fraud will be next.' There is a prioritising. So that you understand the situation, you could not have people standing around in reserve with nothing to do, waiting for those other matters to come in so that you could say we would do them. Things expand: if someone has got two big files to deal with and they take on a third file, they have to prioritise.

**Senator LUDWIG**—How do you determine the public interest? Is it a weighing exercise that you make, ultimately, or do your officers make it?

**Mr Bugg**—You would discuss it with the investigative regulatory agency. There are things that indicate whether it might or might not be in the public interest. You could take the age of the accused person; it might be someone who is in their late 80s and they are charged with an offence that was committed 30 years ago. You would look at it and say, 'If this person goes to court, long experience indicates that a court is unlikely to impose a custodial sentence. They are likely to take that person's age and state of health into account.' The prevalence of the matter will also be taken into account. It may be a matter such that the regulatory agency says: 'This is not a great problem for us. We have tripped across this breach; it is the first one we have seen, heard of or even suspected in 10 years so there is no great regulatory message we want to send.' We might say, 'If that's your view, is it in the public interest to take it on?'

There is a list of about 20 to 23 items in the prosecution policy. They are said to be not exhaustive but indicative. One of the issues that you might take into account is the state of health of the accused person. To take the example of a well-celebrated matter, whilst we had good, substantial and reliable evidence in the case you are immediately thinking of in Queensland, if something like that were to occur again we would take that medical evidence to court and require the accused to apply for a permanent stay of proceedings. I suspect on the evidence we had available to us at the time that would have had a reasonable prospect of success.

**Senator LUDWIG**—Would that be why some of those war crimes have not been prosecuted?

**Mr Bugg**—I do not think there has been a war crime brief referred to my office that we have decided not to prosecute—there was one referred to us with insufficient evidence, but it was not on a public interest ground. I will defer to my deputy on this because over the substantial period of time we are talking about he was head of that particular branch of my office.

**Mr Thornton**—Public interest factors very seldom occur in relation to serious matters. They are really around the edges if something were regarded as trivial. It is not a usual process; it does not figure heavily in the vast majority of cases. I am certainly not aware of any war crimes matter where we would find that it is not in the public interest. One of the things we take into account is a consultation with the agency referring to look at their

regulatory intention and how important the case is to them. I certainly have no knowledge of a war crime matter which would fall into that category.

**Mr Bugg**—One of the interesting aspects of Commonwealth prosecuting that I see is a fairly sharp distinction between that and state prosecution. The distinction between the two is that state prosecutions are mainly crimes against the person—assaults, rapes, murders, serious car incidents causing injury or death and theft of property. That categorises it. Commonwealth offences are breaches of Commonwealth law, a lot of which is regulatory. At a state level these days, thank goodness, the interest of the victim is taken into account. You talk to the victim about how you see the evidence and what matters you might be able to prosecute, and you take into account the victim's views about a proposal, let us say, to take a plea to three charges instead of six as an appropriate outcome.

A Commonwealth regulatory agency is trying to control market behaviour through regulation and therefore their views about the regulatory outcome and the signal they want to send from a particular investigation they have undertaken is something you factor into what you do. I cannot think of any serious matter that has come our way in my time as director where we have looked at it from a public interest point of view and gone back to the agency. Normally we will say: 'Obviously, this is a serious breach. The only regulatory message is to prosecute this criminally and seek a sentencing outcome that reflects the seriousness of the conduct.'

There is a healthy dialogue about that. Sometimes you might have an accused person whose lawyers say, 'He's being charged with eight offences; we'll plead to six.' And you say, 'Which six?' They might be at one end of the conduct. You then go back to the regulator and the regulator says, 'Hang on, this was a very expensive investigation and we have extradited this person from overseas.' We then say, 'Yes, they are all good factors.' So you go back and say, 'No, it has to be a trial, because those serious matters at the other end have to be heard.'

**Senator LUDWIG**—If you look at one end—for example, at Centrelink prosecutions—and then you look at the other end—for example, at war crimes prosecutions or prosecutions for serious drug offences—are they balanced in terms of the gravity of the offence with regard to how you commit your resources and how the briefs come in?

**Mr Bugg**—No. Centrelink numerically is the highest area of activity. We have Centrelink branches in each of our offices and primarily that is all they do. In the smaller offices you might get a mixture of Centrelink matters and other fraud being dealt with by one officer because you do not have the resources to have a separate branch. But, in the larger offices, you will have a general prosecutions branch or even two, as we have in some of the larger offices, which will undertake prosecutions of drug offences and other serious criminal conduct. Then you will have a tax branch and a commercial prosecutions branch. The commercial prosecutions branch in, let us say, the Sydney office deals exclusively with ASIC. The tax branch deals exclusively with ATO prosecutions. You might get some excise prosecutions which now come under the tax office instead of Customs. Previously those prosecutions would have been dealt with in the general prosecutions branch.

As to the resources, you tend to have a certain number of referrals. There is dialogue at a regional liaison level where we know whether there is suddenly going to be an increase or

influx in numbers. John Thornton was in the Perth office two weeks ago and I was there last week because we have been given an indication from one of the agencies that there is a level of activity that is going to increase and we need to explore ways of resourcing that particular branch. It is not a question of saying, 'Let's take some people off the Centrelink office and get them to work in this area because there has been an influx of work.' You do not prioritise in that way. You tend, through reasonably long experience now, to have a reasonable idea of what sort of workload you are getting from each agency. Those regional liaison meetings tell you whether you need to resource up. If it is a special case, such as it was and still is with HIH in Sydney, we seek special purpose funding. You get it and then you recruit and resource to meet that demand. What we do is we normally recruit at the bottom level and then transfer more experienced staff out of other branches.

**Senator LUDWIG**—You should not give too much away on that with the minister beside you! But I understand the concept.

**Mr Bugg**—So that is how you achieve it. We prosecute everything that is referred to us unless there are no reasonable prospects of conviction.

**Senator LUDWIG**—If for argument's sake a Centrelink branch was running short in a particular area of work, you do not hunt a brief; you might just reassign the work? Is that what would happen?

**Mr Bugg**—Say, for instance, there was a fall-off of work in a Centrelink branch, in one of the big offices, and we had people who were—

**Senator LUDWIG**—Underutilised?

**Mr Bugg**—Yes, underworked. We would say, 'Look, we need to reallocate these people.' We would look at other areas of the office where maybe there were greater pressures of work and we would move them there. We do not ring up Centrelink and say, 'Listen, we need more prosecutions.' It is a question of what they send to us. If what they send to us does not meet the prosecution test then it is not prosecuted.

**Senator LUDWIG**—Coming back to some of the issues we were discussing last time, you indicated that you had received feedback from ASIC or Mr Lucy about how the briefs were constructed or about the job you were doing. Do you get that from other agencies like ATO or ACCC? In other words, what is the relationship between those organisations and yours as to feedback about whether their cases are being attended to, whether the briefs are being completed in a timely fashion and whether they are satisfied with the work you are doing? Do you also talk to those agencies?

**Mr Bugg**—Yes. I mentioned one of the agencies whose CEO had telephoned me about a matter that involved a case officer who had some personal issues and the matter had not been attended to to my satisfaction, nor to his. We allocated the file to someone else. That is another agency, not ASIC.

**Senator LUDWIG**—You indicated that you had received positive verbal feedback from Mr Lucy. Have you received positive verbal feedback from the ATO—from Mr Carmody previously and now from Mr D'Ascenzo—or from Graeme Samuel from the ACCC?

**Mr Bugg**—Yes. Our working relationship with the ACCC is fairly narrowly focused at the moment. What we are doing is building up a protocol and helping with the training of ACCC officers in anticipation of the cartel conduct provisions. I know that is going very well. With respect to the working relationship since 1995, there was a problem back in 1995—I was not in the position then—and the then director instituted, with the assistance of one of the deputies who is still with the office in Canberra, a fast-track process for dealing with ACCC matters that were being considered for the purpose of prosecution. There is regular liaison and, as I understand it, very positive feedback. I know from my discussions with Graeme Samuel that that is the case. He is very happy with the work we are doing. There is also the preparatory work for these other matters. With the ATO, yes, there has been quite a restructuring of the serious non-compliance enforcement area in the ATO in the last 18 months to two years. I know there is very close liaison between my office and the ATO about that.

There is a sense of frustration when you get into the court list. You will see that our performance indicators are more about timeliness in assessment of briefs, because once you get into the court list, to an extent, you lose control of the stopwatch because the listing is administered elsewhere. Sometimes we will have problems getting a witness to court and we will have to seek an adjournment; sometimes the defence counsel are double booked and they ask for an adjournment because they change counsel. Frustrating things like that start to get at the agencies. Where obviously it is not our fault, clearly there is an understanding about it.

**Senator LUDWIG**—You mentioned performance indicators. Do you use performance indicators for court work?

**Mr Bugg**—The main focus of our performance indicators is timeliness of brief preparation. It is in the annual report.

**Senator LUDWIG**—So that is what you are referring to.

**Mr Bugg**—Yes.

**Senator LUDWIG**—You were not referring to anything apart from that?

**Mr Bugg**—The performance indicators we use in the annual report are outcomes in terms of an assessment against previous years.

**Senator LUDWIG**—Is timeliness one of them?

**Mr Bugg**—Timeliness is not one.

**Senator LUDWIG**—No, I could not recall that. Is that a separate one that you use or is it not one that you use?

**Mr Bugg**—We use it on this basis: I seek a report on the timeliness of our brief assessments on a regular basis from all the regions and if we look as if we are not assessing briefs in a timely fashion in particular areas then we seek a report on what the difficulty is and go back to the resourcing issue. Or it might be one of these problems where you have briefs that come to you that are, for want of a better word, in a bit of a mess, where they are not in any good order, they are hard to deal with. And we are not talking about a file that big. I was looking at one in one of my regional offices the other day that was brought to my attention where there were over 40 lever arch folders. It takes an individual officer some considerable

time to sort that out, particularly if there is no reasonable assistance in a covering report from the agency; it is just sort of dumped. That happens. But other people have their pressures on them as well to get a file to us, and they think they have achieved it if the file comes no matter what state it is in. I said that we have robust understandings, and I think that is important. We understand their priorities. Sometimes it can get a little bit difficult, but we have all got hard jobs to do and we try to get on with them as comfortably as we can.

**Senator LUDWIG**—As a consequence of some of those verbal conversations you have had with the ACCC, ASIC or the ATO, have they asked you to change any procedures or change the way you handle any briefs?

**Mr Bugg**—In terms of change, I guess there are two areas with ASIC. One is that they have changed the basis of their regulatory enforcement focus—they do it nationally now rather than regionally. That is something we cannot adjust to 100 per cent: with someone who goes national we cannot finger joint into that because section 80 of the Constitution requires us to prosecute where the offence occurred. If, for instance, a Western Australian offence is, because of resourcing, investigated by a Sydney team we cannot allocate a Sydney team to its prosecution because ultimately it has to be prosecuted in a court in Western Australia. We have got to stay on very much a jurisdictionally set focus for our teams. So that caused some difficulties when it was first implemented. I think I mentioned we have just renegotiated our MOU and I think as a result of it you could say that there is a better flexibility about that relationship in terms of ASIC's need to have a national focus but our need to have a regional practical application.

**Senator LUDWIG**—In terms of a good working relationship with ASIC, ATO and the ACCC, do you contact them to ask them if they are sitting on any work or any briefs that should come across or if they are working on something that is coming across?

**Mr Bugg**—Pretty much as I said a moment ago, at a regional liaison meeting the regional commissioner if it is ASIC or the deputy commissioner if it is the ATO might say, 'We've got this big matter and we are just about ready to start talking to you about where it should go to from here. We think half of it should be prosecuted, the other half should be dealt with by way of civil penalty, but we will need to sit down and talk to you about it. That will probably be in a couple of months.' That is the sort of exercise that goes on. Rarely these days is the truck parked in our backyard without reasonable notice.

**Senator LUDWIG**—We were talking last time about perjury and I think you took some questions on notice. If the ACCC or the ATO or ASIC had issues where they were not confident that their witnesses at the time were providing sufficient information to you, do they then seek a prosecution for the suspected perjury or send you across a brief for that if the witness turns out to falsify evidence?

**Mr Bugg**—It depends on the nature of the—

**Senator LUDWIG**—Yes, the particular perjury.

**Mr Bugg**—conduct, because if it is just building up a brief and they are not satisfied that a witness either is being truthful with them at the investigative phase or is being uncooperative with them you will not be looking at perjury at that stage.

**Senator LUDWIG**—No.

**Mr Bugg**—As I think I might have mentioned to you last time, one of the difficulties you are confronted with at a trial phase, or maybe at a committal phase, when you are looking at perjury is that someone says, ‘Look, I can’t remember,’ and you might have the witness declared hostile and have them cross-examined. It is very hard in those circumstances to look at it as straight perjury because somebody says, ‘Sure, that’s my statement but, whilst it’s in that statement, I’m not now 100 per cent satisfied that I have an accurate recall about that.’ That very situation was one of the causes for derailing an enormously significant tax prosecution a couple of years ago. Because you are dealing with time spans, you cannot say, ‘This is perjury, black and white: I’m going to prosecute it.’ That is one of the difficulties.

**Senator LUDWIG**—If we take a broader view of perjury, would you take a matter and say, ‘This warrants an investigation or a prosecution’? Do you refer on that instance, or do you develop a brief?

**Mr Bugg**—We have no investigative function at all. We are totally dependent on the agencies that refer matters to us. If, for instance, there was a case of unsatisfactory behaviour of a witness in a sworn testimony situation where we felt that it ought to go further, we would refer the matter out to the police for further investigation to then examine the material they gather.

**Senator LUDWIG**—And has that happened recently?

**Mr Bugg**—I have no recall of it in recent times, no.

**Senator LUDWIG**—We will go to more specifics, but we will bear in mind what you can and cannot say. Given what you said about it being unusual that the truck would turn up without someone phoning you beforehand, is the Gerard case one where they would talk to you beforehand?

**Mr Bugg**—No, I think the then commissioner made a public statement. The matter was never referred to my office, so that did not ever come our way. If I could just pause to make a comment about that, it is quite interesting how, in a sense, I think some commentators believe that we are the gatekeeper on what gets prosecuted and what does not. That is certainly true on the application of the prosecution policy of the Commonwealth, which I was outlining earlier. We are totally dependent on what is referred to us by the 40-odd agencies who refer matters to us following their investigation or examination of matters over which they have regulatory responsibility.

**Senator LUDWIG**—But you could ask for a brief if you wanted one.

**Mr Bugg**—I have no power to direct an agency to refer a matter to me.

**Senator LUDWIG**—To take an extreme position, say everybody knew there was a major case and it had not got to you. It was common knowledge that there was a major investigation under way, there was an outcome and that was aired in public, I guess, or you read it in the paper. Do you just continue on? You would not take cognisance of that and ask a couple of questions like, ‘Where is the brief?’

**Mr Bugg**—I guess it would depend on the circumstances.

**Senator LUDWIG**—But in terms of it being legally possible, you do not have—

**Mr Bugg**—I suppose it is possible for me, or someone in the region, to ring up and say: ‘Is this matter coming our way? There’s been a fair amount of publicity in the press.’

**Senator LUDWIG**—‘We want to get our resources ready, because it’s a large matter’ or—

**Mr Bugg**—Yes. But if the agency says no then I have no power to direct it to send something to me.

**Senator LUDWIG**—Yes, that is the additional point: you do not have any power to then say, ‘I demand that you send me a brief.’

**Mr Bugg**—There will be some matters where there might be an arrest. Not all Commonwealth matters work up to the laying of charges after consultation and advice from my office. There may be concern that someone is about to flee the jurisdiction. In those circumstances, the agency will arrest and lay charges and then the matter comes to us. I would not classify that as a file that we have not been forewarned about and that has been dropped on us with no notice. However, that can impact fairly significantly on how we would then allocate resources to deal with the matter, because, once an arrest has taken place and someone is brought before the court, there are varying regimes of management of cases in the states and territories, and the clock starts ticking. You then have so many days for disclosure in some jurisdictions. You have to give particulars of charges, and the matter starts running into the court system.

Then, obviously, if you have, say, an arrest in a serious tax fraud and you have other people who are working on fairly detailed tax briefs where there is no charge yet laid then you will drag them off that and say, ‘This matter is urgent.’ As I say, that is the sort of process where we just cannot have people standing by waiting for that sort of thing to happen. You have to prioritise, and that means that then maybe the brief assessment of the other matter will be held up until that officer or officers are free to deal with it.

**Senator LUDWIG**—I think we have already circled this wagon, but I guess what I am trying to establish is where you might act under your statutory authority where you recognise that there might be criminal intent or suspected criminal intent occurring—that someone is not cooperating with an interview with the ACC—in other words, within the brief—or the ACC tell you that, if requested, ‘We are not getting a cooperative witness, so what should we do?’ Do they come and ask you for advice, or do they seek their own legal advice first?

**Mr Bugg**—Where there is a prosecution for a person not cooperating, the matter will be referred to us. Where there is a witness who is not cooperating and the ACC wants them prosecuted then the matter will be referred to us. I think about two appearances ago you asked me a question about what I felt about that particular position and whether there ought to be a summary power to prosecute for contempt, and we discussed the pros and cons of that. I think it was in November last year. That will be referred to us in the form of a file, in which there will obviously be a transcript of the person’s refusal to answer questions, and we will prepare the matter and submit it to the court as a prosecution for failing to answer.

**Senator LUDWIG**—And you get those from the ACC and the ACCC?

**Mr Bugg**—Certainly from the ACC. I am unaware of any from the ACCC, but I could check.

**Senator LUDWIG**—Would you mind just having a check. I think I have already asked for those that have been referred from the ACC. If I have not, I will ask you to do that just in case.

**Mr Bugg**—Yes. I am pretty sure that it was in November that there was some discussion about it. It would be in the transcript somewhere.

**Senator LUDWIG**—Of course, the ultimate is that, if there is a breach, under the ACCC there is a requirement to answer questions, and if they fail to answer questions then the ACCC can send you a brief and request a prosecution. I am not sure of the penalties but the penalties might involve penalty units and/or other sentencing options. I am not familiar with them.

**Mr Bugg**—The ACC or the ACCC?

**Senator LUDWIG**—The ACCC.

**Mr Bugg**—I will take on notice just what has come our way in recent times.

**Senator LUDWIG**—They would not go to the AFP then, would they? That would normally be a breach of their statutory function? Only if they ultimately did not cooperate with you or they changed their tune, you might then refer it to them for a criminal investigation?

**Mr Thornton**—They would have to be investigated by somebody, so you would have to have a brief put together. For example, if you take the ACC, it became a bit of an issue for them in certain investigations or inquiries they were doing. They came and saw us and we sat down and talked about how we might go about it: what is the best way to get these matters before the court quickly? We discussed what some of the problems they were facing were and how we might bring them to the attention of the court. That is not unusual with agencies in not only this area but any regulatory area where there is something that they want to take particularly a strategic approach about. They would come and talk to us about that.

In relation to the ACCC, I am not as familiar. I cannot recall offhand that we have had any examples, certainly in recent times. I am actually not familiar with the powers either. That is something that we could take on notice. We could look at whether they have a similar power in terms of the failure to answer or the provision of false or misleading answers.

**Senator LUDWIG**—Do you recall whether you have referred matters to the AFP for investigation in the last couple of years, in terms of the non-cooperation of a witness or, alternatively, in the broader meaning of perjury, I guess?

**Mr Bugg**—I just cannot think of any, I am sorry, in terms of, let us say, the ACCC. Certainly we have had matters come to us from the ACC in relation to a particular national inquiry that it is undertaking, and that has resulted in prosecutions in a couple of regions that I am aware of. Sometimes someone will bring something to our attention. For instance, someone will write to us on an assumption—as I said, commentators have encouraged them to think that we also have an investigative function—and we will write back and say: ‘Look, thanks for drawing this to our attention. We don’t have an investigative function. We’ve referred it to the AFP.’ There are matters like that which could cover a broad range of

allegations of inappropriate conduct: it might be a suggestion that someone is dealing in drugs or that someone is breaking a particular law that might come under a regulatory agency's authority.

**Senator LUDWIG**—Graeme Samuel, the Chairman of the ACCC, has been reported to have said:

A failure to respond frankly and honestly can involve a breach of the criminal code, which can involve jail sentences if the DPP prosecutes.

Is that accurate?

**Mr Bugg**—What is the preamble to that, because it may be a failure to respond in giving evidence in court in a way that misleads, where you might be able to say that the person is committing perjury? I would like to take that on notice. What is that in relation to—a report of an interview?

**Senator LUDWIG**—Yes, it is an interview, so it may not be clear.

**Mr Bugg**—I think I see Mr Samuel tomorrow, so I could ask him, if you like. I could take it on notice and put him on notice!

**Senator LUDWIG**—I am happy for you to do that. Sometimes people throw up novel issues and you then try to unpack exactly what they are talking about.

**Mr Bugg**—I would like to look at that a little more carefully because I would not want to mislead you.

**Senator LUDWIG**—The other area revolves around, in part, the Gerard matter. The tax office have the ability to conduct their own prosecutions—I think we can agree on that. In the Morris case, it was said that the DPP has the ability to prosecute a person for a tax offence even if that person has previously reached a settlement with the ATO. So, as I understand it, even if a person had reached a settlement with the ATO, if a brief were referred to you for a prosecution, you could still prosecute. Would the trigger be that you would require that brief to be sent to you? I guess you would not see it if it was not.

**Mr Bugg**—I am not sure of the facts of the Morris case. It was when Michael Rozenes was director and the case happened, I think, about 12 years ago. I think that outcome was a result of Morris's application for a stay of proceedings, on the basis that he had obtained a civil settlement of his tax liability with the tax office, in which he was saying, 'That is an end to the matter; I cannot be prosecuted.'

**Mr Thornton**—As part of the settlement the agreement was that he would not be prosecuted. That is not a power that the tax office has. It is a question for us in terms of the actual prosecution. So, as a result of that, it was inserted into the guidelines that in any settlement Tax was doing they would not include a condition that you would not be prosecuted, because that was a matter for us.

In relation to the prosecutions that the tax office does, which you mentioned at the start, they are minor regulatory failures to lodge tax returns and those sorts of things. I think they do a number of thousands of those each year. They do not prosecute serious fraud cases or anything like that.

**Senator LUDWIG**—Going back to the first part of that quote, which might help you, it says:

We have become increasingly concerned at the lack of frankness and honesty in responding to investigations or inquiries by the ACCC ...

Then he went on to say:

A failure to respond frankly and honestly can involve a breach of the criminal code, which can involve jail sentences if the DPP prosecutes.

I expect you will want to take that on notice. But that might bound the area if Mr Samuel's memory needs jogging as to what he has said.

**Mr Bugg**—I read the transcript of a radio interview he did from London recently and I thought it was very accurate, but I would need to look at that a little more closely.

**Senator LUDWIG**—Going back to the tax matter, the ATO does the regulatory offences. Is there a grey area where it shifts from one to the next? Once a matter becomes a serious offence as defined under the Criminal Code is a brief then prepared and sent to you?

**Mr Thornton**—Yes. They are very minor matters. Any matters that may involve potential jail sentences, for example, or anything like that, would come to us. I guess there has to be a grey or crossover area, but it seems to be fairly well understood in relation to the matters that they do. They are fairly straightforward pleas of guilty. They do not do hearings as such. If there is a plea of not guilty the matter will come to us.

**Senator LUDWIG**—So the DPP has the ability to prosecute a person for a tax offence even in situations where a person might have reached a settlement with the tax office?

**Mr Thornton**—Yes. Going back to the Morris case, it was not a case where they considered it for prosecution and said, 'We have decided as part of our prosecution process that this is a matter we are not going to prosecute.' It was just that they reached a global settlement and one of its conditions—I am speaking from memory here—was that there would not be a prosecution. As I said, as a result of that, it is now clear in Tax's published guidelines on settlements that that is not one of the conditions that they would include.

**Senator LUDWIG**—I think we established earlier that you did not receive a brief from the ATO relating to a case against Mr Gerard, or other persons involved in his company, for tax evasion or any other form of tax fraud.

**Mr Bugg**—I confine that to Mr Gerard. It is a pretty big company; there may be someone in there who has failed to lodge a return or something. I just do not know about that. But, certainly, the publicised—

**Senator LUDWIG**—I think we could confine it to the more publicised issue. We will forgive you if there has been a breach of a regulatory tax file return.

**Mr Bugg**—Yes. No file was referred to us specifically.

**Senator LUDWIG**—When you say 'specifically', is there a condition or did you seek—

**Mr Bugg**—No.

**Senator LUDWIG**—Did you talk to the ATO about the Gerard matter?

**Mr Bugg**—We heard about it in the same way that I guess most of Australia did.

**Senator LUDWIG**—You read it in the newspaper?

**Mr Bugg**—Yes. I heard about it on the radio.

**Senator LUDWIG**—Maybe listened to it on the radio.

**Mr Bugg**—Then I read about it in the newspaper, yes.

**CHAIR**—Through the generally available public media.

**Senator LUDWIG**—I use the news aggregator RSS feed. It is quicker.

**Mr Bugg**—Certainly, we did not ever get a brief on the matter. Whether there was any comment about it at a liaison meeting—I could clarify that.

**Senator LUDWIG**—Yes, that would be helpful. Thank you.

**Mr Bugg**—A couple of years back a judge was to be prosecuted for failing to lodge annual tax returns. That is the sort of thing that you might see at a liaison meeting, for example. That came to us.

**Senator LUDWIG**—Yes, I think I have been pursuing ITSA about barristers for a while. Some of those issues did include—

**Mr Bugg**—It clearly would be inappropriate for a tax officer to be in court trying to prosecute that. So that is in the grey area and it is discussed at liaison meetings.

**Senator LUDWIG**—I am happy to leave it at that. I can put any other questions on notice. It has been very helpful that we have been able to have the additional hour of questioning. I know there was a bit of inconvenience involved and I appreciate your appearance here this evening, Mr Bugg.

**Mr Bugg**—Thank you, Senator.

**CHAIR**—Thank you very much, Senator Ludwig. Thank you for your assistance tonight, Mr Bugg, and thank you to you and your colleagues for returning for this estimates committee hearing this evening. We appreciate that, as Senator Ludwig said. Also, thanks to the minister and Mr Cornall.

**Committee adjourned at 9.33 pm**