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Submission to the Parliamentary Joint Committee on Law Enforcement: Operation of the Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019

The Australian Criminal Intelligence Commission (ACIC) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Law Enforcement (PJCLE) regarding the Operation of the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019* (the SOSI Act).

The ACIC faces significant challenges in investigating transnational serious and organised crime activity as serious and organised criminals are highly resilient to, and cognisant of, the traditional methodologies deployed by law enforcement and intelligence agencies. Powers such as the ACIC's examination powers, are vital to assist in investigating and disrupting such activities and must be maintained to ensure they are fit for purpose.

The ACIC's examination powers and associated notices to produce are most fruitful at generating high-level strategic insights that provide the ACIC and our partners with break-through understandings of criminal networks, methodologies, planning and motivations.

As a result of the importance of ACIC examinations, the SOSI Act successfully and appropriately amended the *Australian Crime Commission Act 2002* (the ACC Act) to strengthen the authorisation process for Special Operations and Special Investigations and confirm the validity of current and former Special Operations and Special Investigations. The amendment to replace the old legislative test with a new public interest test has strengthened the threshold for Special Operations and Special Investigations determinations to be made.

These changes were crucial to ensure the ACIC's continued ability to conduct coercive examinations and gather key intelligence on serious and organised crime groups impacting Australia in situations where traditional law enforcement methods are unlikely to be effective. Further, these measures were procedural in nature and did not expand or otherwise alter the powers available to the ACIC in the course of undertaking a Special Operation or Special Investigation.

Changes implemented by the SOSI Act

Special Operations and Special Investigations collect intelligence, but also disrupt and deter identified criminal syndicates through collecting evidence of criminal activity that may result in arrests and seizures of proceeds of crime and other illicit commodities. The ACIC Board must authorise, by determination, a Special Operation or Special Investigation to occur.

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Prior to the SOSI Act, the manner in which the Board had ‘determined’ that the ACIC may conduct a Special Investigation or Special Operation had been undertaken in a similar way for more than a decade. That process had been the subject of advices from various Senior Counsel, withstood many court challenges and had been confirmed and endorsed by the Full Federal Court on a number of occasions. The ACIC and its Board had always believed the process was robust.

Challenges to the use of ACIC’s coercive examination powers during *CXXXVIII v Commonwealth of Australia* in the High Court (2019) highlighted the need to clearly define, beyond any doubt, the manner in which the Board authorise a Special Investigation or Special Operation, thus authorising the use of the ACIC’s unique examination capabilities to target a specific area of serious and organised criminal activity impacting Australia.

If they had been successful, these legal challenges could have resulted in a number of serious and direct consequences for the ACIC, with effects felt in the wider law enforcement community.

Implementation of the SOSI Act

Passed on 5 December 2019, the SOSI Act changed the way the Board authorises a new Special Investigation or Special Operation to occur in a number of ways. The concept of an investigation and operation that is not ‘special’ has been repealed from the ACC Act. The ACIC is now only authorised to undertake a ‘special’ investigation or operation – noting that although the ACIC historically had the power to undertake an investigation or operation that was not ‘special’, this function has rarely been used.

Changes to the legislative test undertaken by the Board before authorising a Special Investigation or Special Operation to occur have strengthened the process and allowed the ACIC Board to rely on the collective experience of the Board members voting at the meeting when a new determination is made.

The ACIC Board consists of the following members:

- the Commissioner of the Australian Federal Police (Chair)
- the Secretary of the Department (Currently the Department of Home Affairs Secretary)
- the Comptroller-General of Customs (Commissioner, Australian Border Force)
- the Chairperson of the Australian Securities and Investments Commission
- the Director-General of Security (Australian Security Intelligence Organisation)
- the Commissioner of Taxation
- the Commissioner of Police of each State and the Northern Territory
- the Chief Police Officer of the Australian Capital Territory, and
- the Chief Executive Officer of the ACIC (non-voting member).

The Board also has two non-voting observers who provide assistance and advice:

- the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (non-voting observer), and
- the Secretary of the Attorney-General’s Department (non-voting observer).

Highly experienced and with a deep collective understanding of Australia’s fight against serious and organised crime, the Board is well-placed to make a public interest assessment for the authorisation of new Special Investigations or Special Operations.

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The ACIC Board met on 28 July 2020 and authorised, by determination, 9 new Special Investigations and Special Operations to occur. These determinations were made pursuant to the new public interest test. The new determinations authorised by the ACIC board are:

- Outlaw Motor Cycle Gangs (OMCG) Special Operation 2020
- National Security Impacts from Serious and Organised Crime (NSISOC) Special Operation 2020
- High Risk and Emerging Drugs (HRED) Special Operation 2020
- Firearm Trafficking (FT) Special Operation 2020
- Emerging Organised Crime Threats (EOCT) Special Operation 2020
- Cyber-Related Offending (CRO) Special Operation 2020
- Criminal Exploitation of Australia's Migration System (CEAMS) Special Operation 2020
- Targeting Criminal Wealth (TCW) Special Investigation 2020
- Highest Risk Criminal Targets (HRCT) Special Investigation 2020

The new manner in which the Board exercises its powers has provided certainty for the ACIC to confidently exercise its powers for the purpose of collecting criminal intelligence insights through examinations.

Conclusion

Changes made under the SOSI Act have successfully strengthened the process to make a Special Operation or Special Investigation. These changes have ensured beyond any doubt, the validity of current, former and future Special Operations and Special Investigations. They have also enabled the ACIC to continue to effectively fulfil its statutory functions and actively protect Australia from criminal threats through coordinating a strategic response and the collection, assessment and dissemination of intelligence and policing information.

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