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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Monday, 14 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: Senators Denman, Greig, Hutchins and McGauran and Mr Baird, Mr Dutton, Mr Kerr, Mr Sercombe and Mr Cameron Thompson

Terms of reference for the inquiry:

Australian Crime Commission Establishment Bill 2002

WITNESSES

Committee met at 6.07 p.m.

FORD, Mr Peter, Acting General Manager, Criminal Justice and Security Division, Attorney-General's Department

MEANEY, Mr Christopher, Assistant Secretary, Criminal Justice Division, Attorney-General's Department

OVERLAND, Mr Simon, Implementation Manager, Australian Crime Commission, Attorney-General's Department

SELLICK, Ms Suesan, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

CHAIR—I declare open this public meeting of the parliamentary Joint Committee on the National Crime Authority. The committee is examining the Australian Crime Commission Establishment Bill 2002, which is a culmination of 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. It will be focused on criminal intelligence collection and the establishment of national intelligence priorities.

I welcome the officers from the Attorney-General's Department. As you know, the committee prefers all evidence to be given in public, but if you wish to go in camera, please advise the committee and we will consider your request. I invite you to make some opening remarks about the committee's inquiry into the Australian Crime Commission Establishment Bill 2002. At the conclusion of your remarks, we will proceed to questions. I apologise that we have not had a chance to read your submission. I understand that it has only just been finished anyway.

Mr Ford—Mr Chairman, we do not have an opening statement. We have made a submission, as you have noted, and we can refer to that in the course of answering questions. We are happy to assist the committee with any questions that might be raised. I will hand over to Mr Meaney to add anything further.

CHAIR—I have had some discussions informally with my colleagues, and it is clear that there are a number of things of concern. Obviously my colleagues here today will be asking you questions on these issues, but I think you are aware, Mr Meaney, from having sat in these deliberations, that there are two principal areas that concern the committee, although there are many subsets of those. The first is the question of the use of the coercive powers. That relates to the fact that the police commissioners will, for the first time, have access to these by making determinations, and they will also be able to form subcommittees, which will include two federal officers, and make determinations through that area. There are concerns about that process per se and the ease with which it appears that determinations can be reached. There are also questions of concern regarding the use of coercive powers when it is strictly for intelligence gathering rather than when an individual is suspected of criminal activity, which has been the case in the past.

As you would know from listening to the discussions, there have been lots of concerns about operatives involved in regular policing who will be determining the overall direction of the

Australian Crime Commission, as well as the fact that, with the exception of the head of Attorney-General's, you are dealing basically with law enforcement agencies and operational bodies such as Customs and ASIO. It is seen that this will head the organisation in a more operational sense rather than play a strategic intelligence gathering role, and there seems to be no oversighting of where the coercive powers can be used in relation to the states and their individual requirements. There is a concern about the CEO and that he or she can be suspended or sacked, and there has been some dispute even amongst committee members as to which one is appropriate. Rather than having the same status as a judge and serving a term, the fact that they can be suspended by the minister or by the board does not seem appropriate. The same applies to the independence of examiners.

There are also concerns about the Australian Federal Police being too dominant, with the head of the AFP being the chair of the board of the ACC. There is a question about the role of the ABCI in terms of the immunity it currently has and what will happen when it is subsumed into the ACC. There are also questions about the overall organisational structure of adding another level to it, the role of AUSTRAC and why that has not been included, and the problems operationally in that we might have a heads on sticks approach rather than an overall strategic view. That sets the broad parameters. I am sure my colleagues will have questions within that. I invite my colleagues to follow on in terms of that and we can perhaps discuss various blocks of that.

Mr SERCOMBE—Perhaps Mr Kerr might care to address the coercive powers issues in the first instance, and I will come in later.

Mr KERR—As a starting point, I will give some clarification, because in private discussion with representatives of the Commonwealth, Mr Meaney, I discovered that the framework was other than I had anticipated it to be, and I think it would be useful to tease out exactly how these provisions are intended to operate in practice. Under the existing NCA arrangements, once the remit is given by the IGC to the NCA, investigations are done within the resources of the NCA. It seconds members of police forces and the like to task forces, but they are all under the management and control of the NCA itself. As I understand from that conversation outside of the hearing, that is not intended to be the way in which this provision operates. Once an area is identified by the board for investigation, the board is intended to appoint the head of the task force. The task force will be made up of either a single police force or an amalgam of police under a task force head appointed by the board and will be subject to the operational control of the person who has been appointed by the board. They will not be subject to the operational control of the Australian Crime Commission as such and certainly not by the direction of the CEO. Is that correct?

Mr Meaney—Yes, we did have that discussion. I think it would be fair to say, going through the points that you have elaborated, that, yes, it is proposed that the board appoint the head of the task force and, yes, the task force that might result might be one police force or could have members of a number of police forces. Certainly it is intended, in the normal operational sense, that the operational control would be by the head, who must be nominated under the legislation.

CHAIR—You are talking about the CEO.

Mr Meaney—No. When the board authorises a task force or sets up an investigation or intelligence operation, it must nominate the person who is to head that up. So, when the board is sitting, it must specify who is to be in charge.

CHAIR—Don't you find it just amazing that you would have a board that determines what is going to happen, bypassing the CEO? In what organisation in Australia would that happen?

Mr Meaney—The point is that the head of such a task force will usually be a member of a police force. So it is a matter for the board, the commissioners or whatever.

CHAIR—But you might as well not have a CEO then. If you are going to bypass the CEO, what is he there for?

Mr Meaney—But the CEO will not have any line responsibility for police officers until such time as they become, within the—

Senator HUTCHINS—So the task force could come from the New South Wales police or the Victorian police. Is that what you are saying?

Mr Meaney—Yes. Or it might be a combined AFP-New South Wales-Victoria task force, and the board will sit down and say, 'Who is the most appropriate person to head this up?' It is not necessarily going to be a person—

CHAIR—You are really bypassing the Commonwealth if you set up something where they can say, 'We have the police commissioner from South Australia, I am from New South Wales and he is from Tasmania. What about Bill heading that up? Never mind what the CEO of the ACC will think about it.' Isn't that very strange?

Mr Meaney—It is a question of professional judgment by police officers of who is the best person to head it up.

CHAIR—Why not the CEO?

Mr Meaney—The CEO is not going to know who the police officers are in police forces. That is the whole point. The CEO, if he were going to appoint who was to be the head of a task force, would presumably be confined to people that he would be aware of who had some affiliation with the ACC.

CHAIR—In a normal situation with a CEO, the recommendations would come to him and he would then have the choice as to who, rather than basically having an old boys' club operating.

Mr Meaney—Under the system that is proposed, the board takes the decision as to whether or not, for example, coercive powers ought to be available. If they are to be ultimately held accountable for how that investigation is run, then it is appropriate that they have a say in whom they will entrust that responsibility. It would be an inappropriate structure to have, for example, the board responsible for things that the CEO somehow or other makes a decision on. As I said, it is not as if you are employing—

CHAIR—It must be the strangest organisational structure that I have ever struck.

Mr Meaney—I do not think it is that dissimilar to the way that many of the operations are run in practice under the NCA at the moment, because they are headed up by police officers.

CHAIR—But it is quite different because you do not have the police commissioners sitting on the board.

Mr KERR—I am just trying to follow this. You mentioned that in practice you anticipate that normally the head of the task force will be the head of a police agency. That would mean the Commissioner of the Australian Federal Police or a commissioner of one of the state jurisdictions.

Mr Meaney—The CEO would still have residual responsibility for the management of it and the power to say how that ought to be run.

Mr KERR—You would then have the CEO responsible for allocating an examiner to effectuate the operation of the powers of coercion for a task force which is headed by the Commissioner of the Australian Federal Police or a state police commissioner.

Mr Meaney—No, it is not headed by them.

Mr KERR—The task force would be.

Mr Meaney—No. The board would nominate who is to head it. It would be a senior police officer from a particular police force. That would be the usual expectation.

Mr KERR—I am just trying tease this out. I misunderstood your evidence. I would have to go back to the transcript, but what I thought you said was that it would be expected that the head of a task force would normally be the head of a police force.

Mr Meaney—No, the board appoints who is to be the head of an investigation or operation. The point that I was trying to make was that you are not selecting people from within the ACC because, in much the same way as is the case with the NCA at the moment—or certainly as I understand it, and maybe Simon can give you some exact figures—the vast majority of investigators come from police forces. They are not like employees of that organisation.

Mr KERR—I understand that. But at the moment the National Crime Authority has I think Mr Adrian Whiddett in that position. I cannot remember the official title.

Mr Meaney—Yes.

Mr KERR—What is that position called?

Mr Overland—General Manager Operations.

Mr KERR—He is responsible for the operational conduct of NCA operations.

Mr Meaney—Yes.

Mr KERR—So he in turn is responsible to the three members of the authorities.

Mr Meaney—That is right.

Mr KERR—So, in other words, there is a direct line of authority within the NCA.

Mr Meaney—Yes.

Mr KERR—What you are proposing now is a structure whereby the line of authority will be from a board made up principally of police commissioners to an appointed head of a task force, who will be a senior police officer—possibly a police commissioner—who will not be accountable to the CEO in any form and who will draw on resources which the organisation will not direct or be managerially responsible to.

Mr Meaney—No, with respect, there would still be a managerial responsibility for the way the thing was run. When we talk about control, that is about the operational judgments.

Mr KERR—They are currently subject to the decisions and accountability of the NCA, and if we have concerns—

Mr Meaney—They would be accountable to the board in the same way and the CEO would have a role to advise the board on his or her assessment of how that has been done.

Mr KERR—How would he know? Who is the head of the task force accountable to—the CEO?

Mr Meaney—They would have to provide all reports. I would imagine all regular reporting and that sort of thing would need to go through the CEO.

Mr KERR—Where does it say this?

CHAIR—Does it say that in the legislation? Basically, you are setting up an organisation where the CEO is a lame duck CEO, with the responsibility bypassing him. It comes from the board down to the head of the task force and they seem to report back up. The CEO has some administrative responsibility and that is about it. It just seems a little unusual.

Mr Meaney—It is certainly not intended that the CEO would be involved in the day-to-day operations of investigations or intelligence operations, but they certainly would have general oversight of the way those teams were operating.

CHAIR—It is still very curious.

Mr Overland—I think there is some confusion in terms of the roles, which I will try to clarify.

CHAIR—I'll say there is confusion! It sounds like the noodle nation.

Mr SERCOMBE—Barry Jones would do better than this.

Mr Overland—I think that responsibility for day-to-day running of investigations is the responsibility of the person who is appointed as the head of the task force.

CHAIR—What does 'responsible for day-to-day operations' mean?

Mr Overland—It is the tactical and operational decision making that is required in terms of how we are going to progress a particular investigation or intelligence operation. That is really something that you would expect a police manager to do, by and large, because it is a policing function. It requires that sort of skill, experience and expertise.

CHAIR—What you are saying is that the CEO is responsible for everything except who is appointed to head it?

Mr Overland—Yes.

CHAIR—That is a little different from what Mr Meaney has been implying.

Mr KERR—I am just trying to piece this together. Mr Overland, I think you were saying that that responsibility is for the head of the task force, not for the CEO?

Mr Overland—For the day-to-day running of the investigation, the responsibility is vested in the head of the task force. But once the board has approved it as an intelligence operation or investigation, it is an ACC investigation, albeit staffed by—

CHAIR—But who does the head of the task force report to?

Mr Overland—Ultimately they have an administrative line of accountability back to the CEO.

CHAIR—To sort out the paperclips, or what?

Mr Overland—No, it is not about paperclips.

CHAIR—Is it operational or not?

Mr Overland—It is not directly operational but—

CHAIR—Then it is pure administration so—

Mr Overland—You could equally argue, though, that Adrien Whiddett's current role is not directly operational. It is a management of operations role that Adrien Whiddett discharges. Equally it is envisaged here that the CEO would have a management responsibility in terms of oversight of investigations. It is not a direct tactical role though; it is a step back from that.

Mr DUTTON—Isn't that the point that we need clarified though, because I think there is some misunderstanding as to Mr Whiddett's current position? He would not have—for

argument's sake—day-to-day responsibility for every tactical decision that is made in relation to each of the operations going on around the country.

Mr Overland—No, absolutely not.

CHAIR—Mr Whiddett's current position is what?

Mr Overland—He is the general manager of investigations.

Mr DUTTON—I think there is a fallacy at the moment that Mr Whiddett may have this ultimate responsibility that we are envisaging the CEO take on, and I do not think that is in fact the case.

Mr KERR—Both Mr Lamb and Mr Whiddett, in their turn, had that accountability responsibility.

Mr Overland—They have the accountability but in practice, in terms of the way—

Mr KERR—Like every police commissioner, you do not know what officer X is doing at a particular time of the day.

Mr Overland—No. That is right.

Mr KERR—You must build systems that report and have accountability; you cannot manage everything at that level.

Mr DUTTON—That is important. I do not see the difference between the way in which the NCA operates at the moment and the structure that you are talking about under the ACC—

CHAIR—The difference is that you have a chairman now.

Mr DUTTON—Except for the appointment—I understand your point there.

Mr SERCOMBE—What if something screws up in an NCA operation? Whilst Mr Whiddett might not immediately have detailed involvement in that particular matter, ultimately he can be called to account.

Mr Overland—Yes, he can.

Mr SERCOMBE—Under the proposal we are now considering, as I understand it, the CEO will not be called to account for a screw-up in operations. Who will be?

Mr Overland—No. I think the CEO will be accountable for a screw-up in operations.

CHAIR—Let us take up Peter's point. How does the role of Gary Crooke, the current Acting Chairman of the NCA, differ from what you are proposing for the CEO?

Mr Overland—In terms of administrative accountability, I would suggest that it does not. The difference that needs to be borne in mind though is that these officers who are now working in task forces will not be formally seconded to the authority or to the agency as they are now. What happens now is that the officers are seconded and work as part of the National Crime Authority. It is easier then to say that the National Crime Authority is wholly and solely responsible for what happens to those officers, and that is fair enough. Under what is proposed, the officers are not seconded; they are made available. They are seconded in a sense but it has a different legal effect. They do not actually become part of the ACC in an organisational sense. They still belong to their home organisation, so they do have a responsibility back to their respective commissioner or CEO. In a sense that person who is the head of the task force has a dual responsibility. They have a responsibility back to their commissioner but equally they have a responsibility to the CEO of the Crime Commission.

CHAIR—What types of things would they be responsible to the CEO for?

Mr Overland—They would be responsible for the conduct of the ACC operation. Because the board has approved it as an ACC operation, it would then be for the CEO to manage and oversight the conduct of that operation.

Mr KERR—From what I understand, the CEO has no power to remove, discipline or address deficiencies in the conduct of a head of a task force. That would be a matter for the board.

Mr Overland—Yes.

Mr KERR—So any instances where in ordinary circumstances Mr Whiddett or Mr Lamb would be developing strategic overviews of the operational work of the NCA, as it currently exists under the accountability to the members, would no longer exist. The accountability is back to the board.

Mr Overland—Yes.

Mr KERR—And the board will meet twice a year?

Mr Overland—At the moment it is proposed the board will meet formally at least four times a year, but there will also be an ongoing need for the board to meet as required, particularly when it comes to making decisions about whether to authorise the use of coercive powers or not.

CHAIR—Will they meet in subcommittees then?

Mr Overland—In relation to the decision to authorise coercive powers, there are requirements in terms of the number of people required to vote in favour.

CHAIR—What is the minimum number?

Mr Overland—Nine is the minimum number required. So in a sense I guess they can operate as a subcommittee but there need to be nine votes in favour of the approval or the grant of the coercive power.

Mr Meaney—I think the nine relates to the full board. Maybe we could go back one step. Yes, it is envisaged that the board would be able to establish subcommittees. That is set out in the legislation. Those subcommittees must be established by way of a unanimous resolution of the board so that everybody must agree and the role of the committee can be limited or expanded, depending on the terms or whatever resolution the board may make about what it can and cannot do. For example, it might give a general power to a committee or it might give it in a very qualified sense in that it can make recommendations and come back to the board. There is a very wide power to use committees. It is a matter for the board to determine how to do that.

Senator HUTCHINS—I am getting confused about the subcommittee having to have unanimous decisions. Who has to make a unanimous decision for an investigation?

Mr Meaney—At the full board level to establish a committee you must have unanimous decisions. No committee can be established unless it is a unanimous decision of the board.

Senator HUTCHINS—So does that mean that the commissioners have to make a decision about priorities? So it could be drug trafficking to car rebirthing—are those the sorts of decisions of the board you are talking about?

Mr Meaney—No, this is just about committees to assist it in the management. You might have a human resources committee or a finance committee.

Senator HUTCHINS—Do you need a unanimous decision for a human relations committee?

Mr Meaney—Yes, in order to set up a committee and to determine its mandate, because this is a Commonwealth-state arrangement what is proposed is that the board must be unanimous. If there is any dissent about what the ambit of a committee is or—

Senator HUTCHINS—Are these administrative matters?

Mr Meaney—It could range from administrative. The board conceivably—

Senator HUTCHINS—But not operational?

Mr Meaney—They could have operational committees. Again, there is no limit on the nature of the committees that could be established. To go back to the point about the subcommittee, if there is a subcommittee established for the purposes of considering applications for authorisation—that is, the sort of authorisation process that you require the nine majority on—there is a special voting requirement for the full board to approve those. If there is such a subcommittee, the legislation limits it to only being able to authorise where there is unanimous agreement of the committee. If there were any dissent, it would need to be sent back up to the board level.

Mr KERR—It could be as small as two, couldn't it?

Mr Meaney—It could be, yes. It would be a matter for the board.

Mr KERR—So it could be a unanimous decision of two people?

Mr Meaney—To establish the committee there must be a unanimous resolution about how many people it is going to have and what its powers are.

CHAIR—So is it possible that you could have a committee of two deciding when coercive powers are going to be used?

Mr Meaney—It would be possible if the board passed a resolution to that effect.

CHAIR—Isn't it a concern that this involves royal commission powers and two people to make that decision?

Mr Meaney—If the parliament was to consider that there ought to be more criteria around that then that would be a matter that we could consider. There is a question of balance. For the full board you have got a possibility of having to have 14 people meet. Organising such meetings at short notice, for example, is not necessarily easy.

Mr SERCOMBE—We are busy people.

Mr Meaney—You might want to have a committee.

Mr KERR—In practice, of course you would want to have a committee, because it would be absurd to do it otherwise. But this is the concern that you get to when you do establish a committee.

CHAIR—Especially when they have got such powers. It would be different if it was the human resources committee—fine, they can meet with two. But this is royal commission powers that no police force in Australia has had and two people are going to be doling that out.

Mr Meaney—As a theoretical possibility. Nobody has actually suggested that there be two.

CHAIR—But theoretically—

Mr Meaney—Yes, theoretically, it is possible.

Mr DUTTON—How is it possible?

Mr Meaney—Because the legislation does not actually specify the minimum number of people that must be on a committee.

Mr DUTTON—But when the chair was talking about the powers of a standing royal commission, how is it possible for two people in a subcommittee to exercise those powers?

Mr Meaney—I did not hear the chairman say 'exercise'. I heard him say 'authorise', but I might be mistaken. It is the same authorisation function that the board has.

Mr DUTTON—There is an important distinction to be made there, though, isn't there? You are talking about a decision by two in relation to operational matters and progression of an

investigation as opposed to the powers which might otherwise be exercised through a hearing at the height of the investigation. They are two separate things.

Mr Meaney—Just so there is no confusion, the sort of powers that it is envisaged a subcommittee would have would be the same powers that the full board would have—that is, the scope of the authorisation of coercive powers in respect of a subject matter, if you want to put it that way.

Mr DUTTON—They could not direct a hearing, though, could they?

Mr Meaney—They could not direct the hearing. There is a two-tier process in the legislation. In much the same way as there must be a reference under the current NCA arrangements, there is now what is called an authorisation process—that is what the board is permitted. When the board authorises something—for example, as a special investigation—the consequence of that is that the coercive powers are available in pursuance of that investigation. So this is a conferring of jurisdiction, a possibility that it will happen. The second stage then is that the actual exercise of the coercive powers is in the hands of independent statutory officers—these are the examiners.

Mr DUTTON—That is what I want to clarify.

Mr Meaney—The authorisation is about saying, 'Yes, the rules apply in respect of this matter.' The exercise of the powers is not conducted by the board or by police officers. The exercise is conducted by examiners, who are independent statutory officers set up under the legislation.

Mr KERR—Let us clarify this process. As I understand it, once a task force is established then the CEO must appoint an examiner to that task force.

Mr Meaney—That is right.

Mr KERR—The second point that I want to test here and get clarified is this: when you say that a task force does not become part of the ACC—there is a different legal framework—what does it become part of?

Mr Overland—The operation itself is an ACC operation. The people who staff it do not necessarily become part of the ACC.

Mr Meaney—They are not ACC employees.

Mr Overland—They are not ACC staff.

Mr KERR—Then how are they subject to all of the obligations that are currently inherently placed upon staff who are members of the NCA? They do not become staff of the ACC?

Mr Overland—No.

CHAIR—They are more like a loose amalgam of people appointed by commissioners from another state who carry out their role.

Mr Overland—They become members of the staff of the ACC in the sense defined under the act; they do not actually become employees. It is probably the use of language that is confusing. They do not become employees and they do not legally become seconded to the ACC, but they are picked up under the definition as members of the staff of the ACC. By virtue of that, the safeguards that are in the draft bill apply to them in that capacity.

Mr Meaney—Let us put to one side the consequence of a managerial person becoming a member of staff. Because of the statutory definition, there are legal consequences of being a member of staff. There are two legal consequences of coming within the definition of a member of staff. One is that they are able to exercise powers and functions that are part of the ACC framework established by the legislation. A concomitant of that is accountability in the way they exercise those powers, but that is something less than the full accountability they would have as an employee. It is about being accountable when you are wearing that hat.

Mr KERR—Is there such a thing as an ACC as a legal identity? Can you sue the ACC? Does it have a legal existence?

Mr Meaney—It does not have a separate legal personality.

Mr KERR—If it has no separate legal personality, how can it be held accountable for errors committed by its staff? How is it liable in any way?

Mr Meaney—Under general principles, I would think, governments are liable for the activities of persons exercising powers or functions.

CHAIR—Yes, but which government?

Mr Meaney—It is a Commonwealth statute. The Commonwealth would.

CHAIR—I understand that, but if you do not have a legal personality—

Mr KERR—If it has no legal personality, against whom do you bring an action? Let us assume you have misfeasance in public office. Let us assume you have some tortious conduct—wrongful conduct—by somebody purporting to exercise its powers. Against whom do you bring an action?

Mr Meaney—I would have to take that on notice.

CHAIR—Mr Kerr can make his point very well on his own but, with respect to the board—which is made up of state police commissioners—appointing someone from a state police force to go about their activities, the responsibility of the Commonwealth is somewhat tenuous and the CEO does not have responsibility for the operational activities of that particular task force. That is what you said, isn't it?

Mr Meaney—I do not want to go over old ground, but I think Mr Overland explained the sort of responsibility the CEO would have. There is a technical distinction that could—

Mr SERCOMBE—Is there another model? Are you aware of any organisation, either in Australia or elsewhere, with a broadly comparable structure that we can get our heads around in order to understand what is being proposed?

Mr Meaney—I am not aware of any.

Mr SERCOMBE—So this is a world first?

Mr Meaney—Yes.

CHAIR—I am not surprised.

Mr Meaney—I do not think that, merely because you are doing something for the first time, it is—

Mr KERR—One of the things that strikes me is that, under the appearance of continuing a transition from the NCA to another organisation, the first thing you do is destroy the legal personality. You do not now have an organisation which has any legal personality as such. Under this act you give powers to certain persons—examiners, task forces and the board. In practice, you will therefore be conferring the powers that used to be vested in a specialised, limited organisation on groups pulled together for various purposes which are essentially police task forces. You are giving to the police the power to access powers of coercion that no government, state or federal, has ever previously seen fit to give them.

Mr Meaney—With respect, isn't that what happens now? It is the police who are the investigators of the ACC who are able to have access to those powers for the purpose of their investigation.

CHAIR—But, by your own words, they are directly responsible within the NCA.

Mr KERR—Commissioner Keelty gave evidence to us as recently as last year to the effect that he believed there needed to be a complete structural separation between the Australian Federal Police and any organisation that would exercise coercive powers, because no police force in Australia should be vested with such powers. Plainly from what you are saying this vests them with exactly such powers.

Mr Meaney—I would have to disagree, because the powers are exercised by examiners, who are not police by definition.

CHAIR—How does the role of the NCA chairman—the position previously held by Gary Crooke—differ from the proposed role of the CEO of the ACC?

Mr Meaney—To put it bluntly, they are chalk and cheese. They are significantly different.

CHAIR—Wasn't it you, Mr Meaney, or Simon Overland, who said that they were very similar models? If they are chalk and cheese, they do not sound like similar models.

Mr Overland—There is similar managerial accountability in the role of the CEO of the ACC and the role of the chair of the NCA. But the chair of the NCA also has responsibility for exercising coercive powers, which the CEO of the ACC will not have. In a sense, that is the difference. There has been a split between—

CHAIR—That is a huge difference; that is not just a minor one. One is left with the admin and the other one had overall strategic operational direction.

Mr Meaney—That is true, but I refer the committee to pages 3 and 4 of our submission that we tabled today, where we do a little bit of a comparison of the existing NCA regime and the proposed ACC regime. There are some fundamental differences in philosophy, if you like, between the two organisations. The most significant, I think it is fair to say, is that at the moment it is true that the NCA is an independent organisation. The head of that organisation is indeed responsible for the strategic direction of it. I think it is also fair to say that in the past there have been frictions with other law enforcement agencies because it is an independent organisation and, whilst one would always hope it would be, its direction is not necessarily always in consultation with the rest of the law enforcement community. The fundamental difference that is sought to be achieved here is to demark—that is, to have the organisation, the ACC, having a complementary role to existing law enforcement agencies and not one that competes with them.

Mr KERR—Are you dissenting from my analysis that this effectively confers on state and federal police forces the powers to compel persons to give testimony against their interests and to exercise the compulsive power? Let us test this in practice. You say that those powers are vested not in the police force but in an independent examiner. What are the criteria that the independent examiner must adopt to determine whether or not to grant an application made to them by the head of a task force for the exercise of their powers?

Mr Meaney—There are no statutory criteria.

Mr KERR—So in what wise do you put it to us that this does not give access to the police to go to an examiner of their choice—they can go to part-time or full-time examiners—when there are no statutory criteria setting out the basis upon which a determination will be made yes or no in relation to an application?

Mr Meaney—There are no fewer criteria in this act than there are in the NCA Act.

Mr KERR—But the police do not make applications to the NCA to use one of their members to follow up whatever investigation they wish. A reference is given by ministers to the NCA, which conducts its own processes, under the supervision of an independent three-person membership. It is not the police.

CHAIR—Isn't it a fact that, because you are changing the very nature of it, the checks and controls that we would expect to be there—for example, in the way that these powers can be exercised or the choice of examiner—do not seem to be there?

Mr Meaney—I am not too sure about your point about choice of examiners.

CHAIR—It follows on from Mr Kerr's comment.

Mr KERR—You said that there are no statutory criteria to be set for examiners to exercise power?

Mr Meaney—No. There is a discretion that the examiner may exercise certain powers.

Mr KERR—There is an application made to an examiner. Let me test this. What criteria do you say should be applied by an examiner when somebody comes before them from a task force, properly appointed by the board, and seeks the assistance of the examiner appointed by the CEO to examine particular witnesses whom they believe, they say, would be useful in pursuing a line of inquiry that they are exercising under the reference? What criteria should be exercised to make a decision yes or no?

Mr Meaney—Firstly there would be an overall criteria of reasonableness as to whether the examiner was satisfied having regard to the matter before him—

Mr KERR—Reasonableness of what?

Mr Meaney—that it was appropriate to grant whatever the particular coercive power being sought was.

Mr KERR—Reasonable against what criteria?

Mr Meaney—In terms of the investigation.

Mr KERR—Is he to second-guess the grant of the reference?

Mr Meaney—No.

Mr KERR—Is he going to say, 'Was that reference properly given'?

Mr Meaney—I do not believe so, but I believe—

Mr KERR—Is he going to say, 'How have you conducted your inquiries to date; could these powers have been exercised by methods other than normal policing'? That is presumably a decision that has to be made by others before the reference can be made. When you say it is to be exercised reasonably what do you mean?

Mr Meaney—We need to have regard to the nature of whatever the power might be. Say, for example, the coercive power required was to call in a person to answer questions at a hearing. I think it would be appropriate for an examiner to find out what other avenues have been explored, what part this person played in the investigation and to make a judgment about whether it was appropriate in the circumstances that that proceed.

Mr DUTTON—I want to move on a little bit from that point and follow some evidence given by the AFPA in Sydney. What checks or balances are in place under this legislation for a complaint process? For argument's sake, if a complaint were received by the ACC that an investigator, solicitor or examiner had leaked information in relation to a particular matter, what investigative process is there and what disciplinary action can be taken by the ACC against one or more of those members? If there is nothing within the legislation, is it something that we could consider to raise the level of integrity of those people that might be involved with the ACC?

Mr Meaney—The Ombudsman retains jurisdiction to deal with complaints in relation to the ACC in the same way that the Ombudsman has jurisdiction in relation to the NCA at the moment. A person could make a complaint to the Ombudsman to have that investigated. It would depend on the nature of what was involved. For example, for an investigator who was also a member of a police force there would be questions about whether or not the breach might be better punishable under their own integrity regime.

Mr DUTTON—I understand that, Mr Meaney, but let us assume for argument's sake it is a contracted civilian—for example, a person who is conducting telephone intercepts or a secretary who reads a particular briefing and leaks that information—and it amounts to professional or criminal misconduct. What power does the ACC have to discipline or charge that person?

Mr Meaney—They would have the same powers as any other organisation. Such an employee would be employed under the Public Service Act so the whole regime would come in. Clearly there would be criminal sanctions if in fact it were a breach of provisions of the act that proscribe providing that sort of information to persons other than in the specified class where it is permitted.

Mr DUTTON—Are you satisfied that under the Public Service Act there is enough scrutiny for employees of an organisation with such enormous powers? The point that I am trying to make is that each police force around Australia has a specific administration act that provides for severe penalties for breaches of conduct. Do you not think it would be appropriate for this act to include a similar provision?

Mr Meaney—Firstly, my understanding is that, in relation to the NCA at the moment, the staff who are not members of the police force are employed under the Public Service Act. There have not been, as far as we are aware, any issues there where that regime has proved to be inadequate to deal with any misconduct or misfeasance that has arisen.

CHAIR—An issue has been raised with us by a particular officer, by someone who has been under investigation, and that issue has been addressed by the Ombudsman. It is not as though there is not a precedent of people complaining about the activities of the NCA and its operations.

Mr Meaney—Secondly, I understand that police organisations and maybe other law enforcement agencies have particular high integrity regimes that relate to their conditions of service and employment and so forth. Clearly, one can see why that is the case, given the nature of policing duties. Because of the nature of the industrial relations scene at the moment, those core conditions also translate to support staff who are not necessarily operationally trained investigators—they might be working in the office and that sort of thing—and that is clearly

consistent with the policy in relation to having an agency agreement whereby everybody who works for one agency is treated similarly.

So the justification starts with the fact that you have an armed and disciplined force. It extends to support people. To then suggest that support people in other organisations ought to be brought within the rubric when really it was an agency agreement is starting to move a little further along the continuum than we see necessary.

CHAIR—It still does not answer the question why there could not be a complaints mechanism.

Mr DUTTON—Whilst people come under the auspice of the ACC, whether they are seconded for a particular investigation or whether they are there as a permanent member of staff, why is it not possible during that period to raise that level of integrity and address it specifically within the act so that we maintain a professionalism that is beyond reproach? I question why that is unreasonable.

Mr Ford—On one aspect of what was said, some legislation has its own sanctions which apply generally. You instanced telecommunications interception. Any leak of telecommunications interception product from a warrant will attract penalties under the Telecommunications (Interception) Act, so action could be taken there by way of prosecution.

Mr Meaney—It certainly would be possible under the agency agreement, for example, to have those additional safeguards.

Mr DUTTON—I just do not understand the difficulty when every other law enforcement agency in the country has a specific act or regulation within its governing act that addresses the concerns that we are trying to address here tonight.

Mr Meaney—Very briefly, without dwelling on it too long, the majority of employees who would form the ACC under this arrangement are in fact Public Service Act employees. There are some from the ABCI who are currently employed under the AFP Act. For convenience, the vast majority are already under the Public Service Act. It would be possible to translate conditions from one organisation to the other, but it would come at a cost because the trade-offs usually are that there are different terms and conditions and different levels of remuneration that go with a higher integrity regime. So there are trade-offs both ways.

Mr SERCOMBE—Going back to the issue of the independent statutory officers, the examiners, could you speculate with us on what sort of people you would expect and what sort of background would the people who would occupy those positions come from?

The committee heard evidence or fairly strongly expressed views last week that the prospect of part-time examiners particularly is quite a concern because, amongst other things, it could lead to a phenomenon that I am told occurs from time to time with police forces in relation to justices and the like—in other words, you shop for the person who is likely to produce the warrant in the easiest possible way. The part-time nature of examiners is such that over a period of time the culture of shopping, if you will, for the examiner who will give the result that you are looking for may well arise. Can you comment, firstly, on what you would expect to be the typical background of an examiner? Secondly, if we were to persist with this part-time notion,

how in a practical sense would you build into their operations a standard that prevented the emergence of a pretty undesirable culture?

Mr Meaney—Looking at the full-time examiners and the sorts of people you would envisage there, we would anticipate that they would be the same sorts of people whom we have attracted as members of the NCA.

Mr SERCOMBE—You are not going to pay them as much, though.

Mr Meaney—As members of the NCA?

Mr SERCOMBE—Yes.

Mr Meaney—I do not know why you would say that.

Mr SERCOMBE—Are you anticipating that these examiners would be paid quite substantial salaries?

Mr Meaney—The matter has not been decided by government, but our submission would be that they ought to be remunerated at the same sort of level as members of the NCA. So if there is a suggestion that somehow or other there was a diminution of the function—

Mr SERCOMBE—That has certainly been suggested.

Mr Meaney—That is incorrect. That is not the wish of the government. The second proposition, regarding the concerns about part-time examiners, may well have had its genesis in the fact that the proposal in relation to hearing officers under the NCA was that they would be remunerated on a sitting fee or daily rate basis. I think the argument is run along the lines that if the remuneration of your part-timers depends on getting more work, you could have the forum shopping argument that you alluded to a few minutes ago. After due consideration, the government is not disposed to have part-timers of that kind—that is, paid on an hourly, daily or use rate. The proposal would be to have full-timers akin to the full-time members of the NCA at the moment and permanent part-timers who would be remunerated with a set amount per annum, so that their income is not affected, and with a designated number of hours per week expected for that remuneration. It would not be a fluctuating income depending on whether or not you were used. Regarding the perceptions that you would shop around, because you would not use X if you had a choice between X and Y, those fears would not eventuate under this model.

CHAIR—I am wondering whether you have thought of another way. Is there the possibility of an independent group deciding in what activities these coercive powers should be used or are you locked in to only the board being able to decide that?

Mr Meaney—At the risk of being repetitious, the board just decides when they are available. It is the government's submission that the examiners would decide the circumstances of when the powers ought to be executed.

CHAIR—The concern of people who have come before us—and you have been there, so you have heard them—is about the board, which is made up of state police commissioners, having this ability to make preferences and determine where coercive powers are to be used. I am asking if you have considered another model as to how this could be exercised.

Mr Meaney—The two models seem to be either the existing model, whereby you give it to some sort of independent body—call it the National Crime Authority—being a three-member authority with a chair and two members in the narrowest sense, or take the view that it is appropriate that these matters be authorised in a collegiate way by the law enforcement people. The opinion of the governments of Australia, following the summit of ministers on 9 August, is that the police are better placed to say where, strategically, these powers ought to be used.

CHAIR—Can you point to any overseas country where similar arrangements exist whereby police commissioners determine where coercive powers of this power are to be exercised?

Mr Meaney—I am not aware of any, but we will take that question on notice.

CHAIR—Is it possible for the committee to see a copy of the Palmer-Blunn report, which commented on the operations of the NCA? I understand that was the trigger point for why we should move on from the model.

Mr Meaney—It was. I will take that question on notice but there has been an issue in relation to that report because cabinet, which commissioned that report, did not make it available to the states and territories. Because it is a cabinet-in-confidence document we will need to go back to cabinet to raise that matter. However there is another document which I think would be readily available. The Palmer-Blunn report was provided to cabinet. It informed cabinet's consideration and cabinet then put forward a paper to the states and territories. Palmer-Blunn had certain options which the government rejected. The government said, 'This is our position.' This position is derived from the Palmer-Blunn report. I can certainly make this paper—which, if you like, is the derivative product—available to the committee. I will also take on notice your request but I am constrained without checking with other authorities.

CHAIR—I am mindful of the time.

Mr KERR—I want to tease out one point. Mr Meaney, you are making this clear distinction that the circumstances in which these powers are to be exercised are in the hands of the independent examiners. Assuming that we accept the legitimacy of the broader framework, why should we not be asking you to identify the criteria under which those determinations will be exercised and the issues that the examiners must satisfy themselves of before exercising those powers so that we can look at them in the same way as when the police or any other agency seeks of an independent body a search warrant, a listing device or any other substantial intrusion into the ordinary rights of the citizen?

In each of those instances we have defined the responsibility of the requesting agency to set out the materials upon which they are seeking the exercise of a particular power, the basis upon which they hold certain beliefs and the tests that those who are going to exercise the power to authorise an intrusion of some kind or another must be satisfied of. Why have we not been provided with anything in relation to this other than a general assertion that this would be the discretionary decision of an examiner in a framework where no statutory criteria are provided

and where the examiner is likely to know very little of the nature of the investigation before them?

Mr Meaney—I can take that question on notice. There are no fewer criteria in this legislation in relation to examiners than there are in relation to members of the National Crime Authority.

Mr KERR—But it is not the police who go to a National Crime Authority person saying, 'You have been allocated to this investigation. We want X.' At the moment it is the National Crime Authority saying, 'We have an investigation. We have determined to exercise these powers for these reasons.' It is a very different framework; you have made the point as such.

Mr Meaney—We will take that question on notice.

CHAIR—Colleagues, the other question is whether we should call this particular grouping—the Attorney-General's reporting group—after we have talked to the other people who are waiting, as we are now running out of time. If necessary, we may call them back during the week if we consider it necessary. I am sure they would prefer the latter option. So we may want to call you back and have further discussions because it is obviously of interest to us to flesh it out. You know the parameters of the areas in which we have concerns, so perhaps you could also exercise your minds in the process to see that our concerns—and, more importantly, the concerns of the people who appeared before us—can be allayed.

Mr Meaney—Absolutely.

CHAIR—Thank you for coming and for your input. We will probably see you again.

[7.14 p.m.]

BROOME, Mr John (Private capacity)

LAVARCH, The Hon. Michael, Secretary-General, Law Council of Australia

O'GORMAN, Mr Terry, AM, President, Australian Council for Civil Liberties

CHAIR—Welcome. The committee prefers all evidence to be given in public, but should you at any time wish to give all or part of your evidence in camera, please advise the committee and we will consider your request. I invite you to make an opening statement, and then we will proceed to questions.

Mr Lavarch—Mr Chair, I will kick-off as I have just presented to the committee secretary a written submission prepared by the Law Council. I understand that last week the committee heard from Michael Rozenes QC, amongst others. This submission of the Law Council was drafted in the first instance by Dr Chris Corns from the Faculty of Law at La Trobe University and was settled by the Law Council's National Criminal Law Liaison Committee, of which Mr Rozenes, Brett Walker SC, Tim Game SC, Tony Glynn SC and I were the members. I will not go into the submission in great length due to the compressed nature of the committee's reporting time frame. It has obviously also put some pressure on those appearing before the committee in terms of preparation of materials. Hence the submission concentrates on the issue of the coercive powers, which I think has been a constant theme before the committee. It attempts to set out how the structure and role of the NCA currently operate and goes through that proposed for the Australian Crime Commission. It provides a brief but interesting review of how the various state crime commissions operate—in particular, how they deal with the issue of coercive powers. It then provides an evaluation on behalf of the Law Council of the proposed operation of the commission, particularly in relation to the issue of coercive powers.

Suffice to say that the Law Council endorses the submissions made by both the Australian Bar Association and the Victorian Bar Association in their evidence to you last week. We are not satisfied that the particular model proposed for the empowerment of the board of the Crime Commission, the special voting majority required for a decision as to the activation of the coercive powers and the role of the CEO and of the examiners taken as a whole provide sufficient safeguards to citizens in terms of the way in which the powers will be used. Like all of these matters, it is about trying to get an effective balance between properly empowering police and law enforcement agencies to do their job and to tackle those crimes which impact on the Australian community and at the same time ensuring that the rights of citizens are properly regarded. We do not believe that the particular model being put forward in relation to the central role of the board fulfils that aim. The proposition that we advance to the committee is that there should be an ongoing role for the intergovernmental committee beyond that which the bill proposes. We think it should be more than simply a monitoring role. We believe that there is a continued role for the committee in terms of making decisions as to the activation of the coercive powers. I will leave my remarks at that, and no doubt matters will be drawn out during the panel discussion.

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

That the submission be accepted.

CHAIR—Mr Broome, did you want to make an opening statement?

Mr Broome—Thank you, Mr Chair. Yes, I want to make some brief comments. My initial reaction to the proposal is to ask the question: why? If the National Crime Authority needed fundamental change, why was the act amended significantly as late as August last year and what has changed since then to bring about what we now see before us? In that context, I would simply ask the question: what is the vision that is being put forward for Australian law enforcement for the 21st century that the ACC forms part of? I have not seen anything said or written that gives me a sense that there is a clear view held by the government or indeed by the state governments that sees a particular blueprint for Australian law enforcement and a place and a particular role for the proposed organisation. If the Blunn-Palmer report contained such a blueprint, we all ought to see it; if it contained a rationale, we ought to see it. If it does not, perhaps that explains why it is not a public document.

It seems to me that these proposals raise questions of significant principle and questions of practicality. I think, and I have described it publicly elsewhere, that what may have set out to be designed as a racehorse has become a five-legged camel. I think the organisation in this present legislative format is unmanageable and unaccountable, and it will be unsuccessful for that very reason. I am happy to elaborate on why I think its structural arrangements are quite inadequate, but I think you have already touched on a number of those issues in the evidence I heard earlier in terms of the role of the CEO, the role of the board, the role of the examiners, the interrelationship between each of those entities and so on.

If this is about, as it is said, an organisation that will be intelligence driven—and we have heard a lot about intelligence-driven policing or intelligence-led policing in the context of the development of this legislation—I pose the somewhat rhetorical question: have we had unintelligent-led policing to date? That jargon does not seem to me to have much sense at all. Certainly, from my time at the NCA, we conducted operational activity on the basis of available intelligence and we sought to use that intelligence in the best possible way. I see nothing fundamentally different from what people have been doing subsequently, other than the adhering of a label that seems to have become a mantra in its own right.

It seems to be following on from that sort of analysis that all of a sudden the NCA has a greater focus on intelligence and that, indeed, we are now going to have the coercive powers used purely for the gathering of intelligence. My own view has always been that the NCA, despite what its critics have said, is in the business of getting admissible evidence. The best test of how well it did its job and how well it adhered to its statutory responsibilities was to see whether that evidence stood up in court in terms of prosecutions. If we are to have the coercive powers used simply to gather intelligence that is not even intended to see the light of day, almost by definition, I query whether that is an appropriate use of these kinds of powers in our kind of society. I have said elsewhere, and I repeat it here: to the best of my knowledge there is no law enforcement agency in the Western world that would have the operational structure and the separation from government combined with the kinds of powers that are being conferred here. I think it is wrong in principle and I do not see why it should be agreed to by the committee.

I would just a make a final comment in these introductory comments in relation to the question of urgency. I understand the committee has been told by the government that it wants this legislation through the parliament by the end of this year. I would ask the question: do we want third-rate legislation by December or a good act by some time next year? There is a lot that could and should be done to the NCA in terms of its operational structure, but that needs to be carefully considered and properly discussed. What we have seen to date I do not believe is a carefully considered or properly discussed model. There is a long history of issues involving the NCA, particularly ones arising from this committee, not being dealt with with a great deal of alacrity. Whether it was in fact the appointment of members or whether it was responding to this committee's own reports, a period of three and four years lapsed before they were dealt with. It seems to me that there is no good reason to agree to this legislation without a proper and thorough review of whether it will actually achieve the fundamental purpose: which is a better Australian law enforcement capacity. That is the critical question: are we getting a better organisation or a worse organisation in what is being proposed? I am not satisfied that we are getting one that is even as good, let alone one that is better.

CHAIR—Thank you very much, Mr Broome, we appreciate the input.

Mr O'Gorman—Mr Chair and members of the committee, firstly, I would like to compliment you for holding this hearing. I think it is critical, because I have attempted to get a handle on where this legislation is going and what its implications are, and it is very hard to get considered material to latch onto in one's development of one's thinking.

I have read the submissions that have been released, and I thank you for making them available. I find myself in the unusual position of agreeing with most of what the Australian Federal Police Association say about the absolute necessity of a strong, external monitoring authority. The AFPA went into some detail, perhaps not as much as I would like, but I am aware of the time constraints. I simply observe that the Australian Law Reform Commission recommended an equivalent to the CJC-CMC in Queensland to supervise principally the NCA. For reasons that I can never work out, that has never been implemented. If the NCA had problems—and as a civil libertarian I think it did—it looks pretty attractive compared with this current ACC model.

I would see as an absolute first point the establishment of a real, effective, external monitoring body. I think you should start with the model that the ALRC posited and then build on it, because the ALRC model was in fact based on the NCA. I never thought I would come here and say that I prefer the NCA to what is now being proposed, but I suppose that is the price of growing older. The fact is that very forceful external monitoring is an absolute must. Indeed I agree with what the AFPA say: the ALRC model of external monitoring was intended to cover all the myriad federal law enforcement agencies. So if—and I do not think we should cop it—we are going to be met with 'there shouldn't be this sort of external monitoring agency because it's too expensive', my position is: sorry, if this model politically is going to go ahead, it must go ahead only with very forceful, very well resourced and demonstrably independent external oversight.

I will move to the second point: the troubled history of this committee. That is not to say that you as individuals are troubled but that, institutionally, you are much more aware than I am of the numerous reports that have centred on the recurring theme of to what extent the supervising committee can supervise even the comparatively milder NCA—that is, compared with the beast

that we are currently considering. I have read most of the transcript of the Sydney and Melbourne hearings and I am aware that there is a split in this committee. I think it was Senator McGauran who made the point that the leak of the Elliott material indicated that there was a real problem with a parliamentary committee having access to sensitive operational material. That debate will go on and on.

Can I pose at least something of a solution. Queenslanders are noted—and I suppose I will have to cop it, being a Queenslander—for being parochial. But in some respects Queensland brought in an Australia first—and it was brought in by the conservatives. In 1996, the conservative Borbidge government brought in the office of the parliamentary commissioner. Forget about the diabolical circumstances that brought about that birth; the fact is that that body has now operated for six years and it is regarded well. It has to be a lawyer. I have seen the debate about lawyers and police; it will go on as long as there are lawyers and police. That office has been recognised as being fairly effective. Why? It is because the supervising Queensland committee of the CJC suffered, on a smaller scale, the problem that this committee has suffered institutionally and historically: busy people do not necessarily even collectively possess the expertise to ask the hard questions. I see no logical reason why the parliamentary commissioner model, if it works with the CJC, now the CMC, cannot be transposed to the federal arena. If you as a committee, at least by my measurement, are going to have to be supervising a body the like of which there is no known equivalent to me in the Western world, you are going to need not only the active assistance of a very effective external watchdog as proposed by the ALRC but also the very effective assistance of a parliamentary commissioner.

The Queensland parliamentary commissioner is a part-time body. Whether the parliamentary commissioner here is to be part time or full time I think is a matter of resources. But compared to the significant resources—and, dare I say, the significant damage that the ACC potentially can do—the issue of part time versus full time will be something of a lesser discussion.

As to the examiner, I just cannot get my head around that concept. But if it is to exist, can I at least put up for consideration this proposal: if there is to be an examiner and if that examiner is to be something of a real judicial figure, then let us draw on, say, an existing body such as the AAT and have the AAT provide their members to perform the role of examiners. The beauty of that is that it partly deals with some of the scourges that exist in the current pickle where the CEO can, at least, on one view, get together his or her small coterie of darling examiners—and they will supposedly be the independent judicial figures. If we are serious about having some independence to the examiners, there is an existing structure called the AAT, most of whose members have judicial experience. It just does not seem to me to be a big jump to say, 'Why not use them rather than the current hybrid or joke-ish figure that exists in the current draft bill?'

In relation to state police, I note that a number of you, particularly Mr Kerr, have asked questions of previous attendees. I have grave concerns about this turning into a telephone intercept equivalent. Do you remember the history of telephone intercepts? It came in in 1979. There were major concerns about privacy and civil liberties. So what was said? It was only for top drawer offences and supervised by the top-drawer judiciary, the Federal Court. Now what do we have? Over the period—I think the term was used by a couple of committee members in Sydney and Melbourne—we have severe function creep. We have just about the whole panoply of indictable offences now supervised by the lowest rung of the judiciary, the AAT. I have grave concerns about the same function creep occurring in relation to the ACC. I think the potential for it is there.

I will conclude by talking about what I see as a criminal offence practitioner. Totally illusory protections currently exist in terms of the Supreme Court or Federal Court review. When I first came to practice in the area of NCA hearings, I thought that the Supreme Court or Federal Court review was you-beaut. It has turned out to be totally illusory. Leaving aside Elliott and one bikie group that appeared to have money at one stage to bring a challenge, other than the well-heeled, no-one has the money to bring challenges to court. Those who do have some money are faced with the reality that they might lose. If you look at most of the challenges, they are like convictions in Japan—99 per cent successful in Japan and 99 per cent unsuccessful here. Supreme Court or Federal Court review is illusory. The number of cases won by applicants is about one per cent. A practical thing that prohibits people from bringing these applications is that it is in the civil jurisdiction—you wear the other side's costs.

My final point is that the Supreme Court and the Federal Court have a consistent strain or thread through their judgments, and in effect it is that the power given to the NCA is so broad that the ability of the Federal Court or the Supreme Court to conduct an actual, precise and focused review is very limited.

CHAIR—Thanks very much; that was a comprehensive review and particularly interesting.

Mr DUTTON—Mr Broome, pardon my ignorance, but for what period of time were you at the NCA?

Mr Broome—From late 1995 until 1999. I was chairman from 1996 until 1999.

Mr DUTTON—How many officers or members of the NCA were at that stage conducting hearings?

Mr Broome—For most of that period, two, because there was a vacancy in the office of a member for two years. But for some of that period, three.

Mr DUTTON—What sorts of numbers of hearings would have been conducted, say, on a per annum basis?

Mr Broome—In the order of a couple of hundred.

Mr DUTTON—I will just go back to a couple of your opening remarks as to why we find ourselves in this position. One of our concerns as a committee has been the productivity of the NCA. It is always a difficult thing to measure because, in major and organised crime—as we have seen in evidence—it is not just a case of heads on sticks that should indicate the success or otherwise of a body. Are you able to tell us—you have obviously been a keen observer—what sorts of numbers of hearings have been conducted, say, over the last 12 months or two years at the National Crime Authority?

Mr Broome—I have no idea, because I have no knowledge—nor should I—of the activities which the NCA has been carrying out since I ceased to be a member. My only source of information is what I see in the newspaper or read in parliamentary committee considerations and so on. While I think this is an important enough issue to come and give evidence to the committee on, I do have another life after the NCA and I have not necessarily spent all of my time trying to keep on top of the last bit of detail in relation to the way they have operated.

Mr DUTTON—I am glad to hear that.

Mr Broome—Not as glad as I am.

Mr DUTTON—If it was the case that hearings had in fact dropped off quite dramatically from what they were since the inception of the NCA, what would you put that down to? How do we, as we go forward in this process to the ACC, keep a credible watchdog approach over the productivity of the new body?

Mr Broome—That is a very fair question. I am certainly aware, from general comments that I have heard, that there may well have been fewer hearings conducted under the now previous regime of my successor than was the case when I was there and perhaps when my predecessor was there. That, in part, is attributable to a new direction which was put in place by my successor. It is not my place here to be criticising how the NCA was run after I left, but I had some difficulty, for my own part, in understanding quite what the nature of that new direction was. It seemed to be saying that there should be a small number of nationally significant investigations conducted. If by implication that was to suggest that in the previous arrangements there was a large number of nationally insignificant investigations, I would refute that.

I would also refute that the conduct of investigations in some of the smaller states—at least small in population terms; larger in area—was not in fact part of a very considered approach to gathering information relating to criminal activity across the whole of the country. It was, quite frankly, sometimes more productive to be examining witnesses in Perth in relation to activities in which they may have links to somebody in Sydney than trying to dig around in the much larger haystack of Sydney. We did have a national approach, and I did not quite understand what the change in direction was about. As to the operational reasons for that and as to the policy considerations that were involved, I simply do not know what they were. The committee is no doubt much more aware of those than I am.

Mr DUTTON—It might just go some way to answering the question of why.

Mr Broome—This committee has heard me before express concerns about some aspects of the present structure of the NCA Act. I think that there are difficulties with the act. Although I have disagreed with Mr O'Gorman on more than one occasion, on this occasion I agree with him. When you look at what is proposed, it does make the NCA look like a much more attractive organisation. It is certainly a much better organised organisation. I do not see how this proposed body can actually operate at all.

CHAIR—Mr Broome, sorry to cut across Mr Dutton's questioning, but for the benefit of relative newcomers to the committee, like me, in brief, what were your concerns about the operation of the NCA?

Mr Broome—What we have proposed is a board consisting of—

CHAIR—No, I am talking about the previous, or the current, model of the NCA.

Mr Broome—My concern with the previous model was that there was an accountability issue in relation to members of task forces, which you have alluded to in fact earlier tonight, but at least the seconded staff were within my responsibility. I had to answer for what they did to

you, the public and parliamentary committees generally for what went right or what went wrong. The worry was that there were members of task forces who were never formally seconded to the authority and so I had some people in the situation where all task force members would seem to be now. At least those people under the regime that was in place would operate in relation to NCA operations under tactical instructions which were developed by and exercised by NCA staff. So I had some degree of comfort that, if I were to be held accountable for what happened with those operations if they went pear-shaped, I would at least have people in my organisation that I had some confidence in who were making operational decisions. The model described to you earlier this evening is one where the buck seems to stop nowhere—not with the CEO, not with the board, not with the examiners—except perhaps with these strange creatures who are going to be heads of investigation, whoever they may be and to whomever they will answer. So I think we had a problem in the past, but it pales into insignificance.

The other problem that we had was that there was a need to get corporate responsibility by the members at the same time as trying to run an organisation in a public sector environment. There had been various attempts made to overcome the inevitable differences that have appeared to have existed over history between various chairmen of the authority and some of the members. There is the amendment in there which makes it clear that the overall policy of the authority is to be determined by all of the members, as distinct from the chairperson or the chairman. When I was there, the position was, in practice, that general policy would be set by the members, and that meant that the two members could outvote the chair. Given that for most of my time there were only two of us, it never really became an issue, and in fact we worked very well together and I believe we never had to worry about formally resolving issues of that kind. But I think there were some structural issues in relation to the responsibility of members and the relationship between members and investigations. We very much took the view that members were the ultimate leaders of investigations, that they were the statutory office holders who were appointed to exercise those coercive powers, that they were responsible for how they were exercised and that they felt accountable for them, even if others thought they were not.

We went to some pains to make sure that those powers were only exercised where we were personally satisfied that they should be. I saw some issues there in terms of our relationship with operational activities. There was inevitably a tension where operational police would not want you being involved in tactical decisions, to draw that distinction between tactical and strategic. I took the view that I had to know what was going on and be satisfied about the way things were being run because it was my butt on the line at the end of the day: you were not going to sit here and call in the regional operational director; you were going to call me in.

CHAIR—How do you think the proposed model will work?

Mr Broome—I do not know who you are going to call in now. I really do not know.

Mr SERCOMBE—Earlier this evening there was a reference to, in the history of the NCA, some record of difficulty with the police forces, in particular state police forces and also the AFP. One of the inferences of that comment that came from the Commonwealth officials was that that might be part of the explanation as to what is driving this current proposal. I was wondering if, for the benefit of the committee, you might quickly run us through the history of the NCA's relationships with police forces, particularly in your own time.

Mr Broome—In relation to the police services, anybody who has observed the NCA over a long period knows that there have been very different relationships at different points of time between the authority—

Mr SERCOMBE—Perhaps focus more towards more recently.

Mr Broome—and individual police services or the police as a whole. The underlying issue is that there are many people in Australia's police services who believe that the NCA should never have been established. They have, with more or less strength of voice at different times, wanted to return to what they saw as being the appropriate relationship, which was that there should be no entity other than police services with the primary responsibility for investigating criminal activity. That is a view which a lot of Australian police officers still hold. That is not what the parliament believes should happen and therefore we had an NCA and we had to make it work.

In my time, we had very good relations with most of the state police services. I have to say that one of the things which I think changed attitudes towards the NCA was the Adelaide bombing. The relationship we had with the South Australian police service after the bombing was one in which we were able to afford—because of budget cuts at the time I was appointed we had five people in Adelaide—25 South Australian police officers on secondment to our building, to make the organisation a viable entity, because they were not going to see it destroyed as a consequence of the bombing and as a result of the budget cuts that occurred in 1996. We had a good relationship in Western Australia; it varied. I think we had good relationships in most states. We had the least best relationship, if I can use that expression, in New South Wales, because the New South Wales police attitude was quite straightforward: they were big enough and ugly enough not to need us or the AFP, and in many respects they were right. They deal with most of the criminal activity in New South Wales. If you look at maybe 400 people tops from the AFP being located in Eastern Region and if you look at the NCA, with maybe 170 people, compared with a police service of 14,000 or 15,000, that is not a bad call. New South Wales would cooperate with the NCA when it was seen to be in the interests of the New South Wales police service. That is not being critical of Commissioner Ryan or his staff; it is a simple fact. The relationship would vary, just as the relationship between the AFP and Customs—as anybody who has worked in this environment for the last 20 years knows—has varied considerably. It is a constant day-to-day attempt to try to keep a functional working relationship. But I do not see that what is being proposed here is going to address that particular issue, because there will still be the inevitable tensions that exist now between the various police services as to who gets their share of the NCA or the ACC and the activities which it will be carrying out. They will be competing with each other to get their share of special hearings and so on.

CHAIR—Could we have comments from Mr O'Gorman and Mr Lavarch in terms of the board as it is currently defined in the act, with all the police commissioners being involved and the operational groups from Canberra?

Senator HUTCHINS—Before we go to that, Chair, could I ask Mr Broome to comment on the relationship with ASIO?

Mr Broome—We had what I believe was an appropriate working relationship. There were occasions, which I am obviously not in a position to go into, when we exchanged information of intelligence interest to ASIO that came to our attention and when ASIO would provide us with

information of law enforcement interest. That relationship worked very well. It seemed to me to be the appropriate relationship between an intelligence agency with a primary function of national security and our function of law enforcement, although I think issues arise in the current environment about this model and terrorism which we may want to explore later on. I think there are some issues as to how well we might be placed to deal with some of those issues and whether this model helps us.

Mr SERCOMBE—It would be helpful if you could make any comments on that matter now.

Mr Broome—I want to make some general comments. There are some things I would rather say, quite frankly, in a closed hearing.

CHAIR—We can go to a closed hearing if you wish.

Senator HUTCHINS—Perhaps if we allow 10 minutes at the end.

Mr Broome—As a general proposition, it seems to me that we need to think about dealing with terrorism for what it is: a serious criminal activity. We need to investigate it for the purposes of getting admissible evidence to jail terrorists that we locate. Most of the debate I have observed over the last 12 months has seen the response to terrorism as being essentially about intelligence collection, not about the gathering of admissible evidence for use in a prosecution. There are a whole range of issues as to how we might do that better which, as I said, are probably better discussed with the committee in confidence. I think you can see the drift of my general concern. We have made new offences but I am not sure that we have enhanced our capacity to investigate much at all.

CHAIR—Can we come back to the issue. There are a number of concerns, as you have raised yourself, and I would like to direct attention to some key factors like the make-up of the board. What are the views of the three of you in relation to having the police commissioners sit on it? Is there an alternative model?

Mr Lavarch—Firstly, the Law Council do not oppose the creation of the board. When Justice Phillips was chair of the NCA he created a consultative committee with a make-up that was not dissimilar to this particular proposal—that is, state police commissioners and Federal Police. A federal agency—AUSTRAC, I think—was involved in it at that stage; I do not think ASIO was. The committee's role in that particular model—which operated, I understand, for some years—was to provide a level of input from the chair and members to assist the intergovernmental committee in making decisions about references. The idea that you would involve the principal policing agencies of the country in the intimate operations of the NCA simply makes good sense.

The Law Council's problem is not with the board; it is that the board takes over from the intergovernmental committee the power to activate matters where the coercive powers come into play. It is a matter of getting the benefit of that input and the best level of cooperation, coordination and prioritisation—all of the rhetoric which goes with these proposals—but at the same time not putting coercive powers in the hands of police, which is not a feature of any of our systems. People say they do not know the models around the world but, if you look at the state crime commissions in New South Wales and Queensland and the anti-corruption commission in Western Australia, you will see that none of those models give policing agencies

the determination of where coercive powers come into play. So, if this were to occur with this particular model, it would take it out of step not only with how the NCA has operated but also with the way in which equivalent bodies operate throughout the country. You should look at that long and hard before going down that path. That is certainly our view.

What is an alternative to that? It is not easy if your starting point is that what operates at the moment is broken and needs to be fixed. It is easy if you say, as I suppose Mr Broome and others might, 'It isn't fundamentally broken. There are some things that need to be improved, but it isn't broken—you don't need to replace it.' If your starting point is the assumption that it is broken and has to be fixed, but you still want to meet all these requirements, we have no easy answer. The best that we have been able to come up with will suffer criticisms that it is clumsy and has the same problems—if these so-called problems exist now. Our answer on this particular threshold issue, which we think is a matter of both principle and precedent—principle in regard to the way in which powers of this sort should be determined and where the lines of accountability are—is that they are royal commission powers and powers of the executive and that the executive, not the police forces, should be directly responsible for them. We believe that the intergovernmental committee—which remains in the model, but playing a different role—should, at least in this aspect, retain its responsibility for this issue.

A ratification process might come into play. The advisory board—if you were to call it that rather than simply 'the board'—would make a determination or a recommendation as to the reference which could activate the use of the powers. We will talk about the other end—about examiners and the CEO—a little bit later, but it would make that recommendation. The IGC, however, would be responsible for ratifying that decision. That is where the power and responsibility would rest. There would be a direct executive responsibility back to the Commonwealth and the states for the decisions of that body. That may not be the smoothest alternative but, given our limited opportunity to think it through, it is the only one we are able to recommend to you.

Mr O'Gorman—The only comment I would make is that the structure of having a board full of police commissioners frightens me, simply because there is a huge philosophical gap between the way police approach policing and the way even lawyers such as Mr Broome approach policing. The point I am making is that I have a concern that there has to be some body, whether in fact it is the IGC or otherwise, above a board constituted by police commissioners. At least, even though I could never find any common ground with any chair of the NCA, even the honorary lawyer Mr Broome brought a degree of distance to decisions about coercive hearings that I do not think a policeman who has had a career as a police officer is philosophically capable of bringing.

If I could briefly make a point about the question of terrorism, the whole issue of terrorism to the extent that it fits into the ACC thing is that people on the right and the left in the US have said that the failure in respect of the tragic events of September 11 was not a failure of legislative power; it was a failure of the existing agencies—the CIA and others—to join up the dots on the whiteboard. People on the right and the left have said that, including previous directors of the CIA.

CHAIR—Any further questions on the board?

Mr Broome—I want to make one quick observation. I agree with all that Mr Lavarch and Mr O'Gorman have said about the board. I want to say this as a matter of fact. Some of the evidence that I heard earlier this evening suggested that those who had been designing these proposals may not have been as aware as they might have been of the way things actually worked in the past. Every reference that went to ministers in the time that I was at the NCA was the subject of prior consultation with the police commissioners. They knew what was being proposed. Quite frankly, without their agreement the state ministers would have almost certainly said no to it anyway. So there was a consultation process but it was, in my view, fundamentally important that at the end of the day the decision about whether the authority was given a reference or not was made by ministers. They were accountable. Nowhere else in this country can you establish a royal commission without the government agreeing to it. Nowhere else can you do it without there being terms of reference that are settled by government ministers through an executive council process. Why should we start now with a model in which, as you pointed out earlier, two people, who might be the police commissioner of the AFP and the Secretary of the Attorney General's Department the way the bill stands at the present time, decide to use the special powers and in fact grant a reference, to use the old language, to this new entity. It is fundamentally flawed.

Mr KERR—I have one question on the board for anyone about the appropriateness of the board appointing the heads of the task forces.

Mr Broome—I think it is very clear. You have replaced a three-member authority with a 14-member camel and you have left off the one agency that if you are serious about this being an intelligence driven activity you would have there in the centre. That is AUSTRAC. How could you conceivably leave the head of the agency that is in a position to provide financial intelligence to Australian law enforcement off the managing board of this organisation? Would that just make the Commonwealth numbers too high? If that is the case, take somebody else off but you have to have AUSTRAC there if you are going to make strategic decisions about priorities and directions.

CHAIR—Perhaps we could move on to the CEO. Do you have any comments on the way that it is proposed, where there is no direct operational responsibility?

Mr Lavarch—I think that John will certainly be able to comment a lot more than us. From a Law Council point of view, we do not see issues of principle at stake here. It is probably more to do with the practicalities of how the issue works and whether, in an operational sense, you support the Bradley view that it is much better for the CEO to be able to direct that the examiners have the capacity or they must bring someone in or secure a particular line of documents. The concern is that that power is not there.

Alternatively, from another point of view, the practical issue is that the relationship of the examiners as opposed to the position of the members is that they will not have that whole of organisation view or understanding, and you will lose something in terms of what you are getting with the members now. However, I was gratified to hear a little earlier, in the tail end of the evidence from the Attorney-General's Department, that the intention is for the examiners to be protected in that their financial wellbeing will not be dependent on how they are performing their tasks as such. That certainly was a concern that we had and it was reassuring to hear that evidence, although I suppose that, because of the way the legislation is framed, that does not have to be the outcome. It is obviously the administrative intent for it to be the outcome, but it

does not have to be the go. Maybe John or Terry might have a better sense of the practicalities of it. Certainly, on the matter of principle, I would say that the council does not have a particular concern about those issues.

Mr Broome—I just think it is unworkable. The CEO in fact under the bill is not even given the statutory role of being responsible for the management of the organisation. That is because, as I think Mr Kerr pointed out in questions, there is no organisation. There is no entity of the ACC. There is this thing which has a name and a CEO and examiners who are, I think, probably members of staff of the organisation, although that is debatable. It then has these police officers who will be part of a task force which will be controlled by the head of investigation, who may or may not be a member of staff of the organisation, I think.

The examiners can in fact issue summonses to witnesses. I accept that, under the model that is envisaged, they will have to satisfy themselves that the summons relates to a matter which is the subject of special investigation. I accept also that the definitions which have been used for special investigations have been taken from the current definitions in relation to references. The big difference is that you had to justify to a committee of ministers why you wanted a reference in relation to a particular area of activity and that discipline has gone. So you have the CEO, who is running the organisation, and you have examiners who are not technically answerable to the CEO but who are committing resources by holding hearings. They are doing that because they are being told to hold a hearing by the head of the investigation, whose relationship to the CEO is unspecified and unknown. It has lost me.

CHAIR—Mr O'Gorman, do you have any comments on that?

Mr O'Gorman—No, I am trying to get my head around other things apart from the CEO.

Mr KERR—I just wonder whether there is one issue of principle that goes back to Mr O'Gorman's point about a location of accountability.

Mr Lavarch—That is probably a fair point. It is not clear who the CEO is accountable to. He is obviously accountable back to the board in that it is sort of a corporate structure of a board of directors and a CEO.

Mr KERR—But the minister can dismiss him.

Mr Broome—That is the point, isn't it. It is the minister who hires and fires; it is not the board.

Mr KERR—It is curious because the board hires and fires the head of task forces and the minister hires and fires the head of the non-existing legal entity. When people appear before us or in any other forum in relation to issues of accountability—going back to the crude way that Mr Broome put it—the question is: whose butt is on the line?

CHAIR—As a former minister, how do you stand up and be accountable in the parliament for the operations of the NCA if you have so many different players reporting to other regimes?

Mr Lavarch—I do not think you can.

Mr O'Gorman—There is a crackdown ability at even the lower level. As a defence lawyer, if I thought that the police in the task force were withholding—the endemic problem of disclosure to the defence; if there is one issue apart from science that causes miscarriages of justice it is the failure to disclose—at least when the NCA operated and was headed up by lawyers or quasi-lawyers like Mr Broome you could go to the members and say, 'We want you to satisfy yourselves that in this case there is disclosure.' Here you have got a top-heavy organisation constituted by police, and police and lawyers philosophically cannot agree on commandment 1 of disclosure.

Mr Broome—There is one other simple example of where I think the dilemmas are going to arise. Examiners will be entitled as members are at present. I have got to say that I can see no difference between the office of member and the office of examiner other than that this approach has been adopted to remove the position of chairman. That is the only logical conclusion you can reach. This is about not having an authority with the chairman but having a CEO who answers to the minister. But there is a need to ensure—to give this legislation some chance of success—that those who exercise the coercive powers are seen to be independent statutory officers. So we get two things. The first one is that the minister hires and fires the CEO, but removal of an appointment of an examiner is at least done through the Executive Council, and that has certain constraints placed on it. The second issue that follows is a practical one, which I noticed this afternoon: examiners have to make decisions every time there is a hearing about whether or not evidence can be published and, if so, to go to whom and under what conditions. When you go to proposed section 25A, what in fact is allowed for there is that the CEO can vary that condition that was imposed on the distribution of the evidence concerned.

If somebody actually exercised those powers—this is just a straight take from the old act, and 'chairman' has been replaced with 'CEO'—it was sometimes a matter of considerable consideration and debate as to whether it was appropriate or possible to vary the condition which had been made about disclosure and what would be the consequences. After all, the statutory test goes to issues such as prejudicing the safety or reputation of a person or prejudicing the fair trial of a person who has been or may be charged with an offence. Those are issues which involve legal considerations, even for quasi-lawyers, Mr O'Gorman, and the bottom line is that under the act as it is proposed the CEO does not have to have any legal qualifications whatsoever. So that power is going to be exercised by somebody who—based on what I have seen in government press releases—is probably expected to be a senior law enforcement official. I think that is code for an ex-policeman. They may or may not have legal qualifications—but that is not a requirement—and yet that person will be making these kinds of decisions, which are not straightforward or easy decisions, and they never have been because sometimes you are actually dealing with evidence taken three, four or five years ago and you have to read the whole transcript and understand the context in which the evidence was given before you can exercise that discretion.

CHAIR—You are tending to refer to the responsibilities that you had more than to the outlines contained in the Attorney-General's legislation—

Mr Broome—No, I am referring to the specific statutory responsibilities which are being conferred by this bill on the CEO. I am saying that that is the same power I had and that it was not easy to exercise. I am questioning whether the independent statutory appointees who are examiners and make decisions should then have that decision altered by a person who does not

have to have the same qualifications that they have to have and indeed is not protected in the same way in terms of the independence of their office. That is the point I am making.

Mr SERCOMBE—Mr Lavarch, from the Law Council point of view, as a matter of practicality, what is your opinion as to the likelihood of attracting as examiners people with the sorts of legal backgrounds that the government departmental representatives are envisaging? What would be the practicality of actually attracting suitable people to these roles? Bear in mind that there has been some difficulty in attracting members of the NCA in its current form. Certainly, the length of time between appointments suggests that there are some difficulties. The sort of seniority that has potentially been talked about for these examiners suggests that they are people who would be earning quite significant sums at the bar, if they are any good. Given the sorts of organisational constraints that have been talked about—and perhaps organisational confusion that has been talked about—how difficult, as a matter of practicality, do you envisage it might be to attract suitably legally qualified people to this examiner role?

Mr Lavarch—The basic requirement of five years admission is a very low threshold, but five years is the magic time to become a High Court judge, even. It really depends not on what the legislation says in terms of basic requirement but on how the culture and the practice will build up. To an extent, that is hard to answer, because it is not known how the thing will be regarded. Over time, it might be regarded very prestigiously and well, and be able to attract people. Certainly, if there is confusion about the role or controversy in that way, that may prove to be some difficulty. If you are asking for a straight monetary comparison of whether you can pull someone out of the bar at a senior level to go in there, money is one criterion that people apply, but there is a range of other public service style motivations as well. If it were purely on money, you would never get anyone on an Australian superior court, because they all inevitably take a pay cut to get there. Terry might have a view on that as well, if he practises at the criminal bar office.

Mr O'Gorman—I think you run the risk of getting hacks and has-beens. I think it is a real risk. If, as Mr Broome interprets the legislation, the examiner can make a ruling and the CEO, as to dissemination, can overrule it, who is going to be attracted to it? I cannot envisage people with any serious ability being prepared to take it on. The advantage, at least, of having the member structure of the NCA is that—even notwithstanding the difficulties in filling some positions—I never could say that any of the members were hacks. This structure runs that real risk.

CHAIR—What about—and this question is particularly for Mr Broome and Mr O'Gorman—the expansion of the use of coercive powers that can be used for intelligence gathering per se? Mr Lavarch, feel free to make comment as well.

Mr O'Gorman—We have a system where, when the NCA was set up for something like telephone tapping, overriding of the protection of self-incrimination could not result in your words being used against you. Then the law enforcement lobby eventually knocked down that wall and knocked down the wall that prohibited derivative use. Now we are moving way beyond that. At least the NCA had coercive hearings in relation to actual investigations. If we are to move to intelligence, it expands the field so much that you have the right to silence gone, you have the protection against derivative use gone and you have police running the organisation—you have not just criminal investigation but intelligence. I just say this: where can the police go after that? What else can they possibly want? It is hard to know.

Mr KERR—I would also like to ask people to comment on the following; I do not know whether or not this is so. It appears to me that there are practical limits on the number of instances where coercive powers can be exercised presently. Those practical limits arise from the fact that the members are both administratively and strategically responsible, so they do not spend all their time as simply hearing officers.

Secondly, there is a limited budget that goes with these investigations. Nothing seems to me here to constrain the budget that will be available, subject to state or federal police forces deciding that they want to utilise this kind of resource so that they can use that as part of their routine work, provided they can get such a reference. In a sense you will have quite an incremental increase in the number of investigations.

Thirdly, if you have an unlimited number of examiners available, you can therefore satisfy every instance where a police force wishes to access these powers. In other words, what was in a sense limited simply by resources and the management structure of this process now will be much more available as a matter of practice. Whereas, previously, there had to be a choice within a menu of priorities, now you can pursue everything. That is an exaggeration perhaps but I am just testing this.

Mr Broome—I think that is the consequence of the legislation. You start with a provision which I would think was almost *Alice in Wonderland*. It says that an intelligence operation that the ACC is undertaking and that the board has determined to be a special operation is the definition for a special operation. So it is, because we say it is. But it gets better because at least a special operation is supposed to be in respect of the listed category of offences. But where the head of the ACC operation suspects that an incidental offence that is not a serious and organised crime may be directly or indirectly connected with or may be part of a course of activity involving the commission of a serious and organised crime, whether or not the head has identified the nature of that serious and organised crime, then the incidental offence is only for so long as the head so suspects taken for the purpose of this act to be a serious and organised crime—that is, it is the subject then of the special powers. So if the police officer suspects that something which is not even covered by the definition of serious criminality is something which ought to be so covered, it so becomes.

Mr KERR—Would you also have a look at section 55A—

Mr Broome—I have no idea what section 55A means.

Mr KERR—It seems to expand it to state offences which are not defined as common law offences.

Mr Broome—I seriously do not understand 55A. I know it is an attempt to try to overcome the High Court difficulties that have emerged over the last decade in relation to Hakim Wakim and so on. But it seems to me that the solution to that is perhaps to go and do some fundamental restructuring of the legislation and not try to do a belt and braces with those kinds of provisions.

I think what Mr O'Gorman said is absolutely right. You have gone from a situation where you were talking about structural creep to the situation where the police officer in charge of the operation, who may not even be—on the evidence you have heard tonight—employed as a member of staff of the organisation, can now decide that offences which do not fall within the

prescribed definition are to be treated as if they did and, with the consequences that flow, they can then be the subject of the special powers. I just think that is going further than we need to go. That is not to say that you did not have hearings in which information came to light that was in the nature of intelligence. I can only speak for the way the authority worked when I was there. We ran hearings for the purposes of attempting to get admissible evidence, not to go on fishing expeditions—despite allegations to the contrary.

What we are institutionalising in this bill is those kinds of fishing expeditions. Any activity that might be criminal, that somebody thinks ought to be looked at, can be the subject of a special investigation, and anybody who the examiner thinks ought to come in can be asked to come and give evidence in respect of those matters.

At least with the old reference arrangements—and they were generally expressed—every time a summons was issued for someone to attend a hearing the individual member had to satisfy themselves that the evidence that was sought to be obtained was relevant to the particular reference. It had to be placed in context. A report would go to the member or the chairman seeking for them to sign the documentation. It explained where this witness fitted into the investigation, what had been done previously, what was proposed to be done with the evidence and so on. You had to jump through those hoops. I cannot see that there will be any hoops to jump through.

Mr O'Gorman—Could I just make this observation. The ABCI has been the subject of a lot of criticism, particularly with some of the witnesses called here. But the general view seems to be that, once the ABCI becomes part of the ACC, the intelligence ability will skyrocket. Perhaps we should take up the rosy view and say that, with the ABCI under the umbrella of the ACC, the intelligence gathering capability will dramatically increase and therefore there is no need to have intelligence as part of the coercive hearings. Let us give the ABCI a chance to work in its new home.

CHAIR—In terms of your previous role as chairman, did you not think that it would be very useful in carrying out your role to have these expanded powers so that you could call people in to assist you with your intelligence?

Mr Broome—As I said, there is no doubt that we conducted hearings in which we were seeking to obtain intelligence about suspected or actual criminal activity. But it always had to be directed towards the investigation of criminal conduct which was the subject of the reference. The references were narrower then than they will be under this. If the reason for changing the reference process is that it is hard to get ministers together once every X months to have a meeting, people seem to have forgotten the fact that references were granted as a result of telephone meetings and the distribution of documents in the past, and those references have been found by the Federal Court to be validly granted. It does not take rocket science to come up with a better process for ministers to deal with documents, for crying out loud. We have run things like the ministerial committee on companies and securities for years with telephone votes and faxed documents and so on. In the days of email, there should be no reason why we cannot legislatively provide for ministers to deal with these things if they are urgent and important.

Mr KERR—If we are stripping away a veneer here and actually seeing this in practice as seeking to provide to police forces the opportunity to access coercive powers, and if we concede that this is not fundamentally offensive, which some might think it to be, if that is the

framework, then what is wrong, if anything, with Terry O'Gorman's suggestion about actually having either a court or the AAT—presumably a legally qualified member of the AAT I would think he would mean—being the persons to whom you make an application with some set of criteria and a basis where the police come forward and say, 'This is an exercise. There is a reference. This is a matter of serious and organised crime. We are now going to an independent body'? It might in some ways get over some of those things and be more transparent than what appears to have been put before us at the moment.

Mr Broome—Do you go and get the summons to bring the witness in or do you actually conduct the examination before the AAT member?

Mr O'Gorman—Both.

Mr Broome—If you do that, why change what you have now?

Mr O'Gorman—Well, if the government wants to—

Mr KERR—All I am saying is this: assuming that you are actually going to concede to commissioners, there is a difficulty here. The Commonwealth and the states have all signed up to a framework. I do not know that they know what they have signed up to, but at least on paper they have all signed up.

Mr Broome—They signed up to a number of different options at different times during the last 12 months, some aspects of which are internally inconsistent. The premiers and the Prime Minister agreed to one thing; the state police ministers have agreed to something quite different. But let us assume that there is a proposal. I do find it a problem that these powers are being effectively conferred on police services. What I find amazing are the views which I think the chairman or perhaps it was you, Mr Kerr, quoted from the current Commissioner of the AFP—some time before certain events last year, I suspect, and I was not talking about September 11—that is, that it would be anathema for these powers to be conferred upon police services. That is a view which his predecessor expressed publicly and privately. It is a view which every other police commissioner that I am aware of has expressed publicly and privately. But now, all of a sudden, it has changed. I do not know what has fundamentally changed to have those people, whose views in many ways I have a great deal of respect for—and I think they were right in that view—have their view suddenly change.

Mr KERR—It seems to me that there are two possible ways of skinning this cat—to put it crudely—from our point of view. One way to skin the cat is to try and squeeze the cat back into a box that says that authorisations are to be made subject to some of the kinds of restraints that Mr Lavarch has identified—that we actually do get a process of accountability where the CEO takes managerial responsibility for these things, that we have some processes that in a sense reinvent some of the constraints that exist within the National Crime Authority. The other way of skinning the cat is to say that, if we are going to give these powers through the police services, let us explicitly recognise that and have an application to a body that is truly independent—hearing officers that are chartered outside the police environment entirely or even outside the ACC—and then have an application, set out the terms of it and have the investigation conducted by someone like the French examining magistrate.

Mr Broome—My concern about that is twofold. First, as has been pointed out earlier, what would be the criterion on which the examining magistrate would decide whether or not to grant the request to examine the witness? I think there virtually are none. You could overcome that hurdle though.

Mr KERR—I think that is a crucial thing, but doesn't that apply for either an examiner internally or an independent person outside the ACC? I would like the wisdom of all of you about whether you could set some criteria.

Mr Broome—I think what you are describing is the natural and inevitable consequence of even further watering down a test for getting a reference, which is what I think we are doing. You say there are two ways of skinning the cat. In my analogy, there is a way of improving the present organisation, but if this is the cat that is the alternative I am going to kill the cat because I do not think the cat is worth saving. I do not think it can be saved. If we start tacking on a CEO with some executive responsibilities, we start having a board which then goes back to ministers. Why not tart up what we already have, rather than go to this kind of model? I still have not heard a consistent and coherent reason for going down the track we are going down. If there is one, I would love to hear it.

CHAIR—I understand that previously you offered to go in camera. Is that still your wish?

Mr Broome—There are just some things in relation to that particular issue which I think are better discussed in that sort of environment.

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

That further evidence be taken in camera.

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

[8.42 p.m.]

BUSH, Mr William, Vice-President, Families and Friends for Drug Law Reform

McCONNELL, Mr Brian, President, Families and Friends for Drug Law Reform

CHAIR—Welcome. The committee prefers all evidence to be given in public, but should you at any stage wish to go in camera, the committee will consider that request. As you noticed, one of our previous witnesses did take that option. I invite you to make some opening remarks and then we will follow up with questions.

Mr McConnell—Thank you for the opportunity to speak to you. Families and Friends for Drug Law Reform are a group that came out of the suffering and tragedy experienced by families because of illegal drugs. The tragic loss of a son or a daughter to drugs has led many families to question the effectiveness of Australia's drug policies. They felt deeply about the injustice of our drug laws which allow organised crime to make significant profits while families are blamed and sacrificed. In fact, we are currently organising our seventh annual remembrance ceremony for those who have lost their life to illicit drugs. We believe those lives lost were valued lives. What happens in families is connected intimately with society, and if families suffer and are degraded then society also suffers. The issues for families can only be solved if governments and society are prepared to look at the bigger picture, which includes profits and organised crime.

Families and Friends for Drug Law Reform has informed itself on all the aspects of illegal drug issues. We promote the raising of awareness of these issues and encourage the adoption of evidence based drug policies, whether that is in the area of law enforcement, treatment or education. The immediate focus of our group is on the impact of criminal law and policies on our children, our relatives and our friends. Our interest in organised crime is vital. We looked to law enforcement to keep drugs from those we loved, but it did not do so. There need to be changes to prevent illicit drugs from being as available as they are to younger and younger children. And all the while the profits from these are fuelling organised crime.

We have respect for the efforts that law enforcement agencies around the country put in to catching big-time criminals who are amassing wealth from illicit drugs. We support those efforts, but they should not stop there. The matter of high principle before this committee is not so much the continuation of those important efforts but the need for the people, parliaments and policy makers to know all the facts, however discomfiting, about the extent of organised crime and what should be done to reduce the menace. Royal commissions and other inquiries that led to the establishment of the NCA recognise that shining a light in dark places is one of the best disinfectants. Shining the light in the dark corners lets people see what scuttles out.

The NCA has been advising about dangers of organised crime for some time, crime which is fuelled by the profits of illicit drugs, but from where I sit the most recent response has been to ignore its warnings and then to abolish the NCA to replace it with an organisation that will be compromised. How governments respond to assessments and recommendations is of course up to them. What is essential in a democracy is that everyone has access to information essential for informed debate and good decision making. The accuracy of information and how policies

are likely to work in practice are not determinable by numbers of people voting for them. In other words, truth and knowledge are not determined democratically, but they are essential if democracy is to function. Without them democracy will degenerate.

We are hoping that the committee can resist this headlong rush to replace the NCA and will rather undertake a more comprehensive examination of the proposed replacement organisation. I believe it took three years for the NCA to come into place. This seems an unholy rush to put in a new organisation which I believe is not going to be as good as the current one. Experience strongly suggests that the replacement commission will be less rather than more effective than the NCA in investigating crime. Families and Friends for Drug Law Reform fear that a less effective crime fighting organisation will have a devastating effect on families and the community. I will leave it to Bill to add to this. Bill wants to pay particular attention to the question of independence of the new organisation.

Mr Bush—I am an international lawyer who has had some involvement in combating organised crime. Between 1980 and 1989 I was director of the treaties section in the Department of Foreign Affairs and Trade. During this time I was involved in the negotiation of agreements on extradition and criminal assistance. Currently I am a community representative on the ACT Crime Prevention Committee. Mr Chair, I ask your indulgence if I speak plainly. The government has put forward several reasons for the replacement of the NCA, but they do not stack up. In his second reading speech the Attorney-General said it was timely to reassess the NCA because the globalisation of markets has brought with it the globalisation of crime, and terrorism is funded by organised criminal activity such as drug trafficking or arms dealings. These developments are not new. They were notorious in 1998 when this committee undertook its most recent review of the NCA, a review that led to enhancement of the NCA, as moved by the government and approved by parliament only last year.

Appealing to September 11 is hollow. Law enforcement changes may have been called for, but the government itself sought to do this by amending ASIO legislation, not the NCA act. Organised crime is a more insidious threat to Australia than terrorism, and I say this with full awareness of the fearful events that have just occurred in Bali. Those events show that terrorism, to have an effect, has to manifest itself. Organised crime fails when it manifests itself. It is there, working out of light, secretly.

The NCA reference system, the government tells us, is cumbersome. That, I understand, is correct. Why then not just streamline that system by, for example, letting law enforcement agencies determine references? I have heard evidence tonight that questions that. The problem is external to the NCA, so you do not need to put those agencies in charge of the NCA. The government claims that the new structure will make the ACC more efficient in fighting crime. This claim is not credible. No other crime fighting body is run by a committee of 15 agency heads who have long had difficulty cooperating as well as they should have. Added to this, the lines of responsibility of the ACC are like a bowl of spaghetti, and our submission and the other evidence you have heard tonight, I think, makes that clear. Big-time criminals will be the beneficiaries of this reorganisation, so why then does the government want to replace the NCA? The absence of a credible explanation invites the suspicion that it wanted to eliminate the NCA's royal commission-like independence.

The bill will deliver the ACC into the hands of law enforcement agencies. Has the government forgotten that the NCA was endowed with independence in 1984 to shield it from

the corruption revealed to exist in police and other government agencies? The NCA structure was also designed to quarantine its operation from political interference. That too will be sacrificed. The minister will have powers, we have heard tonight, to suspend the CEO of the ACC for unsatisfactory performance. Political interference can also come through the police, as well as other ACC board members. For example, under section 37 of the AFP Act, the minister has issued directions on politically sensitive issues such as 'providing an effective contribution to the whole-of-government approach to unauthorised arrivals', as well as 'countering and otherwise investigating organised people smuggling' and 'providing an effective contribution to the implementation of the Government's "Tough on Drugs" strategy', as well as 'countering and otherwise investigating illicit drug trafficking [and] organised crime'.

Without independence there is the danger that the parliaments and people of Australia will be left in the dark about the state of organised crime. When the political stakes are high enough the pressures on the ACC to withhold objective assessments are likely to be irresistible. This is a live issue in the context of the heroin drought. Last year the NCA issued an assessment that law enforcement was not getting on top of the drug problem. In contrast, the government and AFP claimed that the drought was brought about principally by law enforcement. In this matter the credibility of the AFP is stretched mainly because of four reasons. In 1999, for example, the Director of the Office of Strategic Crime Assessments forecast a drought because of big demands for heroin, particularly in China. Secondly, there was a shortage of supply through poor weather conditions and other factors documented by the United States. Thirdly, the AFP Commissioner himself revealed the detection of a decision by crime syndicates to promote amphetamine-like drugs in Australia rather than heroin. And, fourthly, with the heroin drought a flood of amphetamine-like drugs, and cocaine too, has occurred. This evidence of manipulation of the illicit drug market has chilling implications for the security of this country.

Because so much is at stake, we ask, Mr Chair, that the committee stand back and look at the big picture beyond the legal fine print of the bill before you. At issue is a matter of principle far more important than performance criteria that, with respect, the committee seems to have been absorbed by. Your review of the NCA's annual report in June ignored the NCA's message. At the very least, this demands a full and open inquiry of the committee. The annual report, amongst—

CHAIR—I draw your attention to the fact that you have limited time. If you want to take it all up by your statement that is fine, but we would like to ask some questions.

Mr Bush—I am pretty well at the end. The annual report stated that the NCA's firm view is that a whole of government approach will strengthen the fight against organised crime. The commentary referred to in the report advocates a whole of government approach to organised crime because in its various manifestations it presents a threat spanning well beyond the province of law enforcement agencies. It argues that such an approach involving law enforcement, health and other relevant agencies is required to effectively combat organised crime and attack the profit motives underpinning it. Organised crime can no longer be recognised as merely a law enforcement issue. Mr Chair, that sort of assessment is one that, by the elimination of the independence of the NCA, will never see the light of day.

Senator McGAURAN—So you do not like the police and you do not want them running this show? That seems to be the single most important objection of people. Is that the truth?

Mr Bush—The NCA was established in the context of widely suspected corruption and widely documented corruption in police and government agencies. That situation has been shown by royal commissions to continue to exist and by other inquiries that have continued since the NCA was established. It is, of course, the subject of a royal commission in Western Australia and there is a separate inquiry into the police drug squad in Victoria. The NCA was seen as a means of countering that sort of situation.

Senator McGAURAN—So the answer is yes? You do not want the police running this new organisation?

Mr McConnell—The police will not be independent; they will be subject to directions, as Bill pointed out. The Commissioner of the AFP is subject to directions. He has a direction that he must support the Tough on Drugs strategy, which is a government policy. If it finds evidence which runs contrary to that then he has a conflict.

Mr DUTTON—Are they not just conspiracy theories? What substantive evidence do you have to backup your assertions? All we have heard is theory and what I think really is just a conspiracy base. Is there anything that you can flesh out for us that substantiates your outrageous claims?

Mr Bush—Could you give us a set of reasons for the replacement of the NCA that hold up? This is an attitude of scepticism that we hold, but having listened to the other evidence tonight it seems to be a widely held view amongst those who appear before the committee.

Mr DUTTON—I am asking you to give your reasons and the basis of your claims.

Mr Bush—If you read our submission you will see set out in the statements various evidence that goes into the heroin drought issue and the fact that the government seems to have completely ignored the assessments and recommendations that came from the NCA, which that body is entitled to make as part of its mandate under the act.

Mr DUTTON—I see. I suggest that you are following the same conspiracy theory line in relation to, in particular—I read between your lines—the federal government's policy in relation to the Tough on Drugs strategy. As a by-line, can you tell me, for argument's sake, about the heroin deaths in Australia and how they have reduced over the last couple of years—or certainly since the introduction of that policy? That is really what you are trying to attack behind the scenes, isn't it?

Mr McConnell—The Tough on Drugs strategy was introduced in 1997. The overdoses from heroin increased, as they were increasing prior to that time, from that time up until the heroin drought which hit Australia in November or December 2000. The heroin overdose deaths reduced from that time, largely because there was no heroin around. The heroin, from all reports that we have, seems to have been diverted—partly because of a reduction in the amount of heroin available globally; partly because the heroin was diverted to China, where there is an increasing demand for heroin. Australia was one of countries where it was not sent.

Mr DUTTON—I will check but my understanding is that, over that period of time, we have seen a rapid reduction—and that is only one indicator of the success of that policy. I will check my statistics.

Mr McConnell—There were somewhere around 3,000 deaths between 1997 and 1999-2000.

Mr KERR—The written submission will stand on its own merits, but I make the observation that the same point was made by one of the strongest supporters of the proposed ACC, Mr Priest, on the Tuesday of our hearings in Sydney. We will find out in due course. If you take credit for the blessings of the summer sun, sometimes you may get the blame for the coldness of the winter. Events will prove or disprove the thesis that law enforcement is capable of making a significant impact on the quantum of drugs brought into this country. I must say that I am sceptical. All the advice that we have ever received on this committee from those responsible for law enforcement has generally been to the effect that only a relatively small component of that which is imported or domestically produced has been the subject of seizure.

Senator McGAURAN—But you have one statistic: there were record busts of heroin in this country, on top of all the other factors you gave, according to the drought. So it is working.

Mr McConnell—It is a question of whether the record busts, as you say, reflect police activity or whether they reflect an increase generally in the drugs that are coming into the country.

Senator McGAURAN—But there is a drought—you admitted it. During that drought—

Mr McConnell—No, the record busts were occurring prior to the drought.

Senator McGAURAN—And during it: of late, in the last six or seven years, there have been record busts year on year.

Mr KERR—Hang on, this is silly. The submission will stand on its merits. We can all research these things.

CHAIR—We need to wind up. But the basic premise you are making is that you are concerned that, in terms of the proposal, it will not be an organisation that can effectively deal with drugs in the same way as the NCA. That is the core of your submission.

Mr McConnell—Yes. Whatever you do, or whatever is done in this area, has a trickle-down effect to families and to the community, and I think that is important. I do not think that should be forgotten. Families are at the base of the importation and the use of drugs in this country, and these are drugs that are fuelling organised crime.

CHAIR—If you speak to the Bob Bottoms and the Tim Priests of the world, who have earned their stripes from tough law enforcement activities and intelligence gathering, they are strongly in favour of it. They believe that it will strengthen our ability to crack down on organised crime, money laundering and drugs et cetera. So you have got, on the one hand, people who have perhaps had some experience in that area taking a very strong supportive line on this.

Mr Bush—I could only say that I wish they were sitting here to hear the earlier evidence this evening. Leaving the heroin drought question aside—we raise it as a case study—the issue of principle which we have raised, which we have heard none of your other witnesses raise, is the function of the NCA, as Brian said, to throw light. This was a big issue in the Costigan royal

commission and the Stewart royal commission: the need to have light thrown on criminal conduct. With the structure of the organisation, if anyone on the board has a significant enough objection to an assessment coming out, it will not come out. We give the assessment relating to the heroin drought as an example. It is a highly political one, and it just would never get through the board. We do not want to argue, at the moment, the rightness or wrongness of it. All we say is that that is a legitimate and a serious enough possibility for the parliaments and people of Australia to know about and for it to be examined thoroughly. We ask simply that this committee take that sort of issue very much on board, to ensure that the new body has as strong a capacity to make independent assessments and recommendations to government.

CHAIR—That is probably a good point on which to finish, to summarise your point of view. I would like to thank you for coming, Mr Bush and Mr McConnell.

[9.08 p.m.]

GILLESPIE, Ms Margaret, Assistant National Secretary, Community and Public Sector Union

RAMSEY, Mr Steve, Legal Officer, Community and Public Sector Union

CHAIR—Welcome. The committee prefers all evidence to be given in public. If at some stage you wish to go in camera, please let us know and we will proceed in that direction. I invite you to make some opening remarks and following that we would like to ask you some questions.

Ms Gillespie—I will make an outline of our submission, which the committee would have already received. The CPSU submission addresses two main issues. The first relates to the employment of the proposed Australian Crime Commission employees under the Public Service Act 1999. The second relates to the maintenance of conditions and entitlements of ACC staff and the ongoing industrial stability of the organisation. Our submission makes three recommendations, which are summarised on page 2 of our submission.

As would be expected from the union covering the majority of employees in the proposed organisation, we have focused mainly on employment related issues. However, before I address these matters, I would also like to put on record our members' concerns in relation to support for the proposal for the continued employment of crime commission staff under the Public Service Act. Our members support this proposal because they are firmly of the view that the new commission will be better placed to be truly independent—both in its day-to-day operations and in terms of the public perception of the organisation—if they are employed under the Public Service Act. Our members are anxious to ensure that the new commission is successful and believe that the Public Service Act is the most appropriate employment framework to ensure there is an apolitical commission free from manipulation by political or other influences.

There has been some suggestion that the Australian Federal Police Act would provide a stronger regime of accountability and integrity than the Public Service Act. The CPSU believes that the APS code of conduct and associated values provide an effective regime of integrity and a broader focus beyond merely policing functions. This reflects the commission's charter, which goes well beyond the policing role of the AFP. Our members are strongly of the view that the ACC must be able to operate outside the umbrella of the relevant police forces, as a specialist national agency focusing on all aspects of organised and serious crime. These matters are covered on pages 5 and 6 of our submission.

In relation to the funding of the new commission, we note that the current budgets of the contributing organisations will be transferred to the crime commission. However, the committee may want to satisfy itself that the start-up costs of the commission are adequately covered. Certainly, some NCA staff have expressed concern to me that integrating the various systems of the constituent agencies will generate additional costs to the budget bottom line.

Turning to employment conditions, we have identified three areas of concern: firstly, the status of current terms and conditions of employment of transferring employees and future regulation of terms and conditions of employment in the new commission; secondly, conditions covered under various Commonwealth legislation relating to maternity leave, long service leave and occupational health and safety; and, thirdly, maintenance of membership in relevant public service superannuation funds. Without going into unnecessary detail, the issue for consideration by the committee is a decision as to whether the transmission issues which arise from the creation of the new commission are adequately covered in the proposed bill. Put simply, the ACC is a new organisation or, alternatively, it is a continuation of the NCA. Our submission highlights issues relating to the transmission of certified agreements and questions whether current AWAs will apply in the ACC. Naturally, we are keen to minimise any uncertainty in relation to these matters and note that legal advice obtained by the NCA from the Australian Government Solicitor in August this year supports that uncertain situation which I have outlined. In response to this identified uncertainty, we have included, for the committee's consideration, a new clause to deal with this matter for insertion in the current bill. The clause can be found at paragraph 29 on page 9 of our submission. These employment matters are canvassed in detail on pages 7 to10 of our submission. My colleague, Mr Ramsey, is available to answer any questions on these matters.

The final part of our submission covers the application of additional Commonwealth legislation relating to maternity leave, long service leave, occupational health and safety and superannuation. With the exception of superannuation, which will require appropriate CSS and PSS delegations, these matters appear, on our reading, to be unproblematic. So in short, we support the proposed bill. We are suggesting one additional clause which relates to transferring employees and have drawn the committee's attention to the need to ensure sufficient start-up funding for the commission as well as some sundry superannuation delegations. Last, but not least, we have articulated our members' strongly held view that it is entirely appropriate that the new commission be established under the Public Service Act. That concludes my remarks.

CHAIR—Thank you very much. I suppose from my point of view your claims are really industrial and go to conditions. The focus of our committee is really on whether this is the appropriate structure, whether it will meet the objectives of intelligence gathering and prosecution of crime rings and money laundering, et cetera, whether it is just a further widening of your area of control and whether we should be concerned as a committee.

Ms Gillespie—It is extremely important for the operation of the new commission that it starts well and that the staff who are transferring from various organisations across the public sector have a degree of certainty. Like any organisation, whether it be in the private sector or in the public sector, these matters need to be done smoothly and well in order to ensure that—

CHAIR—Certainty in terms of what?

Ms Gillespie—In terms of conditions of employment and how they are going to be handled. We are not trying to claim that these are the most important issues before the committee in relation to this legislation, but certainly we have a responsibility to ensure that the staff understand where their conditions come from particularly, for instance—and Mr Ramsey might want to comment on this—if you take the example of somebody who is currently on an AWA in the National Crime Authority and if there is some ambivalence about what their status is in the

transfer. Of course, as a union we are used to these kinds of issues particularly in the public sector and it would be incumbent on us to bring those kinds of issues before the committee.

CHAIR—So what are your indications that their conditions would not be preserved in terms of transferring?

Mr Ramsey—There are vexed questions with respect to the operation of the relevant sections of the Public Service Act and the way in which people might be transferred into the new ACC. To cut a long story short, Senator, I lived through four years of fairly acrimonious and bitter legislation and fights to do with Employment National and staffing conditions in terms of employment. I think our experience is that in the short term stability and certainty are far more important than that sort of ongoing acrimony over terms and conditions of employment. It ensures that staff move across smoothly and that staff are certain as to what is going to apply to them when they get there. It ensures that experienced staff are happy to move across to the new organisation. It just takes away a whole lot of unnecessary angst and concern. Our members support the new organisation. They want it to operate smoothly. We think that it is easy to deal with this issue in a clear, concise, simple way, and that is by making the amendment to the bill that we have put in our submission.

Mr KERR—I accept the goodwill with which you have presented us with this material. There are a couple of points though that I would like to test. Under point 15 of your submission you refer to the ACC as being:

... able to operate outside the umbrella of any of the relevant police forces. The ACC is not a police force, but a specialist national agency ...

and you continue:

At times this may entail investigation aspects of the police itself.

That does not seem to be the role that has actually been described to us by the Attorney-General's Department and other submitters. I am just wondering about the characterisation of the ACC that you understand—and I do not blame you for that understanding because it was mine until recently that it would be a stand-alone agency. Perhaps you might like to reflect on that particular point and then come back to us if you wish to—

CHAIR—It is appearing more as a conglomerate of people on secondment so it is not like other statutory bodies—

Mr KERR—It is not like it was.

CHAIR—and not like the NCA, per se. It is a hybrid organisation.

Mr Ramsey—We would be happy to reflect on that and get back to you. We have recognised elsewhere in the submission that there will be an ongoing mix, as there is now in the NCA, of secondments, permanent staff and police. If it was your understanding at one stage, Senator, it is certainly our members' understanding that that is—

CHAIR—I draw your attention to the fact that this is a joint standing committee: we have some senators but several of us are members of the House of Representatives.

Mr Ramsey—I am in the habit of addressing people on that side of the table as 'Your Honour'.

Mr KERR—The most persuasive point of the evidence that was given to us by the AFPA—and it was backed pretty strongly by a couple of witnesses earlier tonight, so I think you have to address it—is that it would enable the application to staff of the additional complaints regime. It could extend the complaints regime under the Ombudsman Act. I cannot remember what it was called. Perhaps you might also come back to us on that particular point, because it seems to have a considerable degree of attraction that, if we are setting up a new arrangement, we need to have strong external scrutiny. The present regime that is being proposed is a bit weak, and at the very minimum we should have the kind of external scrutiny that exists under the regime to hear complaints that applies to the Federal Police. Those are two substantive points that really need to be addressed if we are going to be persuaded. We have to find some way of dealing with those issues.

Ms Gillespie—I will respond to that. If the legislation put aside the intention to have the Public Service Act for the employment coverage and adopted the Federal Police Act, a lot of the matters that we canvass in relation to transmission will then change again. You will see from our submission that in relation to what we canvass and trace—and you will need to be mindful of this if you are looking at an alternative—a lot of the employment arrangements would then change and would need to be dealt with subsequently.

Mr KERR—I find myself completely out of my depth when I deal with these issues. I know that employees have all these very proper concerns—decades ago I was a Public Service employee of a state government—and they are really important. Your security of employment, your entitlements, your relationship with your association are all very important. The strongest point that was put to us, though, that we need to have addressed is that, if under one regime you can link into this higher level of external scrutiny fairly easily and you can find a solution for that that says, 'We can link into a higher level of external scrutiny and still have that continuity,' maybe we can be satisfied.

Ms Gillespie—I presume that you would then take the view that scrutiny by the Ombudsman would not be appropriate.

Mr KERR—Not as it is presently structured. The regime of complaints against the police gives the Ombudsman a far higher degree of capacity for intrusive and direct intervention with respect to employees of the Federal Police than to employees of the NCA. At least that is the submission put to us; whether or not it is accurate is another question.

Ms Gillespie—I should also alert the committee to the fact that certainly our members in the current NCA, being aware of the content of the AFPA submission, are extremely concerned about the proposition that under this legislation they would not come under the Public Service Act. They have made that very clear to us. Our submission was written in conjunction with current employees of the NCA.

Mr KERR—I do not imagine morale is particularly high at the NCA at the moment.

Ms Gillespie—I can only emphasise to the committee that all these things have other consequences as well. If current employees were to suddenly see themselves come under an act, particularly after all the consultations that have been going on with current staff, which to my understanding have been going well, with a very open and transparent process—

Mr KERR—Gosh, that is more than we are getting!

Ms Gillespie—If suddenly the whole dynamic and framework changed, that would cause grave alarm, I would have thought, amongst current employees in the NCA.

Mr KERR—I am not trying to diminish it.

Ms Gillespie—No, but I think it is only reasonable to put that position to the committee so that it is well understood.

Mr KERR—It is only reasonable to warn you that we have had submissions from the AFPA which were echoed today. Chair, who was it earlier today who was saying that the regime should be the AFPA regime?

CHAIR—That was not today; it was Mr O'Gorman.

Mr KERR—At least we have had two fairly strongly argued submissions that the accountability regime would be substantially enhanced through this course. I just think you would have to come back to us if you think that is wrong.

Ms Gillespie—Yes.

CHAIR—We will need to pay some attention to this in our report. We will take your views on board. We appreciate you coming to see us at such a late hour of the night.

[9.30 p.m.]

DELANEY, Mr Grahame, First Deputy Director, Commonwealth Office of the Director of Public Prosecutions

THORNTON, Mr John, Director, Legal and Practice Management, Commonwealth Office of the Director of Public Prosecutions

CHAIR—Welcome. As you will be aware, the committee prefers all evidence to be given in public, but if at some stage you wish to go in camera, you might wish to let us know and we will put it to the committee. I invite you to make some opening remarks and we will follow that up with some questions.

Mr Delaney—Our opening remarks will be fairly brief. We did not make a written submission and I was not intending to go into the sorts of philosophical issues that you have been discussing earlier this evening and which I noticed you have been discussing in previous hearings. I was going to tell you our view from a prosecution perspective and how we see practical arrangements being put in place with the new body to give effect to the prosecution of briefs that may be referred to us from that body. As I appreciate it, put broadly, the Commonwealth DPP's function is to prosecute summarily, or on indictment, offences against Commonwealth law and, as appropriate, take action to recover the proceeds of Commonwealth crime.

The DPP and the NCA have a long history of working together. They came into existence at about the same time in the early eighties. At the moment, we have about 100 matters that we are working on that emanate from the NCA and those range from matters on which we are presently giving advice through to matters that are being prosecuted. We get about 50 matters a year and anticipate that that will continue under the new body. As the committee would be aware, the crime commission is to have several functions one of which is to investigate, when authorised by the board, matters relating to federally relevant criminal activity. The ACC's remaining functions relate to intelligence matters. It is the federally relevant activity that will involve the Commonwealth DPP's office and section 4A of the ACC bill sets out the circumstances in which a state offence has a federal aspect. That section seeks to ensure that the DPP is constitutionally empowered to prosecute state offences provided they comply with the description in section 4A.

The committee would also be aware of the ACC board's functions to authorise investigations and determine in writing whether such an investigation is a special investigation such as relates to a federally relevant criminal activity. The significance, of course, of the ACC board determining that an investigation relates to a federally relevant criminal activity is that the compulsory powers may then be used in relation to it. The ACC also has the function of assembling evidence of a Commonwealth or state offence and, as appropriate, giving it to the Commonwealth or state DPP. In subsection 59(7) we note that the ACC may provide information to law enforcement bodies and to other Commonwealth agencies and that will enable the DPP to give advice during the course of an investigation were that to be challenged.

Where the ACC refers to the DPP evidence of offences fitting the description of federally relevant criminal activity the DPP, on current High Court authority, will be empowered to prosecute such offences in accordance with the prosecution policy of the Commonwealth. Otherwise, if the evidence is of a state offence which has no federal aspect, we would anticipate that those matters would go to the relevant state DPP. The compulsory powers as we see them provide a reasonable balance. We note that a person being examined may claim privilege against selfincrimination in respect of answers given or a specified category of document that the person produces. In other words, there is a use immunity: a person cannot convict themselves out of their own mouth, although material that may lead to other investigations can be used. We think that use immunity is an appropriate and sufficient safeguard for an examinee. They are the opening remarks that I intended to make, but of course we are happy to take questions if the committee has them.

CHAIR—I suppose that as the prosecuting body by de facto you would be in favour of anything that you see as assisting your role.

Mr Delaney—That is a fair comment.

CHAIR—Your primary role is not civil liberties.

Mr Delaney—No.

CHAIR—That is it: prosecution?

Mr Delaney—Yes.

CHAIR—You may have heard previous chairmen—I do not know whether you were here early enough—suggest that there is always a problem with widening the powers: when it gets to prosecution, it does not translate because you are prevented from using some of the information and how you got to that position et cetera. Do you see this as a problem?

Mr Delaney—If the investigators go beyond what is regarded as reasonable or what is provided for in the law, yes, that could be a problem.

Mr KERR—I think the comment was made in relation to intelligence gathering in the main. Mr Broome is sitting there perhaps he could explain?

CHAIR—I do not think it is appropriate to ask him now.

Mr Delaney—We have not touched on the area of intelligence; we have looked at the bill from the perspectives of investigation and prosecution only.

CHAIR—Could you look specifically at that and the evidence given by Mr Broome in that area and come back to us because it is something that we are interested in?

Mr Delaney—Certainly.

CHAIR—The gentleman is sitting behind you so we can probably confer following this meeting.

Mr KERR—The powers are currently exercised by members of the authority, and they control the investigation so they are aware of the nature of the investigation. The new regime will be largely driven by police references. They will then appoint a task force, and an examiner will be appointed to that task force. With evidence that is currently conferred, I do not know the practice but I assume that some form of warning is given to persons who come before the members of the board. I presume that the members of the board explain the nature of their powers. I have not seen transcripts that describe this, but I assume that they say, 'I'm a member of the National Crime Authority. I have the power to compel testimony if you fail to answer questions.' Is there a circumstance where people are advised of their entitlement to claim selfincrimination?

Mr Delaney—Under this bill or under present practice?

Mr KERR—Under this bill certainly, but also under present practice because I am wondering whether there is a shift.

Mr Delaney—This model appears to me to be quite similar to that which is used by the Australian Securities and Investments Commission. They have compulsory powers to examine, and they certainly explain prior to an examination what rights the examinee has to claim privilege at any point. There is usually an entitlement in that situation for a lawyer to be present, for example. Where the legislation is silent, I think it will be a question for the ACC to devise an answer to.

Mr KERR—When a policeman suspects that a person may be guilty of an offence then the judges rules come into effect which require certain warnings. I cannot remember the terms of one of the warnings, but I remember the substance of it.

Mr Delaney—The caution.

Mr KERR—Yes. Presumably the courts would require a similar effective caution in relation to examinations of this kind, and I am wondering whether that should be prescribed or whether it is implicit and if the courts have developed it. I am asking because I do not know. Because the circumstances in which this has applied previously seem to me to be somewhat different, I wonder whether this is something we now ought to clarify, if it has not been clarified before.

Mr Delaney—I cannot speak for how the ACC might put the provisions into practice, but I would imagine that the examiner will inform the examinee of the requirements under the act, as it will then be, and of that person's right to claim privilege in respect of answers which the person feels may incriminate himself or herself.

Mr KERR—So it would not in your view be an onerous burden if we clarified that, if we saw that as part of the technical adjustments that we might wish to make? I am just exploring this in my mind.

Mr Delaney—I would not see any difficulty with that.

Mr Thornton—You can claim privilege.

Mr KERR—You can claim privilege and then you get an indemnity against the direct use of that in future proceedings.

Mr Thornton—That is right.

Mr KERR—But derivative use is still—

CHAIR—Is there a warning about that currently with the NCA?

Mr Delaney—I do not know the answer to that.

Mr KERR—I do not think they would need to, because they have no lawful entitlement to refuse to answer. I think you could only warn them. All I am saying is that I assume there are two kinds of person that get drawn in here. One is the professional villains, if you will. These people will often turn up with lawyers and they know, backwards and forwards, what they can and cannot do. Then there is the other group of people. You pull them in because you want to ask them some questions. They may or may not have done some wrongful conduct that has associated them with a real villain, but they are not the usual players in the criminal justice system. They may be an accountant that has been drawn into a web of criminal conspiracy. That is not to say that they are good guys, but they come into those circumstances perhaps without lawyers and perhaps without really understanding what their full legal entitlements are. They must answer the question, but if they are not told to claim privilege and they are told that they must testify, then any answer they give is presumably not protected and so that can be used directly as a confession, as can any derivative material. So I would not have thought that we intended to confront people with that dilemma.

Mr Thornton—I guess in that situation there is always an overriding discretion in the court in terms of fairness, and so the sensible way to go if you wanted to be able to use the evidence later would be to make sure that the person is treated entirely fairly in any hearing—

Mr KERR—That is all I am saying: maybe we should build that in.

Mr Thornton—It is a bit like an unrepresented defendant in court. The judge goes to a lot of trouble to explain the procedure, the defendant's rights and that sort of thing.

Mr KERR—I assumed it would be done but I was wondering, given that this is a new piece of legislation—at least in this sort of framework—whether we ought to identify it. The other thing is taking on an issue raised by our departing friends from the Families and Friends for Drug Law Reform, who have identified a lack of any requirement for public reporting in this legislation. I think that is what they were identifying. The previous legislation had all sorts of provisions to report on the strategic environment facing law enforcement in Australia, and I think this legislation omits that. Does that concern the DPP in any way?

Mr Delaney—That is a bit removed from our primary function. I do not have any personal difficulty with there being some reporting function, but it is really a matter for government and a matter for the committee to consider and recommend.

Mr KERR—I think the point they were making is that it is not just a matter for government; there is a public interest in having an informed debate about law enforcement and this is the agency that had that pre-eminent responsibility. That function appears to have been entirely removed.

Mr Delaney—I must confess that I have not given that any thought.

Mr KERR—Neither had I until they raised it, so I am asking you.

Mr DUTTON—Duncan, I am not sure I understand the premise of your question. What are you saying has been removed?

Mr KERR—The previous legislation required the NCA to report on the criminal law environment in which they were operating. In other words, they were tasked not only with undertaking work towards the investigation of organised crime and the gathering of intelligence but also with publicly reporting.

Mr DUTTON—In the annual report?

Mr KERR—Not only in the annual report but also in special reports, which they did from time to time. But that has been removed. There may be a reason for its removal but it has not been explained thus far.

Mr DUTTON—Do you mean that we should investigate that a bit further, with all due respect to our previous friends?

Mr KERR—I just looked for it; it does not exist. I know it used to but there is nothing in there now.

Senator McGAURAN—Do you mean previously reporting to this committee, or to the Attorney-General or publicly?

Mr KERR—Publicly and through the Attorney-General.

CHAIR—Perhaps we can have that checked out.

Mr SERCOMBE—One of the perennial issues that has come up for this committee is getting an effectiveness measure for the National Crime Authority. I suspect you will not be able to answer my questions, either because they are matters of policy or because you do not have the data, but I will put them nonetheless. Are you able to give this committee your observations in relation to the quality of the briefs that have come to the office of the DPP from the National Crime Authority? Are you able to give this committee any assessment as to the numbers of briefs that come to you compared with the number that proceed to prosecution? In other words, how frequently do you determine not to proceed with a brief from the NCA?

Mr Delaney—Answering the second question first, I think we would have to take that on notice.

Mr SERCOMBE—Is there any reason in principle why you cannot advise the committee on that?

Mr Delaney—No, there is not; I just do not have those figures with me.

Mr Thornton—Were you looking at a particular period?

Mr SERCOMBE—I think perhaps over the last three or four years.

CHAIR—Yes. There is a view that the NCA has drifted somewhat—convictions are down and so on. We are interested to know whether that is in fact the case.

Mr SERCOMBE—By point of comparison, would you be able to give us the comparable data for the Australian Federal Police?

Mr Delaney—Comparable data might be difficult because matters from the NCA are generally in the more complex category. I say this without looking at the figures but I think the AFP have a far broader spectrum of matters. But we will see what we can do.

Mr SERCOMBE—It would be helpful if you could give some consideration to that complexity issue as well. It would be very helpful for this committee as one aspect of a performance measure to have that sort of data and to be able to compare it with another agency of the Commonwealth in the way that matters are dealt with under the more objective form of assessment such as your officers give.

Mr Delaney—We will see what we can do. I should say that we, of course, only keep statistics on Commonwealth matters. The NCA refer quite a number of state matters to state DPPs.

Mr SERCOMBE—Indeed.

Mr KERR—I guarantee every agency hates the DPP because it does not pursue very well-founded investigations.

Mr Delaney—Some say that.

Mr KERR—Every agency would hate you.

CHAIR—As we indicated that we would only be keeping you for about 15 minutes, and we have gone five minutes over that, we would like to thank you for appearing today. Perhaps you could follow up those requests that have been made. Thank you very much for coming.

Mr Delaney—Certainly. Thank you.

Committee adjourned at 9.50 p.m.