



Australian Crime Commission

USE OF CERTAIN POWERS UNDER DIVISION 2, PART II
OF THE *AUSTRALIAN CRIME COMMISSION ACT 2002*

August 2008

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

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Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

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EXECUTIVE SUMMARY

An own motion investigation in accordance with s 5(1)(b) of the *Ombudsman Act 1976* (the Ombudsman Act) was initiated on 2 July 2008 into the Australian Crime Commission's (ACC's) use of certain of the examination powers available in Division 2 of Part II of the *Australian Crime Commission Act 2002* (the Act).

A preliminary part of the investigation was an inspection conducted at the Examinations Unit of the Brisbane offices of the ACC from 15 to 17 July 2008.

The inspection focused on the summonses and notices issued under ss 28 and 29 of the Act since the amendments made by the *Australian Crime Commission Amendment Act 2007* (the Amendment Act) came into effect on 29 September 2007. The inspection also examined material required to be served with a summons or notice. The preliminary investigation was designed so that any findings which could assist the current inquiry into the Amendment Act by the Parliamentary Joint Committee into the ACC (the PJC) could be provided without undue delay.

This report makes four recommendations.

Recommendation 1

The ACC should encourage Examiners to record reasons, where possible, before or at the time that a summons or notice is issued. The ACC should also note the Ombudsman's concern, arising from this investigation, that where reasons were recorded after the issue of a summons or notice, this was not done 'as soon as practicable' in all cases.

Recommendation 2

The ACC should record on the relevant computer record for a summons or notice when a witness, during examination, has confirmed receipt of a statement of rights and obligations and the applicable determination of the ACC Board (for summonses).

Recommendation 3

The ACC should record as the date of issue of a summons or notice the date the relevant instrument is signed.

Recommendation 4

The ACC should obtain specialist advice to confirm that summonses, notices and records of reasons, once in final form, are being retained in an electronic format that cannot subsequently be changed.

PART 1—BACKGROUND TO INVESTIGATION

1.1 On 2 July 2008, the Acting Ombudsman wrote to the Chief Executive of the ACC, giving notice of her intention to conduct an own motion investigation under s 5(1)(b) of the *Ombudsman Act 1976* into the ACC's use of the examination powers (Division 2, Part II) in the Act.

1.2 The decision to conduct an investigation flowed from discussions between the Ombudsman and the ACC Chief Executive in December 2007. At that time it was proposed that examination records be inspected so the ACC might be reassured that actions taken under the examination powers complied with certain of the requirements of ss 28 and 29 of the Act. More recently, the PJC noted that it would consider, as part of its inquiry into the Amendment Act, the findings of such an investigation by the Ombudsman.

1.3 Section 28 of the Act authorises an examiner to summon a person to appear and give evidence and produce documents at an examination to be conducted by an examiner. Section 29 authorises an examiner to issue a notice requiring a person to produce a document or thing to an examiner or member of staff of the ACC. It is an offence if a person fails to comply with a summons (s 30(1)) or notice (s 29(3)).

1.4 Prior to the Amendment Act both sections provided in similar terms that an examiner 'must be satisfied that it is reasonable in all the circumstances' to issue a summons or notice, and 'must also record in writing the reasons for the issue' of the summons or notice (ss 28(1A) and 29(1A)). The then Attorney-General, the Hon. Phillip Ruddock MP, in his Second Reading speech on the introduction of the Bill which became the Act, advised that in *ACC v Brereton* [2007] VSC 297, the Victorian Supreme Court held that for a summons to be valid, reasons for issuing the summons must have been issued prior to the time the summons was actually issued.¹

1.5 The purpose of the Amendment Act was to respond to the decision in *Brereton*, by amending ss 28(1A) and 29(1A) to provide that an ACC examiner could record his or her reasons for issuing a summons or notice to produce documents before, at the same time or as soon as practicable after the summons or notice had been issued. The Amendment Act further provided that failure to comply with certain technical requirements, including those of recording reasons, did not affect the validity of the summons or notice. The amendments retrospectively validated any summonses or notices that might have been considered invalid for failure to have reasons for issue recorded prior to issue of the instrument.

1.6 It was agreed between the Ombudsman's office and the ACC that the most effective means of progressing this investigation would be in the form of an inspection by the Ombudsman's staff of the records made by examiners of their reasons for issuing summonses and notices under the Act. This inspection would focus on the dates that reasons had been recorded in writing and the date the respective summons or notice was issued. The report on such an inspection should be able to provide findings that would assist the PJC inquiry. A notice to the ACC to produce documents in accordance with s 9(1) of the Ombudsman Act was sent to the

¹ Australia, House of Representatives 2007, Debates, No. 14, page 119.

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ACC on 14 July 2008 and at the same time, the Attorney-General, as the responsible Minister, was notified of the investigation in accordance with s 8(7A)(b) of the Ombudsman Act.

1.7 The Ombudsman team has also begun preparing for a more detailed inspection in relation to the form and appearance of the reasons statements and, possibly, the wider administrative and procedural arrangements of the ACC in regard to the issue of summonses and notices.

PART 2—INVESTIGATION METHODOLOGY

2.1 This investigation consisted of an inspection in relation to all examination summonses and notices issued by the ACC between 29 September 2007 and 14 July 2008 inclusive. That is, the investigation looked only at summonses and notices issued since the commencement of the Amendment Act.

2.2 From each set of summons and notice a representative sample was selected. This was accomplished by selecting, from a list of the set in number order, every third item, commencing at a random point in the list. The selection went to the end of the list and recommenced at the beginning until a third of the numbered instruments had been selected for inspection.

2.3 In the time available, the Ombudsman team was able to inspect 24% of the set of summonses and 31% of the set of notices. The inspection process was significantly slowed by the difficulties in using the ACC software and searching through the database used by the ACC (an ACC expert guided the team during the inspection). The comment is made later in this report that such a slow and difficult system may itself provoke errors.

2.4 The Examinations Unit at the ACC has moved to almost total electronic document management and storage with very little material retained as a paper record. For example, the copy of an issued summons that is retained as a record is the original PDF document with a digital signature. No paper photocopy or scanned copy of the summons and any required accompanying documents served on the witness is kept by the Examinations Unit.

2.5 In order to confirm that the retained electronic record was indeed issued and served at the date indicated, the team also inspected the service document returned to the Unit by the investigator after they had personally served any summons or notice and required accompanying documents. Many service documents had not yet been returned by investigators so that the checks of the dates served, although indicating consistency with the computer record, were limited.

2.6 The ACC has since advised that service documents are generally kept by the investigation unit within the ACC that sought the issue of the summons or notice.

2.7 Other documents are required to accompany summonses and notices when served: the determination of the ACC Board, referred to in s 28(2) of the Act, and the statement of rights and obligations, referred to in s 29A(3) of the Act. As no photocopy or scanned copy of the documents actually served is kept by the Examinations Unit, to confirm service of these associated documents, the Ombudsman staff inspected the exhibits tendered during examinations. The ACC informed the Ombudsman team that Exhibit 1 in each examination, being a copy of the summons, the determination and the statement of rights and obligations, is shown to the witness for confirmation that they have received each of the documents. The team inspected the exhibits available at Brisbane office which were consistent with what would be expected. However, confirmation by the witness was not recorded other than on the audio record of the examination. The team did not listen to each recording to verify that confirmation was made by the witness.

PART 3—RESULTS OF INVESTIGATION

Time of recording of reasons

3.1 The main focus of the investigation was to provide an indication of the time taken by the examiners between issue of a summons or notice and the recording of reasons for the issue of the instrument. The results are set out in *Table 1: Summonses* and *Table 2: Notices*. The investigation also revealed a number of ways in which the ACC could improve the administration of the provisions of the examination powers that were the focus of this preliminary investigation. Recommendations, where appropriate, are made in relation to each issue.

Table 1: Summonses

Number of summonses inspected	Reasons recorded at same time as issue of summons	Reasons recorded at later time	Reasons that could not be produced at inspection
161	69	86	6
100%	43%	53%	4%

Note: There were no reasons recorded at a date prior to the issue of the summons. The records did not note the time of the day at which reasons were recorded, so there was no way of knowing if the reasons were recorded at an earlier time on the day that the summons was issued. This does not raise any issue, as s 28(1A) permits reasons to be recorded prior to the issue of a summons.

For reasons recorded at a later time		
The number recorded within 1 day	The number recorded between 1 and 7 days	The number recorded more than 7 days later
36	26	24
22%	16%	15%

Table 2: Notices

Number of notices inspected	Reasons recorded at same time as issue of notice	Reasons recorded at later time	Reasons that could not be produced at inspection
127	50	72	5
100%	39%	57%	4%

Note: There were no reasons recorded at a date prior to the issue of the notice. The records did not note the time of the day at which reasons were recorded, so there was no way of knowing if the reasons were recorded at an earlier time on the day that the notice was issued. This does not raise any issue, as s 29(1A) permits reasons to be recorded prior to the issue of a notice.

For reasons recorded at a later time		
The number recorded within 1 day	The number recorded between 1 and 7 days	The number recorded more than 7 days later
26	23	23
20%	18%	18%

Discussion

3.2 As noted at paragraph 1.5 above, the Act provides that a record of reasons for the issue of a summons or notice may be prepared before, at the same time or as soon as possible after issue of that summons or notice. It also provides that the validity of a summons or notice is not affected by matters related to the recording of reasons. Consequently, any issues disclosed by this investigation about delay, or failure, in recording reasons do not impact on the validity of these documents themselves.

3.3 The then Attorney-General, the Hon. Phillip Ruddock MP in his Second Reading speech, intimated that delay in preparing a statement of reasons would only happen in exceptional circumstances:

By clarifying that an ACC examiner may record their reasons for issuing a summons or notice to produce as soon as practicable after the summons or notice has been issued, the provisions of the bill address potential operational difficulties for the ACC presented by the decision in Brereton.

In particular, the amendments proposed by the bill will address situations where summonses or notices need to be issued in *urgent situations or where large numbers need to be issued simultaneously*. (emphasis added)²

3.4 This inspection has disclosed a different picture, that in respect of both summonses and notices, the majority of reasons were recorded after the issuing of the summons or notice.

3.5 In respect to those summonses and notices where reasons were recorded after issue of the summons or notice, the Act offers no guidance as to what constitutes 'as soon as practicable'. As the ACC has advised, determination of whether or not such a standard was attained would require analysis of the circumstances in which the summonses and notices were issued. Such an analysis was outside the scope of this investigation. However, this office notes that for those reasons recorded after issue, 28% of reasons for summonses and 32% of reasons for notices were recorded more than seven days after issue of the summons or notice.

3.6 Noting that the examiner must be satisfied that it is reasonable in all the circumstances to issue a summons or notice before issue of that summons or notice, the recording of those reasons need not be a time consuming task. Although there may at times be reasons that warrant more lengthy delays before reasons are recorded, in general it is difficult for this office to accept that delays of the extent found during this inspection could reasonably be considered to meet the legislative standard.

3.7 In discussions held with the Examinations Unit at the time of the inspection, the Unit wished it to be noted that the delays and omissions identified during this inspection should not become confused with whether summonses are being issued for a proper reason. Section 28(1A) requires that, before issuing a summons or notice, the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiners, only after forming that view, sign the summons or notice including a sentence to the effect they have formed the required view.

² Australia, House of Representatives 2007, Debates, No. 14, page 119.

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3.8 The Examinations Unit advised the Ombudsman team two weeks after the inspection of records that the Unit had been able to locate those records of reasons that could not be produced at the time of the inspection. The Unit advised that the reasons had in each case been recorded either on the same day as issue of the instrument or within the period one to seven days after issue. However, they could not be located at the time of the inspection as access was restricted to the issuing examiner. This arrangement has since been changed.

3.9 In a draft of this report, the Ombudsman recommended a period of five days to guide examiners in meeting the requirement to record reasons 'as soon as practicable'. This recommendation has been withdrawn. The ACC advised that they have asked examiners to consider issuing their own guidance note specifying a period within which reasons should be recorded, and whenever they could not be so recorded, a note should be made to that effect.

Recommendation 1

The ACC should encourage examiners to record reasons, where possible, before or at the time that a summons or notice is issued. The ACC should also note the Ombudsman's concern, arising from this investigation, that where reasons were recorded after the issue of a summons or notice, this was not done 'as soon as practicable' in all cases.

Other documents accompanying summonses and notices

3.10 All but one of the instruments inspected had a notation as provided for by s 29A(1) of the Act, setting out that disclosure of information about the summons or notice was prohibited. Consequently, all but that one instrument, when served, needed to be accompanied by the written statement as set out in s 29A(3) setting out the rights and obligations conferred or imposed by s 29B on the person.

3.11 Additionally, a summons issued under s 28 must be accompanied by a copy of the determination of the ACC Board that the intelligence operation is a special operation, or the investigation into matters related to federally relevant criminal activity is a special investigation, s 28(2).

3.12 The electronic version of the summonses and notices held in the ACC computerised recordkeeping system always included the statement of rights and obligations when they were required to be included and the relevant determination of the ACC Board (for summonses). As previously mentioned, the ACC does not keep a copy of the actual printed documents that are served on the person. To the extent possible, the Ombudsman team inspected exhibits to confirm that the written statement of rights and obligations and the relevant determination of the ACC Board had been shown to the witness. The team was informed by the ACC that the witness is then asked to confirm they have received those documents. The Ombudsman team did not listen to the audio record of each examination to hear confirmation by the witness in relation to receiving the documents. No instances were observed during the investigation to doubt that the documents were properly served when necessary.

Discussion

3.13 Sections 28(9)(c) and 29(5)(b) of the Act respectively provide that the validity of a summons or notice is not affected by any failure to comply with the requirements of s 29A in relation to notations and accompanying written statements of rights and

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obligations. Section 28(8)(b) of the Act similarly provides that the validity of a summons is not affected by failure to comply with the requirement to accompany a summons with a copy of the determination of the ACC Board. However, it is recommended that the ACC improve its compliance audit trail by having confirmation by the witness of receipt of the documents (made during examination) noted on the ACC computer record related to the relevant instrument.

Recommendation 2

The ACC should record on the relevant computer record for a summons or notice when a witness, during examination, has confirmed receipt of a statement of rights and obligations and the applicable determination of the ACC Board (for summonses).

Date of issue of summons and notice

3.14 It was noticed during the inspection that the date recorded on the ACC record system for the date of issue of the relevant instrument occasionally varied from the date that the instrument was signed. The Examinations Unit conceded this was an administrative error flowing from a misunderstanding of the Act. Policy was corrected so that the date of signing of the instrument is recorded in future as the date of issue.

Recommendation 3

The ACC should record as the date of issue of a summons or notice the date the relevant instrument is signed.

Documents that should display a final form

3.15 Copies of documents that have a legal effect should be retained in a form that does not allow changes to be made to the record at a later date. The ACC kept copies of summonses and notices in PDF format, a proprietary electronic format that appeared secure from change. However, the reasons required to be recorded by ss 28(1A) and 29(1A) are retained in a Microsoft Word format that does not appear to be locked. It would seem prudent for the ACC to obtain specialist technical advice to confirm that the final forms of summonses, notices and the records of reasons are being retained in a format that is permanently locked against subsequent change.

Recommendation 4

The ACC should obtain specialist advice to confirm that summonses, notices and records of reasons, once in final form, are being retained in an electronic format that cannot subsequently be changed.

Other issues related to electronic records management

3.16 Electronic records management, although providing certain efficiencies, does present some challenges in relation to an audit process. For example, no photocopy is kept of the actual documents served on a witness, as mentioned previously. If the electronic record of a document is the official record, the security of the record must be considered for each of the official documents maintained in that way. Given the significance of a person being subject to an examination under the relevant powers of the Act, the use of a digital signature on the summons would seem to raise the level of security necessary for the use of such digital signatures. An alternative, for the summons to be printed and then signed and scanned, may allow for electronic records that have an enhanced level of security. It may benefit the ACC

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administration to review the use of digital signatures with summonses to confirm for the organisation that they provide the level of security necessary in the circumstances.

3.17 The Examinations Unit provided further opinion, after the Ombudsman team inspection, in relation to the use of digital signatures on summonses. The Unit stated, in part:

... the convenience of digital signatures compared with any alternative is overwhelming, given the disparate locations from which coercive documents are frequently issued.

3.18 As mentioned under the heading 'investigation methodology', the various software systems used by the Examinations Unit were difficult to navigate and slow to search. It appeared to require a significant degree of knowledge to operate correctly.

3.19 The Ombudsman team did not operate the system directly but rather were assisted by an Examinations Unit person skilled in the use of the system. However, it often took quite some degree of searching to track down particular documents, if found at all. It was apparent that users of the system tended to record information in different ways, some of these ways defeating the usual search processes.

3.20 The Unit thought the difficulty of the recording system may have contributed to some instances of human error. The Ombudsman team would not disagree with this view and considered that users of the system may benefit from further training, or even, review of the system itself.

3.21 The Examinations Unit, as mentioned previously, did provide further information to the Ombudsman team, not only on missing reasons statements, but on a variety, but small number, of other missing documents. Most of the explanations seemed to involve documents being misplaced by users in the Unit computer system.

PART 4—FURTHER INVESTIGATION

4.1 Given the results of the present investigation, and the scope of the powers of the ACC examiners, the Ombudsman will consider whether a more expanded investigation is desirable in the future.