

Parliamentary Joint Committee on the National Crime Authority

Report into the Australian Crime Commission Establishment Bill 2002

Response to Recommendations

Recommendation 1

The PJC recommends that the Bill be amended to provide that Austrac be included as a member of the Board.

Not agreed.

AUSTRAC provides specialist financial intelligence that is integral to the fight against crime and money-laundering in particular. It is a valuable organisation that has a key role to play in the broader criminal intelligence framework and it is envisaged that there will be a very close and special working relationship between the ACC and AUSTRAC. However, it is a financial intelligence body, not an investigative body. It provides intelligence in support of law enforcement. The Board is to be focussed on setting national priorities and while such priorities are based on intelligence assessments, those who make such assessments or provide input to such assessments are not necessarily best placed to do this.

Recommendation 2

The PJC recommends that the Bill be amended to restore the entitlement for the ACC to develop co-operative relationships with corresponding overseas law enforcement agencies.

Agree.

Section 17, which dealt with the National Crime Authority acting in cooperation with law enforcement agencies and coordinating its activities with foreign law enforcement agencies, will be re-inserted and apply to the ACC.

Recommendation 3

The PJC recommends that the Bill be amended to ensure that the relevant state/s are informed of any operation or investigation that is proposed to take place within its boundaries.

Agree.

The Bill will be amended to oblige a Committee to inform all other Board members of its decisions.

Recommendation 4

The PJC recommends that the Bill be amended to explicitly provide that:

- The CEO should be responsible for the overall management of the ACC. The Minister for Justice and Customs of the Commonwealth Parliament should be the Minister, under our system of responsible government, accountable to the Parliament for the work of the ACC.**
- The CEO appoint the head of a task force after consultation with and advice from the Board.**
- Heads of task forces are responsible to the ACC through the CEO.**

Agree.

The Bill will be amended to provide that the CEO:

- is responsible for the administration and management of the ACC;
- must manage, coordinate and control ACC operations/investigations.(This will ensure that the head of an ACC operation/investigation is responsible to the Board through the CEO.); and
- must appoint the head of the investigation/operation after having consulted with the Chair of the Board and appropriate Board members. Appropriate Board members may be determined by the Board under directions issued under subsection 46(1).

The Minister for Justice and Customs will be the Commonwealth Minister responsible for the Australian Crime Commission Act (this is by virtue of the combined effect of Administrative Arrangements Order and Acts Interpretation Act 1901).

Recommendation 5

The PJC recommends that the Bill be amended to provide that the suspension of the CEO can only take place on the initiative of the Minister until a meeting of the full Board to consider the matter and that the CEO can only be removed for cause, or, if that is thought to be insufficient scope to allow for the removal of the CEO, by the Minister following a resolution of the full Board passed by two-thirds majority.

Agree in principle.

In relation to the suspension of the CEO, it is proposed that the Minister must not suspend the CEO unless the Minister has consulted the Board about the proposed suspension.

In relation to the termination of the CEO, the proposed provision enabling termination for 'unsatisfactory conduct' is a 'for cause' provision. That is, it does not enable a subjective power to terminate the CEO or to have termination without cause.

General administrative law principles protect against arbitrary acts. This will be clarified in the Explanatory Memorandum to the Bill.

Recommendation 6

The PJC recommends that the Government give careful consideration to the terms and conditions of ongoing staff to be employed by the new ACC, particularly in the context of their current conditions of service.

Agree.

This will be a priority for the CEO, who is the head of the Statutory Agency and responsible for workplace relations and accountability issues.

Recommendation 7

The PJC recommends that the Bill be amended to provide that complaints against all staff of the ACC be investigated by the Commonwealth Ombudsman as a minimum.

Agree in principle.

It is appropriate that the Commonwealth Ombudsman be able to investigate complaints against all staff of the ACC. The Commonwealth Ombudsman currently has the jurisdiction to deal with complaint against the National Crime Authority.

However, no amendment is necessary. The Bill already amends the Ombudsman Act to provide that the Australian Crime Commission is a prescribed authority for the purposes of the Ombudsman Act. This means that the Commonwealth Ombudsman will already be empowered to deal with complaints against the ACC and the ACC is defined in the same way as is it is defined in the ACCE Bill, and therefore includes all staff.

Recommendation 8

The PJC recommends that the Government, once the ACC has been established, gives urgent attention to ensuring that operational, investigative and support staff work under the same integrity and complaints regime.

Agree.

This will also be a priority for the CEO, who is the head of the Statutory Agency and responsible for workplace relations and accountability issues.

Recommendation 9

The PJC recommends that the Bill be amended to provide that the ACC is obliged to provide the Parliamentary Committee overseeing its operations with any information sought by the Committee except where that information would

identify any particular individual suspected of criminal conduct (unless the matter is already in the public domain) or would, in the opinion of the CEO, risk prejudicing a current inquiry.

Agree in part.

It is proposed to amend the Bill to provide that the PJC-NCA may have access to the same information that the IGC-NCA is able to access. This includes information relation to an ACC operation/investigation that the ACC is conducting. Information that would prejudice the safety or reputation of persons or the operations of law enforcement agencies would not be disclosed.

Where the Chair of the Board decides that the material should not be disclosed on these grounds, then the PJC will be able to direct the request to the Minister for determination.

Recommendation 10

The PJC recommends that the Bill be amended to establish the ACC as a legal entity.

Not agreed.

The Office of Parliamentary Counsel's drafting guidelines (OPC Guidelines) provide for a presumption against incorporation of statutory bodies—'a body should not be established as a body corporate unless there are good reasons for doing so. One good reason is to allow the body to hold money on its own account. If the body is to deal with money only in the capacity of agent of the Commonwealth, it should not be given a legal personality distinct from the Commonwealth unless there are other good reasons for this.' The ACC has been set up in accordance with the OPC guidelines, and is therefore in accordance with the usual standard for bodies of this type.

The PJC's comparison with the Australian Securities and Investments Commission Act 2001 is misplaced. ASIC falls within the exception in the OPC Guidelines as it has a significant revenue base. There is indeed a significant increase in accountability for financial management when a body is incorporated and becomes subject to the requirements of the Commonwealth Authorities and Companies Act 1997. This includes additional auditing, reporting and disclosure requirements. However, the ACC will not have significant revenues to account for and to impose the additional financial reporting burdens on an organization not intended to be covered by them merely complicates processes that the Government wishes to streamline.

In addition, incorporation of a statutory body is sometimes seen as an indication of independence from the Executive, but the two are not really linked. A body corporate that is largely reliant on the Department of Finance for its funding may not act any more independently than a body that it not incorporated. Issues such as extending the shield of the crown to the ACC and immunities from taxation would also need to be addressed.

Finally, the implication in the PJC's report that a person having a cause of action against the ACC could be legally disadvantaged if the ACC is not incorporated is wrong. As the PJC itself acknowledged the NCA was not incorporated and there is no evidence to suggest that any one has been disadvantaged by that.

Recommendation 11

The PJC recommends that there should be no blanket immunity from suit for the ACC.

Agree.

The Bill will be amended to provide that the protection from liability for damages should only be available to the Board.

Recommendation 12

The PJC recommends that the Bill be amended to provide explicitly that any decision by a committee of the Board to authorise an operation/investigation as a special operation/investigation requires ratification by the full Board.

Agree in principle.

The Bill will be amended to expressly prohibit a committee determining that an intelligence operation/investigation is a special operation/investigation. The effect will be that all such decisions will have to be taken by the full Board. This then removes any requirement for ratification.

Recommendation 13

The PJC recommends that the Bill be amended to provide that no part-time examiners can be engaged on a per-hour or per-diem basis.

Agree.

The Bill will be amended to remove any references to part-time examiners.

Recommendation 14

The PJC recommends that the Bill be amended to explicitly provide that examiners must satisfy themselves in each case that before they exercise special powers under the Act that it is appropriate and reasonable to do so and that they indicate in writing the grounds for having such an opinion.

Agree.

The Bill will be amended to expressly provide that before an Examiner exercise coercive powers under section 28 (Summons to attend) or section 29 (Notices to produce) the examiner must decide that the exercise of the power is reasonable in all

the circumstances. It is also agreed to insert provisions requiring the Examiner to indicate in writing the grounds for making the decision.

Recommendation 15

The Committee recommends that the Bill be amended to provide for a comprehensive public review of the ACC Act to take place after three years have elapsed from the date of Commencement of the ACC Act.

Agree.

The Bill will be amended to provide that there is to be a review of the operation of the ACC as soon as practicable after 1 January 2006.

Additional recommendations by certain members

Additional Recommendations 1 to 3.

- 1. The Board should be responsible for general references.**
- 2. In circumstances of urgency the Board should be entitled to issue a reference authorising the use of coercive powers but such a reference would lapse after 45 days unless ratified by the Inter-Governmental Committee within that period.**
- 3. In non-urgent circumstances the Inter-Governmental Committee would be required to approve any reference authorising the ACC to use coercive powers.**

These recommendations arose out of certain members concerns that the power to authorise the use of coercive powers should not reside with the proposed Board of the ACC but should remain with the Inter Governmental Committee. However, this change was unanimously agreed to by all governments of Australia, Federal, State and Territory and was only taken after serious consideration and debate. It is fundamental to the agreements reached by Leaders at the Summit and by police and justice ministers in August and it is the type of decision that it is appropriate for governments to make. It is not proposed to agree to those recommendations.