

Report to the Criminology Research Council

Research Project 15/99-2000

**Private Investigators in Australia:
Work, Law, Ethics and Regulation**

by

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Sole responsibility for interpretive opinions and recommendations in this report rest with the author.

Tim Prenzler.

Short Summary

This study analysed the nature of the private investigation industry and associated issues of ethics and regulation. A comprehensive study was undertaken of legal powers and controls, and interviews were conducted with 40 practitioners. It was clear that private (and commercial agents) provide a wide range of services to their clients. Such services are vital to the business operations of insurance companies and legal firms. Private agency services also provide a significant public good in the fight to reduce the cost of fraud in the community, and facilitating the achievement of justice for aggrieved parties who are owed money or who are the victims of crimes and others wrongs. The last 10-15 years has seen an enormous increase in the use of private agents to investigate insurance fraud and there is currently an increase in the outsourcing of investigations of suspected welfare fraud. Private agents claim to have a very high success rate in recovery of losses, dropping of suspect insurance claims, discovery of offenders, facilitation of fair legal process, and in various other forms of solving crime-related problems for clients. This process contributes to a wider response to the problem of 'hidden crime', primarily in terms of prevention and restitution.

The sensitive nature of private agency work and conflicts with privacy principles can lead to abuses of position – as revealed in two inquiries in New South Wales and Queensland in the last ten years. However, there is also a growing sense of professionalism among investigators who are strongly supportive of an enlarged role for government in further lifting standards of conduct and the image of the industry. Governments need to pay more attention to means of facilitating the many benefits provided by private agents, in part through improved pre-service training and more active consultation with the industry. In particular, more attention needs to be paid to finding a more productive balance between justifiable requests for information and the interest of personal privacy. There is a case for strengthening controls on access to confidential information held by governments while also expanding controlled access by private agents for legitimate purposes. This arrangement is supported in the review of legislation undertaken in this study, by practitioners who were interviewed, and by inquiry reports.

Extended Summary

This research project examined the work of private investigators and commercial agents in Australia in terms of the types of work performed, industry trends, contributions to justice and crime prevention, legal powers and constraints, ethical issues, and issues of regulation – with a focus on ways to facilitate the social benefit of private agency work. The project was developed with reference to ‘private investigators’ in generic terms, including process servers and debt recovery agents. In terms of licensing, this latter group is regulated as ‘commercial agents’. Because of the many overlaps entailed in these areas of work, a broad terminology has been adopted in this report to describe the target group, except when discussing specific licensing issues. The terms ‘private investigators’, ‘inquiry agents’ and ‘private agents’ has been used generically and interchangeably in most instances.

The research involved two components. Study I was a detailed review of legal statutes and judgements affecting the powers and responsibilities of private agents. Study II involved in-depth interviews with private investigators, many of whom were also involved in commercial agency work. Forty interviews were conducted with investigators (25 from Queensland and 15 from New South Wales), representing an overall response rate of 65%.

The following main points were identified from the two studies.

1. There is an approximate division of labour in private investigation work between fraud investigation work for insurance and welfare agencies; legal work including factual enquiries, locating persons and serving legal documents or recovering property; ‘commercial work’ involving a miscellany of services such as debugging, pre-employment checks, and specialised investigations (such as for copyright violations); and ‘domestic work’ including finding missing persons, abduction recoveries or spouse fidelity checks.
2. Insurance agencies comprise the bulk of private investigators’ clients, and there appears to be considerable growth in insurance fraud investigations outsourced to private investigators.
3. Private agents constitute an essential element of the civil and criminal justice systems in terms of investigations, service of legal documents, and recovery of assets wrongfully obtained.
4. Private agents act in large part in the service of victims of crime and injustice in default of state provision. Interviewees claimed a very high ‘success rate’ in the range of 70-90%, in terms of recovery of losses, dropping of suspect insurance claims, criminal convictions, employment termination of offenders and various forms of problem solving for clients.
5. There appears scope for governments to make greater use of private agents in testing suspicious insurance claims and in other areas of investigative work.
6. Private agency work involves a number of areas of risk in terms of violation of ethical principles and their embodiments in civil and criminal law. The risks relate primarily to the protection of privacy in areas such as accessing confidential information, trespass and harassment.

7. In general, civil and criminal law have developed to a point where there is a reasonable balance of rights between private agents and their clients, on the one hand, and the subject of private enquiries, on the other hand. There are two main exceptions to this. One is in the area of access to information for legitimate purposes by licensed agents. The other is in protections on information in private sector and some state and territory locations.
8. Practitioners reported that from their perspective there has been a significant improvement in compliance with the law in the profession in the last decade. The large majority of interviewees reported that unethical and illegal conduct was at the margins of industry activity. Private inquiry agents also report acting as ethical gatekeepers in screening and rejecting requests for illegal activities. Nonetheless, the large majority also felt that anecdotal reports of misconduct were of sufficient gravity to justify greater control and scrutiny of the industry by government.
9. The work of private agents is undervalued in government responses to industry claims for greater regulation and enhanced powers.
10. There is a case for governments to enhance the legal capacities of licensed private agents, especially in the area of access to information concerning persons' whereabouts and assets (as in point 7 above).
11. Industry members support a *quid pro quo* arrangement for extended powers in advocating tougher licensing, especially in pre-service training requirements.
12. Private investigators want a more active regulatory regime with more proactive auditing of firms, and more comprehensive consultation and communication with licence holders.

Background and Literature Review

Any study of private investigators is faced with an initial problem of definition. The term 'private investigator' has both generic and specific legal definitions. In its broadest terms it relates to any person who conducts enquiries for a customer or employer. This may include serving summonses after locating a person, as well as repossessing property. Alternatively, these two areas are sometimes separated. Historically in Australia there has tended to be a division in licensing between 'private investigators' or 'inquiry agents' on the one hand, and 'commercial agents' and 'process servers' on the other hand. Often, however, these functions overlap and it would appear useful to examine the law as it applies to a set of issues associated with these combined functions. Alternative generic terms that are sometimes applied are 'inquiry agents' and 'private agents'. This would usefully combine private investigators, process servers and debt recovery agents. Consequently, 'private investigators', 'inquiry agents' and 'private agents' have been used in largely interchangeable terms in this report. However, 'private investigator' is favoured, in large part because most repossession agents and process servers have an enquiry function in locating people. Some of the legal issues examined here also apply to security officers generally, and to specific groups such as insurance 'loss adjusters' and 'store detectives'. The focus of this study, however, is on operators in the private sector who contract out their services or who work for contractors.

The security industry has been the subject of a growing body of research in Britain, Canada and the United States, with an emerging profile in Australia.¹ Despite this growth, the international literature has paid very limited attention to private investigators², and in Australia there is an extreme paucity of research. It is clear nonetheless that the security industry has overtaken conventional public sector police to the extent that private and public 'non-police' forms of security are the dominant source of crime and loss prevention services in most Western societies.³ In response to this growth, a negative critique has developed of the implications of the 'privatisation' process for democratic values of equality of protection and equality before the law. This concern includes factors such as the affordability of security, but it can also extend to more discrete areas of justice delivery such as searching for missing persons or locating people owing money. There also have been a number of exposés of misconduct by security providers.⁴ Where these cases have been revealed by investigations into individual companies or by inquiries in specific jurisdictions, it is difficult to assess the level of probity across the industry or industry sector. However, it is clear from analysis of such cases that security work has a very high opportunity factor for misconduct. This results from the possession of privileged knowledge about clients' assets and vulnerabilities, and from the potential 'Dirty Harry'-style conflict between noble ends and legal constraints. Growing cognisance of these pressures has produced a clear trend towards increased regulation of the industry.⁵

¹ See for example: A Rees, *Private Security in Australia*, Australian Institute of Criminology, Canberra, 1984; I Warren, 'An Air of Uncertainty: Private Security Regulation in Victoria' (1995) 2 *Deakin Law Review* 223-53; T Prenzler & R Sarre, 'Regulating Private Security in Australia' (1998) 98 *Trends and Issues in Crime and Criminal Justice* 1-6.

² M Gill & J Hart, 'Exploring Investigative Policing: A Study of Private Detectives in Britain' (1997) 37 *British Journal of Criminology* 549-67.

³ L Johnston, *The Rebirth of Private Policing*, Routledge, London, 1992.

⁴ T Prenzler, 'La Sécurité Privée et le Problème de la Confiance: L'expérience Australienne' (1998) 31 *Criminologie* 87-109.

⁵ T Prenzler & R Sarre, 'A Survey of Security Legislation and Regulatory Strategies in Australia' (1999) *Security Journal*, 12/3: 7-17.

It is difficult to obtain a true picture of the size of the private investigation sector because of variations in state-based licensing categories. Western Australia in 1998 had 735 'Inquiry Agents' or 'Investigators' out of a total of 6,620 security licence holders.⁶ In other words, the 'inquiry' category accounted for 11% of licensees. South Australia in 1997 had 7,545 'security agents' and 3,681 'investigation agents'. Investigators made up 33% of the total. Of these there were 137 'bodies corporate' and 3,544 'individuals'.⁷ This is indicative of a perhaps surprisingly high number of investigators. However, similar figures obtain in New South Wales. In 2001 there were 5,339 Private Inquiry Agents, 4,434 Private Inquiry Sub-Agents, 1,539 Commercial Agents and 4,539 Commercial Sub-Agents. This made for a total of approximately 15,800 – about 32% of the larger security industry.⁸ Queensland in 1999-2000 had approximately 1,200 private investigators and 320 commercial agents – a total of 1,520: approximately 38% of combined security licensees.⁹

However one looks at the figures, there would appear to be a substantial number of private agents operating in Australia. As part of the larger security industry, their work is significant as a component of a complex and evolving form of 'hybrid' policing.¹⁰ While conventional police in Australia number approximately 45,000, security providers make up approximately 80-100,000, with the private sector accounting for at least two-thirds of that number.¹¹ Private inquiry agents in turn make up a large proportion of this group. From that perspective inquiry agents account for an important specialist part of the network of 'non-government participants in crime prevention and control'.¹² They fill a crucial gap in public provision of detection services. As part of the move in government towards privatisation, there also appears to be a distinct trend towards outsourcing of work to private investigators. This is occurring with workers compensation and, most notably, in the current crackdown on welfare fraud instigated by the federal Department of Social Security.¹³

A major point of difference between police and private security is that private providers do not have the same powers to detain and question, or obtain search warrants, as police do in some circumstances. Additionally, although there are significant difficulties in ensuring proper accountability of public sector police, private sector operatives are subject to a much less stringent system of scrutiny.¹⁴ One possible response to this situation of overlap and a-symmetry is to more formally integrate private and public police. This would involve two main areas of adjustment.¹⁵ One is in the area of accountability, where the recent expansion of regulation has introduced somewhat similar background checks and training processes for private as for public-sector entrants. The second area is legal powers, involving a far more radical and controversial set of options. Swanton argues that similar accountability might logically imply that 'qualified and accredited private sector

⁶ Western Australia Police Service.

⁷ South Australian Office of Consumer & Business Affairs.

⁸ There were approximately 32,000 additional security licensees (making for a grand total of approximately 48,000). Source: NSW Police Service, Organised Crime (Gaming and Liquor) and Security Industry Registry.

⁹ Office of Fair Trading.

¹⁰ Johnston, op cit.

¹¹ Prenzler and Sarre, op cit.

¹² P Grabosky, 'Law Enforcement and the Citizen: Non-Government Participants in Crime Prevention and Control' (1992) 2 *Policing and Society* 249-71.

¹³ A Dolahenty, 'Happy as Larry with Surveillance' (2000) September *Security Australia* 8.

¹⁴ R Sarre, 'Accountability and the Private Sector' (1998) 10 *Security Journal* 97-102.

¹⁵ B Swanton, 'Police and Private Security: Possible Directions' (1993) 42 *Trends and Issues in Criminal Justice* 1-8.

operatives might be equipped with the same coercive powers as members of police agencies'.¹⁶

Like policing, private investigating appears highly vulnerable to misconduct. For example, the 1983 Australian Law Reform Commission Report into Privacy found that private agents can be strongly tempted to engage in breaches of privacy. It concluded that they,

might commit trespass, might conspire with others in what on the face of it might amount to a criminal or civil conspiracy, might obtain and disclose information in circumstances amounting to a breach of confidence in the legal sense and might breach legislation aimed at making certain activities criminal, such as that relating to official secrets, interception of telecommunications, and the use of listening devices.¹⁷

This assessment was borne out in the 1992 New South Wales Independent Commission Against Corruption (ICAC) inquiry which found that private inquiry agents acted as the go-betweens in a 'massive illicit trade' in confidential information.¹⁸ Over 250 people were identified as being involved including police, officials from government departments and private agents. The Commission noted a 'just cause' element in the trade but that illegal means of attainment reduced the pressure for legitimate law reform. Intrusions occurred into a wide range of personal information including passport and bank account details, correspondence and unlisted phone numbers. Some recipients of information were known criminals and in many cases the agents did not know how the information would be used.

In 2000 the Queensland Criminal Justice Commission (CJC) exposed a similar trade between police and private enquiry agents. The Commission identified the same market conditions for corruption as were identified in NSW and a similar just cause element:

The demand for confidential information is created by end-users such as finance organisations and legal firms, whose staff are often trying to locate evasive individuals. Private investigators and commercial agents act as the intermediaries between the end-users and the suppliers of information.¹⁹

However, the ICAC and CJC inquiries were significantly different in that, in the Queensland case, most of the misuse of the police information system was not associated with private agents. In fact, only two instances were identified where it was clear that private agents were involved. One of these was a police officer who also worked as a private investigator. Recommendations to improve security were focused on police computer systems and management. Nonetheless, the report did highlight the threat to confidential information posed by the market for information, which goes well beyond police databases. Current licensing systems were considered insufficient to ensure appropriate standards of conduct. The report recommended a review of licensing of private investigators and commercial agents, clarification and toughening of penalties for illegal disclosures, and a prohibition on police working as private investigators. At the same time, it also recommended consideration be given to allowing licensed agents greater access to government

¹⁶ Ibid, at 8.

¹⁷ The Law Reform Commission, Report No.22, *Privacy*, 1983, Australian Government Publishing Service, Canberra, Volume 1 at 319.

¹⁸ ICAC (1992) *Report on Unauthorised Release of Government Information, Volume I*. Sydney: Independent Commission Against Corruption, p. 3; G Greenleaf, 'Prosecutions follow NSW ICAC data trafficking report' (1994) 1 *Privacy Law and Policy Reporter* 47.

¹⁹ CJC (2000) *Protecting Confidential Information: A Report on the Improper Access to, And Release of, Confidential Information from the Police Computer Systems by Members of the Queensland Police Service*. Brisbane: Criminal Justice Commission, p. xviii.

held information such as criminal histories, and information on drivers' licences and vehicle registrations.

It is not always clear whether illegal and unethical conduct by private investigators is a result of inadequate controls on deliberate misconduct or the result of investigators' lack of understanding about the laws regulating their activities. The latter explanation would not be surprising given 'the piecemeal array of legal rights, privileges and assumptions of authority' in Australia²⁰. However, it seems that both arguments have some merit. In response to these issues of legal standing and regulatory control a key aim of the current study article is to provide a summary of the various State and Territory laws relevant to the activities of private investigators. One obvious fact is that different stakeholders are involved with potentially competing interests. Consequently, a key criterion will be to find a reasonable balance in terms of the interests of the investigators, their clients, and the public who may become targets of private enquiries. A second key aim is to obtain the views of practitioners about the nature of private investigative work and perspectives on key issues. From these sources an evaluation can be made of the contribution of private investigators to public interest goals of justice and crime reduction, and an assessment made of policy options in law reform and regulation. The latter focus would address means of facilitating the beneficial law enforcement functions of private investigators and of improving their compliance with legal and ethical standards.

Method

A two-part study was devised to address the aims described above. The first component was intended to provide a comprehensive national summary of current legislation relevant to private investigation work. The Australian literature on the security industry includes two reviews of legislation, produced in the mid-1990s (Sarre 1994a, 1994b). These are very useful summaries but tend to focus on issues most relevant to the larger security sector (such as detention, direction and search) and less on those directly relevant to private investigators, such as privacy, access, harassment and use of surveillance equipment. Consequently, an academic lawyer was employed to collect all relevant statute and case law, and reviews of relevant legal issues, and to work with the principal researcher to summarise current law authorising and constraining private agents. This was organised around a series of illustrative scenarios to maximise relevance and accessibility to general readers.

The second component consisted of practitioner interviews and was designed to more clearly map the industry's structure and functions and identify practitioner perspectives on key issues. A critical methodological question was how to gain access to industry members and ensure objectivity in responses. It was apparent that personal contact and face-to-face interviews are most likely to be successful (Rees 1984, Golsby & O'Brien 1996, Gill & Hart 1997). It was also highly likely that a positive response would be obtained when the contact person and interviewer is a practitioner. A distinct advantage of this project then was the employment of Michael King, the operator of a private inquiry firm with an interest in studying the industry. Mr King was employed as a research assistant to contact the sample group, conduct interviews, contribute to the development of the interview schedule and advise on the analysis.

²⁰ R Sarre and T Prenzler, 'The regulation of private policing: reviewing mechanisms of accountability' (1999) 1 *Crime prevention and community safety: an international journal* 17-28 at 18.

It was proposed to interview 50 investigators, half in New South Wales and half in Queensland. New South Wales provides the most recent case of regulatory expansion (*Security Industry Act 1997*) and would allow for a follow-up to the 1992 ICAC report. Queensland (with the *Security Providers Act 1993*) represents an earlier phase of regulatory development with less exacting controls. The case study and comparative approach allowed for a qualitative in-depth study that was practical and offered the potential for a good response rate. Interviews were pursued through an 'opportunity sample' via Mr King's professional contacts and sources such as *Yellow Pages* advertisements. An enhanced degree of representativeness was sought by consultation with the peak industry bodies (Australian Institute of Private Detectives and the Institute of Mercantile Agents) to identify respondents across a range of opinions and specialisations.

Assistance was also sought from the professional associations in the development of an interview schedule that included questions covering industry concerns and that was worded appropriately to encourage frank responses. In-depth interviews of approximately one hour using open-ended questions were planned to allow for maximum coverage of issues. Face-to face interviews would be tape-recorded with the approval of the interviewee. All interviewees would be assured of anonymity in the reporting of data and asked to sign a consent form. The main areas of questioning developed in the interview schedule included the following.

1. Main types of work and clients
2. Job satisfaction, stress and danger
3. How the profession is changing
4. Perceptions of the utility of legislation for client objectives
5. Perceptions of the fairness of legislation from a public interest perspective
6. Main areas where ethical conflicts and challenges occur
7. Perceptions of levels of compliance with the law in the industry
8. Suggestions for legal reforms
9. Suggestions for improvements to regulatory systems.

Findings from Study I: Legal Powers and Controls

The laws affecting the activities of private investigators can be divided into two broad categories – the laws relating to the investigator's relationship with the client and the laws relating to the investigator's interaction with the public.

Law as between Private Investigator and the Client

The relationship between private investigators and their clients is contractual. Specifically, it is a contract of agency. Agency is a relationship in which one person has authority or the capacity to act on another person's behalf in dealings with a third person.²¹ The contract may be oral or in writing, or a mixture of both.

Duties of the investigator

As an agent, the investigator has a number of common law duties to the client.

The duty to follow instructions: If the private investigator acts outside the client's instructions, he or she will be in breach of contract and may be liable to pay the client damages for any loss caused as a result of the breach.

The duty to act in person: The investigator can only delegate his or her duties to another person with the client's consent or where delegation is a normal part of the business of private investigators. For example, if the investigator is hired to personally conduct surveillance and make enquiries, he or she is not entitled to sub-contract this work to another person. However, the investigator is entitled to employ other people to perform associated tasks, such as typing up the surveillance report or making copies of videotapes.

The duty to act in the interests of the principal: The investigator must not use his or her position to promote his or her interests in preference to the client's. This includes an obligation to maintain confidentiality, that is to keep secret as between the client and the investigator all information provided by the client or received by the investigator on behalf of the client. The investigator is required to make full disclosure to the client of any information that is obtained in the course of carrying out his or her responsibilities on behalf of the client. The investigator is also prohibited from making a secret profit or gain which becomes available as a result of their activities under the contract of agency. For example, assume that the investigator is asked to enquire about the activities of one of the client's business competitors. In the course of that investigation the investigator finds out that the competitor company is about to be the subject of a takeover bid, and that shareholders are likely to make a large profit. The investigator must inform the client and must not use that information to make personal gain, for example by buying shares in that company prior to the takeover.

The duty to take care of the principal's property: The investigator must take care of the principal's property as if it were their own.

The duty to keep separate accounts: The investigator must not mix the client's money with their own. If the client has provided funds in advance to pay for the investigator's activities under the contract, this money must be kept in a separate trust account.

²¹ *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.

The duty to keep proper accounts and have those accounts available for inspection:
The client is entitled to see receipts and other documents which show how their money has been used by the investigator.

Authority of the investigator

As an agent, the private investigator has authority to do certain things on behalf of the client. This authority may be express. For example, a written contract may specify the particular things that the investigator is required to do, how they are to be performed and when. Alternatively, when there is no written authority, or when the express authority does not cover all of the aspects of the things the investigator is required to do, the authority may be implied. Implied authority may cover things that are necessarily or ordinarily incidental to the express authority, or that are customary to the private investigator's business. For example, the written contract may authorise the investigator to 'carry out investigations' on behalf of the client. This would imply that the investigator is authorised to perform actions that are necessary or ordinarily incidental to the carrying out of investigations, such as making enquiries. It may also imply that the investigator is authorised to perform an activity such as surveillance, if this is something that is customarily carried out by investigators in the course of 'carrying out investigations'. For example, the investigator may be authorised to make enquiries about the capacity of one of the client's debtors to pay an overdue loan owed to the client. Without further specific instructions the investigator would not be authorised to attempt to collect the debt from the debtor, as the authority only allows the investigator to make enquiries about their capacity to pay. If the investigator acts beyond these instructions, for example by making threats to the debtor about the consequences of non-payment, and the debtor brings an action against the investigator as a result of that conduct, the investigator is not entitled to any protection from the client.

The private investigator may also have 'ostensible authority', which is the appearance of authority to do something in the eyes of others, regardless of what the agent is actually authorised to do by the client. The type of authority is important when the private investigator performs an act which may give rise to an action against the investigator by a member of the public. This is because the client may also be held liable for acts performed by the private investigator which fall within the scope of the actual or apparent authority. For example, a security officer may be instructed to check the identification of people entering the client's property, and to notify the client if a person is not on the list of authorised entrants. If the officer attempts to physically restrain a person from entering (something that he or she is not authorised to do) and injures that person, giving rise to an action for assault, the client may be held liable if a person attempting to enter the property would reasonably believe that the officer has the authority to physically prevent entry by unauthorised people.²²

However, a client may not authorise a private investigator to commit an act which is illegal, and the client will not be liable for such acts performed by the investigator. Accordingly, if the client instructs the investigator to conduct surveillance of a person and the investigator, without the client's knowledge, installs an illegal telephone tapping device on the person's telephone, the client will not be liable for this illegal act.

²² *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-Op Assurance Co of Australia Ltd* (1931) 46 CLR 41.

Rights of the investigator

As an agent, the investigator also has a number of common law rights which may be enforced against the client:

*The right to remuneration*²³: The investigator is entitled to be paid for any work carried out on behalf of the client in accordance with the terms of the contract between them.

*The right to indemnity and reimbursement*²⁴: The investigator may incur liabilities as a result of carrying out work for the client. If the investigator has incurred these liabilities while acting within his or her actual authority, he or she is entitled to be indemnified or reimbursed by the client. Where the liabilities have been incurred while acting within his or her apparent authority, the client must meet the cost of any liabilities to the third party, but will be entitled to claim reimbursement from the investigator.

*The right to a lien*²⁵: A lien is the right to hold the property of another as security for the performance of an obligation or the payment of a debt. If the client gives the investigator documents or other things in the course of the contract, the investigator is entitled to keep those documents or things until the client has paid the investigator for his or her work under the contract and reimbursed the investigator for any lawfully incurred expenses.

Law as between Private Investigator and the Public

The conduct of private investigators is currently regulated by the common law (judge-made law) and by legislation (parliament-made law). Where there is a conflict between these two areas of law, the legislation prevails. However, where there is no legislation covering a particular type of conduct, the common law applies. Private investigators' conduct can be subject to criminal or civil sanctions. Criminal punishment may include fines and/or terms of imprisonment. Civil penalties are likely to be fines or orders to pay monetary damages to the person aggrieved by the private investigator's actions.

It is important to note at the outset that at common law a private investigator does not have any more power in carrying out his or her activities than an ordinary member of the public.²⁶ A provision reiterating this principle has been specifically included in the various jurisdictions' licensing legislation, sometimes with a penalty for acting in a way that implies that the investigator has greater powers.²⁷ This is particularly important given that possession of a licence may give the appearance of special authority.

²³ *Dolphin v Harrison, San Miguel Pty Ltd* (1911) 13 CLR 271.

²⁴ *Hunt and Baird Industries (WA) Pty Ltd v Cartwright Taylor Engineering Pty Ltd* (1984) 2 SR (WA) 198.

²⁵ *Campbell v Smith* (1887) 13 VLR 439.

²⁶ See also Canadian and American decisions to the same effect: *R. v. Anderson* (1960) 32 WWR 329, *R. v. Gibson* [1976] 6 WWR 484, *Schultz v. Frankfort Marine Accident and Plate Glass Insurance Company* (1913) 139 NW 386 (Wisc. Sup. Ct).

²⁷ See for example s. 50 *Auctioneers and Agents Act 1971* (Qld); s.7 *Commercial Agents and Private Inquiry Agents Act 1963* (NSW); s.41 *Commercial and Private Agents Licensing Act 1996* (NT), penalty \$500; s.15 *Commercial and Inquiry Agents Act 1974* (Tas), s.15 offence, penalty up to 20 p.u.; s.21 *Private Agents Act 1966* (Vic), penalty up to 20 p.u.

Interfering with property

The common law reflects the saying that one's home is one's castle.²⁸ At common law neither a police officer nor a private citizen has the right to enter another person's property or conduct a search without express or implied consent.²⁹ Police officers do, however, have statutory authority to enter property in certain circumstances (such as the belief that a criminal offence is being committed). An entrant upon land for some lawful purpose (such as delivering a parcel addressed to an occupant) is assumed to have consent unless notified to the contrary by the occupier.³⁰ If an investigator enters a property where it is clear that there is no consent (for example, a 'trespassers will be prosecuted' or 'private property – do not enter' sign) or remains on the property after consent has been withdrawn (for example after being asked to leave), the investigator is a trespasser. If the investigator has entered the property by a misrepresentation, this will also negate any consent and constitute a trespass.

For example, a commercial agent may believe that a car ordered for repossession is locked in a person's home garage. Repeated attempts to contact the owner have failed. What can the commercial agent do? The agent is entitled to enter the person's property for a lawful purpose. It would be a lawful purpose to attempt to contact the owner of the property to enquire whether they have the car. The investigator could enter the property and go to the front door to see if the occupier was home. If the investigator happened to be able to see into the garage while doing this, that would not be a trespass. However, the investigator would not be entitled to enter the property for the purpose of trying to break into the garage to see if the car was there. If, after speaking to the occupier of the house, the investigator were asked to leave the property, he or she would have to do so immediately, without any detour past the garage window to see if the car was there.

The person upon whose property the trespass has been committed does not have to prove that they have suffered any particular damage as a result of the trespass, but in the absence of such damage, only nominal compensation will be awarded. However, if the investigator has acted in a morally reprehensible way in committing the trespass, the court may order punitive or exemplary damages, which are intended to punish the wrongdoer, rather than compensate the plaintiff for any loss. 'Morally reprehensible' conduct may include gaining entry to the property under some misrepresentation – for example, telling the occupier of the house they have won a free car safety check so that the investigator is given access to the garage. The laws of trespass will also give a person the right to bring a civil action against an investigator where the investigator has physically interfered with their land or other property. Physical interference would include placing a listening device in a person's home or taking photographs after forcing entry. One Australian case has also awarded damages for hurt feelings arising out of a trespass.³¹ The plaintiff's brother had installed a microphone in her flat and listened to her conversations. The court accepted that the plaintiff suffered an affront and indignity as a result of the invasion of her privacy and ordered the defendant to pay punitive damages.

Private investigators will also be subject to the various criminal laws relating to break and enter and unlawful entry. For example, if the investigator has previously been asked to leave a person's property but later returns and enters the house (either through an open window or by forcing a locked door) the investigator will be guilty of

²⁸ *Semayne's Case* (1604) 77 ER 194.

²⁹ *Plenty v. Dillon and Ors* [1990] 98 ALR 353.

³⁰ *Robson v. Hallett* [1976] 2 QB 939.

³¹ *Greig v. Greig* [1966] VR 376.

a criminal offence, regardless of what they have been instructed to do by their client. Many jurisdictions also have specific legislation making it unlawful for a person to enter a dwelling house³² without the consent of the lawful occupier or lawful excuse.³³ The Queensland Act also makes it an offence to be found in a house or yard without lawful excuse.³⁴ In Queensland, it is also an offence to enter with consent if the consent has been obtained by 'force, threats or intimidation, deceit, fraudulent trick or device, or false and misleading representations as to the reason for entry'.³⁵

Entry to a house or yard is not an offence if the entry is authorised, justified or excused by law, or is bona fide for the protection of a person or the property in question.³⁶ However, a private investigator does not normally fall within this exception simply by virtue of carrying out his or her normal duties. In *Poznanski v. Stosic*³⁷ a private investigator accused of entering a dwelling house defended himself on the basis that his status as an investigator searching for evidence gave him a lawful excuse. The South Australian Supreme Court rejected this defence and stated that:

entries of that kind are liable to lead to breaches of the peace and I do not think that the courts should countenance them. Even a police officer in search of crime is not allowed to enter a private dwelling without the occupier's consent unless under a search warrant or under the provision of a statute giving him authority to do so.³⁸

Entry for the purpose of repossession

Entering a property for the purpose of repossession may provide a lawful excuse, however the relevant statutes must be strictly complied with. Various statutes provide conditions on entry in certain circumstances, for example when repossessing leased residential premises (the reposessor must not enter leased residential premises unless the tenant abandons, or voluntarily gives up possession, or with an order from the court or Tribunal)³⁹ or repossessing goods subject to a security interest (such as a mortgage or hire-purchase agreement).⁴⁰ Generally, the investigator or commercial agent must have a court order⁴¹ or consent of the occupier before the investigator may enter residential premises⁴² for the purpose of repossessing goods. Consent is generally only given if the request was made by the agent in writing in the required form or in person by calling at the premises between the hours of 8am and 8pm Monday to Saturday.⁴³ Note that it is the consent of the occupier that is required, not the consent of the lessee of the goods. It is an offence to enter in breach of these provisions and there is a financial penalty of up to \$5,000. All of the above applies to private property. There is nothing to prevent an agent from seizing goods that are in a public place. It also seems that, as the goods being repossessed are legally the property of the credit provider, the agent can be expressly or impliedly authorised to

³² Non-residential properties are covered by the common law and criminal legislation.

³³ See for example s.48A *Invasion of Privacy Act 1971* (Qld), s.52 *Auctioneers and Agents Act 1971* (Qld), s.27 *Private Agents Act 1966* (Vic)

³⁴ The penalty for unlawful entry is 20 p.u. and/or imprisonment for one year.

³⁵ s.48A(1A) *Invasion of Privacy Act 1971* (Qld). The penalty for entry with false consent is 30 p.u. and/or 18 months imprisonment.

³⁶ s.48A(2) *Invasion of Privacy Act 1971* (Qld)

³⁷ [1953] SASR 132.

³⁸ *Ibid*, at 139-140.

³⁹ s.95 *Residential Tenancies Act 1995* – must not enter leased residential premises unless the tenant abandons, or voluntarily gives up possession, or with an order from the court or Tribunal. Penalty up to \$2000.

⁴⁰ s.91 *Consumer Credit Code*.

⁴¹ A court order can be obtained by application to the court by a credit provider under s.92 *Consumer Credit Code*.

⁴² Entry to non-residential premises will be covered by the common law (discussed above).

⁴³ s.24 *Consumer Credit Regulations 1995*.

treat the goods in any manner necessary to affect the repossession. This can include forcibly breaking into a car parked in a street or any other 'public' location.

If the agent is unable to gain access to the goods after following the prescribed procedures, the Court may grant an order directing the debtor to hand over the goods. An agent is not entitled to use force to gain entry to premises or to obtain possession of goods from a person. If an agent does so, he or she will be liable for penalties under the act, an order to pay damages in a civil action for trespass or assault, and possibly criminal prosecution for break and enter or assault. As a last resort the police may be able to attend and assist in order to avoid liability on the part of the agent.

Interfering with chattels

If an agent interferes with another person's chattels (personal property), for example by wrongly repossessing goods or by placing a monitoring device on a vehicle, they will be potentially liable under the common laws relating to trespass or torts to chattels. These causes of action generally provide for a remedy of damages to the person with lawful possession of the chattel. For example, an investigator who attaches a tracking device to a person's car would be liable in trespass for interference with that person's chattel. The person would be able to claim monetary compensation for that interference, even if there has been no physical damage to the car.

Various State laws provide conditions which must be met before leased goods can be repossessed. These conditions generally include a period of notice or a requirement for a court order allowing repossession.⁴⁴ There are financial penalties for breach of the conditions. Some jurisdictions also require certain records to be kept in relation to repossessions.⁴⁵ Where a motor vehicle is being repossessed, many jurisdictions require that the nearest police station be notified of the repossession.⁴⁶

Most of the statutory requirements relating to repossession relate to formalities of notice and record keeping. There is no legislative guide to the manner in which the repossession must be carried out in practice. Generally speaking, the person carrying out the repossession may do whatever is necessary to gain possession of the goods, so long as he or she does not act in a way that gives rise to civil or criminal liability or breach of a legislative provision. For example, the person must not commit an assault, damage property or make any misrepresentation during the course of the repossession. Again, as a last resort, the police may be called to attend and assist.

Entry for the purpose of process service

Process servers (who personally deliver legal notices) have no greater right than any member of the public to enter private property, and the fact that they enter the property for the purpose of process service will not provide them with an excuse for unlawful entry. The prohibitions against harassment and misrepresentation will also

⁴⁴ See for example s.156 *Consumer Credit Code* (Qld), s.156 *Consumer Credit Code 1996* (WA).

⁴⁵ See for example s.8 *Commercial and Private Agents Licensing Regulations*; s.30 *Commercial and Inquiry Agents Act 1974* (Tas); s.25 *Commercial and Private Agents Licensing Act 1996* (NT); s.53 *Private Agents Act 1966* (Vic).

⁴⁶ S.34 *Commercial and Inquiry Agents Act 1974* (Tas), s.22 *Security and Investigation Agents Act 1995* (SA), s.22 *Commercial Agents and Private Inquiry Agents Act 1963* (NSW); s.37 *Private Agents Act 1966* (Vic).

apply to process servers, and they may be subject to disciplinary action if they act inappropriately.

Consider, for example, an investigator who wishes to personally serve a document on Mr X. Mr X's house, which is surrounded by high fences with a security intercom on the gate. Each time the investigator presses the intercom, Mrs X answers and informs him that Mr X no longer lives there and that the investigator is not welcome on the property. The investigator suspects that she is lying. However, the investigator is not entitled to enter the property without her permission, nor is he able to enter the property by false representation (for example, by telling Mrs X that he is from Australia Post and has a parcel that needs to be signed for). There is no legal recourse in terms of obtaining a court order to allow entry and search for the purpose of locating a person.

Surveillance

The common laws of trespass give some protection to members of the public from surveillance of their activities while they are on private property. The laws of nuisance will also give a remedy if the investigator has been guilty of a 'monstrous invasion of privacy'⁴⁷ by constant surveillance of a person's house. In other words, the surveillance must cause a substantial and unreasonable interference with the person's right to the use and enjoyment of land. Whether the interference is unreasonable and substantial is a question of fact to be determined in reference to all the circumstances of each particular case, including the nature of the location of the land, the character, duration and time of the interference and the effect of the interference. The standard is measured by reference to ordinary use by normal people.

The Canadian case of *Davis v. McArthur*⁴⁸ is a good example of a situation which might give rise to an action for trespass as a result of surveillance. This case was decided on the basis of invasion of privacy, which is not an action available in Australia. However, the general principles may be applied to support an action in trespass. In this case the investigator was acting for the wife. Surveillance of the husband was carried out over eight months, although it was said to be discreet and sporadic. The investigator conducted surveillance from the street and never entered private property. The husband suspected he was under surveillance, and his suspicions were confirmed when he discovered a tracking device attached to his car. The court found that knowing one was being watched was not sufficient for an invasion of privacy. However, any surveillance must be taken in context. Here an invasion of privacy was found because some other surveillance was being conducted of the husband at the same time by some other party. The court held that combined surveillance by different parties was an invasion of privacy. The investigator was ordered to pay compensation to the husband.

The common law of nuisance does not prevent a person overlooking another's land, home or activities⁴⁹, or taking photographs⁵⁰ unless those activities are substantial enough to constitute an unreasonable interference.⁵¹ In *Bathurst City Council v. Saban* a council officer took photographs and videotape of the defendants' back yard

⁴⁷ *Bernstein v Skyviews* [1977] 1 QB 479 at 489.

⁴⁸ [1971] 2 WWR 142

⁴⁹ *Victoria Park Racing and Recreation Grounds v. Taylor* (1937) 58 CLR 497.

⁵⁰ *Bathurst City Council v. Saban* (1985) 2 NSWLR 704.

⁵¹ *Raciti v. Hughes* (1995) 7 BPR 14,837, SC(NSW) (deliberate snooping on neighbour and recording on videotape). Compare *Bathurst City Council v. Saban* (1985) 2 NSWLR 704; 55 LGRA 165 (no right to privacy from photography).

without their consent. The photographs and tape were taken from a public street and from neighbouring properties with the consent of the owners of those properties. The court held that this was not a trespass. In contrast, in *Raciti v. Hughes* the plaintiffs' neighbour set up an elaborate system of floodlights and cameras so that when someone moved in the plaintiffs' back yard, a sensor was activated, the lights came on and the video cameras filmed what they were doing. The court held that bright lights can be a nuisance and a proper degree of inconvenience was established. The system was found to be more than merely photographing and filming a neighbouring property, it was '*approaching the condition of watching and besetting*'. This was held to be an actionable nuisance.

It would appear then that an investigator is perfectly entitled to sit in a car outside a person's house and photograph the occupants coming and going. However, it may be that continuation of this, or more overt forms of surveillance, would be illegal. Certainly, it is likely that more elaborate systems of surveillance would be found to constitute unreasonable interference. It may also be an unreasonable interference if the investigator openly follows a person in such a manner that it was obvious to others that the person was under surveillance, and this carried on for a period of weeks.

Surveillance also gives rise to ethical issues and the possibility of misleading and deceptive conduct when investigators actively create a situation in which a plaintiff is likely to act in a particular way, as opposed to passive surveillance. Investigations of personal injury claimants are vulnerable to this type of behaviour. Assume that a claimant alleges that as a result of the injury he can no longer bend over and pick up heavy items. The defence solicitor believes that the claimant is not as seriously injured as he says. The private investigator places a large heavy item behind the claimant's car, and waits with a video camera to film the claimant if he attempts to move the item. This kind of 'set-up' is not strictly illegal and there are no real sanctions against such conduct. Although, according to the laws of evidence⁵², reliance on the videotape may be excluded (that is, the party seeking to use the video tape may be prohibited from relying upon it in court), the defence may use it to their advantage in other ways. There is also an ethical question about such behaviour. A 'just cause' element might legitimise a test, but the danger is that the subject may injure themselves or be inconvenienced. This is an area in which there seems to be a particular need for clear guidelines as to the appropriate conduct.

Some redress is available to aggrieved persons who have been surveilled or subject to simulation tests. If someone under surveillance wishes to bring an action against an investigator for nuisance, they do not have to prove that they have suffered any particular damage, but in the absence of such damage, only nominal compensation will be awarded. However, if the investigator has acted in a morally reprehensible way in conducting the surveillance, the court may order punitive or exemplary damages. A private investigator who employs someone to conduct surveillance on his or her behalf will be vicariously liable for any damages awarded to the plaintiff as a result of a nuisance created by that person in the course of carrying out their duties.⁵³

⁵² S.138 *Evidence Act 1995* (Cth) gives the court a discretion whether or not to accept illegally obtained evidence. The general rule is that it will be excluded unless the desirability of admitting it (having regard to such things as the type of action and how relevant the evidence is) outweighs the undesirability of admitting evidence that has been obtained illegally.

⁵³ *City of Richmond v. Scantelbury* [1991] 2 VR 38 at 40; (1988) 68 LGRA 49; 6 BCL 286 per Kaye J; *White v. Jameson* (1874) LR 18 Eq 303.

Some activities associated with surveillance and investigative work are specifically regulated by legislation, such as the use of listening devices, privacy of mail and privacy of telecommunications.

Listening Devices

All Australian Jurisdictions have legislation regulating the use of listening devices.⁵⁴ The ACT definition of a listening device is generally representative of that used in the various Acts:

any instrument, apparatus, equipment or device capable of being used to listen to or to record a conversation, but does not include a hearing aid.

The legislation generally prohibits the use of listening devices to record private conversations and the communication or publication of a record of a private conversation obtained by the illegal use of a listening device. A representative definition of a 'private conversation' is found in Section 3 of the *Listening Devices Act 1991* (Tas):

any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only -

(a) by themselves; or

(b) by themselves and by some other person who has the consent, express or implied, of all those persons to do so.

However each jurisdiction has conditions under which use, communication and publication is allowed. The legislation differs in each State in a number of important respects. For example, in Queensland, Western Australian and the Northern Territory an investigator can record a conversation to which he or she is a party without the knowledge or consent of the other parties. In the Australian Capital Territory an investigator can only record a conversation to which he or she is a party with the consent of the other parties to the conversation. In Tasmania, New South Wales, the Australian Capital Territory and South Australia an investigator (or any other person) can record a conversation to which he or she is not a party if it is reasonably necessary (for a variety of reasons, such as where there is an imminent threat of violence or a serious narcotics offence).

In some jurisdictions it is an offence simply to use a listening device, but in New South Wales, the Northern Territory and the Australian Capital Territory it is also an offence to 'cause to be used' a listening device contrary to the Act. This would cover clients who instruct the investigator to use such a device. In those jurisdictions it is also an offence to possess or use a record of a private conversation (that is, something that contains the substance, meaning or purport of the conversation) obtained by the use of a listening device contrary to the Act. Accordingly, a client may be committing an offence under the act by possessing a letter written by the investigator which contains a summary of the contents of a cassette recorder using a prohibited listening device. In New South Wales and the Australian Capital Territory it is also an offence to possess a listening device, whether or not it is used in breach of the relevant Acts.

An exception to the general prohibition against publishing and communicating the contents of a private conversation exists in Queensland, New South Wales, Western Australia and the Australian Capital Territory. In these jurisdictions this is allowed 'in

⁵⁴ *Listening Devices Act 1992* (ACT); *Listening Devices Act 1984* (NSW); *Listening Devices Act 1996* (NT); *Invasion of Privacy Act 1971* (Qld); *Listening Devices Act 1972* (SA); *Listening Devices Act 1991* (Tas); *Listening Devices Act 1969* (Vic); *Listening Devices Act 1978* (WA).

the course of legal proceedings'. However the definition of legal proceedings differs in each State's legislation. In some jurisdictions publication or communication is only allowed in legal proceedings which arise as a result of an alleged breach of the Act. That is, the contents of a private conversation in those jurisdictions could not be used in the course of litigation such as claims for compensation for personal injuries or fraud. The penalties for breaches of the various Acts include fines of about \$5000 to \$8000 (for individuals – there are higher penalties for corporations) and terms of imprisonment from 6 months to 5 years.

In New South Wales there is some additional scope for private investigators to use listening devices. All jurisdictions provide for warrants to be issued by a judge to authorise the use of listening devices. In most jurisdictions application can only be made by a member of the police force or other crime fighting body. However in New South Wales an application can be made by any person, provided that they comply with any conditions set by the judge (for example in relation to the particular times when the device may be used). Generally, the legislation requires the applicant to show reasonable grounds to support the need for the listening device (such as the belief that a serious offence has been or is likely to be committed). If the warrant is granted, there will be conditions attached in relation to the placement, timing and retrieval of the listening device.

It seems unlikely that a warrant will be granted to a private investigator unless they are involved in a criminal investigation with the support of the police or a recognised crime fighting authority. For example, assume that a police homicide squad is desperately searching for a serial murderer. They have numerous suspects in mind but have insufficient personnel to follow up all leads and conduct surveillance. The squad has some money which they would like to use to contract a firm of private investigators to plant listening devices in two premises and monitor the devices. In principle there seems to be no reason why the police could not obtain a warrant authorising the investigator to install and monitor the listening devices, provided they comply with the attached conditions.

Mail

There is no general law relating to the privacy of correspondence. However there is an equitable principle that the law will restrain the publication of confidential information *'improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged'*.⁵⁵ There is also legislation which makes it illegal to steal, tamper with or fraudulently obtain articles in the course of post. The *Crimes Act 1914* (Cth) provides penalties of up to 5 years imprisonment for offences such as stealing or obtaining articles in the course of post.⁵⁶

For example, an investigator may believe that a debtor is staying with her brother. He checks the brother's letterbox on a number of occasions, but does not find any mail addressed to the debtor. However, the investigator finds a letter addressed to the debtor's brother from their mother. The investigator wishes to open the letter to see whether the mother is writing to the brother and the debtor, which may be evidence that the debtor is residing in the house. If the private investigator opened the letter, they would be committing an offence under the Crimes Act.

⁵⁵ *Commonwealth v. John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50.

⁵⁶ s.85K and s.85M.

Telecommunications

Individuals and companies are protected from telephonic eavesdropping by the use of electronic and other phone tapping devices by legislation in all jurisdictions.⁵⁷ The *Telecommunications (Interception) Act 1979* (Cth) provides that it is illegal to intercept a telecommunication.⁵⁸ S.6 defines 'interception' as 'listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication'. It is also an offence to deal with (use or copy) information where it has been obtained by interception which is suspected to have been unlawful.⁵⁹ The criminal penalty for interception or dealing with information is imprisonment for up to 2 years.⁶⁰ There is also provision for an aggrieved person to claim damages in a civil court, including punitive damages.⁶¹ It is also illegal to use or possess equipment for the purpose of intercepting a telecommunication in breach of the *Telecommunications (Interception) Act 1979* (Cth). The penalty is imprisonment for up to five years.⁶² A private investigator is not, under any circumstances, able to intercept a telecommunication without a court-issued warrant

The client may also be liable for breaches of this Act by the private investigator if the client 'authorises, suffers or permits' another person to intercept a communication in breach of the Act.⁶³ The client may also be found guilty of an indictable offence under s.86 *Crimes Act 1914* (Cth) for conspiring to commit an offence against a law of the Commonwealth. The penalty is imprisonment for three years. In Western Australia in 1991 a private investigator and his client were convicted of such offences in *R v. Smith*.⁶⁴ The investigator installed an illegal interception device on one of the client's former employee's telephone service. They were found to have conspired to intercept a telecommunication contrary to the *Telecommunications Act 1979* (Cth). The investigator and his client were sentenced to two years imprisonment under s.86 of the *Crimes Act 1914* (Cth).

Harassment

Harassment is not consistently defined across the different jurisdictions, but generally incorporates acts causing embarrassment, ridicule or shame, such as acts indicating that surveillance is being carried out, unduly visiting or communicating with a person or making statements or enquiries with relation to a person's financial position.⁶⁵ For example, an investigator who telephones a person's employer, business associates and friends to enquire whether the person usually pays their debts is likely to be found guilty of harassment. This entails a question of degree, so that calling only one person may not be harassment, so long as the enquiries are made tactfully and in such a manner as not to embarrass the person about whom the enquiries are made.

⁵⁷ *Telecommunications (Interception) Act 1979* (Cth), *Listening Devices Act 1984* (NSW), *Invasion of Privacy Act 1971* (Qld), *Listening Devices Act 1972* (SA), *Listening Devices Act 1991* (Tas), *Listening Devices Act 1969* (Vic), *Listening Devices Act 1978* (WA).

⁵⁸ s.7 *Telecommunication (Interception) Act 1979* (Cth)

⁵⁹ s.71 *Telecommunication (Interception) Act 1979* (Cth)

⁶⁰ s.105 *Telecommunication (Interception) Act 1979* (Cth)

⁶¹ s.107A *Telecommunication (Interception) Act 1979* (Cth)

⁶² s.85ZK and s.85ZKB *Crimes Act 1914* (Cth).

⁶³ s.7(1) *Telecommunications (Interception) Act 1979* (Cth).

⁶⁴ (1991) 52 A Crim R 447 (CCA WA)

⁶⁵ s.4(8) *Commercial and Inquiry Agents Act 1974* (Tas); s.3 *Private Agents Act 1966* (Vic); s.39C *Commercial Agents and Private Inquiry Agents Act 1963* (NSW); s.3 *Commercial and Private Agents Licensing Act 1996* (NT). The *Security Providers Act 1993* (Qld) does not include a definition of 'harassing tactics', which is the term used in the Act.

The New South Wales Department of Consumer Affairs *Review of Private Investigation Industry* in 1993 found that harassment was one of the three main areas of complaint against private investigators.⁶⁶ However, most State legislation does not include any penalty for harassment, and simply provides that evidence of harassment by the investigator is a ground to be considered in applications for the granting or cancellation of a licence.⁶⁷ There is some scope for a private investigator to be found liable for stalking, however this generally requires that the private investigator has the 'intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety'.⁶⁸ This is unlikely to be able to be proved with respect to a private investigator's enquiries. The New South Wales legislation is the only one to specifically provide a penalty for harassment (up to \$1000 and/or six months' imprisonment).⁶⁹ The Victorian Law Reform Commission recommended in its *Report on Inquiry Agents, Guard Agents and Watchmen* in 1989 that the legislation for establishing the licensing system for inquiry agents should specifically prohibit harassment and provide a civil remedy with assessment of damages based on tortious principles.⁷⁰ This has not yet been done. The Commonwealth ALRC Report on Privacy in 1983 made similar recommendations, and included a draft *Privacy (Harassment) Ordinance_(ACT)*, which has also not been implemented.

Nervous Shock

An investigator may be liable in tort for the infliction of nervous shock if their activities are such that emotional distress is caused without lawful justification. In *Janvier v. Sweeney*,⁷¹ for example, private investigators were found liable for causing a lady emotional distress by accusing her of a number of things that were untrue (including that she was under investigation for corresponding with a German spy) in order to obtain further information to assist their enquiries. It is also foreseeable that a person may suffer nervous shock as a result of excessive surveillance activities.⁷²

As an example, an investigator may want to find out whether a person has sufficient money or assets to pay a debt. The investigator goes to the person's house and, in order to gain access to their financial records, claims to be a police officer and asserts the person is under investigation for fraud. This is completely untrue. The investigator is likely to be found liable to pay the person compensation for the distress he causes the person as a result of making these false allegations (apart from the criminal offence of claiming to be a police officer).

Privacy and protection of reputation

A private investigator may be the subject of an action for defamation either as originator of a defamatory statement or as a person passing it on. The making of a defamatory statement can be express or by innuendo. The mere undertaking of an inquiry can raise imputations of wrongful conduct (for example, asking questions of a person's employer about that person's potentially criminal conduct). In the Canadian

⁶⁶ 'Review of Private Investigation Industry', New South Wales Department of Consumer Affairs, 1993.

⁶⁷ S.4(7) *Commercial Inquiry Agents Act 1974* (Tas); s.11(4)(a)(ii) *Security Providers Act 1993* (Qld); s.13 *Private Agents Act 1966* (Vic); s.11 and s.16 *Commercial and Private Agents Licensing Act 1996* (NT).

⁶⁸ For an example see S.21A *Crimes Act 1958* (Vic).

⁶⁹ S.39C *Commercial Agents and Private Inquiry Agents Act 1963* (NSW).

⁷⁰ 'Report on Inquiry Agents, Guard Agents and Watchmen', Victorian Law Reform Commission, 1989.

⁷¹ [1919] 2 KB 316

⁷² See for example *Davis v. McArthur*

case of *I.C.B.C. v. Somosh*⁷³ an investigator was hired to determine the defendants' income and assets to see if they could pay a claim. The investigator telephoned the male defendant's employer and asked questions relating to his employment, salary, character, morals, moods and drinking habits. This was found to be an invasion of privacy. It seems that in Australia, similar activities could found an action under the common law of defamation or the harassment provisions mentioned above.

For example, assume an investigator is employed by a parent who suspects that her daughter is taking drugs. The investigator telephones the daughter's employer, implies that the daughter is a regular drug user and asks whether the daughter has ever come to work under the influence of drugs. As a result of this telephone call the employer terminates the woman's employment, believing she is a drug-user. The daughter would be entitled to claim compensation from the investigator for defaming her to her employer. It may not make any difference whether the allegation is true or not.

Breach of confidence

Where a private investigator receives information in confidence, or knows that it was originally supplied in a situation of confidence, they are not permitted to pass the information on in the absence of just cause or excuse.⁷⁴ A just cause or excuse may be that the disclosure of the information is necessary to ensure public safety (for example, when the investigator becomes aware that a particular model of swing set has an inherent defect that makes it dangerous to children). Whether or not passing on that information to the investigator's client is a sufficient cause or excuse will depend on the type of information and the source of the client's interest in the information.⁷⁵

For example: a private investigator has previously done work for X Insurance Company. She knows that the company will normally settle claims for less than \$2000 without requiring detailed proof of the loss, but this is a confidential policy. She is subsequently retained by a firm of solicitors who act for a client who is claiming \$1800 compensation from X Insurance Company. The investigator is asked to compile a detailed proof of the loss. The investigator would not be entitled to inform her client about the insurance company's policy.

Consumer Protection Issues

There are a number of areas in which the *Trade Practices Act 1974* (Cth) or the various State Fair Trading Acts may apply to activities conducted by a private investigator, whether or not the business is incorporated. These provisions generally prohibit unconscionable, misleading or deceptive conduct by the private investigator in the course of carrying on their business. The legislation provides clients with a number of remedies, most commonly the right to damages, if they suffer loss or damage as a result of such conduct by the investigator. There are also a number of statutory provisions prohibiting licensed agents from making misrepresentations in the course of carrying out their business.⁷⁶ The penalties include fines of up to \$10,000 and the Queensland legislation includes imprisonment for up to 6 months.

⁷³ (1983) 51 BCLR 344.

⁷⁴ *Seager v. Copydex* [1967] 2 All ER 415.

⁷⁵ *Seager v. Copydex* [1967] 2 All ER 415.

⁷⁶ See for example, s.53 *Auctioneers and Agents Act 1971* (Qld), penalty of up to 40 p.u. or 6 months imprisonment; s.20 *Commercial Agents and Private Inquiry Agents Act 1963* (NSW), penalty up to 20 p.u.; s.17 and s.37 *Security and Investigation Agents Act 1995* (SA), penalty up to \$10000; s.17

An example of unconscionable conduct might occur if a person under investigation believes, without any such representation by the investigator, that the investigator works for a market research firm. The person invites the investigator into her house and agrees to answer his questions on this basis. If the investigator, knowing that the person is under this misapprehension, takes advantage of this, he is acting unconscionably. An example of misleading and deceptive conduct might be when an investigator implies that he is employed by a market research company in order to gain access to the person's house and have them answer questions. An example of misrepresentation would be where an investigator specifically tells the person under investigation that he is employed by a market research company.

Access to Information

Australia does not have a general statutory right to privacy contained in a document such as a Bill of Rights. There is an Australian Privacy Charter, but it is a voluntary code and has no penalty provisions.⁷⁷ At common law there is also no general right to privacy. However various parts of the common law in relation to confidentiality, property, search and seizure, liberty and security of person give certain privacy rights in specific contexts. There are also common law actions relating to the disclosure of information, such as defamation, the giving of negligent advice, the making of a negligent report, and inflicting nervous shock. These areas of the common law give aggrieved persons the right of commencing a civil action against someone who has interfered with their rights. Private investigators could be liable to pay damages and court costs if they are the subject of such an action.

Government held information

Commonwealth legislation protects personal information in the hands of Commonwealth agencies, credit providers and credit reporting agencies.⁷⁸ (Similar regulations can be found in the various states and the Northern Territory.⁷⁹ All States and Territories also have Freedom of Information legislation which regulates access to personal affairs or information.⁸⁰)

Commonwealth agencies must comply with the Information Privacy Principles,⁸¹ which are based on the OECD guidelines.⁸² The Information Privacy Principles contain guidelines in relation to:

- The manner and purpose of collection of personal information;
- Things that the collector must inform the individual to whom the collected information relates;

Commercial and Inquiry Agents Act 1974 (Tas), penalty up to 20 p.u.; s.28 *Private Agents Act 1966* (Vic), penalty up to 20 p.u.

⁷⁷ See discussion in T Dixon and G Greenleaf, 'Private Parts' (1995) 2 *Privacy Law and Policy Reporter* 20.

⁷⁸ *Privacy Act 1988* (Cth). See also *Privacy Committee Act 1975* (NSW), *Data-Matching Program (Assistance and Tax) Act 1990* (Cth), *Crimes Act 1914* (Cth) Pt VIA, *National Health Act 1953* (Cth), s.135AA, AB, *Income Tax Assessment Act 1936* (Cth) Pt VA, *Taxation Administration Act 1953* (Cth), *Freedom of Information Act 1982* (Cth), *Archives Act 1983* (Cth), *Australian Security Intelligence Organisation Act 1979* (Cth) s.93A.

⁷⁹ For example, *Privacy Committee Act 1975* (NSW).

⁸⁰ *Freedom of Information Act 1989* (ACT), *Freedom of Information Act 1989* (NSW), *Freedom of Information Act 1992* (Qld), *Freedom of Information Act 1991* (SA), *Freedom of Information Act 1991* (Tas), *Freedom of Information Act 1982* (Vic), *Freedom of Information Act 1992* (WA), *Freedom of Information Act 1982* (Cth).

⁸¹ s. 14 *Privacy Act 1988* (Cth)

⁸² *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

- The storage and security of personal information;
- Gaining access to personal information stored by a record-keeper;
- The accuracy and alteration of records containing personal information;
- Limits on use and disclosure of personal information.

Commonwealth agencies are only allowed to use information gathered for specific purposes, and are generally unable to release this information to members of the public. This would normally prohibit the release of information to private investigators.

The legislation also provides for the appointment of a Privacy Commissioner who has power to enforce the legislation against anyone, not necessarily a Commonwealth agency. This means that a private investigator who receives information from a Commonwealth agency in breach of the statute may be directed by the Commissioner to destroy or hand over the information, or to pay compensation or costs. However, a determination by the Commissioner is not binding unless action is taken in the Federal Court to enforce it. Determinations are also subject to review by the Administrative Appeals Tribunal.

Some of the specific offences are:

- Access to computer data⁸³ ;
- Corrupting or bribing a Commonwealth officer to provide data⁸⁴;
- Obtaining information by false pretences⁸⁵

Note that a client who requests an investigator to access such data in breach of the *Crimes Act* 1914 (Cth) is liable for the same penalties (if he or she aids, abets, counsels or procures) or 12 months imprisonment (if he or she incites the investigator to commit the offence). For example, a client asks the investigator to go to a government office, pretend to be the client's husband and ask for copies of some documents relating to her husband. She gives the investigator copies of accounts with the husband's name on them to use as proof of identity. The investigator does this and gets copies of the documents. Both the client and the investigator have committed an offence under the *Crimes Act* and are liable for a penalty of up to 12 months imprisonment.

Information In the Private Sector

The *Privacy Amendment (Private Sector)* Bill 2000 was introduced into the House of Representatives in April. It includes provisions similar to those regulating the privacy of information held by government organisations. The Bill includes the National Principles for the Fair Handling of Personal Information which were developed by the Privacy Commissioner after consultation with business and consumer groups. They are similar to the Information Privacy Principles but tailored toward the activities of private businesses and individuals. The Bill sets out detailed guidelines in relation to the manner of collection, storage and use of personal information. When the Bill is passed, private investigators will have to be careful to conduct their inquiries in a manner consistent with the guidelines.

In the period 1998-1999 the Commonwealth Privacy Hotline received a large number of complaints relating to the activities of private investigators which were outside the jurisdiction of the Privacy Commissioner because they related to private sector bodies. These calls included 205 about surveillance, 392 about telecommunications

⁸³ s.76B *Crimes Act* 1914 (Cth)

⁸⁴ s.73 *Crimes Act* 1914 (Cth)

⁸⁵ s.18T *Privacy Act* 1988 (Cth), s.10 *Invasion of Privacy Act* 1971 (Qld).

and 134 about debt collectors.⁸⁶ The *Privacy Amendment (Private Sector) Bill 2000* expands the jurisdiction of the Privacy Commissioner to cover privacy complaints relating to private sector bodies. Aggrieved persons will be able to bring a complaint before the Privacy Commissioner, whose determinations may be enforced by the Federal Court.

Specific Rules

Process service

The manner in which process service must be undertaken is set out in the various rules of court. Generally personal service is required, however the means taken to effect service must be lawful. For example, a process server cannot unlawfully enter a person's property in order to affect service, nor can they affect service by misrepresentation. Accordingly, process serving can be a very difficult thing to do. The document must be presented to the person on public property, or on private property if the occupier has consented to the private investigator's entry. In circumstances where a person cannot be personally served, either because of avoidance tactics or simply because they cannot be located, the courts can order a form of substituted service.⁸⁷

Debt collecting

In all of the States and the Northern Territory there is legislation regulating the conduct of debt collectors.⁸⁸ Under this legislation, debt collection agents are subject to the provisions prohibiting harassment and misrepresentation and may also be subject to disciplinary proceedings if they behave inappropriately. The New South Wales Privacy Committee has also issued guidelines for debt collectors.⁸⁹ There is also some protection found in the *Trade Practices Act 1974* (Cth) and the various Fair Trading Acts. These provisions generally prohibit the use of '*physical force or undue harassment or coercion*' in connection with:

- (a) the sale or grant of an interest in land or payment for that interest⁹⁰;
- (b) the supply of goods and services or payment for that supply⁹¹.

Contravention of these provisions is a criminal offence with fines of up to \$40,000 for individuals and \$200,000 for corporations. There are also civil sanctions such as

⁸⁶ Privacy Commissioner, *Eleventh Annual Report on the Operation of the Privacy Act for the period 1 July 1998 – 30 June 1999*, Human Rights and Equal Opportunity Commission 1999.

⁸⁷ That is, an alternative method of attempting to notify the person of the document rather than personally handing it to the person. For example, an advertisement in a newspaper.

⁸⁸ *Debt Collectors Licensing Act 1964* (WA), *Auctioneers and Agents Act 1971* (Qld), *Commercial and Private Agents Licensing Act 1979* (NT), *Commercial Agents and Private Inquiry Agents Act 1963* (NSW), *Commercial and Private Agents Act 1972* (SA), *Commercial and Inquiry Agents Act 1974* (Tas), *Private Agents Act 1966* (Vic).

⁸⁹ N.S.W. Privacy Committee, Information Bulletin No.3, *Guidelines for the Use of Debt Collection Letters Referring to People's Credit Ratings* (1976), Paper No.49A, *Guidelines for Debt Collection* (1979).

⁹⁰ *Trade Practices Act 1974* (Cth), s 53A(2); *Fair Trading Act 1992* (ACT), s 15(2); *Fair Trading Act 1987* (NSW), s 45(2); *Consumer Affairs and Fair Trading Act 1990* (NT), s 45(2); *Fair Trading Act 1987* (SA), s 59(2); *Fair Trading Act 1990* (Tas), s 17(2); *Fair Trading Act 1985* (Vic), s 13(2); *Fair Trading Act 1987* (WA), s 12(2)(d). There is no equivalent provision in the *Fair Trading Act 1989* (Qld). 'Interest' is widely defined in the *Trade Practices Act 1974* (Cth), s 53A(3).

⁹¹ *Trade Practices Act 1974* (Cth), s 60; *Fair Trading Act 1992* (ACT), s 26; *Fair Trading Act 1987* (NSW), s 55; *Consumer Affairs and Fair Trading Act 1990* (NT), s 55; *Fair Trading Act 1989* (Qld), s 50; *Fair Trading Act 1987* (SA), s 69; *Fair Trading Act 1990* (Tas), s 26; *Fair Trading Act 1985* (Vic), s 22; *Fair Trading Act 1987* (WA), s 23. 'Consumer' is defined in the *Trade Practices Act 1974* (Cth), s 4B. There is no 'consumer' limitation under the *Trade Practices Act 1974* (Cth), s 53A(2).

injunctions, damages or enforceable undertakings. These can be imposed as a result of action by the aggrieved person or the ACCC itself. These sanctions are enforced in the same way as civil judgments. S.60 of the *Trade Practices Act 1974* (Cth) has not been tested in court, so there is no judicial pronouncement on what kind of conduct will contravene the section. However, the ACCC has published a guideline for debt collection activities.⁹² The guidelines do not have any legal effect and simply provide direction as to the appropriate conduct. According to the ACCC guidelines, some of the things an investigator is required to do are:

- communicate with the debtor at reasonable hours;
- ensure that communications with or visits to the debtor's workplace are handled discretely and with care;
- not make an unreasonable number of unsolicited communications with the debtor;
- not use inappropriate language, violence or physical force.

It is important to note that the force, harassment or coercion does not have to be directed at the consumer personally. For example, an investigator is employed to recover a debt from Mrs D. He contacts Mrs D's husband and informs him that if his wife does not pay her debt within two weeks, he '*wouldn't like to be in her shoes*'. This would amount to undue harassment or coercion, even though it is not directed to Mrs D herself.

Licensing

All States and Territories in Australia have licensing requirements for private investigators and associated occupations (such as commercial agents, process servers and security officers). These schemes are '*designed essentially to protect the public from unscrupulous agents*'⁹³ In the last fifteen years there has been a trend to tougher licensing through criminal history checks and compulsory training. This is an area where there is a growing body of research and surveys have shown that licensing is strongly supported by security industry members in Australia.⁹⁴ There are a number of grounds on which someone may object to a licence being granted, including lack of good character, age, bankruptcy, previous use of harassing tactics, prior contravention of the legislation, previous convictions, incapacity and unfitness for duties. Generally speaking, an applicant with a criminal record or who has shown a lack of respect for the law is unlikely to be seen as a fit and proper person. An applicant who has a history of poor work practices, such as the use of harassing tactics, or who does not seem likely to be a competent inquiry agent may have their application rejected. Licences can be suspended or cancelled on similar grounds. In most jurisdictions it is an offence to carry on business as an agent without a licence, to improperly obtain a licence, to use a licence to exceed authorised powers, to lend, sell or dispose of a licence, or to delegate work to an unlicensed person. Penalties range from \$200 to \$20,000 with terms of imprisonment from 3 to 6 months.

Despite these relatively strong measures designed to protect consumers, significant problems remain with the licensing systems. Requirements are not uniform across the different jurisdictions, so that different criteria obtain in different jurisdictions in terms of disqualifying offences, training periods, liability insurance, and the use of

⁹² The guideline can be downloaded for free at <http://www.accc.gov.au/consumer/sec60.html>

⁹³ *Hoban v. Davey* [1972] NSWLR 59, 65 (Sugerman P); *Glynn v. Denman and Monk* [1978] VR 349, 356-7 (Harris J).

⁹⁴ Prenzler, T and Hayes, H, 'An Evaluation of the Queensland Security Providers Act: Implications for National Regulation of the Protective Security Industry'. (1999) 32 *Australian and New Zealand Journal of Criminology* 79; Prenzler, T, 'Security Managers' Perceptions of Industry Regulation: An Australian Study' (1995) 6 *Security Journal* 227; Younger Report, para 451f; Turner, 'Fair Dealing with Consumers in South Australia' (1976) 2 *Legal Services Bulletin* 38 at 42.

codes of conduct. Training remains a major area of concern. Some jurisdictions do not set minimum training periods and, for those that do, the average is one week of instruction.⁹⁵ It is difficult to see how the complex legal principles analysed in this paper could be communicated in one week, alongside other elements of a curriculum. Additionally, few jurisdictions require any kind of training-based certificate for private investigators and associated agents to hold a licence.⁹⁶

⁹⁵ Prenzler, T and Sarre, R, 'A Survey of Security Legislation and Regulatory Strategies in Australia' (1999) 11 *Security Journal* 7.

⁹⁶ New South Wales, South Australia (loss adjusters and credit providers), Western Australia (security officers and crowd controllers) and Queensland (commercial agents).

Study II: Practitioner Interviews

Response

The study focused on firms located in Brisbane, the Gold Coast, and Sunshine Coast, Sydney and Newcastle. A database of private investigators was constructed from a number of sources. Telstra's *Yellow Pages*, under the categories of investigators was used initially. It was assumed that most private investigators would advertise in this medium. Professional Industry Directories from the Institute of Mercantile Agents (IMA) and the Australian Institute of Private Detectives (AIPD) were also used. Two international organisations, the World Association of Detectives (WAD) and Council of International Investigators (CII), were also approached for suggestions. However, both organisations have low representation in Australia and thus did not significantly assist the study.

A total of 40 interviews were conducted (Table 1): 25 in Queensland and 15 in NSW. This made for a total response rate of 65%. Four of the interviewees were female and 36 were male. The response is well above the average for mail out questionnaires to private investigators (as reported in the literature review above). In NSW the interviewer was restricted to two weeks availability and a number of difficulties were experienced with appointments being cancelled at the last minute because of respondent's work commitments. Interviews averaged two hours - twice as long as expected. Despite not reaching the target of 50, it was felt that a great deal of very useful information was obtained from private agents engaged in a diverse and seemingly fairly representative range of work.

TABLE 1 – response rate in QLD and NSW

Source	Contacted	Declined	Interviewed	% Response
Yellow Pages	24	5	19	79
Internet Sites	10	5	5	50
APID Directory	10	2	8	80
IMA Directory	17	9	8	47
TOTALS	61	21	40	65

Interviews were held in a location nominated by the interviewee. In almost all cases this was in their office. One initial finding was that many investigators operate a home-office format. Nineteen (47.5%) operated from home, 18 (45%) had traditional offices and three (7.5%) had either serviced offices or operated on a share basis with other firms.

Business Profile

All 40 respondents had Private Investigator licenses (in NSW, 'Private Inquiry Agent') and 15 had Commercial Agent licences. Six also had security guard or crowd controller licences. The large majority were owners or directors of investigation firms (Table 2). The respondents were asked what kind of work they undertook before becoming a private investigator. Half stated they had prior military, corrective services or police experience (State and federal). Those with law enforcement experience accounted for the largest single group with a common background – 14 (35%). Others came from a diverse background including a lawyer, musician, a human resources officer and car salesperson. Many of the former police officers,

from both detective sections and general duties, stated that they considered private investigation work a natural progression from the service. Those respondents with military experience included both officers and enlisted persons from a mainly enforcement (military police, dog-squad) or legal background. It would appear from the interviews that the lack of a prior law enforcement background does not adversely effect a private investigator's career.

TABLE 2 – Interviewees' Positions

Position	Number
Owners and Directors	34
Employee Managers	5
Employee Investigators	1
TOTAL	40

Just over half the interviews classified their companies as either small or medium (52.5%) (Table 3). The remainder were large, with four or more investigators (47.5%), in terms of the size of their company in the relevant state. The maximum number of employee investigators cited was 50.

TABLE 3 - Number of Investigators

Number of Investigators	Number of Firms	Percentage
One	14	35.0
Two or Three	7	17.5
Four or More	19	47.5
TOTAL	40	100.00

Twenty-two interviewees (55%) stated they had at least one permanent full-time employee for office administration and four (10%) stated they either had a spouse or part-time employee undertake some office work. Some firms employed several investigators on a permanent basis but, despite some larger numbers in a few firms, interviewees attested that the industry is based largely on sub-contracting of 'operative' work, usually to single operators. This seems particularly relevant for those investigators undertaking work for the insurance industry. The extensive use of sub-contracting was partially attributed to alleged disincentives for taking on employees – such as unfair dismissal legislation and payment of entitlements – as well as providing flexibility to companies and performance incentives for operatives. A few principal contractors stated that on occasion subcontractors would approach the client directly for work and undercut the principal. One respondent stated that when he started twenty years ago most investigators were employees and the owner supplied vehicles for them to use. He claimed this approach created a more professional and motivated workforce.

In terms of the types of work performed, the sample presented a very mixed profile. The larger firms tended to provide diverse services, but with the bulk of work based on surveillance or factual investigations for insurance firms. A small number of firms were highly specialised. Only one concentrated on 'personal work' – such as searching for missing persons, surveillance for suspected infidelity, and locating heirs. Another specialised in criminal work including investigation of extortion and threats, executive personal protection, investigation of robberies and Legal Aid matters. Other firms tended to specialise more in process serving and debt recovery.

In terms of changes in the nature of private investigator work, two key trends were identified by most interviewees. The first was a major shift, over the period from the 1970s to the 1990s, away from 'domestic' work and towards insurance fraud. With the introduction of no-fault divorce many investigators stated that domestic work could not be relied upon to operate a business. 'Gone are the days when we chased people for divorces, taking photos, etc.' said one (18). This was a change welcome by most. Twenty-four (60%) expressed reluctance with taking on domestic matters as involving messy personal problems. One had a very detailed contract that was given to private clients, including cancellation clauses, if the matter involved domestic violence. The 1980s and 1990s were considered to be critical in terms of a profound change in the insurance industry's response to suspect claims. Interviewees claimed that previous practice was to accept most claims and avoid adverse publicity. However, increasing competition and frustration with the level of suspected fraud led to a well-organised system of claims assessment and referral of suspect claims to investigators. Numerous interviewees identified the availability of video cameras as the major technical innovation facilitating this change. The amount of regular high volume business from insurance agencies meant that many interviewees were able to specialise in this work and ignore 'the public':

I don't advertise, I don't even know if I'm in the phone book... I've never advertised in the *Yellow Pages* and it's not an industry where we target the public... The insurance industry understand that you've got a job to do and if you can do it you can, if can't, you can't. They're expectation of us is more realistic (3).

The following approximate four-way division of labour emerged (Table 4):

1. Anti-fraud work, mainly for large insurance firms but also for some self-insured private companies and government insurance agencies. The work includes factual or surveillance work. The client provides case details and instructions to the private investigator. For factual matters the process usually begins with interviewing the claimant, establishing a record of interview, and then making further enquires if necessary. Surveillance work is highly routinised. The client provides a profile of suspect claims, with documentation such as medical reports, and the investigator will do a standard 20 or 30 hours surveillance and tracking on the person making the claim. Almost all these cases involve some claim of physical disability, and agents will try to discover contrary evidence. Insurance work was a very broad classification which includes stolen vehicles, accidents, arson, and welfare. It can be extended to include unemployment benefit fraud.
2. 'Legal work' was the mainstay of many private investigators before insurance companies began to outsource work in bulk. 'Background' or 'factual' work for lawyers in civil, and some criminal, cases largely involves locating and interviewing possible witnesses or claimants. Again the law firm may request that the private investigator conducts surveillance on a party to gather evidence. In some cases agents will locate and analyse forensic evidence, such as documents or scenes of traffic accidents, or investigate the financial condition of people in terms of their capacity to pay court-ordered compensation. Another aspect of legal work is the service of legal summons – process service.
3. 'Commercial inquiry' is a growing area of work for private investigators. In a competitive business world, businesses are turning to private investigators to undertake electronic counter-measures (debugging), liability investigations, workplace investigations into theft or harassment, and pre-employment checks. Another growing area is trademark and copyright investigations. Some

investigators also undertake risk and security assessments, bodyguard work for executives, theft recoveries, and investigation of computer-based attacks on business. An associated area of work is that of repossessions and debt collection to enforce legal contacts and obligations. Much of this work can just as easily be done for government as for business.

4. The final area is 'domestic investigations': the work for which private investigators are most well known. This can include checking fidelity, checking for teenage drug use, abducted child recoveries, missing persons, and private legal matters.

TABLE 4 - Types of Work Performed

State	Insurance	Legal	Commercial	Domestic
QLD	18	16	14	11
NSW	10	10	10	7
TOTAL	28	26	24	18
% of 40	70	65	60	45

Results and Benefits of Private Investigator Work

Interviewees were extremely positive about the services they provided to clients. They generally estimated their ability to obtain concrete results in the range of 70-90%. This was assessed in terms of recovery of losses, dropping of suspect insurance claims, criminal convictions or employment termination of offenders. It would seem that many disputed insurance claims are settled by withdrawal of claims following disclosure to claimants of the existence of video evidence. The use of video is a powerful tool in a courtroom. A number of surveillance operatives claimed an approximate minimum saving of \$6 for every \$1 spent on an investigation. Similarly, some investigators estimated that a minimum of \$3 is saved in every dollar spent on a factual investigation in uncovering fraudulent claims.

Many took satisfaction from helping private clients in difficult circumstances. One gave the example of a client who had been stalked for two years. 'Now they can sleep at night', he asserted (23). And there was a strong sense that many of the wrongs investigators were charged with solving were properly the province of government law enforcement agencies.

All the private investigator basically is, is the equivalent of the police and servicing the government and the community. There is no one there that can do that work for the private sector. Commercial reality is, people need investigators to obtain the facts. As lawyers we use investigators. And I generally find, that we'll try not to. We try to use the legal system to discover what we can. But there are jobs where we can't proceed until we've got answers. And all the private investigators are arms and legs (3).

About 75% held that police were understaffed and so it fell to the private sector to respond to the more determined claimant. However, the remaining quarter were highly critical of police. Many of the most strident critics were ex-police, often from the pre-Fitzgerald Inquiry days in Queensland or the pre-Wood Inquiry days in NSW. However, despite reform initiatives, this group felt that many police had a disdainful view of victims of crime and had simply become collectors of crime reports rather than diligent investigators:

There are several reasons [why private investigators exist]. One is our police force is uh, basically, they don't give a shit – for civil matters and/or criminal matters. In so far as burglaries, yes, I mean a house gets broken into it's just another name to the police. They put very little effort into it unless someone comes along and puts his hand in the air. They have very little interest in it. So for the insurance companies to be sure that the claim is valid they need someone like us to do it leg work for them. And then also to try and quantify their loss, for the insurer's side, the risks they are exposed to. Primarily that's why we become involved (8).

This group also tended to be the most critical of ex-police turned private investigator, claiming many ex-police did not have the skills needed to conduct investigations into civil matters. Such skills included communication with people from different cultures and professions and obtaining responses without the benefit of police authority.

Others were more even-handed and suggested that policing could provide very useful training, depending on an ex-officer's specialist background. For example, one interviewee stated: 'It's like saying a 5 to 10 years general duties officer, who is excellent at his job, would make an excellent fraud squad investigator. It all depends. Experience is what really counts' (40). Another stated: 'for criminal matters we will only use ex-police. They seem to know what to do, what questions to ask and are use to going to court' (13).

The large majority of respondents also had very positive views of the wider contribution they made to society. In particular, from their experience, most private investigators saw opportunistic fraud as an enormous problem in Australian society. Some saw themselves as champions of the honest worker and most saw themselves as contributing significantly to keep down costs affected by fraudulent insurance claims or debt evasion:

With every debtor that we can locate and induce to pay their debts we're helping members of the public. And that is why I say debt collecting is one of the most honourable occupations. You're assisting him recover his debts and prevents him passing on his losses to the public. (17)

There is a lack of appreciation by the public of the professionalism of the industry and the benefits of fraud prevention and the benefits to the taxpayer of stopping fraud against government (22).

About half of the interviews reported referring civil matters to police for criminal prosecution. A few said they handed over full briefs. However, very few received any feedback about the outcomes of such cases. All respondents were strongly in favour of the idea of doing more work for the public sector justice system. Many argued that they could do a range of tasks – such as searching for missing persons, conducting surveillance, executing search warrants, attending burglary scenes, undertaking traffic matters – as well as and more cheaply than police. Some novel ideas were floated, such as trailing serious traffic offenders and videotaping their offences or conducting anti-corruption investigations in the police service or Commonwealth agencies.

The following is an example of co-operation between police and private investigators.

We assisted the police fairly recently in an attempted murder, quite a violent assault, where there were only two detectives working on the matter and the

family of the victim said 'This is taking too long. How can we help you?' And the police said, Well, we're [the PI firm] able to do surveillance, door knocking around the street and so on. And the family came to us and the first thing we said to them was, 'We can probably assist you if the police wanted us to. But we're certainly not police officers and we can only do what the police ask us to do'. Went to see the police who were only too happy too have someone on board. It ended with an arrest. It ended up very successful (5).

Although most respondents saw a great deal of the demand for their services resulting from government neglect of law enforcement, they also were clear that privacy was a factor that motivated some clients to seek private agents. One respondent cited the example of parents wanting to know if their children were on drugs: 'If they are, then they can get them on a program. Police would have to prosecute' (23). Others emphasised the personal service they could provide, and continuity of case management and communication, not usually available from busy police departments. The private contractual nature of the work gave victims a degree of input, if not control, that was not possible in public sector processes.

Work satisfaction, Skills, Stress and Danger

All interviewees rated their job satisfaction very highly. The majority took a wholistic view of the benefits of the job. A typical response was as follows:

The investigator provides much more opportunity for rewards than most jobs. The kind and quantity of reward can be compared to the professions of doctors, lawyers, teachers – anything that traditionally requires reasonable intelligence and tertiary qualifications (30).

There was a strong sense of personal autonomy in investigative work and of fulfilment from satisfying clients by getting 'results'. This was mixed with a sense of achieving justice:

It's exciting if you do the job properly and get a result. I even do the Irish jig when I know I've got a result. It's a mind game. And if you know you've gotten the better of someone you can see what they've done, and you've played by the rules. It's like in the cops. You get job satisfaction (3).

Catching a cheat is very satisfying (12).

In terms of practical skills and personal characteristics there appeared to be a sharp division between investigators who conduct surveillance work and those who conduct factual inquiries. While some do both, most seem to have a preference for one or the other. Factual work for legal cases, and other enquiry work, was generally considered the most interesting. Most respondents emphasised the need for good oral and written communication skills, and a very strong sense of what counts as evidence of culpability or innocence.

Surveillance was considered the most boring task and many respondents would have nothing to do with it, relying instead on sub-contracting. Surveillance operatives were considered a special breed of hardy and tenacious types. 'Few people can do it well', observed one veteran. 'A good indication is if you can get into your car in summer and sit in the driveway for about four hours' (11). Traffic lights were the main source of frustration for surveillance operatives, given that tailing vehicles is a key element of their work. Extreme patience is an obvious quality required in order to sit for up to 10

hours at a time in a cramped vehicle, peeing in a bottle and observing premises where nothing may happen for days.

Most investigation work was not considered dangerous, especially if agents had good verbal skills. Process serving and debt recovery were seen as the most risky. This is because this type of work involves direct confrontation with people with debts who are often in extreme financial trouble. Repossessions of vehicles and furniture can at times lead to heated confrontations. Some had been subject to numerous attempted assaults. One investigator stated 'I had one guy pull a knife on me and a couple of others take a swing at me. The knife was bad. The other two were reasonably mild and were due to inexperience' (40).

Surveillance also carried some dangers, such as being seen by the other party. One interviewee complained of being sent on cases by insurance firms without being told that the targets had been subject to previous surveillance attempts. Consequently, the targets would be wise to the presence of agents and sometimes enlist the assistance of friends in threatening the agent:

I've had my vehicle surrounded by very dangerous dudes ordering me to get out... All the horror stories I've heard from PIs: a good percentage of them are because someone has crept up on while he wasn't watching, opened up the driver's door and pulled him out of the car. Or stabbed – 13 times one bloke (4).

The job was considered stressful by most, but this was largely in terms of deadlines. Interviewees agreed there was a trend towards corporate clients wanting very quick turn around on cases – often within five to seven days. Many felt the worst aspect of the job was the frustration at not being able to obtain sufficient evidence of wrongdoing when they were convinced that a target was guilty.

There were only a few complaints about remuneration – possibly a reflection of the fact there were very few employees in the sample. Five interviewees claimed pay rates had decreased over the years due to the number of investigators seeking work. However, the majority saw a clear cut correlation between effort and remuneration and felt they could make a comfortable living for themselves. A few claimed to have become very wealthy. One interviewee somewhat cynically contrasted private investigator careers work with that of a police:

The police have rigid guidelines [for promotion], which is necessary and good but it doesn't matter how good or bad you are. There is no reflection on that in your salary or promotion. Other factors contribute to your advancement. That's why I like being an investigator: the entrepreneurial satisfaction (37).

Differences in earnings appeared to depend largely on the nature of work, clients and location. Several investigators cited hourly rates between \$30 and \$120 (plus additional expenses) in both Queensland and NSW. Several stated that their sub-contractors could earn about \$50,000 per year. Many interviewees who undertook insurance work observed that surveillance operatives received less per hour than factual investigators, but they would receive more hours per case.

Legal and Ethical Issues

All respondents were highly conscious of the fact their occupation entails numerous ethical challenges and dangers. In particular, they nominated privacy as the area where their profession posed the greatest danger to the public. However, this was

couched in terms of a very clear-cut distinction between legitimate and non-legitimate protections on privacy. Of particular interest was the claim made by all respondents that they acted as gatekeepers of legitimate privacy and safety. In this regard, there appeared to be a marked difference between corporate and private clients. Some suggested that there was still some pressure at times from lawyers to break the law. Additionally, some interviewees observed that some corporate clients had little interest in how information was obtained – implying they didn't want to know if laws were broken in the process. A few respondents were critical of practices engaged in by their corporate clients. For example:

Some finance companies lend money to people who simply cannot afford the loan, knowing they will get the good back in the end. Also, I have heard under good authority that a particular insurance companies in the last tenders required a 30% rejection of claims (12).

Nonetheless, all respondents stated that corporate clients never requested any breaches of law. A typical response was that 'with insurance companies the expectation is that all cases could end up in court so all evidence must be admissible' (25). Concern with corporate reputation was also a major explanation. Government clients were described as 'real sticklers for privacy' (22).

The more private agents dealt with the general public the more they were subject to requests for illegal or ethically questionable services. Respondents were strongly of the view that the large majority of requests they received had a strong just cause element, but they also received a fairly steady trickle of highly dubious requests. These were mainly for placement of listening devices in homes or offices, service of threats, breaking and entering and searching for evidence, and location of people who it appeared enquirers wanted to harass or assault. A small subcategory of this group was men on domestic violence protection orders seeking spouses who had gone into hiding. All the respondents claimed they filtered such enquiries:

If I have a private individual come in I won't do a job unless I'm convinced of the reasons. If someone says, 'I want you to find me where Shirley Bloggs lives', I say 'Tell me a little about it'. They say, 'I want to know where she lives. You're a PI aren't you?' I say 'Yes, but I need to know more about this'. They say, 'I just want to know where she lives'. At that point I usually hang up (14).

Another cited requests to 'rough up' people: 'I say, "We are professional. We don't overstep the mark. We investigate people who overstep the mark. It's best we don't meet. If you do I'll be obliged to report you." Then they hang up.' (23). It would seem then that a common task is to explain the law, and the penalties that apply for breaches, and make it clear to callers that nothing would be done for them.

In other cases, agents moderate clients' requests and try to find a legal compromise. One respondent cited the example of a husband travelling interstate who suspected his wife was having an affair and wanted the house and telephone bugged in his absence: 'You just don't do it that way. You do it by observation' (17). Others emphasised the care they take in protecting targets from embarrassment or alarm. For example, one respondent engaged in repossession described how his operative approached people at convenient hours to avoid harassment (consistent with the Act). He would make a drive-by check at about 4am to see if a vehicle targeted for repossession was at a residence. He would then return with a tow truck in daylight at a reasonable time when the target person would be awake but still there.

The very large majority of respondents took the moral high ground on most ethical issues. A few had a more pragmatic outlook and felt that in some cases the means justified the end. They stated, for example, that they were willing to act deceptively to get information. 'Confidence pretexts are useful in getting information even from government departments,' claimed one (39). Another described pretending to be a door-to-door promotions person to 'get a foot in the door'. 'There's nothing wrong with telling little white lies', declared another (20). One was quite forthcoming about such ruses:

We have a girl that does door knocks. That's all she does: pre-surveillance. She's a good looking girl: blonde, gorgeous, fitness instructor. She goes to the front door with a couple of pretexts. It might be 'Oh Hi. Yeah. That's right'. She's at the door, and you're just saying 'Oh my God'. She's got one of these [hidden camera] under her arm filming. And she'll talk to you about fitness programs: 'I work for the local gym' or whoever it might be. 'Someone's nominated you. One of your friends has nominated you in our bowl. It's gone into a competition and you're in a draw for a car' (4).

Industry Compliance

Views were very mixed regarding overall industry compliance with the law and ethical principles. About a third of respondents said they did not have enough contact with other agents to be able to comment or stated, 'I don't want to answer that'. Another third felt that there was some misconduct but that this was relatively isolated and extremely difficult to eradicate. 'There are still some cowboys' (18) or 'a few rogues' (19), was a common reply in this group. Another third, approximately, felt that non-compliance was widespread. One estimated that '50% are ethical, 50% aren't' (25). Most agreed that compliance had increased substantially in the last decade, especially since the ICAC investigation. One interviewee described in colourful terms the type of situation that obtained prior to the ICAC report:

When I first started process serving and I couldn't find someone or they had moved – I was 18 years old and bumbling around like I did not know what I was doing – I'd go to the local cop shop and say who I was and what I was doing. 'Can you tell me about this person?' It was remarkable the number of times I was helped. I went to the Kingsgrove police station and saw the desk sergeant I introduced myself and asked if he could help? He went right off, asking why he should help and that he was risking his job. I asked, 'you mean I'm not suppose to ask for help or get this information. No one told me'. (40)

Similarly:

When margins are tight and you rely on volume the pressure is greater, such as in process service. Every process server has a pet police officer or RTA [Road Transport Authority] guy to help get information. Because they have to get the process out and make money. That's why they came unstuck with ICAC. For every one ICAC named in their inquiry 100 would have done it (40).

There were some allegations by interviewees of poor quality work by sub-contractors that principals could not properly assess:

Some have a reputation for overcharging and charging for work not done. See, we rely on a fair degree of honesty. If I get a report back saying a person could

not be found I have to take the agent's word for it. At the end of the day we are in business to make money and some people don't want to work too hard (12).

I used to drive around during the day to watch my surveillance guys. Once I had my suspicions about a guy who would only ever get footage on Tuesdays. So one day I drove down the street where he was supposed to be. He wasn't there. I thought I had him. However, when he came into work I asked where he was. He stated that he was in the park down the road. It was the only place I didn't look so I had to let it go. I got him the next week though (25).

Similar views were expressed in relation to charging of corporate and private clients. Several contractors stated that over-charging or charging for work not undertaken was common. They stated that some investigators developed a reputation for billing for work not undertaken.

The main areas of non-compliance cited were accessing confidential information – by far the most extensive – as well as trespass, under-quoting in tenders and then undercutting in doing the work, using unlicensed subcontractors, and taking cash-in-hand. Some respondents cited unethical practices such as staging incidents to provoke targets into letting down their guard (deflating a car tyre or tipping over a rubbish bin) or conducting inappropriate surveillance (such as at a funeral). Some argued that the provision of confidential information was now occurring less as a trade involving money than as a favour between private agents and friends in government departments - such as police, electricity, Medicare and social security. 'The biggest worry about ex-police in the job', said one respondent, 'is that they have mates in the Force who may do favours on information' (18). Most blamed unreasonable restrictions for fuelling the illegal trade in information:

Getting information: That's what makes this industry. It's all about information and who can get access to it. If we had more power we could get the information legally. As it stands we have to be creative about it (10).

The very large majority of interviewees agreed that the conduct of private agents and the image of the industry had improved enormously in the last 20 years, but felt that perceptions were still often misleading. A few were quite pessimistic, especially in relation to image: 'I think public perception is that 80% of us are dodgy, but in reality it's probably less than 0.5%' (6).

Access to Information

Access to information emerged as the key area of ethical and legal contention, although respondents were adamant that they were not dependent on illegal information to run a successful business. In NSW, the ICAC investigation into the illegal trade in information appears to have been a watershed event. Respondents felt that the investigation had substantially raised consciousness about the need to respect privacy as well as increasing deterrence. In Queensland, there was considerable interest in the investigation by the CJC into the sale of information from police databases to private agents, and this was seen in generally positive terms as a potentially useful cleansing exercise.

Respondents cited a range of legal data sources that were useful for their purposes. These included electronic telephone pages, electoral roles, and property records. The Commonwealth Information Technology Electronic Commission (CITEC) is a popular service that provides electronic access to information such as property titles, company ownership and bankruptcies. The Australian Population Index (API) is

another source of information (essentially this is the Electoral Role on-line). Electronic phone books are also popular. Where targets are not listed on these standard databases, they are often traced from their last known address by contacting neighbours or ex-employers. Queenslanders were particularly enamoured of a system operated by Queensland Transport (suspended in 2000 but now reinstated with tighter restrictions) that allows application for particulars relating to vehicle ownership. The restrictions mean that only those acting for insurance companies can access the database. The application form includes categories of reasons and requires documentary support, such as copies of police motor vehicle incident reports or court documents specifying a matter. Penalties apply for false applications and misuse of the information. This system was the envy of New South Welshmen. Another useful tool is the Credit Reference Association of Australia (CRAA) (again only available for insurance matters). This provides a history of all the previous insurance claims that a person has made.

The assessment of the value of these sources was fairly high, but respondents were unanimous in stating that they were insufficient for all cases. There is a group of people who disappear off these databases and become extremely difficult if not impossible to trace. Most were very specific about what they wanted:

- Credit history – normally restricted to financial institutions.
- Financial information – such as earnings, assets and liabilities.
- Location information – such as the names and addresses of the owners of vehicles (NSW).
- Adoption records - for adoptees searching for their natural parents.
- Criminal histories – for pre-employment screening, especially in sensitive areas such as working with children.
- Immigration information – to discover if a person has left the country, where they have gone, or where they may hold assets.
- Rental property information.
- Births, deaths and marriages.
- Police motor vehicle accident reports.

The argument for greater access to information was stated in largely moral terms, rather than as a way of improving business. A recurring theme of the interviews was the respondents' sense of outrage at the victimisation of their clients and the fact that the state, which was supposed to uphold justice and the rights of individuals, served as an obstacle to fair compensation or satisfaction of legitimate claims. An efficiency argument was put forward at times, including the argument that sometimes a great deal of time was wasted pursuing the wrong people. There was also the view that restrictions forced some operators onto the black market. But overwhelmingly the argument for greater access was presented in terms of justice. A number of interviewees emphasised the hypocrisy of privacy controls in regard, for example, to criminal histories: 'You can sit in a court of law and find out if a person is convicted but then after that that information is kept secret' (14). These concerns were mixed with grievances about licensing systems that provided no professional rights to licence holders. It was felt very strongly that licence tests should entail concomitant rights. Indeed all respondents, except one, argued that licensing should provide greater rights of access – or at least the right to apply for access – to government held information and some privately held information. They wanted a formal application system including provision of reasons for information and audits by a regulating body.

I have always been a strong believer that because we are licensed we should have more access to information. The work done by legitimate investigators is

for lawful purposes and better information would mean more offenders would be brought to justice (15).

We need some recognition for our licence. We need access to information. Our licence should give us the power to do our job (16).

Not being able to find a witness can seriously affect the court system and the well-being of complainants (17).

We're really good at protecting the guilty in our society... You know, a bloke owes \$5,000 to someone – a builder – and he just happens to skip, you know. Why can't we go down to the Road Transport Authority with that lawful excuse, being fully licensed and accredited and all the rest – paid up, good reputation? Why can't I pay to see the RTA with a letter, even from a lawyer, if they want, to get that information? And bugger me, if I muck up throw me in jail and throw away the key. But all I want to know is where this guy lives because I've got a bankruptcy notice to serve him – or was the witness in civil matters. Okay. It upsets me... And I'm talking about matters of serious crime. I'm talking about people going to jail when they perhaps shouldn't. I'm talking about people going broke, going under big time. I'm talking about babies being bashed. I'm talking about serious issues, that can be resolved but we're not going to bring to a satisfactory conclusion because I couldn't find someone or something (4).

Many of interviewees felt that they knew much better than the average person how valuable privacy was because they knew how easily it could be violated, often without the victim knowing. However, there was a general consensus that the balance was not quite right and that privacy legislation favoured offenders. 'There are more rights out there for the baddies than the victims' (28) was a common response. 'I feel Australian society would benefit at large if we had more data available and more cross matching without swinging too far to the Big Brother syndrome' (13). Another pointed out that carte-blanc authority to trace people could have 'devastating effects' and told a story about how he had nearly assisted in an attempted murder after he located a woman on behalf of a New Zealand investigator in a domestic violence case. Another who specialised in domestic matters stated,

In one case I was asked to trace four people. I found one of them and gave the client the details. A few weeks later the police were knocking on my door. The person I located was found dead – with a crossbow bolt through the head. Apparently he was a Crown Law witness. So were the other three on my list (2).

When asked, 'Do you think private agents should have police powers?', all respondents stated 'No'. The following is a typical response, 'We don't need more authority. None of us want authority. We want access – justified access – to government documentation' (14). Although respondents rejected the idea of 'police powers' in principle, a small number wanted the right to apply for search warrants (possibly to be executed with police assistance) or warrants to apply listening devices – through judicial approval and with strict controls.

Views on Regulation and Training

All respondents except one (97.5%) argued that mandated pre-entry training was inadequate in developing both practical and ethical competencies. In Queensland, the minimum training requirement to obtain a licence is a Certificate 2 in Investigative Services. Such a course can be completed in five days. 'I just don't think that there is

any way that a person could undertake a course for one week and become a private investigator' (1) was the response of the large majority to such courses. The courses that extended beyond the mandatory period – for example Certificate 4 in Investigative Services – were given a much better rating. For a commercial agency licence in Queensland applicants complete a multiple choice test. In NSW, to obtain a licence the applicant must hold a sub-agent's licence for a period of 12 months and undertake a certificate in commercial agency or private investigations from a TAFE College. These are 222 hrs (approximately six weeks full-time equivalent) for commercial agency work and 265 hours (approximately seven weeks full-time equivalent) for private investigations.⁹⁷

It was claimed that inadequate pre-service training was responsible for a lot of incompetent and unethical work by beginning agents: 'There are a lot of young investigators out there who believe they have a badge that entitles them to do anything and that's really a lack of knowledge' (24). Many described training courses in terms such as 'totally useless' (16), 'pathetic' (23) or 'deceptive' (22), suggesting that real training was in-house and on-the-job. One investigator claimed that one training course was being run by a trainer who had completed the same course 12 months prior, had no experience in the industry and had been refused work by several firms because his surveillance notes were inadequate. Interviewees from New South Wales tended to be just as critical as those from Queensland, despite the much longer training regime in New South Wales. To some extent though, interviewees tended to reflect more on their own training experiences when starting out, and often did not appear to be aware of how lengthy some current courses are. Most were, however, aware that training had definite limits. Questions of personal commitment and natural talent also came into play in determining competency: 'Integrity and discipline are the skills that count. I can train anyone to take a statement' (39).

There were also numerous complaints that private investigator courses were mixed up with security guard courses. For example:

I've seen three different syllabuses from three different companies, all of them are totally irrelevant to the private investigation industry. They talk about powers of arrest. They talk about use of force. They might have a page on surveillance and one paragraph on taking a statement, and the rest goes with security guards... Private investigators do not make arrests. They do not use force. If they do they are in a bad way (6).

Commercial agents complained that they were lumped in real estate agents and motor vehicle sales people. Interviewees expressed concerns about the complexity of law surrounding private agents and the fact it was not taught to a sufficient level of sophistication. At the same time, but most concerns were focused on procedural skills. One argued that insurance related matters constituted 90% of private inquiry business but the processes of the insurance industry were not taught. It was felt that many of the main elements of investigation work were largely ignored. For example:

They don't teach how to take a statement. Things like ... they don't teach them the reality of traffic accidents being investigated. They don't teach them how to speak to people who've just lost a husband in an accident. They don't teach them how to do a scale plan. (8).

⁹⁷ NSW TAFE.

Lawyers have specialisations: family law, taxation and so on. The law's too big for anyone to know the lot. Private investigators should have the same - endorsed to do factials, surveillance, and so on. The law is specific in each case and you can't be a specialist in each area (38).

There was a small number, nonetheless, who felt that some overlapping of security training would help the different specialist branches to understand each other and work together more effectively.

It also appeared from the interviews that few investigators undertake further training once they have obtained a licence. Only five (12.5%) had tertiary qualifications (Bachelors or TAFE Certificates). Most were respectful of academic qualifications but these were not considered essential to do the job. None of the firms offered any form of structured training for investigators in-house. The vast majority simply had another investigator go out on a few cases with the new person and then let them operate by themselves. There was a fairly even division of opinion over more formal in-service training. One group felt there were not enough opportunities, whereas the other group felt that were sufficient specialised courses available in areas such as arson investigation, fraud investigation, and interviewing skills. In general though there appears to be no real co-ordination of in-service training.

All respondents agreed there was insufficient consultation with industry members in the initial development of current regulations and also in the their administration. For example, one Queenslander noted that minimum training was 40 hours when the industry advised it should be 200 hours. 'We're not big enough or rich enough to warrant attention from government', observed one (27). Most argued that regulatory agencies 'don't do anything' (16) other than issue licenses. 'Every year you fill out a form and send them some money and you get your licence' (18). 'There's no policing' declared one, 'I've only know of a couple of cases where people have been operating unlicensed, and it's a slap on the wrist' (6). Another argued that 'basically the market controls business ethics [in the PI industry] and clients are easily deceived. Dissatisfied clients move on but the PI stays in business' (25). 'They're inactive. You never hear from them' (8), was a common complaint about regulators.

There were extremely mixed views on the role of industry associations in regulation. At least a quarter of respondents were extremely negative on this topic, describing associations as 'self-serving' and 'boys' clubs'. Others felt that associations provided useful information on developments of interest to members and did their best to influence regulators for the better. The Institute of Mercantile Agents (IMA), American Society for Industrial Security (ASIS) and Australian Institute of Professional Investigators (AIPI) was held in particularly high favour by in terms of communicating with members and keeping members informed of changes in legislation. There were criticisms of the number of associations and some emphasised the need for a more united front to influence government. Fourteen (35%) of interviewees did not belong to an industry association.

All respondents supported the need for a license as well as the need for background checks of industry applicants prior to obtaining a license. Twenty-one (52.5%) respondents called for a national licensing system to be introduced. The current system of criminal history checks was strongly supported. One argued, for example, 'It works. We've got to have controls' (28). But most remarked on the fact that after the initial check and payment of a yearly licence fee there appeared to be little in the way of further regulation of the industry. 'The industry needs to be more professional and more accountable' (25) was a common view with reference to greater government intervention.

Interviewees were reluctant to support regular tests for licence renewal and conceded that it was very difficult to control agents once they obtained a licence. A number recommended regular auditing of companies but did not provide much detail on what should be examined. One suggested that regulatory agencies should closely examine firms' advertising practices, which he felt were often in breach of the law. Others suggested there needed to be a more vigorous system for receiving and investigating complaints. Certainly, there was a strong consensus regarding the need for improved communication from regulatory agencies about trends and issues relevant to the industry, and more regular consultation over regulatory strategies. A few suggested that regulators should be doing the kind of research undertaken in the present study.

Discussion and Recommendations (CRC Executive Summary)

Study I in this research project showed that there is a continuing process of review and adjustment of the law as it pertains to the activities of private investigators and associated private agents. One of the most recent positive examples of this development is the proposed extension of the jurisdiction of the Commonwealth Privacy Commissioner to private sector bodies. However, this process is fragmented with little in the way of a national approach involving all States and territories. This was confirmed in the Queensland CJC inquiry of 2000, which highlighted an apparent lack of capacity to prosecute illegal traders in areas of information held by state government agencies. A recommendation was made for consideration of a State privacy Act. A specific recommendation was made in regard to 'making it an offence to obtain from government records any confidential personal information about any other person, however it may be held'.⁹⁸ All the same, the law as it stands as present could be said to provide a fairly reasonable balance of the legitimate interests of private investigators, their clients and the public – with a few exceptions. The general laws relating to contracts between private investigators and their clients seem particularly well developed to protect either party from dishonesty or unfairness – subject to the usual constraints regarding knowledge and access to legal assistance. More specific legislation that relates to private investigators – in such areas as privacy, surveillance and harassment – also appears on the whole to be 'reasonable' within the terms of a liberal democratic society based on a regulated capitalist economy. Private investigators are available for citizens to pursue 'private justice' in circumstances where the state cannot provide a service or where the client desires a more private service. In many cases this involves a commercial interest, such as locating debtors, recovering property or checking on the authenticity of compensation claims. It can also serve more personal interests, such as locating missing persons or checking the behaviour of partners. These interests may arguably be justifiably pursued and contracted to private agents if the agents conduct themselves in accordance with the law. However, some questions might remain about the adequacy of the law in terms of what private agents are entitled to do. There are also some remaining issues about the adequacy of mechanisms designed to ensure compliance with the law.

In terms of the question of the balance of interests, one possible argument is that at present the law is weighted unfairly in favour of people avoiding legitimate legal process. This applies primarily to the recovery of property and the location of debtors or people facing civil suit. The Australian Institute of Private Detectives has recently developed a draft Bill designed, amongst other things, to allow licensed private investigators to access government databases to find people's locations and other information relevant to legal proceedings.⁹⁹ The Bill also would allow investigators to apply for search warrants in the company of a solicitor and a police officer. The draft makes an ambit claim for fairly open access and it is unlikely that any government will take it up the Bill in its present form. Nonetheless, the proposal is not without merit and might be considered feasible with more consultation and enhanced controls. For example, applications for access to data might need to be approved by an authority on a case-by-case basis. An additional argument in favour of reform in this area is that prohibition creates an illicit market, which can lead to widespread

⁹⁸ CJC, op cit.

⁹⁹ *Private Investigators Bill 1999: A Draft Bill Setting Out the Regulatory Requirements for the Private Investigation Profession in New South Wales*. Sydney: Australian Institute of Private Detectives Limited.

corruption, as revealed by the NSW ICAC investigation and, to a lesser extent, by the Queensland CJC. There also appears to be a case for closer consideration of the powers of repossession and process servers in recovering goods or delivering legal notices in cases of extreme avoidance by the subjects of these processes. Overall, this perspective is consistent with the view, discussed in the background section of this paper, that enhanced accountability of private security providers might justify equipping them with greater powers. It was abundantly clear from the practitioner interviews conducted in Study II that there is almost unanimous support amongst industry insiders for such an arrangement, and it has been recently supported by the Queensland Criminal Justice Commission report of the disclosure of confidential information.

There appears to be a consensus amongst security industry stakeholders, policy makers and academics that the more restrictive licensing systems introduced in the last fifteen years have improved the competency and conduct of security providers, including private investigators. Nonetheless, there is room for improvement. A uniform national scheme would also be more appropriate to facilitate the inter-state activities of inquiry agents and provide more comprehensive protection for clients and the public.¹⁰⁰ For example, harassment is an area that requires more consistent application. A major area that requires attention is that of training. The fact that the activities of inquiry agents puts them at risk of contravening a wide range of laws means that the State has a duty to ensure that licence holders are properly informed of their powers and limitations. At present it would seem most jurisdictions do not have adequate compulsory training curricula for this purpose. There is also a commendable trend in regulation, albeit slow and fragmented, towards adopting codes of conduct to provide clearer guidance to private investigators about what is expected in the ethically complex circumstances in which they operate.¹⁰¹ Codes can become an important part of training curricula and assessment. A code can also be enforced by licensing tribunals in response to complaints or other sources of intelligence about misconduct. Tribunals would require an investigative arm. Decisions about violations of the code would need to be made on a civil standard of proof with options for licence suspension, revocation or fines, and for referral to mediation. This approach would go some way to bridging the gap between 'the law in the books and the law in practice'.

The private investigator occupies a critical but undervalued role in the criminal justice system. Much has been written about the role that private security plays in the justice system. While the general security industry does play a vital role in the protection of property it does not carry the same responsibilities of a private investigator. This research highlights the close connections between private agents and the legal system. In fact, private investigators constitute an essential element of the civil and criminal justice systems. This particularly applies in cases of disability insurance fraud where there appears to be a large volume of opportunistic attempted fraud which insurance firms test by employing private agents to conduct video surveillance. On the testimony of investigators, this work is highly successful in identifying fraudulent claims. In many cases, sufficient evidence is assembled to force false claimants to drop their claims and avoid expensive and painful disputes and litigation. This needs to be set in the context of the enormous size of the fraud problem in Australia. In 1994 the Insurance Council of Australia estimated that insurance fraud

¹⁰⁰ Prenzler, T and Sarre, R, 'Regulating Private Security in Australia' (1998) 98 *Trends and Issues in Crime and Criminal Justice* 1.

¹⁰¹ Prenzler, T and Sarre, R, 'A Survey of Security Legislation and Regulatory Strategies in Australia' (1999) 11 *Security Journal* 7.

cost \$1.4 billion per year or about 10% of all insurance policies. The Council also estimated that fraud added an extra \$70 to every policy.¹⁰²

Government agencies, include workers compensation agencies, have also benefited from investigations of fraudulent claims. Welfare fraud has recently been an area targeted by government. The Commonwealth's Centrelink recently boosted its use of private investigators. The Family and Community Services Department reported that 1999-2000 surveillance providers received 1,446 cases. Of these, 1,063 were finalised and resulted in a debt or reduced payment in 747 cases (70%). Savings to future outlays as a result of cancelled or reduced payments totalled \$4,167,982. A figure of \$3,996,113 was identified for recovery action.¹⁰³

There are clearly pressures on private agents to breach the law in pursuit of commendable goals of law enforcement and crime prevention. There are also pressures to engage in ends that are not justifiable, such as revenge and harassment. These pressures appear to come largely from private individuals rather than corporate clients, and they do not appear to be overly intense or irresistible. All respondents attested to a change of consciousness over the last 20 years in the industry in terms of both a greater respect for privacy principles and also an increased perception of the probability of being exposed and sanctioned for breaching privacy legislation. However, the relative ease of obtaining a licence, and the fact that it costs very little to establish an investigation firm, means that the general public could become victims of investigators willing to take short cuts or do anything for a dollar. It may also mean that investigators are entering the market not fully understanding their legal rights and responsibilities.

Most respondents wanted a genuine apprenticeship scheme subsidised and supervised by government but with significant industry input into the curriculum. At present New South Wales has a training program that includes on-the-job experience. This would appear to represent a considerable advance. However, the dissatisfaction expressed by interviewees suggests that this program may be in need of comprehensive evaluation. There was also some support for a more structured seniority system in the industry with appropriate increases in award rates to create more of a career path for employees. This could be matched by an industry-wide recommended scale for fees to reduce the problem of undercutting in tendering.

Private investigators act in large part in the service of victims of crime and injustice in default of state provision, and respondents had very firm and positive perceptions of the personal and social value of their work. They felt they were the last port of call for people who had been subject to wrongs that the police could not assist them with. In the case of debt recovery, although this is treated as a civil matter, persons who skip on debt repayments are engaged in a type of theft that is neglected by the criminal justice system. Process serving is also essential to the working of the courts. Tracing and interviewing witnesses is another essential aspect of the delivery of justice in cases of a civil, but often criminal, status – such as culpable driving, breaches of intellectual property rights, stolen vehicles and burglary. The work of private agents is undervalued in government responses to industry claims for greater regulation and enhanced powers. Respondents were unanimous in feeling that there was a lack of systematic consultation by government regarding legislation, licensing and powers of private agents.

¹⁰² Insurance Council of Australia (1994) *Insurance Fraud in Australia*, Sydney.

¹⁰³ Family and Community Services Department (2000) *Annual Report 1999-2000*. Canberra.

Interview respondents were virtually united in the view they could provide greater justice to victims of wrongs if governments would allow greater controlled access to information. There was no support for a *cart blanche* approach. Respondents understood the inherent risks associated with access to databases but presented strong arguments in favour of restricted access to an application system – with reasons required for each application, and regular audits of these transactions by regulatory authorities. Industry members support a *quid pro quo* arrangement for extended powers in advocating tougher licensing, especially in the area of pre-service training and auditing of firms.