Supplementary submission 2B

To: **HoR Committee on Social Policy and Legal Affairs** *SUPPLEMENTARY*

From: Civil Liberties Australia

CLA

Hearing into the

Crimes Legislation Amendment (Powers and Offences) Bill 2011

Summary:

- The Bill needs to state that information sharing by the ACC relates to "serious and/or organised crime" offences (as the Explanatory Memorandum – but not the Bill - says): alternatively, or as well, lower limit clauses as needed;
- The Bill should make the ACC liable to Ministerial protocols/pre-endorsement re sharing information with foreign entities, as the AFP is;
- One national information sharing conduit to foreign entities should be preferred to two or more;
- Several permissible purpose clauses need additional riders;
- The proposed greatly-expanded role of the ACC in information sharing calls for a new audit procedure (perhaps an Intelligence Public Interest Monitor) which should involve review by community representatives instead of by a police-intelligence-security elite or a parliamentary "security" committee; and
- In relation to "automatic parole", legislation with retrospective effect on sentences should be avoided, as should non-judicial (administrative/Ministerial) extension of sentencing.

Background:

Civil Liberties Australia was asked to provide supplementary information on questions which arose during a hearing on 10 February 2012. Questions were:

1) An expanded explanation of our opposition to elements of 'permissible purpose' (Schedule 2, s18) in the draft Bill.
2) Comment on how a community 'audit/monitoring' committee might operate.
3) Comment regarding the termination of automatic parole and its application to federal prisoners serving current sentences of ten years or less.

1. Permissible purpose clauses:

The wording of section 18 of schedule 2 provides for sharing of ACC information[1]. Subsection 4 (1) provides an explanation of the term 'permissible purpose' for which this information may be shared. The Committee asked that CLA identify possible objections to specific clauses.

A primary concern is the danger of the ACC being able to swap information internationally without appropriate oversight. That way lies probable embarrassment for the Minister, the Government and the nation (as demonstrated by the AFP's sharing of information in the Bali 9 case).

Another key concern is the danger of unverified information swapping with the private sector within Australia. The type of danger inherent in uncontrolled "whispers" to the private sector was highlighted by the evidence to the Committee of the CEO of the ACC, Mr Peter Lawler (see transcript).

Most sub-clauses empower activity which we support. However, the same provisions also permit potential misuse of shared information. CLA proposes a much better safety mechanism for judicial review (obtaining a warrant) for each individual circumstance of planned sharing of information by the ACC. We believe the Bill should be altered to that effect.

The Bill allows for the ACC to share information in relation to "foreign laws". If this is to occur with or without judicial warrant and/or Ministerial endorsement, CLA proposes it should be made quite clear which foreign countries it is permissible for the ACC to give information to…and under which foreign laws.

Australia has treaties in place which basically forbid other entities (including the Attorney-General/Minister for Home Affairs/Justice, for example) engaging in information exchange if the alleged crime relates to offences which are not offences in Australia. No such restriction is contained in this Bill.

[1] What is to be shared is 'information' – not 'evidence'. 'Information' can cover a very low level of reliability, such as rumour, hearsay, scuttlebutt, guesswork and gut feeling, for example.

There is no apparent reason why the ACC should not operate under similar restrictions to those which apply to the Attorney-General, Minister for Home Affairs/Justice and other government entities.

CLA believes the ACC should exchange only with countries with existing legal treaties with Australia. To do otherwise, particularly without judicial or Ministerial oversight, could be dangerous (see below) to individuals and to the national interest.

Any exchange of information should include a formal requirement that the information-receiving country keeps Australia fully informed as to what happens to the foreign or Australian citizen(s) as a result of the information Australia provides. If no such requirement is in place, Australia has no way of knowing what the impact of ACC's information sharing is: the people and the Parliament will want to review that impact in the future.

> *(The Parliament's Treaties Committee has already addressed such matters of requiring feedback, including in report No 91, Chapter 3, and in subsequent considerations. It may be appropriate for this Committee to consult the Treaties Committee before this ACC legislation is endorsed).*

The ACC should be required to table in Parliament annually a report on information it has supplied under "permissible purposes" and what the outcomes/results of the supplied information has been, particularly in terms of information exchanged with foreign countries.

> *NOTE: In passing, CLA is unaware why a second federal 'crime agency' – in addition to the prime agency, the Australian Federal Police – should give information to foreign police/crime agencies. Better, safer and less confusing management and governance would see information-swapping through one national conduit only. The potential for government and national embarrassment is immense, and we are surprised at the Attorney-General's Department's senior lawyers being so apparently unprotective of their Ministers in this regard).*

Danger of unfettered information swapping

CLA understands both Coalition and Labor Governments of the past six years have introduced early-warning protocols for the AFP as to the type of sensitive information that can be swapped with Indonesia (and other countries) in future in a similar situation to that which led to Australians being on death row in the 'Bali 9' case. The AFP now appreciates the need to consult with the Minister responsible before an information exchange, which may cause international difficulties, occurs in future. We note that the ACC does not appear to be subject to any such constraints under this proposed Bill: without constraint, ACC information swapping with foreign countries will undoubtedly lead to problems for the Government.

We would be surprised if the lack of any such constraint on the ACC was not alarming to MPs across party lines. It is certainly likely to be alarming to virtually all civil liberties and human rights groups, and many other legal and general commentators, whose opinions were strongly expressed in the aftermath of the Bali 9 arrests.

The future danger includes the potential for inhumane or excessive sentences, and for

interference with Australia's corporate and trading interests. These and other negatives could be induced by an ill-considered exchange of information on the part of the ACC, which may have the full "criminal" picture, but by no means is best placed to understand the full "national interest" picture.

The restraining protocols in place in relation to the AFP strongly suggest there continues to be significant concern on the part of the Executive over the potential for national embarrassment with criminal intelligence swapping.

There are recent examples which illustrate the potential problems:

- The Bali 9 case, which is both well known and ongoing;
- The potential for Australian citizens to be subjected to criminal and corporate laws in some countries, such as China and Middle East nations, which are of an entirely different concept to our notions of the rule of law and a fair go; and
- The danger of Australian citizens as well as those from other countries being exposed to the provisions of the PATRIOT Act and other laws of the US Government (relating to copyright and "piracy" in particular) where potential punitive sentences are hugely in excess of what most Australian would consider reasonable (there are current examples of such cases for both Australian and UK citizens).

In relation to potential death penalty sentences, CLA does not believe any Australian crime agency should be permitted to swap information that facilitates the possibility of such a terminal sentence on a foreign citizen, or an Australian citizen, when the Australian Parliament has voted to eliminate the death penalty from Australia. We believe most MPs agree with us.

"Serious and organised crime" c.f. lower limits

We note that the ACC's slogan is: *"Unite the fight against nationally significant crime"*. But nothing in this Bill restricts the proposed considerably expanded powers of the ACC to "nationally significant crime".

We also note that the second dot point under ***permissible purpose*** in the Explanatory Memorandum (EM) for the Bill clearly indicates that the legislative intention is that both the national and the foreign information sharing relates to "serious and organised crime".

> *This purpose extends to preventing, detecting, investigating, prosecuting or punishing both domestic and foreign criminal offences. As serious and organised crime does not respect traditional national borders, it is important the ACC continues to be able to share information it obtains with its international counterparts* (underline added).

CLA agrees with the statement in the EM that it is important for the ACC to be able to share information about serious and organised crime.

But, there is no such restriction relating to "serious and organised crime" in the legislation.

This appears to be an oversight. As drafted, the ACC could share information on the most trivial of offences against someone, Australian or foreigner, who has absolutely no connection

to serious and/or organised crime.

We believe this aspect of the legislation requires re-drafting. We concur with the statement of a Committee member that:

> *"The assumption that each additional state power will always be used for the common good is a proven lie".*

It is for this reason that we have commented at length, in Appendix B, on why lower limits are necessary in the legislation. If – alternately – the words "in relation to serious and organised crime" were added to the Bill in appropriate place(s), there would be no need to set lower limits in some of the clauses. However, there would be a need for a definition of "serious and organised crime". CLA is not aware of any such definition in any federal legislation: a definition developed in consultation with the community (including civil liberties/human rights bodies) would be a useful addition to parliamentary and national debate.

CLA suggests the "permissible purpose" clauses should provide for judicial review and oversight of the process before information is shared.

Is a CEO of ACC a suitable person for unfettered decision-making?

The example given at the Committee hearing by the ACC CEO, Mr Lawler, of a situation in which he believed it would be appropriate to share information was disturbing. On possibly mere coincidence, he would inform a person's employer.

Mr Lawler is a decision-maker under the proposed legislation. If he shared such low-reliability information with a bank, it would result in the end of a person's job (as the Rule of Law Institute pointed out) on just information, not evidence.

Under Mr Lawler's decision-making, a person could lose a career in both a company and an industry simple by being "caught short" and entering a place, for personal relief, where crime figures happened to be meeting unbeknown to the person in distress.

ACC, police and security surveillance should not be used in such circumstances in Australia. Perhaps the right of the ACC to swap information should be restricted to the Board and not expanded to the position of Commissioner. CLA points out in Appendix A that even the Board of the ACC is more representative of a security, police and intelligence elite culture than it is of average community standards and expectations. A CEO of the ACC is almost inevitably drawn from the same type of culture. CLA suggests that a person drawn from that culture is not the most suitable to making unfettered decisions about information sharing which may have political, diplomatic, trade and human rights implications.

Our own notes on the individual permissible purpose clauses may be useful for the Committee in arriving at its final position. They are at Appendix B.

Powers creep

The ACC will be securing, by this Bill, major expansion of its existing enormously broad-reaching powers. If the ACC wants to expand its powers even further, it should have to return to the Australian Parliament to make out a new case, under freshly-considered full legislation, not by gradually accreting powers under additions to mere 'regulations'.

CLA believes any sharing of information (including accessing of data for potential sharing purposes) should be traceable and auditable. A provision ensuring this should be in the Bill.

CLA also believes the new information-sharing powers of the ACC should be audited, by a monitoring group, twice a year (see below). As well, there should be an annual report to the Parliament through the ACC monitoring Committee and also directly, where appropriate.

The legislation should include harsh penalties if there is any abuse or serious negligence in relation to the ACC and linked databases, and to any information sharing. No such protections appear to be in place in the draft legislation.

2. Community audit/monitoring: Public Interest Monitor

CLA believes that there is a clear need for an Information Public Interest Monitoring panel (IPIM), comprising people from the general community rather than police and security agency executives (see Appendix), to "audit" and monitor how the information–sharing aspects of this legislation operate.

In broad terms, the IPIM's role and method of operation would be:

- Monitor the ongoing planning for and establishment of the information exchange system and relationships (particularly with other countries, and in relation to MOUs in the public and private sectors);
- Monitor planned and existing MOUs;
- Monitor exchanges of information, and their outcomes;
- Monitor and advise on, in the public interest, any requests for access to the database for research or similar reasons;
- Monitor planning for any future developments; and
- Advise on possible future extensions and additions, or required restrictions.

The panel should have representatives of organizations such as:

Legal (such as a private sector criminal law barrister or solicitor)
Academic in the field of criminology
Industry association representative (from banking, tax accountancy, or similar)
Judge/magistrate
Public sector union (operating in the field) representative
Diplomatic corps
Parliament(s)
Civil liberties/human rights
Privacy

Members of the IPIM would be subject to security clearances, and to signing secrecy contracts.

The information IPIM would meet twice a year. Its powers and method of operating would be along these lines:

- The IPIM would meet for a full day twice a year, in the secure offices of the ACC;
- It would be able to demand access to 10% of case files where information had been exchanged, or was being considered (selected by a random file number range, advised on the day at the start of the meeting);
- Of that 10%, a representative sample would be analysed and discussed during the day;
- Appropriate ACC personnel would be made available for check questioning;
- The IPIM would prepare a report, with appropriate detail, for consideration by the relevant Minister and/or Parliamentary Committee; and
- The IPIM would prepare a report, of a more generic nature, for mandatory public release by the IPIM one month after the end of the meeting.

3. Automatic parole:

It was noted during the hearing on 10 February 2012 that sections relating to the repeal of 'automatic parole' would apply to prisoners who had already been sentenced. CLA notes that there is strong and widespread opposition inside and outside Parliament to applying criminal sanctions retrospectively. We recognise the importance of the concept of “truth in sentencing”, but certainty in sentencing for the community and the person sentenced is an equally valuable principle which this proposal offends.

The new provision was intended to apply to, for example, sex offenders who refuse to participate in rehabilitation programs because they know they will be paroled regardless. It would seem logical to address the problem through providing greater incentives to participate (or conversely greater disincentives for non-participation) rather than at end of the sentence. CLA believes sentencing decisions should be made by judicial officers, not by administrative officers or politicians.

APPENDIX A: Members of the Australian Crime Commission Board are:

AFP Police Commissioner (Chair)
NSW Police Commissioner
Victoria Police Commissioner
Queensland Police Commissioner
South Australia Police Commissioner
Western Australia Police Commissioner
Tasmania Police Commissioner
ACT Chief Police Officer

ASIO Director-General
Customs/Border Protection CEO
ASIC Chair
A-G Department Secretary
ATO Commissioner

…and the CEO ACC as
a non-voting member

The Board is a very “closed shop” in terms of the security, intelligence and policing elite (SPIE) of Australia. The Parliamentary Joint Committee on Law Enforcement is not authorised to undertake any “audit” role on the behaviour of the ACC. Given that the ACC’s power to

share information nationally and internationally is being dramatically increased by the proposed legislation, there appears to be a clear need for some form of "audit" function to examine whether or not that information sharing is handled appropriately. We commend an IPIM or similar process to the Committee.

CLA agrees with the statement of a Committee member:

> *"I believe that law and justice should not meet furtively, illicitly and occasionally."*

APPENDIX B:

CLA's notes on the permissible purposes clauses:

(a) appears to be OK...provided it cannot be read so as to expand existing powers.

(b) (i) Please see comments above. Apart from the objections already outlined, sub-clauses such as these need a lower limit (say $50,000 and $100,000 in monetary terms for an offence, say punishable by more than two years in prison in Australia) for national and foreign offences, otherwise they could permit pettiness and serious errors of judgement for very low-level behavior.

(b) (ii) it is unclear to CLA why "civil remedies" should be the province of an Australian CRIME Commission — this appears to be function creep.

(b) (iii) OK, but needs a lower limit for the same reasons as outlined above. Say $20,000 minimum, or offence punishable by more than two years in prison in Australia). It would be inappropriate to use secret ACC 'information' (not evidence) to administratively fine a public official who was fudging a taxi expenses account for $80 a month, if that was the person's only offence. CLA suggests matters with over $20,000 (indexed) annual impact on public revenue. Other provisions in other Acts (particularly the Public Service Act and employment contracts in Australia) would appear to cover lesser amounts adequately.
NOTE: A major crime-fighting organisation like ACC, with massively intrusive and draconian powers, should not be permitted to end a person's career over relatively small amounts or petty offences…but the draft Bill permits this.

(c) and (d) are OK…but it is not immediately clear why the word "serious" is in the second of the two clauses only. It would appear that it should be in clause (c) also. There are many stupid threats made (such as the one to close down an airport in the UK by Twitter message) which should not necessarily engage the full weight of the ACC.

(e) and (f) enforcing laws (including laws of foreign countries) relating to unexplained wealth and proceeds of crime. We have discussed above the danger of "laws of foreign countries" unless there are treaties in place, and/or the countries are defined, and/or the laws which may apply are defined…and there is judicial/ministerial review.

Again, there should be some lower limits: CLA suggests $50,000 within Australia,

$100,000 for offences in foreign countries.

(g) protecting public revenue
OK, but there should be a limit, as above.

(h) developing government policy
OK, but only on general principles and without permission to share names/precise details. Such protections should be written into the Bill in this and other clauses.

(i) research criminology
OK, but there should be provisions in place for any researcher handling data involving names/precise details to have to sign a secrecy contract (not an MOU).

(j) any other purpose prescribed by the regulations.
This is too wide a proviso, and too easy a clause to expand, because it allows mere 'regulations' to expand the reach of 'permissible purpose' without limitations ("any other purpose")

ENDS

CLA Civil Liberties Australia
Box 7438 Fisher ACT Australia
Email: secretary [at] cla.asn.au
Web: www.cla.asn.au

(Prepared by CLA CEO Bill Rowlings, with help from CLA Member Benjamin Smith)