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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Reference: Australian Crime Commission Establishment Bill 2002

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Wednesday, 9 October 2002

Members: Mr Baird *(Chair)*, Mr Sercombe *(Deputy Chair),* Senators Denman, Ferris, Greig, Hutchins and McGauran and Mr Dutton, Mr Kerr and Mr Cameron Thompson

Senators and members in attendance: Senator McGauran and Mr Baird, Mr Dutton, Mr Kerr and Mr Sercombe

Terms of reference for the inquiry:

Australian Crime Commission Establishment Bill 2002

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Committee met at 9.18 a.m.

MELICK, Mr Aziz Gregory, SC (Private capacity)

CHAIR—Welcome to the Joint Parliament Committee on the National Crime Authority. The committee is examining the Australian Crime Commission Establishment Bill 2002, which is the culmination of negotiations between the Commonwealth and state governments about changes to the national framework for dealing with organised crime. The committee prefers all evidence to be given in public, but I understand that you wish to give part or all of your evidence in camera. The committee has agreed to this request. I point out, however, that evidence taken in camera may subsequently be made public by order of the Senate or the committee itself. If you would like to make an opening statement, we will proceed to questions after that.

Mr Melick—I am happy to give all my evidence in public except a certain segment, which I will indicate, that I would prefer remained in camera.

CHAIR—That is okay; why don't we go along those lines.

Mr Melick—I am appearing because I have some very serious concerns about the bill and the rationale behind it. I would like to indicate from the outset that in expressing my opinion today I am not in any way criticising or decrying the capacity of our police forces. I think Australia is very well served at the moment by its police commissioners and their forces, but there are certain areas which I think they do not have sufficient experience to cover properly and this is one of them.

The other thing I would like to mention is that, although I am extremely critical of the drafting and the rationale behind the bill, I do not intend any of my comments to be taken personally by those people who have dealt with these matters. There just has not been enough time to properly consider it and, quite frankly, I think what we have is ridiculous and an affront not only to civil liberties but to the organisation that it seeks to replace. I hope that, if the Australian Crime Commission comes into existence, it works. I do not wish it ill, but whatever happens, whatever comes into place, it will not work as well as an extension of the current powers of the National Crime Authority. I am a little cynical about giving evidence. I do not know whether this committee or the Senate will have the intestinal fortitude, once the public hearings have finished, to stop the bill. There seems to be an overriding political agenda to get this thing through, and I think it has been done with such indecent haste that it has overlooked all commonsense and propriety in the way in which coercive powers should be used.

The first question I would ask is: why? I still fail to understand, apart from reasons of political expediency, how it is for the good of the people of Australia to replace the National Crime Authority. It was an organisation that was three years in gestation; there were several public hearings, with an enormous number of submissions. It has had at least three extensive inquiries into its workings and effectiveness over its 18-year life. This bill arose as a result of a very quick and, so far, kept private investigation or report by ex-Commissioner Palmer, and an ex-head of the Attorney-General's Department, Mr Blunn. I have major concerns that people should act upon such a report which the public have not even had the opportunity to comment upon. I believe it was a very brief report. I know that several people who thought they should

have been contacted were not, including police commissioners and former members of the National Crime Authority. I remain cynical as to the motive behind the report. I think if anybody wants to look at the base of this, they should look very carefully at that report and see its rationale.

The problems of the National Crime Authority for many years were the lack of appropriate powers and the definitions of criminal activity. When it was brought into existence in 1984, people were very concerned about the nature of the powers it was going to give to statutory members. They were not allowed to have powers such as asking self-incriminating questions, even with use immunity. It became quite clear, once the New South Wales Crime Commission was established, that not to have such powers was inappropriate, and consequently the New South Wales Crime Commission Act was amended. When every other crime commission or ICAC has come into existence, it has had the powers the NCA did not initially have. It eventually got those powers 18 months ago. I cannot remember the exact date of the bill.

To my knowledge, apart from the report which has not been published, every extensive report on the NCA has been complimentary. I am aware that there have been problems with the NCA. You are always going to have problems with an organisation when you have a lack of continuity of corporate knowledge. One of the problems with the NCA was that the average time of any one authority was about 18 months. Four years was too short a time—and that was recognised by the amendments to the act, which made it six years—because some people had to be extended from time to time to ensure this continuity of corporate knowledge. I believe part of the problems that the NCA may have had over the last few years was the lack of continuity of corporate knowledge, because there were so many changes happening at once. The government was advised about this at the time, but there were problems because the new legislation had not come through and there was nothing they could do about it. You also have problems with an organisation like the NCA when you have continuing chairs who have differing views about which way the organisation should go. That is why it is important that corporate knowledge and some sort of continuity remain in place. In spite of that, I believe it is a very effective organisation. If utilised properly and properly resourced, it would be far more effective than the Australian Crime Commission can ever be.

Some members of the committee may want to ask me a question about this, but I still cannot quite understand what the Attorney means in his press release and also in the second reading speech when he talks about removing current barriers to its effectiveness. I ask rhetorically: what are they? The barriers that used to be there—the absence of a power to ask self-incriminating questions and the lack of the ability to investigate future criminal activity—have since been removed. This so-called cumbersome reference procedure is no longer there, except in Queensland, because it was the only state that did not have the complementary underpinning legislation which allowed the issuing of a reference for future criminal activity. Whereas before, in my time, we had to go back to the IGC every six months for new references, now a reference can remain extant forever. As far as I am aware, very few references have ever been rescinded and in fact remain active—even ones issued back in 1984. The only thing they do not allow you to do is to investigate future criminal activity. So, if you had a reference in 1984, unless it was for activities in contemplation then, come 1985, you needed a new reference to renew it. That was the cumbersome procedure. That was what caused problems. That has gone, except in Queensland, and all that would need is a simple amendment to the underpinning legislation in Queensland.

There is one other problem as far as the matter is concerned, and that is when you wanted an individual state reference as to whether or not it fitted the definition of organised crime. Occasionally there were problems, because what we were asked to do was to investigate what was essentially a difficult state police matter which did not fit the definition of organised crime. But, because we wanted to help out our state partners, we had to make sure that the reference was issued in appropriate terms to allow that investigation to go ahead without any unnecessary court challenges. That so-called cumbersome procedure, which occurred twice in the four years I was there, could easily be overcome by an appropriate amendment to the definition of 'organised crime', and I notice the ACC bill had extremely wide definitions as to what organised crime was about.

I just do not understand current barriers to effectiveness, and bear in mind that this new organisation is going to be even more cumbersome. We will have yet another level of control, because we still have the PJC, which should remain; we still have the IGC, which I think for political reasons and practical reasons should remain; we have an intervening level, the board; and then we have a CEO. So there is an extra in the reporting chain. The bane of our existence when I was at the NCA was the number of reports we had to write. I recognise that as a necessary evil and that we must be accountable, and I think members of this committee would be aware that when I was at the NCA the authority took the view that we should be accountable and open—and we were, as much as the act allowed us to so be.

But the organisation becomes even more dysfunctional, because off to one side you have the people who are exercising the coercive powers—that is, your hearing examiners. They are a strange animal. I do not know what sort of lawyer you are going to get who will want to come along and do that job, because I do not know what sort of remuneration you are going to offer, among other things. They are going to be at the beck and call of the CEO because, until he appoints them to do an investigation, they will be sitting around without a job. So, if you get a part-time person, he will not know when he will or will not get work. If he is seen by the police or the task forces to be uncooperative because he places too high a hurdle on the threshold he places before he issues the equivalent of a section 28 or 29 notice, he may find himself out of work. We will have the equivalent situation of what happens now when police go looking for search warrants: they go looking for a tame JP or a tame magistrate; they do not go to one who is going to ask too many difficult questions.

I therefore wonder, firstly, how effective the hearing officers are going to be about properly guarding or utilising the coercive powers; but, more importantly, there is this dysfunctional aspect about resourcing, because the person in charge of resourcing is the CEO. The person nominally responsible for exercising the coercive powers is a hearing officer who has no administrative or financial responsibility back to the CEO. Under the system that now exists, the authority is responsible for resourcing and managing its own investigations and cutting its cloth according to priorities. So, as a member, I would not set up a line of investigation by way of hearings or documents if we did not have the resources to back it up. Here, you can have a hearing officer who says, 'To do this investigation properly, I am going to issue 420 hearing notices and, what's more, I want another 500 notices to produce documents to all these financial institutions.' He is no longer independent, because the CEO would say, "I am sorry, but we do not have the money to do it.' I do not see where the CEO has the power to stop him issuing the notices or where the hearing officer has the power to demand the CEO to give him the resources to have the hearings. So this is just a complete dysfunctional split which I consider bizarre.

What I am trying to show is that, instead of enhancing the capabilities and making it less cumbersome, you are restricting its capabilities and making it far more cumbersome.

I will just go back to the board. Apparently the idea of the board is to coordinate activities on organised intelligence. We had an organisation such as that before. It was called SCOCCI, the Standing Committee on Organised Crime and Criminal Intelligence, and it did not work. I would like this part of my evidence to be in camera.

Evidence was then taken in camera, but later resumed in public—

CHAIR—Would you like to repeat the question for the benefit of Attorney-General's listeners?

Mr DUTTON—Mr Melick, my question goes roughly along these lines. I understand some of the reservations that you have in relation to the new structure, and I understand that the management structure will change significantly under the new body. But I fail to understand how you can be critical of what essentially is going to be the same ethos in, the same structure of and the same practice by the police under the ACC as it was under the NCA. Won't the ACC experience the same difficulties as the NCA? You are claiming one model is better than the other and being critical of the police ethos, which some people have some sympathy with. How is that going to change?

Mr Melick—It will be worse, because at least under the National Crime Authority it was controlled by independent statutory officers. They controlled the entire organisation: who was employed by it, how the money was spent, how the coercive powers were used and what investigations would be done—of course, at the request of the IGC, because we used to advise the IGC as to which investigation we should or should not do. What used to happen was that a police officer would come into the organisation. We preferred to have them for three years. They were often, because of the operational exigencies of their own force, only sent to us for two years. But virtually for the first six to eight months they were learning; they were learning about the organisation, they were learning about its culture and they were learning about its ethos. Part of the problem was making them understand how important the coercive powers were, how jealously they had to be guarded and how appropriately they had to be used, because police officers have this incredible desire—which is commendable—to fight crime and get to the root of the problem as soon as possible. They want to cut corners. They become frustrated. They think lawyers are there to frustrate them and block them at every possible corner, and they may be right about that. So what they try to do is overcome it with the force of a blunt instrument. What you have got to do is educate them on how to do it.

What you had at the National Crime Authority were police officers who came into the organisation and left enhanced by their experience. A lot of the people who came to us went on to do far bigger and better things in their force, and some came back in at a higher level later on. What you have then is, I think, an enhancement of Australia's policing as far as attitudinal problems and ethos problems are concerned, because they work with an organisation where there is not a police culture. It is not a police ethos; it is the ethos of the National Crime Authority.

Mr DUTTON—I appreciate your comments, but I am trying to get to how that is going to be different under the ACC structure, where police will still be seconded. The same focus will be in existence, in that the body will be looking at organised and major crime.

Mr Melick— But they will be run by a board. They report to police officers and not to lawyers. There are two things: one, they will report to the CEO, who I assume will be a police officer or somebody with more of a police ethos than a legal ethos; and, two, the CEO is directly responsible to the board and does not even vote on the board. Under the National Crime Authority, they reported to the members via the chain of command. What you have is a police officer reporting to police officers, so the ethos is not going to change. If anything, it will probably get worse. When I say ‘worse’, I am putting it in inverted commas. I am not being critical of the diligence, the desire or the abilities of police officers.

Mr DUTTON—I understand that. In the current structure with the NCA, as I understand it, it is only the chair who comes from a non-police background, essentially, isn’t it? If you look at the structure in a state sense at the moment, the police seconded across come from either a state or a federal background, as do many of the members that make up the current structure of the NCA. In essence, what you are saying is that the chair’s position, which will be replaced by the CEO, is where you have the difficulty.

Mr Melick—It is not just the chair that is being replaced by the CEO. The National Crime Authority was made up of three members, one of whom was a chairman, and two members who could outvote the chairman and occasionally did. All three were lawyers; there were no police officers. In the history of the National Crime Authority, they have all been lawyers—some better than others.

Mr DUTTON—Essentially the current structure is that the heads of each state, who obviously ultimately report to the members, come from a policing background, don’t they? Although they are given ultimate direction, I am sure, by the members, they still—

Mr Melick—Yes, I think they all are now, but it varies. You have to bear in mind that each individual operation is the responsibility of a particular member. The way in which it worked was that, once we eventually got a second member on—for 2½ years there were only two of us—Marshall and I would split up all the investigations and we would keep strategic control over every investigation. The person ultimately responsible was one of us. We used to get weekly reports, we would make regular inquiries and we would go down the line and say, ‘What is happening? X, Y and Z?’

CHAIR—What is the difference? The difference is in relation to the board being made up of the various police officers from around the country and the CEO. I think there was a view that there was a problem with having the chairman and the CEO in one position, so there is an organisational factor. Let us leave alone the background of the person, because they have not been appointed yet. Is the crux of your criticism simply that the board is made up of a range of people which includes police officers from each state? Isn’t that the nub of your concern? It seems that, once you go down to the operational area, nothing would have changed.

Mr Melick—I am sorry, it does change because it changes from the top. The whole problem about it is that the operational people take their leadership from the board or from the person

ultimately responsible. I am talking about the way in which they would use the powers, whether they take short cuts, whether they understand how it should be appropriately used and their whole attitudinal approach to the problem. You are replacing an independent statutory board of experienced lawyers who understand the use to which coercive powers can be put and how they should be jealously guarded and who are able to take a strategic view because they do not have to react to a politician; they know they are there for only four or six years and that that cannot be extended. You are replacing them with police commissioners who have to answer to a politician and who will have an operational view. Imagine if the Federal Police were doing an investigation into a large-scale fraud against the Commonwealth, which is tying up 400 Federal Police officers—and that may not be inappropriate—and suddenly you had another telecard affair or a travel rorts scheme. Where do you think the operational priorities of the AFP are going to go for the next six to nine months?

Mr DUTTON—Of 400 officers?

Mr Melick—Or whatever. How many officers do you think get involved in travel rorts, telecards and things like that?

Mr DUTTON—I would not have thought 400.

Mr Melick—No, but there would be quite a few. What I am saying is, whatever you need, your resources are going to be diminished. As I said, you take a state police force suddenly faced with a string of horrendous kidnappings; the state police force is already supplying a significant part of its resources to that ongoing federal investigation into a multibillion dollar laundering scheme.

CHAIR—I find that an interesting area to pursue. We are mindful that you have a court appearance. Is that right?

Mr Melick—No, I am right.

CHAIR—We have a gap at 10.15, so we will go on if it is all right with you. Did you want to pursue that further, Peter?

Mr DUTTON—There is one other thing that I want to canvass quickly. Mr Melick, pardon my ignorance, but you were at the NCA during what period?

Mr Melick—From 1996 to 2000.

Mr DUTTON—I am trying to find out what went wrong with the NCA, if I can put it that way.

Mr Melick—In my period, nothing.

Mr DUTTON—Far be it for me to suggest otherwise. How many hearings would you have averaged on a yearly basis, for argument's sake?

Mr Melick—We did have a problem. We had A1 and A2, which were the bikie references heard by Justice Merkel, which he should never have heard—he should have disqualified himself from it, but he refused our application to disqualify himself. He ruled that the references were invalid and we had to go to the full court of the Federal Court. That held us up for over 12 months. After that, in one year I did over 200 hearings. I would average about 180 hearings a year, once we overcame the reference problem.

Mr DUTTON—So, if we look over the last two or three years since you exited the organisation, what sort of numbers, hearings wise, would there have been over that period? What we are trying to do is gauge the efficiency of the organisation.

Mr Melick—It is very difficult to gauge the efficiency of an organisation merely by looking at hearings, because some hearings took three or four days; some took 20 minutes. It depends very much on the nature of the matter you are investigating. I did a fair bit of work on a matter which was a fraud on the PPS tax scheme which we estimated was costing the economy $600 million a year, but I believe an academic from the University of Sydney figured it at $2 billion a year. That investigation involved a lot of work outside of the hearing process. Some of the hearings involved in matters like that were quite lengthy whereas, if you were doing a drug-related matter, you may get six or seven witnesses in one day as opposed to over an extended period of time in relation to financial matters.

Mr DUTTON—What measure can you suggest to us that goes to the efficiency of the organisation? What comparative base can we look to?

Mr Melick—We did all this—we did all the benchmarking, we set out the performance indicators. Basically, we went to the government when our budget was cut back to $30 million and we said, ‘Look, you’ve got all this wrong. Here’s all this stuff we’re saying to look at in relation to Commonwealth fraud. You give us X dollars in funding, and we’ll return you more.’ As I understand it, we were returning in cash or kind $60 million to $80 million a year for our $50 million budget by the time I left the National Crime Authority, because we were identifying a lot of tax schemes, frauds and other such matters. A lot of the matters we identified have been matters utilised by the tax department, so we work very closely with the taxation department. Michael Carmody was terrific to work with and had a very sensible approach to all of this. Information from our investigations on a lot of these tax schemes has saved the tax department an enormous amount of money. As to benchmarking, I think you look at the performance indicators we have put in place. It has got to be more than just monetary return. It is very hard to say, ‘We’ve been a great success because the amount of heroin on the streets has gone down.’ That could be a result of the war in Afghanistan or a crop failure somewhere as much as anything else.

Mr DUTTON—Can I suggest to you though that, particularly over the period of the last two years, the effectiveness or the efficiency of the operation has fallen away considerably?

Mr Melick—I cannot comment on that because I am just not there. If it has, part of the problem might be—which I was talking about before—a lack of continuity of corporate knowledge. I am not really in a position to talk about it. Even if it has fallen away, you do not throw the baby out with the bathwater. You look to what is causing the problem and you fix that.

Mr DUTTON—And you try and come forward with a better model, I suppose.

Mr Melick—In the four years I was there, the model was extremely successful. I stand on my record. If anybody thinks otherwise, I would like to hear about it and to talk about it. The model was successful. There was nothing wrong with the model. Therefore, why change the model? The problems with the model when I was there were twofold: lack of ability to investigate future criminal activity and the lack of a power to answer self-incriminating questions. If we had had those powers while I was there, we would have been a damn sight more effective. I was frustrated it took the government so long to bring the legislation in. The model was good, so I go back to my original question: why? I have not been told why. I have not seen this so-called 13-page report or whatever it was—the Blunn-Palmer report. I think it would have a lot of trouble withstanding significant scrutiny because of the time at which it was put together. When the model was comprehensively investigated on three successive occasions, through long comprehensive inquiries run by this committee, the committee not only said the model is good—except it needs these changes which came in in the act 18 months ago—but it is doing a good job, so why change it? Do not come to me and say, 'There's a problem because it hasn't worked properly over the last two years. Therefore, we should change the whole lot.' Look at the reason for change. I have some personal views but I do not think it is appropriate to articulate them here as to why it was not working.

CHAIR—It would be very interesting to know if you have a personal view as to why. We could go in camera. For us it would be interesting.

Mr Melick—All right, I will go in camera.

Evidence was then taken in camera, but later resumed in public—

Mr KERR—I have three questions that I ask you to address. One is this question of strategic against operational priorities, trivialised, I suppose, but, usefully, by Bill Coad's language of 'heads on sticks' as being one measure of success as opposed to the more strategic framework, which is you forsake pursuit of easy targets in order to work over a longer period of time to make large impacts on structures, hierarchies and the people at the top. Perhaps you could look at how you believe these changes would impact on the choice between strategic and operational values.

Mr Melick—You cannot be arrogant and say that we are only going to deal with strategic matters, and we were not arrogant in my time. You have to bear in mind that we worked in partnership with police forces and, in the main, they were very good partnerships. We had the occasional problem but everybody does in any sort of partnership. It is about striking the appropriate balance.

The chair had a question about hand guns. They are a very significant problem. It is probably appropriate that the National Crime Authority or the ACC gets involved in hand guns. However, if one seriously wants to look at hand guns, one has to look at what the motivation is: it is money. One has then got to go to the sources for getting rid of the money—laundering it and matters such as that—and also deal with the external problems such as arms dealers et cetera. If you continually try to lop off the tops of the weeds, you are always going to have the problems of them regenerating. That is why you put in place operations that deal with hand guns at the

operational or tactical level, but you also have a strategic overarching part to the investigation, looking at the money and where it is going.

CHAIR—What is to say in terms of this legislation that that would not happen?

Mr Melick—Because, by the very nature, because the whole thing has been controlled by police officers, who must be reactive, must report.

CHAIR—It is not entirely controlled. If you have a look at the board, it has the chairman who is the commissioner of the AFP, eight state and territory police commissioners, five Commonwealth agency heads—that is, the AFP commissioner, the director-general of security, the chairperson of ASIC, the CEO of the Australian Customs Service, the secretary of the Attorney-General's Department. It is not as if they are all going to lie over and say, 'Do you want some small state issue?' Everyone has to be in agreement, Commonwealth and state.

Mr Melick—Yes, but what will happen is that, if Tasmania has a problem, they will say to Queensland 'Look, I know you have a problem coming up, so you vote for me on this with Western Australia.' The dynamics of the board will be quite interesting. I ask rhetorically: why is the head of ASIO on the board? I find that quite bizarre but I will talk about that when I talk about the intelligence capabilities, which will cause me some concerns.

When I was there, we did two references in Queensland, which involved murders, which the Queensland police had trouble with. We got the references through and both of them resulted in murder convictions. We had a similar one in Tasmania. We did cooperate; we did go down into the backyard and assist. It is a question of getting the balance right. We were able to get the balance right because we were not reporting to a minister who was dealing with the problem in his backyard, who had an operational priority to get it solved there and then. I think the realities of the situation are that the police commissioners will be under incredible pressure to tidy up problems in their own backyards.

Mr DUTTON—If that is the case, is that necessarily a bad thing? That then identifies those issues or throws resources towards the issue—you have used the hand gun example. There will be that federal focus, as Mr Baird said before. The commissioner of the AFP will chair the new ACC and the AFP is not a reactive body by its nature. They deal in similar ways to the work the NCA did. Won't they then have the capacity, having done all that backyard work, to step it up and progress forward through the hearings and other investigative means at their disposal to really pull the weeds out at the base?

Mr Melick—But how many resources are you going to give these organisations? Fifty million dollars is not a lot of money. You cannot do everything. We were being pulled from pillar to post. A surveillance team cost $1½ million a year to run when I was there, and it is probably even more now. It is a question of the best use of the resources. I suggest that the best use of the resources would be to combat the root cause of organised crime, which is money, and to deal with that sort of problem. You only use a sledgehammer to crack a nut when the state police forces have found that they cannot do it and they need your assistance. If you start trying to crack every nut before the state police have a go at it, it is not an effective utilisation of your resources. If you want to give the NCA a $500 million budget and a lot more resources, you can

do that sort of thing, but you have to try to be precision like in the way in which you use the resources and to not use them just as a blunt instrument.

CHAIR—Isn't there the whole question of accountability, though? A lot of what you say is interesting, provocative, stimulating and so on, but this committee operates behind a curtain as well because we cannot get into the operational areas. So who is actually judging the performance? How do you judge? You say, 'We don't want heads on sticks. We have this overall assessment,' yet at the same time crime—if the situation is the same as in New South Wales—is the No. 1 issue and people want solutions in a number of areas. Does it not make a certain degree of accountability direct and immediate to say, 'These are the things that are going on'? One case that I know was given publicity in the *Sydney Morning Herald* last Saturday was of a particular suburban accountant in Liverpool who has been under investigation for five or seven years but there has been no conviction. We wonder, from our point of view—we cannot see behind the curtain—how we should assess it. It seems to me that this gives immediacy, accountability and responsibility to those who pay the freight for it. If people see the response, funds may flow from that.

Mr Melick—But when I was there, the government was getting a very good response. It was getting more money back than it was putting in, and that was on the tax side of things. We were also having very high success rates with major heroin cartels and other such organisations. The bikie problem had been reduced considerably. You should not lose sight of the fact that the Mafia in Australia was virtually wiped out by the National Crime Authority. The National Crime Authority deserves a lot of credit for that.

CHAIR—The Italian Mafia?

Mr Melick—Yes.

CHAIR—We probably have different kinds of Mafia.

Mr Melick—The Russian Mafia are more interested in investing, but we will not go into that.

Mr DUTTON—We still have a lot of Asian organised crime and Mafia.

Mr Melick—I think it is different. Most Asian groups are small, vertically integrated family groups. There are not as many large, complex family type webs as there are with the Mafia. But, yes, there are a lot; I am not saying there are not. I am not trying to belittle the problem. That makes them even harder to deal with. The only way you can really deal with them is by following the money trail. I find it quite interesting that AUSTRAC is not on the board. I would have thought probably the most relevant organisation, outside of the police commission, is AUSTRAC. Most of our worthwhile intelligence comes from organisations like AUSTRAC.

CHAIR—Our secretary has just commented that they are on the steering committee, so they have the opportunity, I imagine, to consider their role in the future. They may wish not to be involved.

Senator McGAURAN—It might be good and bad if they go on it.

Mr Melick—I can give you an example of a case we did—which is on the public record because they pleaded guilty—which might make you understand. In the old days, you used to kick down a door, find a pile of heroin and follow the money trail to the perpetrators. A very successful operation—and this was a typical operation—came out of AUSTRAC whereby AUSTRAC indicated that a large amount of funds was going from a small area in Sydney, from different bank branches, to Hong Kong. We went to the then Hong Kong Police and said, 'Tell us who controls these accounts.' Eventually, they came back very excited and said, 'These are controlled by a major drug lord. We have been after him for 30 years.' We looked at the 59 different identities who had been depositing money into the accounts in Sydney and sending the money to Hong Kong, and on the 57th check of the 59 people we found a real person. I think they had forgotten to take their identity along that day and had used their real identity.

Then traditional policing methods took over. When we moved in we found a lot of heroin, money and other assets and their dole checks. They were a group of four people who were completely unknown to law enforcement. They had being doing everything from major importing to low level wholesaling, and the only way we came across them was by the analysis of AUSTRAC data, which is not a traditional policing task. That is an effective utilisation of resources rather than working from the ground up, going and banging every user on the head, dragging them before a hearing and saying, 'I compel you to tell me who your supplier is', then dragging in the supplier and saying, 'I compel you to tell me who is giving it to you' et cetera. That is a very ineffective and time consuming way of doing it. There has to be a balance between the strategic and the operational and tactical. We tend to get the balance right, bearing in mind our resources. Bear in mind that the Police Integrity Commission costs New South Wales $20-odd million a year. The Crime Commission technically do not cost New South Wales very much because all the police officers, who are the major cost, are not charged out to them. The National Crime Authority costs only $50 million nationally so you cannot expect too much. I know it is a lot of money and all the rest of it, but you cannot expect the National Crime Authority to be able to get involved in every little Cabramatta crime gang, Triad group or whatever.

Mr KERR—I want to follow up the chair's question, which I think is a very difficult one. There are so many polarised assertions of the effectiveness and the ineffectiveness of the National Crime Authority. The assertions on the public record from both the justice minister and the Prime Minister range from the National Crime Authority being an outstandingly successful organisation and the sharp edge of Australian law enforcement to an assessment some six months later that it should be wound up. Both were public accounts given in such a short time. Obviously one or the other could not have been true. Our committee has had three assessments, all of which have said that this methodology is an appropriate one. Yet we all confront the same issue as the chair has: because of the secrecy obligations it is very hard to do an audit on effectiveness. We all strain at some time to produce some objective measurement: number of convictions, number of hearings, this or that. You always have a sense that you could be being snowed by people who really are not doing the job that they should be doing but who say, 'We've got these broad, high horizon objectives; don't you worry about that.'

Mr SERCOMBE—Alan Jones does not understand.

Mr KERR—They say, 'No-one understands this like we do; we're the experts. We're cooperating with Interpol and other international agencies and maybe in a decade or two we

might have some success' and that creates a problem. Yesterday a couple of the witnesses suggested that there would be no proper basis for this committee not being able to have access to operational material as long as it did not disclose the names or present circumstances of people against whom current operations are in place. I am attracted to that proposition because I accept basically the argument you put, but I can also understand the scepticism of others.

Mr Melick—I have never had a problem with that proposition. When I was there, John and I wanted to be more open from time to time than the act entitled us to be. I do not think anybody on this committee could ever complain that we put up any unnecessary blankets; we were always very frank about it. I think names have to be removed. Unfortunately, there is always a bit of a problem there—the leaking, by a politician, of the Elliott investigation did not exactly do much good for the suggestion you are putting up. I happen to have a reasonably high regard for politicians, which probably puts me at odds with general members of the community; then again, I have a reasonably high regard for lawyers, which definitely puts me at odds with general members of the community.

CHAIR—What about politicians who are lawyers!

Mr KERR—If these responsibilities were to be conferred, it would obviously place far greater pressure on the parties making nominations for membership of this committee to take into account any potential conflicts of interests or to examine very closely the ethics and repute of the people they were putting on to the committee.

Mr Melick—As far as there are the appropriate safeguards as to the dissemination of information from the committee, I personally would find it desirable. In the time I was there, I would have been far happier if the committee had known more about what we were doing.

Senator McGAURAN—Just on that matter, were you on the committee during the Elliott leakings?

Mr KERR—No.

Senator McGAURAN—I was. It ruined it—that was the end. Even I, on the committee, would be frightened to be given too much good information, given the Elliott leakings—they were outrageous. I think it is impossible to hand it over.

CHAIR—The problem with that was that it was all tied up with politics.

Mr SERCOMBE—Are we referring to the original IGC leak with Elliott? That is a separate matter from what you are referring to, Julian.

Senator McGAURAN—It was leaked day in, day out—I do not think that you should hand too much over.

Mr Melick—But what would happen is that you would not have names. All you would know was that there was an investigation going on into a business enterprise. The problem with Elliott was the name.

Mr KERR—The point is that this is a serious issue. I accept—although there is obviously less acceptance by some of our members—the basic proposition that at some peak point of law enforcement you need to have a component which is strategically orientated, and you have to fund it to do that.

CHAIR—I think we agree with that.

Mr KERR—But the question then is: how do you assess its performance if the scrutinising body does not have the capacity to examine the work that is actually undertaken?

Mr Melick—I do not have the innate suspicion of politicians that a lot of people do. I understand Senator McGauran's problem.

Mr KERR—I want to raise two more questions that emerged out of your submission so far; before we distracted you, you had other things to say. I want to ask you about the point you made about the dysfunction that would occur with having a CEO responsible for the general administration of the organisation and hearing officers. I wonder whether you have given any attention to the fact that the board, not the CEO, actually appoints the head of investigations as well?

Mr Melick—But the CEO appoints the hearing officer for an investigation, which seems bizarre.

Mr KERR—I am just puzzled at the way in which you anticipate that hierarchy would operate.

Mr Melick—I just cannot see it; I do not understand it. I think it is just part of the dysfunction.

CHAIR—It is something that we need to look at as part of our recommendations.

Mr KERR—The other point I wanted to draw you to was the matter you raised with ASIO. I have no strong view, one way or the other, about whether there is an operational benefit from having ASIO participate, but I wondered whether you had given any thought to the conflicting codes or obligations of secrecy. Assuming that ASIO does play a significant part in the management of the board, would that conflict with the accountability mechanisms that are supposed to be built into the Ombudsman and this parliamentary committee?

Mr Melick—This leads me to one of my fundamental problems. I have two fundamental problems. One of them is the independence of the exercise of that coercive power, which I will deal with shortly, and the other one is this whole question of intelligence. Intelligence at the moment is usually the by-product of an investigation and it is utilised quite effectively. There have been a lot of suggestions that only 10 per cent of the NCA's current resources are directed towards gathering or analysing intelligence. That is not right; virtually all of the NCA's capacities are directed, directly or indirectly, towards the gathering of intelligence. But what we are now talking about is having intelligence becoming the investigation. When I look at the bill, it strikes me that all you have to do is add terrorism to a list of relevant criminal activity and you have got the very bill that did not get through in relation to ASIO. You have got these

powers being given to the ACC which parliament said, or somebody decided, ASIO could not have. It seems quite bizarre that you are now giving the capacity to investigate ordinary citizens in Australia for the purpose of gathering intelligence without the underlying criminal activity. In other words, you do not have to find a criminal act associated with that person before you can then start using coercive powers in relation to them. That, to me, is an abomination.

Mr KERR—You never had to find it. You had to suspect it, didn't you?

Mr Melick—You had to suspect on reasonable grounds that there was an appropriate link. I cannot see any such nexus in this bill or in the explanatory notes. In other words, if we decide we want to gather intelligence generally in relation to some relevant criminal activity, away you go. I do not understand how the hearing officer is going to direct the use of the coercive powers.

CHAIR—That is quite an important point we should be considering.

Senator McGAURAN—Was the point that ASIO is going to use this bill for its operations?

CHAIR—No. We are talking generally that they have the ability to use coercive powers for the purpose of gathering intelligence rather than when they suspect the person or they know the person has been involved in criminal activity. You get the intelligence as a by-product. Now, gathering intelligence is good enough reason for using coercive powers.

Senator McGAURAN—How does that relate to ASIO?

Mr Melick—That is another point. They are talking about combining ABCI, OSCA and the National Crime Authority. ABCI holds very low-grade intelligence as a general rule. People are reluctant to give a lot of the sensitive stuff to ABCI because they are worried about the security of it. If it comes under the auspices of the NCA, hopefully the security will be enhanced. The problem then is that you are going to have levels of intelligence from low grade to very high grade and very sensitive being held by the one organisation, with no statutory limits on its dissemination within the general policing community. At the moment there are strict limitations on its dissemination within the general policing community, although, once operations conclude, the information becomes generally available. I have a real problem with all this intelligence hotchpotch being mixed together. How do you put the appropriate firewalls and protections into the one organisation to keep the sensitive from the mundane or the operational? Once you put in the overlay of ASIO, I do not quite understand where it fits in, what it is doing there and whether there is going to be any input at all from ASIO at the board level. If so, how do you segregate that part of the intelligence? How do you ensure that information being gathered by ASIO for one purpose does not then become inappropriately used by law enforcement for another purpose?

At the end of the day, as a lawyer I should be very happy about this bill. I can advertise myself as an expert on the ACC or such organisations and get lots of briefs, trying to drive wedges into the problems. You have such things as item 29:

… where the head of the ACC operation/investigation suspects that an offence may be directly or indirectly connected with a serious and organised crime, the ACC is able to act in relation to that offence—

This is what Elliott was all about. The full court said it was ridiculous to get in at that level. You want to be able to objectively look at your reference and the offence you are investigating and see whether the offence falls within the reference. You do not want to have to look into the mind of anybody in the organisation to determine whether they have made any connections. Yet here you are trying to ensure that the CEO of the ACC spends half his life in court giving evidence about what his relevant suspicions were.

CHAIR—Part of the problem is that you have all of the states and the federal government at this stage locked into this proposal. We are doing our review of the legislation. You say it is probably more difficult to disband the concept of the states being involved at the board level. What would be your biggest objection to it? If you were saying, 'Okay, let's accept that as a given in relation to the board structure,' how would you fashion it so that you could protect the integrity of the organisation and the independence?

Mr Melick—I would leave it the way it is with the statutory members being directed by this board as to what they would do and what their operational priorities were.

CHAIR—By the board proposal under the ACC?

Mr Melick—Yes.

Mr SERCOMBE—Instead of the IGC.

Mr Melick—Yes.

Mr KERR—If we were to accept that, rightly or wrongly, there is scepticism about having a lawyer appointed as the CEO of this organisation, do you think it would be plausible to modify the NCA framework, which has a three-member system, so that you actually had a non-lawyer chair who did not exercise hearing powers but was essentially an administrator and who was part of a management board on which you had two of the hearing officers or examiners, so that you required that coordination of decision making between the administrative head and the most senior of those persons to whom you give the power to exercise coercive powers? I am just trying to see a way through this. We are under some political pressure to not destroy the organisation. If we came up with a recommendation that we should not bat on with this proposal, perhaps the government would decide not to fund the NCA. I have no idea what the outcome would be, but nobody wants to see an outcome where we had no properly targeted organisation to deal with these issues.

I am just trying to think through it. I can see a problem with having a CEO who does not have any relationship to the hearing officers. I understand what you are saying about capacity to give direction to the organisation—keep it as it is; that is one possible alternative. But, if we were to accept what seems to be such an overwhelming amount of passion from some people saying, 'Keep it out of lawyers'—and we understand what you said in the private session—and give any regard to that, would it be possible to say that you could have a CEO that need not have the qualifications that we currently require of the CEO but that there must be a management coordinating system internally that does integrate this with the hearing officers?

Mr Melick—It would be better than what you have at the moment. I do not see that being a lawyer should disqualify a person from being a CEO.

Mr KERR—I am not suggesting that. Perhaps you could have a rule that says that if they fit those criteria they could exercise hearing powers, but you would not mandate it.

Mr Melick—I think there are some very capable nonpractising lawyers.

Mr DUTTON—That is very gracious.

Mr Melick—I am talking in relation to exercising these sorts of powers. The trouble is that at the end of the day you have to have a gut feeling for the way in which your court is going to go. When I went to the NCA I was handed some search warrants to authorise and I said, 'I do not agree with the form. I think it is entirely inappropriate and I will not authorise them.' I was told, 'That's okay, these are the ones we use in the royal commission; they have been fine and there have been no problems.' I said, 'I don't care. As far as I am concerned they are invalid.' I reworded them all. Two or three years later, Ian Temby, as an acting Supreme Court judge, threw all those warrants out. That severely damaged a lot of the investigations of the royal commission.

If I had not been a practising lawyer—an experienced criminal lawyer, having spent 10 years prosecuting, seven years defending and all the rest of it—I would not have picked that up. You have to be very careful about the sorts of qualities that are necessary. Once you have had a certain amount of criminal experience you know how far you can go with certain coercive powers. I think I probably did about 500 hearings when I was at the NCA and I gave a lot of decisions both written and oral. I was appealed on many occasions, but none of those appeals were successful. Therefore, the organisation did not lose too much credibility. If you put somebody in without the appropriate amount of experience, that is not going to be the case. You are going to have a lot of successful appeals, the image of the organisation will be damaged and its operational effectiveness slowed up and affected. Bear in mind that John Broome and Tom Sherman were essentially administrators rather than practising lawyers.

Mr KERR—That is the point I am really getting at.

Mr Melick—And there was no problem. As everyone knows, my relationship with John was very good. I think we complement each other. We worked as a team. There seems to be too much emphasis on the CEO rather than on the fact that it is a corporate team approach—which I think has helped make the NCA so successful. You do not become too dependent upon getting the one individual right. If you make an inappropriate choice of chairman, at least you have this collegiate responsibility on the board and you can overcome the problem. What I am saying is: don't throw the baby out with the bathwater because of people's perceptions about what qualities a particular person should have at the top.

CHAIR—If we had as a given a board as proposed under this legislation, with its current composition, you would recommend that the best way for it to operate is as it does now: for the board to give direct references. To whom does it give those?

Mr Melick—To the commissioners.

CHAIR—Not direct to the CEO who would then be given the power to implement them?

Mr Melick—No. I still have a problem with that. I think one of the strengths of the NCA was that you had within it a board that made decisions rather than just one person. A full court usually gets it right more often than a judge at first instance does, because you feed off each other, you have these Socratic arguments, you play the devil's advocate with each other and you usually end up with the right result. It is a lot easier for three people to get it right than for one person to get it right. When you are talking about such important and intrusive powers, it is important to get it right.

If the problem is that the NCA is not being reactive enough to what states see as their problem, you can still do it through the IGC because the IGC were the ones who gave them the references in the first place and the IGC are the ones who determine the priorities. When I was there, we had 11 matters. We did the costings and said, 'We can do 1½ of these. Please prioritise.' Everybody ran around and said, 'No, we do not want you to do it that way,' and we talked our way through it. I do not really care where the directives come from. All the NCA or the ACC can do is put up and say, 'This is where we think the criminal environment is going. These are the areas we should look at. These are the areas we think the references should go.' But if our political masters say, 'No, we don't want you looking at long-term money laundering; we want you to look at hand guns,' so be it. That is the direction, and we go ahead and do it.

Mr KERR—If we change it from political masters to police commissioners and public bureaucrats, you don't mind?

Mr Melick—I don't care. Let's face it: the politicians usually took the advice from the police officers, at the end of the day. But once the reference is handed down, once the police officers say, 'This is what we want done,' I think the organisation has got to be independent of them to go about and do it. It has got to be accountable but it has got to run its own race with its own agenda, its own culture and its own ethics. The problem we have with the hearing officers at the moment is that they are neither fish nor fowl; they are a strange beast. You may get a whole lot of mid-level criminal lawyers who happen to come in and do the job because it is sexy and they are getting involved in high-level crime—and they could probably do quite a reasonable job as a hearing officer; I am not trying to denigrate the sort of person who is going to get involved—but you will not attract the people who will have greater levels of experience and who will be able to take the broad view strategic approach.

Mr KERR—One of the things that has become clear is that there are two different views about the role of hearing officers. There is a degree of ambiguity in the act. There is one set of perceptions that it is like a black box model where you have the police either federally or state coming along and saying, 'We have reached a certain point in our investigation and we want to plug in the examiner so that he can have access to the powers of compulsion.' There is another model which says that the examiners have to exercise the same independent discretion about whether or not to commence the exercise of those powers; and, therefore, they have a greater role than simply being the black box at the end of the process. Do you see anything in the act that gives us guidance as to how this should operate?

Mr Melick—It doesn't. It is going to depend very much on the individual hearing officer. That is why I think you have this risk of having part-time hearing officers. They will pick and

choose the people who are going to be the black box model, which I think is a real problem. This is what we used to call the Attorney-General's model for the NCA. There were people in the Attorney-General's Department who thought the NCA should just be a set of hearing powers available to be used by police forces when they wanted them. That is what I think this is all about and it is entirely inappropriate.

Mr KERR—Name names, Mr Melick.

Mr Melick—No, I am not going to name names. There are going to be continual problems with the courts, who are going to look very carefully and very suspiciously at this model. They were suspicious about the one before. Bear in mind that with Elliott they went through something like 11 judges before they found one that would rule the way he did. It was eventually reversed and it was proved that everything we did was correct, but that was the full court saying that the way in which you investigate the use of these powers is to look at them objectively. This bill actually allows lawyers to get the chance to look at them subjectively, and you have the same problems all over again.

Mr SERCOMBE—Justice Vincent is giving evidence to us.

Mr Melick—I will say one thing on the public record: I respect Justice Vincent for the decision he made. I was a bit disappointed he did not get more assistance from counsel in the court as to the way in which he should go. When one looks at the way in which that matter was dealt with, you can see a lot of the reasons why there were problems.

Mr KERR—Could I take you, on the public record, to a matter I raised in the private hearing, just to get a response. It was put to us by Sergeant Priest in our public hearing yesterday that the National Crime Authority failed to cooperate with the New South Wales police with respect to episodes in Cabramatta, and that would have overlapped. In fact, the period that he was identifying is the period during which you were a member of the authority. I think that that is an issue on which we should at least ask your response.

Mr Melick—I have never met Sergeant Priest. He never gave me the courtesy of complaining about any matters we were not doing. I was the member doing most of the investigations for 2½ years before another member was appointed. I was based in Sydney. We did lots of operations involving Cabramatta, so I cannot comment on the lack of cooperation. I do not know what level he is talking about or what particular matters.

Mr DUTTON—Frankly, was it really his place to approach you personally? He was the sergeant of police at a suburban police station. Can you identify any other examples of where you might have been contacted personally by a person at the rank of sergeant within a state police force to identify a particular policing need in their locality?

Mr Melick—I have had police superintendents come—

Mr DUTTON—I am talking about police sergeants—

Mr Melick—who have said, 'Our people have complained about x, y or z'—

Mr DUTTON—I think that was the basis of his complaint, because he was saying that the problem existed on the street and the lack of action on the part of the New South Wales police was the essence of what he was complaining about.

CHAIR—We would assume that the request would not have come from Sergeant Priest from Cabramatta station: 'Mr Melick, I want some help over here in Cabramatta.' It would have come from the police commissioner if it was coming. His complaint was that there have been requests for assistance—

Mr KERR—Everyone turned their back on Cabramatta.

Mr Melick—I do not remember any request coming from New South Wales police that came to my attention in relation to lack of activity in Cabramatta. It may have been dealt with at the operational level; I do not know. But I do know that there was continual cooperation and liaison between us, the New South Wales police, the Federal Police, Customs and the New South Wales Crime Commission in relation to heroin problems. They had regular meetings with the Blade task force, which had up to 19 agencies involved. We used to take the recommendations from those task forces into consideration when we set our priorities. So, if we did not deal with a particular area, it was usually a question of priority rather than turning our back on it.

CHAIR—Have you got other areas that you want to talk to us about in terms of your list? We have given you a fairly good work-out. I just think that at some stage soon we should probably call a halt.

Mr Melick—I have real problems, as I said before, with paragraph 7A(a). The explanatory memorandum states:

Paragraph 7A(a) provides a general intelligence function designed to give the ACC the widest possible power to collect, correlate, analyse and disseminate criminal information and intelligence with prior approval by the Board. This function enables the ACC to pursue lines of inquiry (including conducting probes), receive information and assess the value of that information so long as it is within priorities endorsed by the Board.'

It says nothing about protection.

CHAIR—Protection of what; protection of witnesses?

Mr Melick—No, nothing about protection of what source you can go to for your intelligence and who you can intrude upon, and drawing the necessary nexus between that and organised criminal activity.

Mr KERR—So you are saying that this can open up circumstances where citizens are pulled in for, essentially, star chamber investigations without there having been any reasonable apprehension formed that there is an association with particular criminal activity. Is that what you are saying, or are you concerned about protection of the information, the security?

Mr Melick—No. As I understand it, at the moment you can use coercive powers to investigate relevant criminal activity. Under this act, you can use the coercive powers to investigate for the purpose of gathering intelligence or for the purpose of investigating relevant criminal activity.

CHAIR—Criminal intelligence, though, isn't it?

Mr Melick—Yes, but what is criminal intelligence? Where is the predicate offence you are looking at; where is the connection?

CHAIR—It is a good point.

Mr Melick—I have a real problem with that, I am sorry.

CHAIR—I understand.

Mr Melick—Do not get me wrong: I am not suggesting the ACC should be some ethereal body which is set up to float above everything else. It has to get in and get its hands dirty. It is a question of the balance.

CHAIR—I suppose it is a judgment as to whether the people of Australia would want the NCA to be in there sorting out somebody who is rorting the tax system or investigating criminal activity in Cabramatta, to use Sergeant Priest's example.

Mr Melick—But a lot of the people rorting the tax system are the Mr Bigs who are making their money from criminal activities in Cabramatta. What the public has to understand is that one of the ways to get rid of these problems is to get rid of the blokes who are financing them.

Mr DUTTON—But we are talking in terms of exclusivity, in that one has to be excluded—

Mr Melick—No, you are quite right: they are not mutually exclusive.

Mr DUTTON—That is right.

Mr Melick—Often you will get to your taxation investigation through your investigation at the street level.

Mr KERR—As you got through the painters and dockers royal commission.

Mr Melick—Yes. You would have police investigating Cabramatta. They would come to us and say, 'We think this is bigger than just this little organisation. We now want some help.' Bear in mind that a lot of the Cabramatta stuff was done by the New South Wales Crime Commission. Phil Bradley was pretty effective in that area as well. But I agree: they are not mutually exclusive.

Mr KERR—Do you have concerns about the 55A provisions, which allow state based investigations to, in a sense, plug into these powers?

Mr Melick—Under the current model, yes. State based investigations could plug into our powers before, but there had to be sufficient nexus. I did a couple of operations where, essentially, we provided a lawyer, a member and some analytical assistance and the police force provided all the investigations. These were matters that were essentially local policing matters

that fitted the definition of organised crime. We would not have normally put them on our level of priorities but, because local policing had come to an impasse, we stepped in and helped. We were happy to do so, and it was good for all sorts of reasons—personal relationships and other things as well. It was also very satisfying to be able to overcome the problem. If it is properly coordinated, I do not have a problem; but, if you have the black box method of just having an adjunct to the hearing power, I have a problem.

Mr DUTTON—I will return to one of the points raised before in relation to the backyard model, as you have described it, in relation to the policing ethos and mentality. We took some evidence a few months ago in Sydney from the New South Wales police, in their organised crime area, and they described to us the task forces that they set up to investigate major and organised crime. They had a similar structure, as I would understand it, to the way in which you operated at the NCA, in that they would have legal advisers, accountants, intelligence analysts, investigators, obviously, and all sorts of networks otherwise. How does that structure differ from the structure that operated under the NCA or the structure that you would envisage would operate under the ACC?

Mr Melick—Police do not do backyard matters. What concerns me is that they may get distracted from their overarching investigation.

Mr DUTTON—If you put that aside, and you said that they had the resources to investigate a particular matter, how does their structure of investigative teams differ from that of the NCA? I want to gain an understanding of where you were coming from before.

Mr Melick—There may not be that much difference in the structure; there is a big difference in the accountability. The NCA are accountable to the member, at the end of the day, not to the leader of the New South Wales crime agencies, and therefore the use of the coercive powers is properly regulated. That is one of the fundamental differences. You are talking about creating what is virtually a standing royal commission.

Mr DUTTON—That is right.

Mr Melick—I have a real problem with a standing royal commission being controlled by police officers.

Mr DUTTON—I understand that. I am just trying to get back to the point you made earlier about the investigative capacity. I take on board your comments in relation to the reactive and proactive differences, particularly when you take into consideration the political masters in the whole scenario. I am trying to establish in my own mind the differences in the way in which the two operated, so that I can understand your concerns about the transition into the new body.

Mr Melick—The NCA was driven by a member who understood the strategic use of the hearing processes.

Mr DUTTON—I understand that. I am talking about operationally, at the base. We were talking before about your concerns with the board and the structure. If we look at it from an operational perspective, is it true to say that there is not a great deal of difference in the way in which the teams would investigate particular matters?

Mr Melick—Yes, there is; that is what I am trying to say. Operationally, the police tend to investigate matters by not utilising the hearing process until well into investigation whereas with the NCA you start at the outside of the ring and move inwards. You may do some very basic operational work then have some initial hearings or, more importantly, not hearings but the collection of information from banks and other organisations by way of section 29 notices. That makes the operation more focused initially rather than having people going around the pubs, asking questions and speaking to dealers and their usual sources—although those traditional policing methods are very important and of course we utilise them.

Mr DUTTON—How important now are the telecommunications intercept powers that are available to police, and how are they used?

Mr Melick—They are very important but they are very expensive and very limited. They are very time consuming. I do not want to go into the operational area, but the public might be surprised at just how little telephone interception capacity there is in Australia. The law enforcement bucket does not go as far as people think it does and those powers are very expensive.

Mr DUTTON—Is Queensland the only state that does not have those powers?

Mr Melick—I am not sure. It has access to them through the NCA, on a joint task force of the NCA.

CHAIR—Thanks very much, Mr Melick. You have given us more than our fair share. We appreciate very much your input. It was extensive and comprehensive, and you are obviously somebody who knows the organisation in depth, so it was very much appreciated. Thank you for coming today. Thank you for the length of time you gave to us. If you have anything further to add, please contact our secretary and we will add it to our review, which has time parameters on it at the moment.

Mr Melick—Of course. If anything comes up and any members of the committee want clarification because of other submissions, I am more than happy to assist. The secretary can contact me. Thank you for your time.

Resolved (on motion by **Mr Kerr**, seconded by **Mr Sercombe**):

That Judge King be called to appear before the committee during the afternoon session.

Proceedings suspended from 10.59 a.m. to 11.17 a.m.

NEAL, Dr David, Member, Victorian Bar and the Australian Bar Association

ROZENES, Mr Michael QC, Member, Victorian Bar and the Australian Bar Association

CHAIR—Welcome to the Joint Parliamentary Committee on the National Crime Authority. The committee is examining the Australian Crime Commission Establishment Bill 2002, which is the culmination of negotiations between the state and federal governments. I welcome Mr Michael Rozenes and Dr David Neal, representing the Victorian Bar Association. As you would be aware, the committee prefers all evidence to be made in public, but at some stage, if you wish to go into camera, please let us know and we will take a vote on that. Obviously, that would then allow you to proceed in that regard as we have done with other witnesses. We also draw your attention to the fact that the Senate at some stage may require that that evidence be made public. I understand that you have a paper which you wish to make some amendments to.

Mr Rozenes—The only amendment is that the submission is now also made on behalf of the Australian Bar Association.

Resolved (on motion by **Mr Sercombe**, seconded by **Mr Dutton**):

That the submissions by the Australian Bar Association be accepted as part of the evidence.

CHAIR—I now invite you to make an opening statement which we will follow with questions.

Mr Rozenes—It will be clear to the committee when you look at our written submission that time has not permitted a detailed examination of many of the machinery provisions of the bill itself. Having said that, both the bar and the ABA would be happy to assist the committee with any detailed assessment of various provisions of the bill and any changes that might follow from any discussions that we may have or that you may think of. It is an open invitation, Mr Chairman, that we would be able to give some assistance, if required, in writing at some future date.

Dr Neal—It would include drafting as well, if that is of any assistance.

Mr Rozenes—Having said that, our submissions are essentially aimed at what we would submit are major philosophical issues that arise from this proposed legislation and essentially aimed at two substantive matters which give the Victorian Bar and the ABA cause for very substantial concern. Firstly, we submit that there has been a significant dilution of control over the exercise of the coercive powers that are available to be used in the course of a criminal investigation. Secondly, there has been most recently a significant increase in the potency of the coercive powers granted to the NCA and now taken over by the Australian Crime Commission. To put it in a nutshell, the combination of those two issues means that we now have a police force with coercive powers. That is unprecedented not only in Australia but elsewhere in the world where police conduct themselves in accordance with principles that we well understand. It is not uncommon in those countries where police conduct themselves in a way that we abhor.

The control of the NCA has been taken away from the intergovernmental committee and placed into the hands of a board which is essentially made up of police officers and law enforcement agency heads. The power that they have now is a power which is identical to—if not identical to then almost identical to—the powers of a royal commissioner. It enables the commission to compel the giving of answers; it quite clearly and deliberately abrogates the privilege against selfincrimination. Although it is apparent on the face that the powers to be exercised by the commission are limited by the various descriptors provided in the legislation, the reality is that, because the police essentially control the direction of the coercive power and when it may be used—in a difficult murder case, for example, in a particular state where two or more persons are involved, where there is a degree of planning and where clearly it is a crime of violence—instead of the usual provisions that apply to the investigating of such an event, the principal suspect in the crime can be brought before a hearing, can be interrogated and cannot claim a privilege against selfincrimination.

That is an enormous change to the considerations that were brought to bear when the National Crime Authority was first created. There was an argument then—and I do not need to regale you with the history of this; you will be familiar with it—that there was a failure in the capacity to deal with certain sorts of organised and difficult crimes, particularly those crimes that were across state borders and created difficulties of cooperation between police forces. It was recognised then that a power such as the one that was then given to the NCA would have to be controlled by a body that was not a police body and be presided over by a retired judge, an active judge, a senior lawyer or someone like that. In any event, it was an independent statutory authority and not a police authority and the direction as to when the coercive power could be used was again not given to police, and deliberately so. It was given to the intergovernmental committee, which was made up of the state and Commonwealth police ministers.

No-one in their right mind—and I do not say that in any pejorative sense—then would have contemplated that you would give this power to police forces. I know this might be me crying over spilt milk, because I made submissions to this committee a year and a half or so ago, or maybe longer, trying to resist the then proposal that the privilege or the coercive powers against them should be extended to what it has now become. I had the distinct feeling then that one of the arguments advanced was, ‘Look, we’re not giving it to the police; we’re still giving it to the NCA, and the NCA is not that different from ASIC or some other regulatory body.’ Now it is quite different. Whether or not this has been a two-step process, the fact is that we now have a coercive power in the hands of the police.

CHAIR—When you say it is quite different, what do you specifically mean?

Mr Rozenes—Before the amendment to the NCA Act that turned the coercive power into what it is today this was the position: the NCA had the power to summons before it persons for the purposes of examination. Failure to attend was itself a criminal offence. The NCA had the power to swear the person attending before it. Failure to be sworn was a criminal offence. The NCA had the power to ask questions of that person and the failure to answer those questions was a criminal offence. The person was not guilty of the criminal offence if he had a reason of a substantial character. A reason of substantial character included if the person had an apprehension that the answers the person may give may tend to incriminate him or her. In other words, the privilege against self-incrimination was retained within the NCA structure.

The NCA had an option. It could either accept the claim for privilege and not question the person further or if it wanted that person's evidence for the purpose of its investigation it could approach the state and Commonwealth DPPs who would then, if they thought fit, indemnify the person by saying, 'Whatever you say cannot be used against you in any criminal proceedings,'—that is called a use indemnity—'and anything that is gleaned from your evidence cannot be used against you,'—that is called a derivative immunity. So the protection the person then had was both a use and a derivative immunity as a result of the evidence they gave. It is a fact that no-one, as I understand it, in the history of the NCA who was given such protection was ever charged with a criminal offence. So the NCA well understood that if they wanted to coerce the people into giving evidence they had to choose the people they were not intending to charge. But if they wanted the information for the purpose of advancing their inquiries then they could choose people peripherally involved, get them immunised, if you like, by the relevant DPP, and then get the evidence that they needed for the purpose of their investigation.

What happened when the act was amended—I think last year—was this: that process was taken away and it was replaced by what is essentially the royal commission process, which is that although you may claim to not want to answer questions on the grounds that they may tend to incriminate you, you are nevertheless compelled to answer them. The only protection you have is that the answers you give may not be used in evidence against you but anything that is gleaned from your answers—any derivative material—is admissible against you. That is acceptable in ASIC because we say ASIC is not a police force; ASIC is a regulator. It is acceptable in the tax field because we say that Taxation are not a police force; they are regulators and revenue collectors. We certainly have never given any police force this power—for good reason. We do not accept in this country that police can go about investigating crime by pulling in the suspect and grilling them compulsorily on penalty of imprisonment if answers are not given.

We have had parliamentary inquiries at state and federal level all around this country when the right to silence has been sought to be abrogated in police investigation and nobody suggests that it should be. We are prepared to interfere with the right to silence at a judicial level in court. We are prepared to have consequences if people refuse to give evidence about matters in a curial and judicial process. But no-one suggested that we should change the right to silence at the investigative level. We still say that is a right that we have: that no person should be compelled to incriminate themselves out of their own mouth. This act does that. Although we have had legislation like this at Commonwealth and state level in regulatory and other committees—disciplinary committees—we have never had it given to police forces. The combination of the two features that I have identified in this bill effectively gives police the power to compulsorily interrogate the very people they intend to investigate and prosecute on penalty of imprisonment if their answers are not given. We say that is a dreadful situation. That is my opening statement.

Mr KERR—The character of the changes makes it different.

Mr Rozenes—And the combination of those two facts.

Mr KERR—You objected to that occurring in the first place.

Mr Rozenes—We lost that argument.

Dr Neal—And this just makes it much worse.

Mr Rozenes—Let us assume that argument is not open and that issue is not up for re-examination.

CHAIR—Why is this much worse?

Mr Rozenes—Because instead of the power now being exercised by an independent statutory authority which makes decisions about whether or not it will be targeted at people who are to be charged with criminal offences or otherwise, it is now controlled by police. The question I would ask is: if this is appropriate, if this is what we want, then why haven't we got an examiner?

CHAIR—When you say it is 'controlled by police', you mean the fact that we have got police commissioners on the board. Is that it?

Mr Rozenes—Police commissioners and law enforcement authorities, yes. Why wouldn't we have, in every police station around the metropolitan area, an examiner sitting there with a similar power to the examiner in this case? Why is it these special cases where we are prepared to abrogate the privilege against self-incrimination? Murder is a serious crime. Drug trafficking by one person is as serious as it is by two people. Why is the person who is brought before the National Crime Authority or the Australian Crime Commission going to be treated so dramatically differently to the person that is brought in by the homicide squad in a state policing system, by the drug squad or by the major fraud squad?

CHAIR—I presume it is because you are talking about the wider, national implications—especially when you are talking about drug rings and their implications—rather than them being confined to one individual.

Mr Rozenes—The vast majority of cases that are dealt with in the state court systems have national implications. They are the people that deal with most of the drug cases. They deal with the large conspiracies.

Mr KERR—Section 55A now applies these powers to them.

Mr Rozenes—Yes.

CHAIR—As Mr Rozenes has completed his opening statement, Dr Neal, do you want to add to that?

Dr Neal—This is a joint submission but I have a couple of points to make. In relation to your own question, Mr Chair, it is not simply that the NCA itself is transmogrified into the board; we also regard the presence of the intergovernmental committee, with its approval and consultation function over the occasions on which the coercive powers are exercised, as an important protection.

CHAIR—That was there before.

Dr Neal—That is the intergovernmental committee. But basically, in the case of a federal reference, the federal minister is required to consult with that committee in order to attract the special powers and, in the case of a state minister, it requires that committee's approval. So, in a sense, the initial concern before the NCA—that it would become a sort of roving royal commission—was meant to be tempered by the fact that the terms of reference for this royal commission would be set either by or in consultation with an intergovernmental committee, which would appropriately say, 'Look, from the broad range of the political accountability of that structure, these are the matters of national importance which genuinely merit the exercise of the special powers. Through the issue of this notice, the committee will say or approve the ambit within which those powers will be exercised.'

We would say, in relation to the notice, that it is already gloriously vague, but the stripping away of that additional measure of protection really does mean that, as Mr Rozenes was saying, if you look at the definitional criteria in this legislation, although it is said that the offences which will be investigated really have to be offences of national significance, they are absolutely minimal. It is hard to conceive of any offence where you could not say of it, 'Look, this is one that we can bring within that definition.' When you say, 'Well, look, it's only for offences of the highest national character', I think of a client that I represented in Western Australia; a woman de facto who had approached a building society for a loan. The building society had some questions over its financial dealings, and she found herself dragged before the NCA to be the subject of these sorts of coercive powers. Often these legislative schemes are touched with the grand national scheme but, when you actually start appearing on behalf of people who are being dragged into this process, they are often very small fry and are basically powerless in front of these sorts of powers. They are very significant powers when you have to deal them with at operational level. We would urge the committee to consider very carefully—

CHAIR—How would you recommend that they be appropriately modified?

Mr Rozenes—One way would be to bring back the intergovernmental committee with a power to control the coercive investigation—take it out of the hands of the police and put it back where those sorts of powers ought to lay, if you are going to give them to investigative agencies.

CHAIR—Give it back to the IGC? But aren't you then doing what you wanted the various police commissioners and—

Mr Rozenes—No, you are then back where you were—sort of—when the NCA was about.

Dr Neal—Still is.

Mr Rozenes—I would return to the initial structure of the coercive power and not the one that replaced it a year and a half ago.

Mr KERR—I have two issues: one is the breadth of the menu. The breadth of the menu does not really matter all that much if you treat the NCA as a separate body with priorities to strategically assess serious and organised crime. It has a budget of only $50 million so,

irrespective of the breadth of the menu, forcing through a sieve of priority limits that. The question I ask you to ponder upon is that there seems to be two models for the way in which these powers will be exercised: one is what you call the black box model, where state and federal police authorities will simply plug in the examiner at an appropriate point, so that routine policing then exercises these extraordinary powers. I think the intention of the other model—although it is not explicit—which is open on a reading, is that in many ways this organisation is to operate in the same way as the NCA. In other words, the examiner has to make a threshold determination as to whether or not it is appropriate to exercise these powers and to look at that within the resources of the ACC rather than the resources of state and federal police forces. But there is an ambiguity in the act, and I do not know which is the construction that in practice would be followed and I do not know which construction the courts would adopt. I just wonder whether you have reflected on those issues.

Mr Rozenes—The examiner is a lawyer of five years standing who can be part time. Is this person going to make a decision and in what context and with what influence about whether or not they will take this extraordinary step of using coercive powers to resolve a particular crime?

Mr KERR—The submissions yesterday, which were law enforcement dominated, expressed an alternative concern. They said, ‘We now have what we want. We have an organisation to be headed by a CEO with a law enforcement background. This is terrific; it gets us away from these dreadful lawyers.’ But the real problem is that the examiners will exercise an independent discretion. All I am saying is that this issue does not appear to be resolved by the legislation. Taking up Dr Neal’s point, one of the things you might do is examine, if this model is to be pursued—we are working within a framework where there does seem to be at least a governmental will to pass legislation which has a board of this kind—and if you wish to have an independent discretion, how you set benchmarks and criteria and ensure that these things are not recklessly exercised.

Mr Rozenes—All these things are compromises. If you ask the police, they will tell you that the best way to solve crime is to reverse the onus of proof—have everybody presumed guilty until proven innocent—and we would have it the other way around. Somewhere in the middle there is a line that we can all live with. This is not it. This is really giving the police—at their whim, on their agenda—the ability to use a most draconian power.

CHAIR—I find it curious that you say that because, when I asked you how you would modify the coercive powers, you said, ‘Well, give it back to the IGC.’ But as that body is made up of the police ministers—

Mr Rozenes—And attorneys.

Mr KERR—Attorneys and police ministers.

Dr Neal—And there is a measure of political accountability about that process that is lacking from this. These are better than what is there. I do not see them as ideal by any means. I think the notice provisions under the current legislation are far too broad. One gains some comfort from a level of political accountability of that process and I find more comfort in the fact that the decision making as to what the priorities are and in relation to which particular matters these

extraordinary powers can be exercised is coming through a politically accountable process, such as the IGC, rather than a much less accountable process, such as the proposed board is.

Mr Rozenes—Can I just add that at the next layer, the CEO layer, here we have had replaced an independent statutorily appointed chairperson with two members who are disconnected from law enforcement, by one person who can be directed by the board and who is a person with police training and background—one assumes a former policeman or serving policeman.

Dr Neal—And subject to suspension by the minister for unsatisfactory performance.

Mr KERR—I understand. But the protection that was asserted yesterday, at least by the acting chair of the NCA—a protection that he argued should not be there—is that the CEO cannot direct the examiner. Therefore he asserts that the CEO should be able to direct the examiner, but he says the protection that exists is that the examiner must exercise a threshold discretion. If that is the case, and we wish that to be there, maybe the issue is how do we beef that up so it is transparent and structured in a way which does not take us into this realm where these powers are recklessly being pursued improperly? I simply put that because I am not sure whether the act does what the acting chair of the NCA says it does. I am not certain that the act does in fact confer a discretion on an examiner. It may well be simply that the language is expressed in a way that they may do certain things but the expectation is that routinely they would do those things. I am not certain how it would be interpreted by a court. Do you have any reflections on that?

Mr Rozenes—No. Other than, when I read it, I thought the examiner did have a discretion.

Mr KERR—What would the nature of that discretion be? Perhaps you can come back to us.

Dr Neal—That would be a preferable course. I had read it as a very limited role in the examiners to decide whether the coercive powers will be exercised. But then, within the course of conducting a hearing, it may be that there is an objection taken that this question is outside the ambit of the inquiry or something like that.

Mr KERR—Perhaps you could come back to us. That is a structural question where your legal expertise would be of assistance to us. I have a general question. You have characterised this as setting up a police force with coercive powers. If you used the black box model—and depending on how you answer that legal question about whether there is an independent discretion in examiners—is this better characterised as establishing nine police forces, all with such powers?

Mr Rozenes—I did not mean to suggest that a new police force was being established. I meant that there was a power controlled by a police force or a combination of police forces by agreement. You only need to have two police, because it is a delegation power from the board. So it is as you say it: it is a capacity by nine police forces to use the power.

Mr KERR—And matters that would not be subject to this power would essentially be trivial matters.

Mr Rozenes—At the moment, because there is a regulation power as well.

Mr KERR—Certainly. But, looking at the menu, if you were to use it to its utmost—rather than to focus on a purpose, which presumably was originally a strategic intervention in serious and organised crime—and literally apply it, as lawfully as you could, that would mean that the vast majority of routine police work in anything above the regulatory offence level—

Mr SERCOMBE—Traffic fines.

Mr KERR—would fall with access to these royal commission powers.

Mr Rozenes—I think you would need to have two accused. As I read it, you would need to have two or more offenders.

Dr Neal—Two or more offenders.

Mr KERR—Or a suspicion that there may be more than one.

Mr Rozenes—And then you could, using a sophisticated method involving any one of those: theft, fraud—

Dr Neal—Tax evasion.

Mr Rozenes—violence, affray and so on.

Dr Neal—And other acts as prescribed by regulation.

Mr Rozenes—And the regulatory power is there, so that anything could be added to it.

CHAIR—When you said the reference can be by two police commissioners—

Mr Rozenes—Yes.

Mr KERR—Under 55A.

CHAIR—Delegate to the subcommittee?

Mr KERR—Yes.

CHAIR—Okay.

Mr DUTTON—Which would have to be ratified by the board—is that right?

Mr SERCOMBE—No. It has got to have someone from the Commonwealth on it.

Mr KERR—The subcommittees can be as small as—for Commonwealth matters—two, as I understand it. That would mean perhaps the Commissioner of the Australian Federal Police and the head of ASIO. For state matters, it could be any two police commissioners.

Mr Rozenes—And they could take turns: 'You fix my problem this week; I'll fix yours next week.' I do not mean to be insulting, by the way, when I say things like that.

Mr KERR—One issue that was raised, which I do not know the answer to, is what constraints in terms of the accountability mechanisms might the involvement of ASIO on the board contribute to. ASIO has its own accountability regime through the inspector-general of intelligence. The ACC and the NCA have a different accountability mechanism. We have had some submissions that we should beef it up through strengthening the powers of the Ombudsman on complaints and the like, but it is through the Ombudsman at one level and through this committee on another. What strikes me is that there may be overlapping obligations of secrecy and non-disclosure that then affect the accountability of the ACC to its accountability mechanisms because of the participation of ASIO.

Mr Rozenes—We have not turned our minds to that, but we will take it on notice.

Mr KERR—Mr Melick made a characterisation saying that this act, if you add by regulation the word 'terrorism', achieves exactly what the ASIO legislation was intended to do but for the fact that it would not allow—

Mr Rozenes—Detention.

Mr KERR—detention for a period of 48 hours.

Mr Rozenes—And no representation.

Mr KERR—Yes.

Mr SERCOMBE—Gentlemen, paragraph 6 of your material raises a point in relation to constitutional divisions of power. Are you able to amplify the point you make there?

Mr Rozenes—Dr Neal is the expert on constitutionality.

Mr KERR—A long bow, Dr Neal, but still—

Dr Neal—There is a very famous book called *Democracy in America*, written in 1836 by Alexis de Tocqueville. He said that one of the great benefits of a federal structure is that it divides the powers that can be exercised over citizens among a number of governments according to the allocation of powers set out in the American constitution, which is what he was referring to. Under our Constitution, of course, the power to enforce the criminal law resides with the state governments, and the federal government has a minor role to play under the constitutional structures. What this legislation is doing, really, is to vastly transfer powers to the Commonwealth government in relation to the criminal law. It is doing so via a mechanism which the Constitution does not recognise. It is neither being done by referendum nor by the transfer of powers provisions in the Constitution; it is being done as a cooperative scheme among the governments without the involvement of the provisions in the Constitution itself. As a matter of general political principle, that is offensive to the notions that de Tocqueville described, significantly, as an important protection for freedom, and arguably also offends the principles set out by the High Court in Wakim.

Mr KERR—It does seem a rather long bow from Re Wakim to this being unconstitutional—

Dr Neal—Yes.

Mr KERR—and the way it has been done seems to me to take into account Re Wakim. I understand the principal objection and I share some aspects of it. You do not refer there to any of the ratio of Wakim as to how it would offend the section 55 arrangements in this act. I can see the in principle objection. I would interested if it was unconstitutional because it would strike down a lot more than this.

Dr Neal—It obviously would. I did not want to go into the constitutional minutiae because the real point that is important is the point of general constitutional principle.

Mr SERCOMBE—One of the reasons I am interested in it, apart from the obvious importance of constitutional issues, is that it would seem to me that the sorts of changes that are being contemplated here are going to mean that people with fairly deep pockets are going to be able to engage plenty of you sorts of guys to spend an immense amount of time on issues of this type, so one would have to doubt that the government is likely to achieve some of the outcomes in efficiency and effectiveness that it might anticipate.

Mr DUTTON—It is the only objection they do not have.

Mr Rozenes—We all welcome someone with deep pockets from time to time!

Mr SERCOMBE—Indeed. I was not saying that in a negative way necessarily.

Dr Neal—I was representing someone at the Intergraph royal commission here last year who was basically indemnified by government for his representation. In the course of an extraordinarily intense examination of his conduct of the office that he was operating, he was stricken with massive health problems, his blood pressure went beyond the control of his medication and he lost the job that he was holding. Even though the findings against him were minimal, the effect on him was absolutely dramatic. I think too of the woman I mentioned earlier who I represented in Western Australia, who was a welfare dependant who happened to be the de facto of someone who had borrowed something from some building society where the NCA had an interest. It is easy to make these schemes seem more important and focus on major national issues, but the day-to-day operation involves actual people. Regardless of whether the lawyers get paid, these people have their lives significantly steamrolled. That is something that the committee should be very careful to consider. The practical realities of these things have enormous impacts on individuals, grossly unfairly in many instances.

Mr Rozenes—I would like to add something to that. We all accept and live with the spectre that now and again we will have royal commissions set up to investigate serious matters of great concern where their powers necessarily abrogate the privilege against self-incrimination because it is considered that the greater good is to be served by having the truth emerge so that the public in particular understands what went wrong in a particular area of great public activity. It is a sacrifice we have made for a very long time and no-one has really complained about it. It is when one transmits that issue into standard policing that one takes great care to ensure that one does not pass from what essentially is a very public royal commission exercise, with very

powerful and coercive powers, and just pass that on holus-bolus to a police force. The public interest is not there. We have a public interest in the suppression of crime and the prosecution of people who commit crimes, their ultimate incarceration, and their rehabilitation, if that is possible. But we do not pay the price of subverting fundamental human rights to achieve that. We have always said we do that operating within the rule of law. We have not, until now, and we should not readily abrogate a privilege against self-incrimination to achieve the purpose of convicting criminals.

Mr KERR—Mr Melick has identified yet a further step in what former Senator Cooney calls ‘legislative creep’. Let us assume even that we accept that in relation to serious and organised crime there may be such a public interest that warrants the use of these coercive powers. This committee has held that to be so, but in a different framework; we are looking at a new framework. But the point that Mr Melick has raised is that now, for the first time, these powers will be capable of being exercised not merely when there is a reasonably held suspicion that such conduct has occurred but for the general gathering of intelligence, so that we now can exercise intrusive coercive powers unconnected with the allegation of any specific criminal offence. Have you addressed your mind to that?

Mr Rozenes—No. In fact, I looked at that and deliberately chose the law enforcement and investigative arm rather than the intelligence gathering arm. But the point is apposite there, and may be even stronger there.

CHAIR—If it was not the IGC providing the reference, who else would you consider as appropriately independent? It is not easy.

Dr Neal—It is a very difficult question because, in a democratic system, if there are genuinely issues of national priority to be addressed—just as would be the case if it were to be the terms of a royal commission to be framed—you would say that somehow through the political process and the accountabilities that that brings those who are elected to represent us and those in a ministerial capacity presumably, that is an appropriate forum in which to frame terms of reference to the exercise of royal commission type powers. When you say, ‘Well, is there some other way?’ nothing readily springs to mind because it would be very hard to see how you would satisfy that sort of mechanism.

Mr Rozenes—If you look at another body that exercises coercive powers, such as ASIC, that is a body controlled entirely by the chairman and whoever assists the chair—the members, I imagine. There is no question that they need to go anywhere to exercise coercive powers, but they are not a police force. And the purpose of exercising those powers is to regulate corporations.

CHAIR—As there are no further questions, thank you very much, gentlemen, for your contribution, which was very helpful. It highlighted some areas of concern to the committee. If you could follow up on the questions that you were asked, we would appreciate it.

Proceedings suspended from 12.02 p.m. to 12.17 p.m.

LORKIN, Mr Edwin James, Secretary and Public Officer, Criminal Bar Association of Victoria Inc.

CHAIR—Welcome. I call to order the parliamentary Joint Committee on the National Crime Authority. The committee is examining the Australian Crime Commission Establishment Bill 2002, which is the culmination of negotiations between the federal and state governments. As you are probably aware, we prefer evidence to be given in public. If you wish to go in camera at some stage, please let us know. However, we would do that with the proviso that at some stage the Senate may request that that information be made public. We now invite you to make an opening statement.

Mr Lorkin—First of all, could I thank you for allowing the CBA to put in a submission and me to appear. Second, could I apologise for the absence of the chair of the association, Lex Lasry QC, who, everything else being equal, would have been here before this committee but who is ill this week. I have provided a short submission—some four or five pages—which, perhaps not surprisingly, touches upon the concerns which are pretty much identical to those expressed by the Victoria Bar this morning.

CHAIR—There was no collusion, was there?

Mr Lorkin—None at all. It is not something that even the ACC could investigate!

Mr SERCOMBE—It was a television camera they got.

Mr Lorkin—Did they? Then I will no doubt be attending and compelled! The issues, in our submission, are obvious and seminal. The solutions, having heard the discussion between especially the chair and Mr Kerr and Mr Rozenes, are less obvious. In other words, the creation of a body which has as its centre police operational tasking consistent with achieving an appropriate level of balance of the rights and interests of the individuals to be called before it is, in my submission, extremely difficult. What is clear is that this model does not go anywhere near achieving that.

It seems to me that what has occurred is that the draftsman has been resolute in the main, with some exceptions—the regulation making power, in the way it tricks into 4(d), is one exception. But, in the main, the draftsman has clearly been instructed: pull the NCA Act up, drop it over here, drop in a board, get rid of or at least minimise the role of the IGC, and change the management structure internal to the old NCA and make it pretty much fully accountable in the way in which a managing director might be seen to be accountable to a board of directors in a public corporation. It is a very interesting model. But, with respect to whoever provided the draftsman's instructions, it really rides straight across the reasons why the NCA was set up the way it was, why it operated the way it did and why the management structure within it was fixed with ownership of priority and direction, subject always to the capacity of the minister to make either general or specific directions—the minister, of course, being accountable for those decisions by being required to table and gazette the directions. That is a transparent model. It fixes operational decisions and responsibility where they ought to be fixed.

This model, with respect, does no credit to those concepts. And this in the context where, historically, we have always prided ourselves on the need to balance the two competing interests. Of course we wish to gather appropriate intelligence; of course we wish to detect, investigate, assemble evidence and successfully prosecute serious criminal conduct. On the other hand, we have always found that we can balance that with a reasonable level of protection for the individual the subject of the inquiry or associated with it. The paper that has been provided to the committee indicates why it is that this is not this model.

The Criminal Bar Association is concerned about it. It sees it as an unnecessary slip of a very seminal nature and one which, if it is to occur, must send a signal around Australia that if it is satisfactory in a national context it will be satisfactory in Western Australia, in Tasmania, in every state. Why would they not replicate this? In relation to their criminal conduct that is, for example, not thought to fit within the $50 million budget prioritisation of the NCA, why will they not be saying at the next state election, ‘We’ll set one of these up and we’ll invest it with these powers and we’ll drag people in,’ all in the good name of getting to the bottom of criminal behaviour and prosecuting it. It is simply not satisfactory, in our submission. It should not happen. There has been no attempt to justify it in the second reading materials or the explanatory memorandum. The policy has been set. In our submission it is the wrong policy.

CHAIR—Those are fairly forthright views on the issue. How would you change it? Are you more a status quo man: if it ain’t broke don’t fix it? Some people have the view that it is broke and should be fixed. We could debate that.

Mr Lorkin—I am not wanting to debate the status quo. Government’s job is to govern, to make appropriate policy choices and to put in place reasonable changes and to see what happens. In other words, a bit of risk taking in the context of criminal intelligence and serious national criminal behaviour of course is reasonable. In my submission this goes much further than that. It has simply thrown the baby out with the bathwater.

As to alternative models, I must say that until I heard the discussion with Mr Rozenes I had not turned my mind to it. I think there is a deal of attraction about the IGC concept, the old model, in that appropriate political advice will be coming in at that level which will ameliorate, for example, the fact that the ministers may nonetheless have ministerial responsibility for, say, the AFP. Nonetheless, the minister for justice would be hearing not only that which comes from the AFP sources but from a greater collection. And that would be mirrored, it seems to me, around the country to perhaps a greater or lesser extent. If the view is that that is not something that is appropriate any longer, then it would not be beyond the realms of possibility to gather together a group of elders who are completely disconnected to operational—

Mr KERR—Could I just correct you. Until I became Minister for Justice, no minister for justice ever had that responsibility at Commonwealth level. It was jealously guarded by attorneys.

Mr Lorkin—I see.

CHAIR—Here is the rub.

Mr KERR—No, I am just making the point. In fact the IGC is made up, principally, not of police ministers but attorneys.

Mr Lorkin—That is a helpful and illustrative distinction, but I take it, Mr Kerr, that, when you did have that responsibility—

CHAIR—It is not that we have anything against attorneys.

Mr Lorkin—you were nonetheless getting information which fed not only from the operational side but also from a broader side. You may not want to respond to that.

Mr KERR—Sorry; what I was seeking to do was to say that the framework in which that political decision was made was much broader even than ministers responsible directly for law enforcement. The very narrow role that the present Minister for Justice and Customs and Justice holds compared to that which operated under the previous government also distinguishes it. But that is a different issue. The point you make that it does bring in a larger range of players is true.

Mr Lorkin—It seems to me, for example, there could be a group of retired judges and/or—

Mr SERCOMBE—Politicians.

Mr Lorkin—maybe even politicians. It should be a group of people who the community will be entitled to trust—perforce of their experience, reputation and contributions over time—in the judgments that need to be exercised about this.

Mr SERCOMBE—You could always have retired politicians.

Mr Lorkin—Exactly, whereas this model draws it back into what essentially will be operational decision making, and why wouldn't it be? Mr Rozenes and I have sat in many meetings of, for example, HOCOLEA or CLEB. These things are debated endlessly—priorities, sharing resources; what it is that needs to be accomplished. But in the end, people make judgments based on operational requirements. In my submission, that is not what ought to be driving the exercise of these powers.

Mr KERR—Could you put on the record the background you have? It would probably assist people who read this transcript if you were to mention your previous incarnations. Secondly, in your role at the Criminal Bar Association, have you given any thought to the intersection between the Evidence Act and these changes? There is a broad discretion that goes to the exclusion of evidence, even if it be lawfully obtained. I do not know but, if this becomes the routine way in which policing occurs, at some stage courts will have to confront this. The fact that it is lawfully obtained does not necessarily make it admissible. I wonder whether you have given any reflection to the framework of argument that might arise as to judicial constraints that would be applied to whatever product is produced.

Mr Lorkin—Dealing with the first question first, I was the Associate Director of Public Prosecutions federally from 1992 to 1997—for five years. I have had extensive experience as counsel assisting the NCA from as far back as about 1986, though not for some time. I have been exposed to both sides of it in a broad sense and within the NCA in an operational sense. I

am relatively familiar with the way in which the authority operated at least up until the mid-1990s. As to the other matter, I have not thought about that. There will be a prospect for exclusion. Probably Justice Vincent moved in that direction in the Elliott case.

Mr KERR—In error.

Mr Lorkin—In error, nonetheless that was the intellectual position.

Mr KERR—That was never tested, was it—that particular point?

Mr Lorkin—No, but he excluded evidence on a whole series of grounds and I suspect would have excluded happily on a discretionary ground. But I should not say that so I withdraw it. The problem with respect to that being in some sense the answer is that—

Mr KERR—I am not suggesting it is an answer. I am just wondering whether it is also a problem; whether it is a background issue that we ought to give any concern to or none.

Mr Lorkin—To the extent that it might represent an amelioration of the outcome—

Mr KERR—I am not suggesting it as an amelioration. It would be unpredictable at best.

Mr Lorkin—Exactly.

Mr KERR—I am not suggesting it as an amelioration. I am just wondering whether it is something that we ought to give some regard to if the broadening of this is so great and its application is wider than we have hitherto had confidence that it would be.

Mr Lorkin—I am not quite sure how it is that you would pay much attention to the prospect of exclusion under the Evidence Act, other than to note that it is a possibility. But it would hardly give comfort, in my submission, to the concerns that have been raised here.

Mr KERR—No.

Mr Lorkin—At best it might represent an ad hoc amelioration which would be like the chancellor’s foot: very unlikely to occur in the vast majority of cases, in my submission. In my submission, one of the things that ought to occur here is that there should be a revisiting of that amendment that occurred last year—and that was the subject of discussion with Mr Rozenes. The privilege against self-incrimination was so much amended as to exclude the derivative use protection that had previously existed. In my submission, that ought to be reassessed here. It is a matter of considerable importance in the context of the evolvement of the body into which is reposed these powers.

No-one can argue against the existence of the powers, in my submission. It is how it is that they are triggered, by who and with what level of transparency and accountability; and how they are then put into play, by who and with what consequences to the people against whom they are brought into play. They seem to me to be the key issues. This draft bill cannot be looked at as though one only ought to concentrate one’s mind on changes in the bill as against the NCA Act.

That, with respect, misconceives what the real issues at play here are. They have been the subject of discussion. I did not want to keep rehearsing them.

The paper, at pages 2 and 3, dot points the issues. In my submission, one of the key elements is what is effectively the disembowelling of the management and ownership strategically by the CEO and the ACC of its functions and the subservient role that really he or she plays in the determination of process. In my opinion, that is simply an inappropriate model for the repository of these sorts of powers.

Mr KERR—What about the ad hominem argument—that you get the right person and it is going work? Even the framework that we have at the moment does not work. In other words, we should not be too worried about all this technical framework stuff: get the right person and the organisation will be run with restraint. Put Mr Lorkin in charge as CEO. He will not go around throwing these notices to examiners; examiners will operate properly.

Mr Lorkin—Mr Lorkin as CEO will have no choice in the matter because it is a board driven decision. The board triggers the decision to call it a special investigation.

Mr KERR—He is extraordinarily persuasive and able to command great respect at the board level.

Mr Lorkin—Unfortunately, the board does not listen to him because the board's obligation is to manage the office, to determine priorities and to tell the CEO. So Lorkin is told: 'Get in there and appoint a task force. By the way, the head of the task force is appointed by the board; it's Bloggs.' Bloggs is heading up this task force. The CEO can simply pay the examiner—

Mr KERR—Who can remove Bloggs, by the way?

Mr Lorkin—I looked at that, and I made some note about it but I cannot recall. I think it is the CEO, but I am not sure about that.

Mr KERR—Normally, a power to appoint confers a power to remove—so at least the power of removal would be with the board. It may be capable of also being exercised by the CEO, but it does lead to an odd accountability. If the head of a task force has an independent appointment and could be removed only by an external agency, I am not certain as to how that then fits with good management practice.

Mr Lorkin—I agree with that. In any event, if there is ambiguity about it, it is problematic. In my submission, if that analysis is right—that it is board appointed and board removed—then it illustrates even more that the CEO's function is very much non-CEO like. Really, the CEO is to manage consistent only with that which he or she is told to do by the external board. There is no apparent accountability of the external board, except that there is some level of line-up to the IGC. This is a point I think you, Mr Kerr, raised about ASIO, and I had not thought of that issue. The broader issue is that each of the members of the board have their own ministerial accountability, but it is disparate, not easily sorted through and, I would have thought, quite difficult to manage when they are all brought to bear in something that is meant to be driving an organisation of the type that we are looking at. It seems to me a very cumbersome and problematic arrangement.

CHAIR—On an organisational theory basis, it is unusual.

Mr KERR—It is unique. What about ASIO? We have asked this question a bit, and nobody can tell us why they think it is there. Somebody said they thought it was a good thing but did not give us any reason for that.

Mr Lorkin—I had assumed that it linked into the intelligence gathering process of the new body.

Mr KERR—As a customer of the organisation or as a director of the organisation?

Mr Lorkin—I suspected more in the sense of being able to give informed opinion and to make proper judgments about the criminal intelligence concepts insofar as, I imagine, they fall outside the shores of Australia. But I am not sure about that.

Mr KERR—Let us assume that some information transmitted by ASIO forms part of the basis for the reasons for the CEO determining to request the hearing officer to conduct a hearing. How would that affect either a question as to whether the opinion was formed in a court or the opportunity to examine it by way of the Ombudsman or, indeed, ourselves?

Mr Lorkin—It may well impact expressly. All of the above might prevent making a proper and informed judgment about whether it was reasonable, whether it was open and whether there was sufficient material. I agree with that. One imagines, though, that the government has formed a view that, whatever those difficulties are, they are to be measured against the benefit the director-general will bring to a board of this sort. It is not obvious to me why that is, but I expect you will hear directly.

CHAIR—It really reflects on the question of the previous chairman and being both chairman and chief executive in an operational sense, and trying to separate the two was the logic of it. Because it has been subject to negotiation with all the state premiers and the Prime Minister et cetera, there is a certain inevitability about the board structure. Given that, and the likely composition, how would you see that it could avoid some of the pitfalls that you have outlined?

Mr Lorkin—With great difficulty. But let us assume that the board remains. In my view, the role of the CEO should be rejigged so as not to make that person, as it were, the rubber stamp for the board. If one uses the analogy of a CEO or a managing director in private enterprise and an executive board, there are normally quite significant residual decisions that are taken daily and they include strategic decisions. One could build on that so that the function of the CEO is a more traditional function, where management is undertaken internal to the ACC not external to it—but nonetheless accountably undertaken—with the capacity for directions, which need to be tabled in parliament. Frankly, there should be the removal of the rather unusual provision that the minister can suspend, which seems to me to be a novel concept—it is certainly not in the NCA Act. There should also, frankly, be a walk away from the suggestion that the CEO be someone with a strong law enforcement background, and so one can put in there someone with strong, independent, probably legal, background. Then at least you have the start of a response that can argue that the ACC is not merely the operational arm of nine police forces.

Mr KERR—There is a great scepticism, warranted or otherwise, of the chair necessarily having legal qualifications. I do not think anybody asserts that this would be undesirable—in fact, I think most people would say it would be highly desirable. But there is a view that the predominant characteristic that such a person would have is a capacity to give strategic direction, good management and a sound understanding both of the law enforcement environment and of the legal environment. That may be found in somebody who is a practising barrister, but there is only a handful with those characteristics and they may not put their hand up in these circumstances for appointment.

CHAIR—And management, with 400-odd people.

Mr KERR—Let us assume that we are attracted to something of the kind that you are talking about. Is it possible to have a two-tier process? Is it possible to have a great degree of independence but also to have some of the issues that need to be resolved with that distance from law enforcement perspectives that independent people bring with a legal background—which are obviously supposed to be exercised by examiners in this circumstance—put into a management loop so that we have not got this point that people argue, that there is a disconnection between those two sets of responsibilities?

Mr Lorkin—Yes, it must be. Whether it is achievable and at the same time preserves what I regard as being the minimum level of operational immunity from police driven use of coercive powers, I very much doubt.

Mr KERR—My own personal view is that somebody who headed this organisation simply with a law enforcement background would be equally as inappropriate as someone who simply had a legal background. You really do need to have somebody who is an administrator, competent at running an organisation, who understands the law enforcement background and who is sympathetic to and understands all those restraints.

CHAIR—Are you available!

Mr KERR—I am just saying these are rare birds.

Mr Lorkin—I could not agree more.

Mr KERR—Maybe we are asking too much; maybe we have to go back to Mr Melick’s point: is there some advantage in having three persons sharing that responsibility, each of whom can bring different skills to it?

Mr Lorkin—And, as importantly, have real ownership of the strategic decision making and the allocation of resources, and pay attention to how long hearings should or should not run and how they are to be conducted. All those things are cultural. Cultures need to be reshaped from time to time. I am all in favour of reinventing culture, but not of putting in place these sorts of arrangements. Hence—moving on—the examiner issue is a very interesting concept. I do not know whether the hearing officers that were introduced late last year have been utilised by the NCA. I have no information one way or the other. There are many similarities between them and the new examiners; save, I do not see any provision in the current NCA Act for part-time hearing officers, whereas there is a clear view about use of part-time examiners. I cannot

imagine an examiner, having read that bill, coming to a conclusion when he or she is approached by someone asking, ‘Will you undertake task force X as examiner?’ to sit down and say, ‘The first thing I want to do is see the board, because the board should never have triggered my use of the compulsory powers in this case.’ It will not happen. They are going to say, ‘Oh, this act is all about responsibility for that happening up here and communication to the CEO. The task force head contacts me and says, “I’m arranging some hearings. When are you available?”’

Mr KERR—Is it about the justice of the peace at the Redfern station getting a search warrant application?

Mr Lorkin—Absolutely—‘Where do I sign?’ Part-time hearing officers presumably want more work. That is an incentive for them not to bring independence to bear at all, in my submission, but to say: ‘What’re we after here? Let’s go and get it. Let’s deliver product.’ The independence that is built in is, with respect, a notional independence; it will not deliver disconnected, independent advice. Which is not to say that, within the hearing process, anything will be done improperly—of course there will not be, I would imagine.

Mr KERR—But a subset of issues, I suppose, goes to this question of examiners and appointment. I think the intention is to have these persons dealt with by the Remuneration Tribunal in the same way as are members of the National Crime Authority. In other words, they are meant to be persons of significant status and weight who will exercise some independent discretion. I think that is the framework of decision that underlies the making of this legislation.

Mr Lorkin—Yes.

Mr KERR—Part-timers are in a somewhat different circumstance. Even if it is plausible—and you say it is not—that an examiner would exercise that independent discretion, if you have the multiplicity of part-timers, each of whom can be shopped around, it seems to me that you undermine that. If you have got an examiner in New South Wales and an examiner in Victoria, it might make sense to have a part-timer in Queensland, Western Australia, Tasmania and South Australia—one—to deal with matters that do not warrant the expense consequence and what have you, but I cannot understand why you would want to have a plethora of part-timers who can bypass the full-time person that you have appointed to undertake these tasks.

Mr Lorkin—Nor could I, and it may not happen. I am simply commenting on the potential for it to occur. It is likely to be driven. On my reading, there are sensible fiscal concepts. It provides flexibility—you only pay when you need the service et cetera—but it carries with it the downside that the person concerned will be disconnected from the culture and unaware of the broader issues involved in the authority, and necessarily so. They will be proscribed from knowing, one imagines, because there will be no need to involve them in the broader operational senses. In my submission, it is a big price to pay for any fiscal benefit that might occur. It may well be that the commission would not utilise it, but one has to deal with it on the basis that it is theoretically available and why wouldn’t it?

Mr KERR—More than that: under section 55, these powers can now be bolted on to state, and presumably they will be exercised in the states routinely now. So you would expect they would be utilised.

Mr Lorkin—Yes, but whether by a full-timer or a part-timer is a question I have no—

Mr KERR—You would assume they would be routinely exercised at a state level because your, say, three principal full-time examiners—if you have three, or two; I don't know what the act says—

Mr Lorkin—The CEO cannot be an examiner.

Mr KERR—Let us assume you have two or three full-timers. If they are going to be remunerated at that level, you are not going to have a plethora of them.

Mr Lorkin—No.

Mr KERR—So presumably you will have part-timers in each state where you do not have a full-time examiner located.

Mr Lorkin—That is probably right. I think I said the CEO cannot be. Let's assume the CEO is not legally qualified and will not be able to conduct hearings. You would then be back to two, I imagine, which increases the likelihood of part-timers.

CHAIR—As there are no further questions, I would like to thank you, Mr Lorkin, for your evidence. Perhaps we could have had you all together to have a discussion group, because there have been similar themes that have run through the three presentations, all of which have been excellent. We really appreciate the input. I do not know the end result—having finished this morning's hearing—and I do not know whether I am any clearer as to the direction we should go, but you have certainly raised a lot of very important questions. We thank this morning's presenters. It was very useful.

Proceedings suspended from 12.52 p.m. to 3.14 p.m.

KING, Judge Betty (Private capacity)

CHAIR—We will resume this public hearing of the parliamentary Joint Committee on the National Crime Authority. The committee is examining the Australian Crime Commission Establishment Bill 2002, which is the culmination of the negotiations between the Commonwealth and state governments about changes to the national framework for dealing with organised crime. The new body will incorporate the functions of the NCA, the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments and will be focused on criminal intelligence collection and the establishment of national intelligence priorities. I welcome Judge Betty King. Is there anything you would like to add to the capacity in which you appear today?

Judge King—I am a judge at the County Court, and I am a former member of the National Crime Authority.

CHAIR—Thank you very much for coming today and for coming early.

Judge King—That is fine.

CHAIR—We appreciate that. You are aware that the committee prefers all evidence to be given in public but if at some stage you wish to go in camera please feel free to ask us and we can then proceed on that basis, bearing in mind that on some occasions the Senate might ask that the details be made public. But it is quite within your aegis to request that to happen; it happened this morning that one of our witnesses asked that we go in camera. We would like to invite you to make some opening comments, albeit on an informal basis as we await the arrival of Mr Kerr.

Judge King—I have not had the material for a terribly long time.

Mr DUTTON—Nor have we.

CHAIR—I apologise for that. There have been certain time constraints.

Judge King—Until I ran into Duncan Kerr, I did not realise there had been such a committee established. I have had what I would not call a good look at the proposed act. The real comment that I would like to make is that, when the National Crime Authority was first set up or was intended to be set up, one of the fears that criminal lawyers had was that the control of hearings in which coercive powers were to be used would end up in the hands of police. The National Crime Authority Act actually prevented that. It resided, I thought quite fairly and properly, in the hands of a combination of police advising ministers and was, therefore, part of the democratic process. My reading of this is that it now resides in the hands of police, and it is possibly every worst fear I would ever have. That is my opening statement, if that is of any help.

CHAIR—Why do you believe it now resides in the hands of police?

Judge King—Because the police form the board, and the board is the organisation that determines whether or not those powers can be used. It used to reside in the IGC. Certainly

police attended the IGC, but they attended to advise their respective ministers and, therefore, you had parliamentarians properly deciding this.

CHAIR—Is it appropriate to have politicians considering it, though?

Judge King—Yes, politicians who are properly advised.

CHAIR—Isn't it their police commissioner who usually does the advising?

Judge King—Indeed, but other factors might be taken into account by politicians that are not taken into account by police. If you have this as a wish list of the commissioners of police, I think it is the wrong purpose of this legislation.

CHAIR—Albeit that you have had this material for only a short time, what would be your recommendation as to how we could improve the situation?

Judge King—I think you need to get the parliamentarians back involved. I agree with the simplification of the process, but I disagree that the repository should be the commissioners of police. I think they should have a role, certainly, in advising. The previous procedure was entirely clumsy and difficult—no question about that.

CHAIR—Could you explain why you saw it as being so?

Judge King—It would take us on average nine months to get a reference up and before the IGC. By that stage, so much has gone that you have lost your impetus in some ways. I have a total fear, as a citizen and a lawyer, in handing this over exclusively to the police. Do not tell me it is not the wish list of every police officer to have basically unfettered ability to use these sorts of powers.

CHAIR—It is the police ministers, though, who agreed to this arrangement. Every state agreed to it.

Judge King—I do understand how it came about. I think I would call it one of the best compromises I have seen, in that I am not sure it was particularly the wish list of any of the state ministers, but it certainly was of the Commonwealth.

CHAIR—It was the wish list of the Commonwealth? In what way?

Judge King—The Commonwealth really have a fair degree of power. They almost have a power of veto over what goes forward. As I read it, there must be two representatives on the board from the Commonwealth who agree to the matter becoming a special reference. So I think it makes the Commonwealth into a very powerful section in respect of it.

CHAIR—We welcome our local federal member.

Mr SERCOMBE—This morning we took evidence, very much along similar lines and in some detail, from representatives of the Victorian bar and the Criminal Bar Association. I must

say for the record that I find their view quite persuasive. I am sure you are at least as aware as I and other members of the committee are that there are a variety of pressures in the community in relation to the way in which the criminal law operates. At one extreme we have people like Alan Jones and others talking up, in fairly extravagant terms, some of these issues.

Judge King—There is no doubt.

Mr SERCOMBE—Would you be able to—and I remind you that we can go in camera if that is easier—provide us with some examples of the sorts of abuses you believe could arise if the police have the sorts of powers that have been contemplated in this legislation. It would be very useful to get a better understanding in more concrete terms of the sorts of abuses that could arise and what underpins your concerns.

Judge King—I can happily tell you without going in camera.

Mr SERCOMBE—Fine; that would be preferable.

Judge King—In both Commonwealth and Victorian legislation an accused has the right to silence when interviewed by police. If you can make that person, before they are necessarily officially recognised as a suspect, the subject of compulsory questions and answers, you can in fact abrogate that right to refuse to answer questions. That is a very small example, but it is a very important one. Our parliaments have said that that is the right of every accused person. I can see it very clearly being abrogated if this is allowed to continue in this way. It will depend enormously on who is appointed as examiners. The position of examiner and CEO of the organisation I find terribly worrying. The CEO can be dismissed for basically something like unsatisfactory performance.

CHAIR—That is not unusual in a normal corporate world.

Judge King—Indeed, but this is not a normal corporate world. This is basically quasi-judicial in terms of your forcing people to give evidence—you are forcing people to hand over documents. It is not the equivalent of the judge's position, but it should have at least some of the hallmarks of the independence of that position. That position has more power than your average judge does. I cannot force someone to answer questions. I cannot call an accused from the dock and say, 'You go into the witness box and you answer my questions.'

CHAIR—Under this legislation, the CEO does not have that ability to determine who should be coerced. That is a referral from the board.

Judge King—That is from the board, but once the board is granted the power that power then goes to the CEO and the examiners.

CHAIR—I think it is to the examiner rather than the CEO.

Mr KERR—The CEO initiates it and the examiners execute it.

Judge King—My reading of it is that the CEO can appoint the examiner. Is that right? I know I've had only a very brief reading.

Mr SERCOMBE—Allocates; the examiners are appointed by the Governor-General but the administrative task of allocating an examiner to a particular hearing is done by the CEO.

Judge King—And the CEO can be dismissed on the basis of unsatisfactory performance?

CHAIR—The secretary has advised me that the word is actually 'suspended'. It is the same thing.

Judge King—As I read it, removed.

Mr KERR—Can I take you to section 55A, because there is a significant change there in the legislation in that this picks up and applies, in a federalised system, the NCA powers to state offences. So under 55A the Commonwealth majority does not exist. If you look at section 55A(5A), the power to use the special powers is simply conferred by a majority of the board, which of course can be delegated to a small subcommittee.

Judge King—I did not actually see a limitation on the size of the subcommittee.

Mr KERR—None.

Judge King—Except that it must contain two Commonwealth—

Mr KERR—No, it need not under 55A—that was the point I was making. So for state matters there is not even the requirement for the participation of a minimum of two.

Judge King—I suppose it takes away from the Commonwealth's ability to veto.

Mr SERCOMBE—Yes, but it gives a state administration a backdoor method of getting access to the power.

Judge King—Of course it does.

Mr KERR—It gives a state police commissioner—

Judge King—If you get three state police commissioners who decide to do this via telephone, if they are on a particular committee, you have it, it is done and it is over. It really has some very concerning aspects. The whole process of the committee is of concern because it is not defined as to how many must constitute it and you could just end up with little blocks of people who form alliances, depending upon who they are.

Mr KERR—Could I also take you to the point about the IGC. Consistently throughout this discussion it has been discussed as if it is police ministers who make up the IGC.

Judge King—It is not.

Mr KERR—I may be wrong but I think the IGC is the attorneys, in the main.

Judge King—It varied.

Mr KERR—It varied, but it is not simply police ministers and never was intended to be simply police ministers. Indeed, the provisions regarding the appointment of members required the Commonwealth to make one appointment and then there were two others—one made in consultation with police ministers and the other in consultation with attorneys. So both police ministers and attorneys were involved integrally.

Judge King—I did not notice anything about who would be appointed as CEO and examiners, except that an examiner had to be five years call, basically. Is there a similar proposal as to how they will be appointed, the consultation process? The part-time aspect of examiners I find terribly worrying—this is the same aspect I am getting to with the CEO—because if you do not perform how someone wants you can end up in a situation where it is: 'Thank you very much for your services. We'll find somebody else.'

Mr SERCOMBE—Hunting for a JP to get a search warrant.

Judge King—Yes. I found working as a member at the National Crime Authority very difficult—it was hard work and took lots of time. But I thought you needed people of a particular level to do it. I am just concerned about who you are going to get who is going to want to be in the position of a CEO who can be dismissed. I do not think you will get lawyers who really want to go there and say, 'I am going to be an administrative officer. I can be dismissed.' Does the CEO actually have to be a lawyer, or is it just the examiners?

Mr SERCOMBE—No.

Judge King—Oh dear!

Mr SERCOMBE—The CEO needs a law enforcement background.

Mr KERR—In fact, the explanatory memorandum or at least the background paper suggested that it is intended that it be somebody with law enforcement experience.

Judge King—I think it is just turning more and more into nothing to do with the checks and balances that existed in the National Crime Authority—and they were difficult enough. This is just becoming more and more a tool of the police and giving them the powers via a back door.

Mr KERR—One of the curiosities with this is that were this legislation to be coming forward de novo, I am sure it would attract considerable attention. At the present stage it appears to be minor amendments, I suppose, to an existing piece of legislation.

Judge King—It is the most amazing minor amendments I have seen. It totally changes how the organisation works. It certainly does not appear to be in any way as autonomous as it was. From a criminal lawyer's point of view, I find it very worrying that this sort of power is ultimately going to reside in the hands of police. I do not think that was ever the intention when

it was set up. I do not think it should be the intention now. If government want to give it to the police they should actually come out publicly and say, ‘We are going to give police officers the power to do this via a mechanism.’

CHAIR—It is not as though they are going to give it to them solely; they have the checks of having the Commonwealth representatives on the board.

Judge King—But the Commonwealth representatives on the board are the heads of basically law enforcement type agencies.

CHAIR—The Federal Police, ASIO—

Mr SERCOMBE—Customs.

Judge King—And ASIC, so they have law enforcement type roles. ASIO is certainly different, but one of the big roles of Customs is, in fact, to do with law enforcement. You really do not want to hear what I think about the Federal Police—

Mr SERCOMBE—We do.

Judge King—No, you do not. I would have to go in camera to say it, although we are now constituted so I could not be sued.

CHAIR—If you want to go in camera—

Judge King—No. It is just that they are an exceptionally poor police force. I have prosecuted for them many times and they are disorganised and chaotic. So I am concerned about them having access to anything.

CHAIR—I think the head of the Attorney-General’s Department is on it as well.

Judge King—That is about the only person who is not involved in law enforcement or quasi law enforcement.

Mr KERR—When our civil liberties come down to being defended by the presence or otherwise of the Secretary of the Attorney-General’s Department, it does become a fairly implausible proposition.

Judge King—There are the other bodies, but I would place them as pretty much quasi law enforcement.

CHAIR—I hear what the line is, but how different is it from having the police ministers or the attorneys of various states being briefed by their police commissioners in the previous arrangement—it was called the IGC—and making the referrals?

Judge King—It was different in that at some stage each of those ministers had to go back and face an election.

CHAIR—Come on! Having been involved in state politics, I cannot recall one time when a member of the IGC was held to account by their electorate saying, 'What was your decision in terms of referral?'

Judge King—No, but the government on the whole might be, for doing or not doing things. We can all be beautifully cynical and say that the system does not work that way, but the theory of being an elected representative is that you are answerable to the people who elect you. The commissioners and those in those positions are not.

Mr SERCOMBE—But that is not the point; the real point of this debate is that it is presently the members who exercise the coercive powers, whereas under this proposal it is not people of equivalent status to the members; it is people who are subject to a whole range of other considerations.

Judge King—When you look at all of these people, I wonder how many of them actually have a law degree or have practised in criminal law and understand the checks and balances.

CHAIR—This is what I hear from the lawyers club throughout the day as everyone gets terribly horrified: 'Is this person a lawyer?' With good administration of the organisation, surely you can handle this body without having a law degree?

Judge King—It depends who you want to give the power to. If you want to give it to police officers, fine; that is a decision that parliament makes, but they should at least acknowledge that that is what they are doing and not say, 'These are minor amendments to an act and an organisation that already exist.' The whole face of this organisation will change totally as a result of this legislation.

CHAIR—Do you think the organisation has been effective?

Judge King—At times, yes, and at other times, no.

CHAIR—Do you think it needed some changes?

Judge King—Absolutely; I have no doubt about it.

CHAIR—How would you have changed it?

Judge King—I would have made the process of obtaining references much simpler.

Mr KERR—It has been one of the issues, I think.

CHAIR—How would you propose that?

Judge King—I am not up to date with how the references are obtained; I can only speak about when I was there and how incredibly difficult they were to obtain.

CHAIR—Have you any suggestions as to how you would improve the situation with the references?

Judge King—I would make the language a little bit more like this. This is clearer language about what you are setting out to achieve in obtaining a reference. I used to read the references and think: ‘My God, what does it mean?’ Because of the need to structure it to fit within the act, they were very complicated. There was a lot of lobbying involved in getting everyone on side to actually agree to a reference. So I think there are ways of simplifying—simplification of language is one.

It is not a good idea or proper to totally remove it from the hands of a combination of people—and that, I think, is effectively what is going to happen. As it stands, there really is a combination: there are police involved, there are lawyers involved and there is government, in the form of ministers, involved. I think that represents a good balance. I do not think this represents a good balance at all; it is far too much on the side of law enforcement only.

Mr SERCOMBE—Moving from the matters of principle you are talking about, we had evidence earlier today from another former member of the authority in which he was, in part, talking about examples where police officers and other non-legally trained people can inadvertently—but nonetheless quite disastrously potentially for the operation of an investigative process—not ensure that documentation and related matters are dealt with in a way that would satisfy a court when subsequently a matter comes before the court. We are aware of some fairly notorious cases over last number of years where the courts have knocked over the NCA on a range of matters of greater or lesser technicality. I was wondering whether you have any observations of it from that point of view—ignoring for the moment the issue of the matters of principle you have talked about so far. As a judge and as a person who has practised, do you have a view about the importance of some legal backgrounding for getting a successful outcome rather than achieving a technically flawed outcome when a matter subsequently goes to court?

Judge King—I have to say that my experience, as someone who has both prosecuted and sat on the bench, is very much that police attempt to go through the forms in the correct way, but in most cases they just miss things. You are constantly asked to exercise your discretion to admit something because it does not comply with what is going on. That is a serious issue, because courts have to make sure that everything has been complied with.

Mr SERCOMBE—So you are saying that you do not have to be a raging civil libertarian to actually mount an argument against some aspects of this current proposal—

Judge King—I am probably not a raging civil libertarian.

Mr SERCOMBE—on grounds of pragmatic outcome, not on other grounds.

Judge King—I am concerned about what sort of people are going to take up the position of examiner—what level of interest you will get from lawyers. They have to be a lawyer, but I cannot see it in any way being attractive to anyone of any known ability or substance as a lawyer.

Mr SERCOMBE—Why is that?

Judge King—Because it is basically a position that is going to be subject to direction by police, and they do not like that. I do not care which side they are on, they do not like that.

CHAIR—Which side of what?

Judge King—Whether they are defence people or Crown people, they do not like being subject to direction by police. It is not a system that, as lawyers, we are used to: you can work with police, you can direct police, but very few lawyers have ever been directed by police officers, and those that have will be quite junior. I could look at our Victorian bar and could not think of one person of any ability that would take the job. I think that is a serious concern and I imagine that, if you go around the states, it would be pretty similar in most places. It is not how lawyers are used to working. Police will obey their directions, because they will advise the police about the legal aspects. But they do not intend to or expect to advise them about how to conduct interviews, raids or things of that nature. Neither do they expect the police to tell them how to conduct an examination or when they will conduct one. So I think there would be a really serious issue in attracting anyone of any worth to that position.

Mr KERR—If there is a strong disposition politically that the government has evidenced and that is supported by all the states at this stage to have the ambit of references determined by police rather than by ministers, can you think of any way you could build into that framework sufficient scrutiny or a step at which the exercise of the special powers would be examined independently to enable there to be some confidence that we would not have these powers gradually extending across all police investigations but being broadly retained for those purposes for which, notionally, we are still committing them—that is, the investigation of serious and organised crime?

Judge King—Not really. I was trying to think of a way, and I could not. What would allow people to do it? There is no way that any investigation cannot be investigated better by the use of coercive powers, so it is incredibly easy to fill the criteria required. I just do not know how you would do it unless you involve government in some way.

Mr KERR—One of the things that was, I suppose, no more than touched upon or just beginning to be teased out was if you were to actually constitute the administration of the organisation of three persons, one of whom would be the CEO—who need not be a lawyer—but that any exercise of the special powers could only be exercised upon a decision of a majority of the three. So you would have two permanent hearing officers, or examiners. It would be a slight modification of what we have at the moment, where the chair of the NCA is actually also a hearing officer. Presumably, if that person was also legally qualified, they could exercise that role as well, but let us assume that there is a concern that lawyers may not make the best administrators necessarily.

Judge King—And that is a very valid assumption. We are usually pretty disastrous.

Mr KERR—Maybe there is a best of both—

CHAIR—Quite often the reverse applies, though; that people without legal training can be good administrators in a legal area.

Judge King—Indeed. I have absolutely no problem with that. They are usually 10 times better than lawyers.

Mr KERR—Assuming we are trying to find a fit that accommodates what I hope is a shared concern that we do not open this out to the routine application of coercive powers in regular policing—and we have had no discussion about this issue between us, but assuming that that is the proposition we share—perhaps one alternative would be to say that police commissioners rather than ministers could define those areas of investigation that they want to be the subject of these powers but you actually give the management of the organisation, not subject to direction, to a board of three. The chair of the board need not be a lawyer, but obviously if it happened that you got the right mix it could be a law enforcement officer with legal skills and good administrative backing—that would be a wonderful thing, but we usually do not get those three things together—and then there would be the two examiners. You have to get a majority, which would mean that the chair would have to always at least have the agreement of one of the two examiners to the exercise.

Judge King—Or the two lawyers could gang up on the chair.

Mr KERR—They would say no. But presumably there are going to be instances where, for reasons that are quite proper, we would want to say, 'Although notionally it is within the lawful exercise of these powers—because the menu of criminal items is so wide and the circumstances, if you used them to their literal meaning, are so broad—nonetheless this does not fit within the philosophical frame of the organisation. This is not an attack on serious and organised crime, it is not a strategic use of our resources, it is improper'—or something of that kind.

Judge King—This is two murders, or something like that.

Mr KERR—If there were something like that so that there would have to be some independent reflection by the chair and, say, at least one of the two senior non-police personnel in the organisation, would that be a possible model, particularly if you took away the power to dismiss the CEO without cause, which I think is troubling?

Judge King—Yes, it is very troubling. One of the problems there is that it would effectively allow those three people to place a veto on the board.

Mr KERR—They do currently, in practice. The reality is that the ministers define broad areas, and the three NCA members, while they do not place a veto on those areas, have to choose priorities; and, in a sense, by choosing priorities they narrow down—

Judge King—The special powers can be exercised in respect of references. Here, the board is going to determine which references or matters can in fact have the use of special powers—compulsory powers. But the three members of that organisation—if you are talking about two examiners and the CEO—could then say, 'We know we have the special powers granted by the board, but we don't think that is right.' Isn't that a power of veto over the board?

Mr KERR—I was actually suggesting a step back where the board—the police commissioners—would have broadly the same remit as the ministers; that is, they would define areas but they would not decide that those special powers be exercised in a particular area. That decision would reside with the authority.

Judge King—I am sorry; I misunderstood.

Mr KERR—The thing I am concerned about is that we have a Commonwealth government and six state governments all lined up saying, 'Hooray! This is the best thing since sliced bread. We want to pass this and have it in operation early next year.' We could be brave and say, 'You haven't established the case and you shouldn't do it.' That is one possible response that we could have as a committee, and perhaps we—or a minority of us—might take that view. If we could consistently, with good outcomes, achieve a result which does not torpedo the intention of having a body that can look at these high-level activities of bad guys but not get into some of the things that I think you quite legitimately raise, a number of my colleagues and I might be prepared to go along with that. I do not know; I am just teasing this out.

Judge King—The problem with that is that those who have the power to make the legislation may not think that it is a significant enough change from what we already have. If this is clearly what they want, it is going to be very difficult for them to say, 'We'll let you grant the equivalent of a reference, but you can't determine when the coercive powers are used. We will go to the three members.' To me the act looks very much like it is designed to significantly neuter what was the authority—the three members of the authority. It has done that quite effectively. I do not think that the government wants to give that power back.

Mr SERCOMBE—But the government, to turn the bill into an act, needs a majority in the Senate as well.

Judge King—I think the neutering, and giving it over purely to law enforcement agencies, is a serious issue. The role of the CEO and the examiners is minor and nondescript; it is not much of a role.

CHAIR—Thank you very much. We appreciate your input and we will take on board your concerns.

Judge King—If I can find an answer, I will write to you.

Mr KERR—I am not sure if anything I have suggested is an answer either; it is just an attempt to—

Judge King—Find an answer.

Mr KERR—We are coming in at a stage where everybody has said the boat is halfway down the slip.

Judge King—I think it has actually hit the water, from my reading.

Mr KERR—But maybe it has a hole in it!

Judge King—You never know.

Mr SERCOMBE—They are probably launching boats with holes in them as they sink.

Judge King—We will find out, won’t we.

CHAIR—We really appreciate your input; it was quite useful.

Judge King—You are welcome. Best of luck.

CHAIR—Thank you.

Resolved (on motion by **Mr Kerr**, seconded by **Mr Sercombe**):

That this committee authorises publication of the evidence given before it and submissions presented to it at public hearing this day.

Committee adjourned at 3.50 p.m.