

**Parliamentary Joint Committee on the
National Crime Authority**

**Inquiry Into The Australian Crime
Commission Establishment Bill 2002**

**Submission No:1
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"Called to Account..."

**The need for Higher Integrity Standards
in the proposed Australian Crime
Commission**



*A submission by the Australian Federal Police Association on
why employment under the Commonwealth Public Service Act
fails to provide appropriate integrity standards for law
enforcement employees.*

Glossary

ACC	-	Australian Crime Commission
AD(JR) Act	-	Administrative Decisions(Judicial Review) Act 1997
AFP	-	Australian Federal Police
AFPA	-	Australian Federal Police Association
ALRC	-	Australian Law Reform Commission
ANAO	-	Australian National Audit Office
FOI	-	Freedom of Information
IGC	-	Inter-Governmental Committee
NCA	-	National Crime Authority
PJC	-	Parliamentary Joint Committee
TI Act	-	Telecommunications Interception Act 1979

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1.0 Introduction

The Australian Federal Police Association (AFPA) welcomes the opportunity to make a contribution to the important debate on the establishment of the new Australian Crime Commission (ACC). The Association has previously made a submission to the House of Representatives Legal and Constitutional Affairs Committee on this issue which is included as Attachment A to this document. In our earlier submission the AFPA has addressed the broader issues impacting on the ACC development, the important work of the existing Australian Bureau of Criminal Intelligence (ABCI) and issues relating to the employment framework of the new organization.

The following information is provided in furtherance to our earlier submission and addresses particularly those matters relating to the integrity framework proposed for employees under the new ACC Act.

In general terms the AFPA must express its great concern that the proposed ACC is to be established under the auspices of amendments to the National Crime Authority (NCA) rather than its own specific and new legislation. The AFPA is concerned that this model will invariably transfer to the new organisation existing failures of the current NCA Act and its culture. Most importantly this occurs with respect to the integrity regime applicable to employees under the new ACC.

The AFPA believes that the draft legislation for the creation of the Australian Crimes Commission (ACC) needs to be changed regarding the proposed method of employment.

The ACC will be expected to utilise powers and responsibilities well above any other normal public service agencies. In relation to federal criminal law enforcement agencies, it will have like powers and responsibilities of the Australian Federal Police (AFP) but they will have a significant additional investigate tool of coercive hearing powers. The AFPA believes employees of the commission, in the same way as the AFP, should face high levels of integrity and accountability.

This document will outline the arguments the AFPA believes underpin our position on this matter. The arguments have been gathered from a range of sources including the report that initiated the creation of the AFP, the Parliamentary records in relation to the creation of the NCA, Parliamentary Joint Committee on the NCA reports, Australian Law Reform Commission (ALRC) reports and comments from former Directors of the National Crime Authority. It has been arranged chronologically so as to indicate the progress of the issues.

The change requested is to S47 of the draft ACC legislation, currently worded:

S47 Staff

- (1) Subject to sections 48 and 49, the staff of the ACC shall be persons engaged under the Public Service Act 1999;**
- (2) For the purposes of the Public Service Act 1999;**
 - (a) the CEO and the APS employees assisting the CEO together constitute a Statutory Agency; and**
 - (b) the CEO is the Head of that Statutory Agency.**

The AFPA believes that employees of the ACC should be subject to the same integrity and professional regime as all other Police Service sworn and non-sworn employees. For the commission to have the necessary safeguards expected by the wider community the section should read in one of two ways.

S.47 Staff

- (1) Subject to sections 48 and 49, the staff of the ACC shall be persons engaged under the Australian Federal Police Act 1979;**
- (2) For the purposes of the Australian Federal Police Act 1979;**
 - (a) the CEO and the ACC employees assisting the CEO together constitute a separate Statutory Authority; and**
 - (b) the CEO is the Head of that Statutory Authority and has the relevant and like powers of the Commissioner of the Australian Federal Police in relation to that Statutory Authority.**

Alternatively the ACC could use the secondment powers within the AFP Act in relation to ACC employees (excluding seconded State Police):

S.47 Staff

- (1) Subject to sections 48 and 49, the staff of the ACC, other than sworn staff seconded from state and territory jurisdictions, shall be seconded from the Australian Federal Police under arrangements between the CEO and the Commissioner of the Australian Federal Police.**
- (2) The CEO and seconded employees constitute a separate Statutory Authority of the Commonwealth**

It would seem appropriate that any Commonwealth agency that confers the use of coercive powers, and the handling of information derived from such processes, upon its employees must, at the least, be accountable to Government and the community to the highest order. The AFPA finds it a matter of great confusion as to why this issue seems so comprehensively ignored by the drafters of the exposure draft legislation for the ACC. It would remain a fundamental failure of public policy to enshrine legislation establishing high level investigative capacity on any agency that fails to meet a very basic test of integrity oversight.

The broader AFPA position is that all Commonwealth employees who have responsibility for and an obligation to conduct law enforcement functions, should be held accountable to a common standard of integrity. This integrity must be ensured through the toughest standards of accountability to the Parliament and the community at large. This is not a new concept. The ALRC in its 1996 report into the AFP and NCA stated “active consideration should be given to the proposal that ... it be extended to other aspects of federal law enforcement”. The AFP Complaints Act currently stands as the strongest Commonwealth instrument with application only to employees of the AFP.

It is recognised that the AFP Complaints Act already requires contemporary updating for a variety of reasons. However, best practice policy remains that the AFP Complaints Act or similar legislation should be applicable to employees across a range of Departments within the Commonwealth to include investigators and officers in agencies such as Customs, DIMEA, AQIS APS etc. This issue could be addressed,

at least in the short term, for employees of the new ACC agency by ensuring that all ACC employees are subject to the employment powers of the AFP Act.
(NOTE: ABCI EMPLOYEES CURRENT CONDITIONS)

2.0 The Creation of the Australian Federal Police

The AFP is an organisation, which amongst other functions, was originally created to combat terrorism as a response to the Sydney Hilton Bombing. The organisation currently enforces commonwealth law including terrorism, transnational crime, money laundering, major fraud, illicit drug and people trafficking as well as fraud and e-crime.

Sir Robert Mark G.B.R, Q.P.M, in 1978, wrote the “*Report to the Minister for Administrative Services on the organisation of police resources in the Commonwealth area and other related matters*”. It was the recommendations of his report that were used to establish the AFP the following year.

In addition to outlining the powers that they should have to perform its tasks he also paid a great deal of credence to the weight of the responsibility that was required by all law enforcement bodies.

An Australian Federal Police cannot command public confidence and respect without certain prerequisites. These are in brief...

... that it should be seen to be administratively accountable, and willing to be accountable, to government and public alike, both by law and by a well publicised system for investigation of complaints against police¹

He continues to explain the reasoning behind why it is of the utmost importance that an organisation of such high authority requires comparable accountability.

A police force discharging the duties assigned to the AFP – indeed, any police force in a genuinely democratic society – will not enjoy public confidence and trust unless it is accountable, and moreover, is seen to wish to be accountable. Accountability to the criminal law, the civil law and it’s own police authority, even though that be the government itself is not enough. Nor should the object be to satisfy complaints, some of whom will never in any circumstances be satisfied. The object should be to satisfy the public that every complaint is investigated thoroughly and impartially...

Sooner or later every police force ... must now show its willingness to accept such a system and a newly created force could hardly do better than embrace it at the outset.²

¹ Report to the Minister for Administrative Services on the organisation of police resources in the Commonwealth area and other related matters, Sir Robert Mark, G.B.R., Q.P.M., 1978 page 6

² Report to the Minister for Administrative Services on the organisation of police resources in the Commonwealth area and other related matters, Sir Robert Mark, G.B.R., Q.P.M., 1978 page 20

3.0 The Position of the Australian Law Reform Commission

In consideration of the failures of the current NCA Act, the AFPA notes that should the ACC be established with Section 47 referencing the Public Service Act as the basis of employment, the new organisation will fail to establish uniform standards of integrity or a consistent process for the handling of complaints against all Commonwealth employees and seconded staff.

The AFPA recommendation that the AFP Act be utilised instead would ensure that the ACC would at the least have a uniform model for all Commonwealth employees co-existing with comparable models applicable to seconded State Police service employees. This issue has been historically identified with respect to the NCA.

In 1996 the Australian Law Reform Commission produced a report, *“Integrity: but not by trust alone AFP & NCA complaints and disciplinary systems”*. Of particular interest are the recommendations arising from chapter 5.

7. The NCA should have a formal complaints system established under legislation that provides effective external participation and scrutiny.
8. There should be one uniform NCA complaints system applying to NCA members and all its staff that is, to (a) members and the Chairperson (b) staff employed under the Public Service Act, (b) seconded staff (c) consultants (d) legal practitioners and (e) members of task forces.³

The core position identified by the Law Reform Commission was that the NCA should be brought into common alignment with the AFP as to the handling of integrity matters. The AFP has itself now moved beyond the old 26E provisions of the AFP Act while still recognising the need for loss of confidence provisions within the powers of the AFP Commissioner and the operation of the AFP integrity regime.

It would seem to the AFPA that where deficiencies were previously identified by a range of bodies as to the operational integrity of the NCA, that its replacement organisation the ACC should not replicate such oversights or failures.

Additionally a more recent position of Australian Law Reform Commission (ALRC) is examined in the following section.

4.0 The Third Evaluation of the National Crime Authority

In 1998 the Parliamentary Joint Committee on the National Crime Authority evaluated the NCA for the third time in its history. Comments that arose were clearly stating advice in favor of an external complaints mechanism. Members of the ALRC, NCA and QCs appeared before the parliamentary enquiry making this a particularly important inquiry to look at in relation to this matter.

³ *Integrity: but not by trust alone AFP & NCA complaints and disciplinary system, 1996*

Below are significant sections from the committee presenting the views from those intimately involved with the NCA through to the views of state governments at the relevant points in time.

The overwhelming consensus of all those consulted was that the NCA accountability process, as currently provided for in its Act, is deficient in that it does not have any external scrutiny mechanism with teeth. The external scrutiny that is provided by this Committee, by the Inter-Governmental Committee and by the relevant Attorneys-General and Ministers for Police is capable of providing external policy scrutiny but it is not capable and was not set up for the process of dealing with individual complaints and allegations of criminality, fraud and corruption and dealing with failures in office of members of the authority and its staff.

The National Crime Authority Act 1984 (NCA Act) contains no clear mechanism for resolution of complaints that might be made by members of the public about the activities of the members of the NCA and its staff. These complaints might range from claims that the NCA is acting illegally to an act of rudeness by an investigating officer or a receptionist. While the courts may be the appropriate avenue for appeal against some of the NCA's actions, it is desirable in the interests of good public administration that a low-cost and accessible complaints system should be available. Such complaints may necessitate disciplinary action against an individual or highlight some systemic problem.⁴

There was a definite lack of clarity in relation to exactly who was responsible for the oversight of issues pertaining to accountability. Complaints were being made to the PJC, the Attorney General and some even to other agencies. The NCA Act was unable to give any real definition to the process through which complaints should be handled.

Regular debate is generated on the matter of resolving problems that arise within the agency and yet the problem remains.

NCA Chairperson, Mr John Broome, told the PJC:

“Investigation of complaints requires specialist bodies with appropriate powers and appropriate resources. It is no criticism of this Committee to say that it is not legislatively established to do the job and does not have the resources. It seems to me that it is a very unsatisfactory process to expect parliamentarians, with enormous other demands on their time, to become full-time complaints investigators. What you need is people who are in fact established to do that very function. I do not think it works particularly well.”

“... the absence of an external investigative body, to deal with complaints, means that, irrespective of whether or not the complaints have any foundation at all, there is always a suggestion that there may have been something there, and that is a concern for us.”⁵

⁴ Parliamentary Joint Committee on the National Crime Authority: Mr Alan Rose, President, Australian Law Reform Commission, in evidence 16/9/1996

⁵ Parliamentary Joint Committee on the National Crime Authority: Third Evaluation of the National Crime Authority, April 1998, page 174

The AFPA notes that with respect to external complaints mechanisms, the need to review the operation and effectiveness of the AFP Complaints Act should address this question in a longer term context for all agencies. However, with respect to the immediate question of the establishment of the ACC, the recognised effectiveness of the existing AFP Complaints Act must be acknowledged as a viable short term solution to the issue.

In October 1994 the PJC, reporting on complaints made against the NCA it was noted that no progress had been made in establishing a complaints mechanism. The committee was of the view that the delay was unacceptable and reiterated that legislation must establish an Office of Inspector General of the NCA.

In July 1995 the comments about the need for a complaints system was referred to the ALRC for consideration and to respond by 30th June 1996 as an additional consideration for the inquiry into how complaints were dealt with within the AFP.

The 6th of September 1996 saw the committee issue a statement indicating the dissatisfaction of the delay of the ALRC in responding and took the opportunity to bring attention to the fact that no new complaints arising in the meantime could be properly dealt with.

The ACC, for the first time in Australia's history will be the central criminal intelligence depository of this country combining the intelligence functions of the Australian Bureau of Criminal Intelligence (ABCI), Office of Strategic Criminal Assessment (OSCA) and the NCA Special Intelligence Team.

It is essential that a body of law enforcement which, by its nature, must be concealed and secretive to the general public is able to continue performing the operations such as is required effectively yet must have mechanism that ensure it is accountable for its actions.

The NCA over its history has been subject to great public attack over its seeming lack of accountability and we do not support this experience being transferred legislatively to the new ACC. Examples of this include:

Representatives of the Queensland Bar Association and the South Australian Law Society both expressed support for the establishment of an independent body with sufficient resources and powers to be able to properly hold the NCA accountable when complaints are made, without being committed to any particular model.

The PJC took evidence from only one witness, Mr Mehmed Skrijel, who had personal experience of seeking to complain about the operations of the NCA, rather than using the processes of the courts. Mr John Elliott, who like Mr Skrijel had been the subject of an NCA operation, told the PJC that he had not sought to complain about the NCA's activities because he would have had to direct his complaint to the NCA. Mr Elliott also did not complain to the PJC at any stage because he thought that the NCA's secrecy provisions prohibited him from doing so, although he added: 'I think it is impossible for a parliamentary committee to supervise the NCA'.

Mr Skrijel had been complaining about the activities of the NCA almost since its inception, as one of its earliest inquiries was into a matter Mr Skrijel had

first raised with the Costigan Royal Commission, which was passed by the Commission to the NCA upon its establishment. He has raised his complaint with the NCA, with the PJC, with the Attorney-General, Minister for Justice, and with others. Despite several investigations into the matters he had raised, it has remained unresolved to his satisfaction. His frustration at the lack of support he was receiving from the NCA and the PJC led him to submit that:

[the] Committee is nothing but a cheap political arm of the most corrupt police force in the world which is specifically created by totally corrupt politicians for the protection of organised crime in this country.

The PJC continues to consider aspects of Mr Skrijel's case, which demonstrates the need for an authoritative, independent and accessible complaints agency for the NCA.⁶

In an area like law enforcement and an area like security and intelligence, where of necessity a high level of secrecy must surround the way in which those bodies carry out their activities, there is a manifest case to be made for an oversight body that understands the different nature and responsibility of the work in these government agencies, rather than in the standard public service environment.

It is essential that the ACC, must be security conscious with a high degree of secrecy when conducting intelligence and investigations. It should be able to continue effectively performing its tasks yet have clear mechanisms that ensure it is accountable for its actions.

5.0 The 1999-2000 annual report of the National Crime Authority

The 1999-2000 annual report of the NCA reported that,

Decisions made by the NCA may be subject to judicial review under a range of legislative provisions including the AD(JR) Act which is applicable to some decisions under the NCA Act, section 39B of the Judiciary Act 1903 and section 75(v) of the Commonwealth Constitution. In WY v National Crime Authority [2000] FCA 451, 20 April 2000, Einfeld J decided in the Federal Court that the AD(JR) Act does not apply to reviews under section 32 of the NCA Act of Authority decisions not to accept a person's claim to be entitled not to produce information or a document as required under sections 20 or 29 or to refuse to answer a question or produce a document at an Authority hearing.

The Authority is also monitored by both the IGC and the PJC.

The Audit Committee, which includes an observer from the ANAO, met twice during the year to review audit reports and to oversee the internal audit program.

⁶ Parliamentary Joint Committee on the National Crime Authority: Third Evaluation of the National Crime Authority, April 1998, page 181

Major activities for the year included audits of physical security, access to information technology systems, operations, the vehicle fleet and reviews of the effectiveness of controls within the new financial management and staff management systems.

No cases of internal fraud were detected in 1999-00.

The ANAO undertook no performance audits of the NCA during the reporting period.⁷

OMBUDSMAN INSPECTIONS

During the reporting period the Ombudsman conducted inspections under section 83 of the Telecommunications Interception (TI) Act. They are conducted to assess the NCA's compliance with statutory obligations for warrant management, record keeping and the submission of reports for the Special Register to the Minister. The report for the year 1998-99 noted a high level of compliance. The report on visits undertaken in 1999-00 is not yet available.

This is the only accountability mechanism mentioned in the report and as can be seen by the above mentioned section 83 of the TI Act (Telecommunications Interception Act 1979) it relates to the transparency of reporting by the commission. This section states:

83 Inspections

- (1) The Ombudsman shall inspect the records of each Commonwealth agency:
 - (a) at least twice during the period beginning at the commencement of this Part and ending on 30 June 1988; and*
 - (b) at least twice during each financial year beginning on or after 1 July 1988; in order to ascertain the extent to which the agency's officers have complied with sections 79, 80 and 81 since that commencement, or since the last inspection under this Part of the agency's records, as the case requires.**
- (2) The Ombudsman may at any time inspect a Commonwealth agency's records in order to ascertain the extent to which the agency's officers have complied during any period with sections 79, 80 and 81.⁸*

It can be seen that this has no real impact of the investigating on individual staff members. In fact it seems to be only paying lip service to the notion of reviewing the activities of the Commission.

⁷ Annual Report 1999-2000 National Crime Authority, Page 64

⁸ Telecommunications Interception Act 1979, Section 83

COMPLAINTS AND FREEDOM OF INFORMATION (FOI)

*The NCA places considerable importance on responding to FOI requests and complaints. The ALRC's 1996 report into the complaints and disciplinary systems of the AFP and the NCA, Integrity: But Not By Trust Alone, recommended the establishment of a formal complaints-handling mechanism. The PJC's 1998 evaluation also highlighted the need for a body to address complaints. **The Government is considering its response.***

During 1999-00, the NCA received fourteen FOI requests from individuals. There was one request for comment on an FOI application made to another agency. There was one request for an internal review of an FOI decision. During the reporting period a total of twelve complaints were made to the NCA. Following independent investigation of complaints, half of those received were dismissed as insufficient evidence was found to substantiate the claims. Two complaints were referred to other agencies for investigation as the matters were not relevant to NCA activities. Two investigations continue and will be reported in the 2000-01 annual report. One complaint resulted in a letter of apology being sent to the complainant. A further complaint was finalised without investigation as the complainant refused to furnish further information for the investigation to proceed.⁹

6.0 The 2000-2001 annual report of the National Crime Authority

In the last published NCA Annual Report 2000-2001 it was noted that some headway was made in the recognition of the need for a complaints mechanism.

The NCA places considerable importance on responding to freedom of information (FOI) requests and complaints and has supported the creation of a formal complaint handling mechanism. The ALRC and the PJC have also highlighted the need for a body to address complaints. In its response to the PJC's 1998 Third Evaluation of the NCA the Government supported the creation of an external complaint handling mechanism. This is now reflected in the NCA Legislation Amendment Act 2001 which, upon receiving Royal Assent, will enable the Commonwealth Ombudsman to deal with complaints against the NCA.

During 2000-01 the NCA received nine FOI requests from individuals. There were three requests for internal review of decisions. Two applicants have also sought review of NCA decisions on their FOI applications through the Administrative Appeals Tribunal (AAT). At 30 June 2001 one appeal had been heard by the AAT but no decision had been notified.

During the reporting period three persons made allegations of improper conduct by the NCA and NCA officers. These allegations relate to two NCA investigations using similar methodologies. The complainants alleged to the Commonwealth and NSW Attorneys-General and the Minister for Justice and

⁹ Annual Report 1999-2000 National Crime Authority, Page 65

Customs that the NCA and its officers acted improperly and corruptly in conducting the investigations. The complainants were advised by the Minister for Justice and Customs that the subject matter of the allegations had been considered by the courts and remained matters for the courts. The courts had not found the allegations to be established.

Two investigations were outstanding from the previous report. One complaint was finalized without investigation as the complainant refused to furnish further information for the investigation to proceed. The other complaint was found to have substance and the matter was finalized through internal action.¹⁰

While the NCA has implemented methods for dealing with complaints and integrity issues the fact of the matter is that they don't go far enough. The employees will face the same disciplinary action as a public servant rather than the appropriate accountability of a law enforcement officer.

7.0 Proper Complaints Procedures – A Fair Go All Round

While the need for appropriate anti-corruption and integrity measures obviously serves a great need for the Commonwealth and the Australian community, it should also be recognised that employees also benefit from clear transparent and accessible processes with respect to complaints.

Recent media reports with respect to employee exposure of allegations of corruption, and nepotism within the Defence Signals Directorate (DSD), clearly identified that aggrieved parties felt that no appropriate mechanism existed for allegations to be effectively investigated or addressed. This incident not only exemplifies the failures of the public service complaints culture but clearly indicates the capacity for sensitive and operational environments to be diminished by public scandal and debate.

This environment provides no mechanism for either the complainant or the individuals subject to allegations to receive effective, transparent and accountable treatment of the high order appropriate to the environment. Such situations would be unlikely to occur within the environment defined under the AFP Act and the AFP Complaints Act.

For all parties to receive a fair go all round, the AFPA believes that this matter must be addressed as an urgency within the proposed ACC legislation.

8.0 Conclusion

The NCA appears to have maintained the belief that implementing reporting mechanisms into their structure, policies that should exist in any commonwealth agency, are a substitute for the more onerous scrutiny and the higher level of personal integrity and accountability that employees are subjected to in organisations such as

¹⁰ Annual Report 2000-2001 National Crime Authority, page 74

the ABCI and the AFP. The drafters of the amendments to the NCA Act obviously believe that the new ACC should continue this lower standard.

Given that there has been the commentary on the issue since the creation of the AFP 22 years ago it seems difficult to believe that there remains opposition to ensuring the highest standards not only within the current NCA but almost totally resisted in the creation of new law enforcement bodies such as the ACC.

It seems ridiculous that the employees of the ABCI, who are currently employed using the AFP Act as the employment vehicle, will be translated to the ACC with higher order criminal intelligence capabilities, but will be subjected to lower integrity and anticorruption standards than what they are currently subjected too.

The AFPA has been consistent on the need for common standards of accountability, for federal law enforcement employees, for several years now. The AFP and the ABCI and their workforces enjoy a world best reputation for their integrity and anti-corruption standards. Within the Australian context they have lead all other jurisdictions in this regard.

The AFPA is resolute in the view that post September 11 2001, with the manifest need to extend the operation, reach and activity of criminal law enforcement responses, that there must be a commensurate consolidation of efforts to battle corruption and ensure the integrity of employees tasked with these obligations. The Australian public demand and should expect nothing less. This position has been widely publicly supported in more recent times with debate in regards to the expansion of the Commonwealths Anti-Terrorism efforts.

The AFPA concedes that with respect to the ACC, the move to employment under the AFP Act for its core employees is only a short term resolution of this broader agenda although it at least addresses the immediate situation.

9.0 Recommendations

- 1. That the AFP Complaints Act be reviewed and updated to include all employees of the Commonwealth with functional roles and obligations within the Commonwealth Law Enforcement framework, in particular, the AFP, ACC, and Australian Protective Services (APS).**
- 2. That the new Australian Crime Commission be established with no lesser standard of integrity applicable to its employees than that currently applicable to AFP and ABCI employees.**
- 3. That to achieve a common standard of integrity across the AFP and the ACC that all employees be subject to employment provisions as employees of the AFP Act and not the Public Service Act.**
- 4. That the Public Service Act cease to be used as the employment instrument and regime for Commonwealth Law Enforcement employees;**

- 5. That Parliamentary Oversight be applicable to all employees within the Commonwealth Law Enforcement framework.**
- 6. That S.47 of the draft ACC legislation be amended for the Commission to have the necessary safeguards expected by the wider community. The amended section should read in one of two ways:**

S.47 Staff

- (1) Subject to sections 48 and 49, the staff of the ACC shall be persons engaged under the Australian Federal Police Act 1979;**
- (2) For the purposes of the Australian Federal Police Act 1979;**
 - (a) the CEO and the ACC employees assisting the CEO together constitute a separate Statutory Authority; and**
 - (b) the CEO is the Head of that Statutory Authority and has the relevant and like powers of the Commissioner of the Australian Federal Police in relation to that Statutory Authority.**

Alternatively the ACC could use the secondment powers within the AFP Act in relation to ACC employees (excluding seconded State Police):

S.47 Staff

- (1) Subject to sections 48 and 49, the staff of the ACC, other than sworn staff seconded from state and territory jurisdictions, shall be seconded from the Australian Federal Police under arrangements between the CEO and the Commissioner of the Australian Federal Police.**
- (2) The CEO and seconded employees constitute a separate Statutory Authority of the Commonwealth.**

Appendix A

Section C The Australian Crime Commission

AFPA submission to the House of
Representatives Standing Committee on
Legal and Constitutional Affairs

The Australian Crime Commission

Recent months have seen a rigorous debate within the public arena on the establishment of an Australian Crime Commission. With legislation yet to be drafted, the following provides a perspective on the background and needs underpinning the need for the new agency. The AFPA proposes that careful consideration be given to the new legislation before it is passed through the Parliament. Getting this right is becoming increasingly crucial.

C.1 The Struggle to Establish a Proper National Intelligence Agency

In recent weeks the AFPA has been strongly lobbying the Federal and State Governments over the future construct of the Australian Crime Commission and the future of its component parts the Australian Bureau of Criminal Intelligence (ABCI), The Office of Strategic Criminal Assessment (OSCA) and the National Crime Authority (NCA).

The AFPA has become increasingly concerned with the agenda being mounted by some Senior NCA management to turn the new ACC agency into a new 9th Police Force built from the ashes of the NCA's inadequacies.

It is increasingly the AFPA view that the new agency must be constructed out of new, purpose built legislation and not cobbled together out of the current NCA Act. If the ACC is to be an effective force in the criminal law enforcement environment, it must develop from the effective elements of the NCA and the success of the ABCI.

In the process of lobbying it has also become increasingly clear the ABCI as an agency has failed to penetrate the thinking of either the political masters or many of the Police Commissioners charged with its oversight.

At least one Police Commissioner apparently believes that the ABCI only re-packages statistics sent by the State Services and issues them back with fancy covers. The AFPA believes that it is this short sightedness that has seen the ABCI become largely irrelevant in the ACC debate to the benefit of the NCA. Within this submission we have detailed the Role and activities of the ABCI to assist the consideration of the intelligence aspect of the proposed ACC model. It is not considered necessary to detail the NCA in similar terms given its higher profile.

The AFPA is concerned that very few of the people we have spoken to actually had a view of what the ABCI was or does. This would explain much of the failure to grasp the need for the ACC to be an effective intelligence agency rather than purely an investigative one.

The AFPA has placed on the public record its views on the ACC exercise, our commitment to our members at the ABCI and NCA and our position as to the best practice model that can achieve the needs of the Australian community. The latest in principle agreement between the Commonwealth and the

State/Territory Governments provide some indication that the debate is now back on track.

C.1.1 The Intelligence side of the ACC - What is the existing ABCI?

The Australian Bureau of Criminal Intelligence is a non-incorporated body that exists as a result of an inter-governmental agreement. All ABCI operational (sworn) staff are therefore seconded from a police service or other agency, as the ABCI cannot employ staff in its own right. Permanent employees are employed under section 37 which enables common place services to existing the AFP Act. Therefore all staff are subject to the integrity regime of the AFP.

C.1.2 Who are the ABCI clients?

The principal clients are Australian police services. Other clients include the broader Australian law enforcement community (Customs, Immigration, Environment Australia etc) as well as the international law enforcement community. Historically the ABCI has had limited liaison with defence and national security agencies. However, the link between criminality and national security issues (terrorism, September 11 and people smuggling) has witnessed a rapidly developing relationship between the ABCI and national security agencies.

C.1.3 What does the ABCI do?

The ABCI is an organisation that brings benefits to all governments within Australia, but especially to the Commonwealth. The ABCI is the only Australian law enforcement agency that is capable of:

- Securely communicating with all Australian police services;
- Coordinating a national response to either a criminal or national security threat that needs to utilise the resources of all police jurisdictions;
- Running, maintaining and continuously developing a national criminal intelligence database;
- Maintaining an environment in which police from all Australian police services and the Commonwealth are represented; and,
- Establishing a national dialogue on criminal intelligence through a range of forums. These forums include the Heads of Criminal Intelligence, Chemical Diversion Conference and the National Illicit Drug Reporting Format Conference. In addition a range of national and international gatherings dealing with fraud, child

sexual abuse, violent and serial crime, organised crime and missing persons are also sponsored by the ABCI.

These capabilities will be integral to the future existence of the ACC.

C.1.4 What Does the ABCI Cost and Who Pays?

In recent years the ABCI has cost governments approximately \$6-7 million each year. This figure is a substantial reduction on the earlier budgets of the bureau with financial resources being cut approximately by one third in 1996. The cost of the ABCI is shared by the Commonwealth and the states (including the Northern Territory) on an approximate 60/40 basis respectively. The Commonwealth allocated an additional \$11.4 million dollars over the next four years to improve ACID.

The ABCI received no additional funding for the 2000 Olympic Games or the post September 11 investigations despite playing a major role in both events. Australian police services constantly request the ABCI to expand its services in areas such as firearms, child sex offenders and property theft. Unfortunately these demands cannot be met due to limited resources.

C.2 Existing ABCI resources

C.2.1 Information Technology

The ABCI has some very powerful IT resources in conjunction with very limited human resources. The Bureau runs and maintains a sophisticated IT platform, the Australian Law Enforcement Intelligence Net (ALEIN). Law enforcement and national security officers throughout the world visit the ABCI to view this system. No other country has a system with the same degree of functionality. Other organisations view ALEIN as being better practice and are attempting to emulate the system within their own jurisdictions.

Given adequate resources it would be possible to make ALEIN available to all law enforcement and national security officers within Australia. ALEIN is also available to all AFP overseas liaison officers who have access to the AFP PROMIS network.

As part of ALEIN the ABCI offers two intelligence data bases. The first is the Australian Criminal Intelligence Database (ACID). ACID is the principal intelligence data base for all Australian police services with the exception of the AFP and NSW Police. All police services contribute intelligence in varying degrees to the system. However, much of the information is restricted to small access groups and some agencies are not actively contributing their information/intelligence

despite repeated requests by the ABCI. This reluctance on behalf of some agencies, especially at the Commonwealth level to share intelligence not only assists criminality but also has the prospect of not detecting and preventing intelligence targets that may also be of national security interest. This concern must be addressed as a matter of priority within the new ACC structure.

C.2.2 Human Resources

The ABCI is staffed by approximately 65 officers from Australian police services at any one time. The bulk of these officers are from the AFP, with most jurisdictions only providing one officer to the ABCI. NSW is the exception seconding five officers. State police services may supply additional officers to national positions on a merit selection basis. The majority of ABCI officers are located within Canberra with one out posted officer in each of the mainland states.

Given the low level of staffing the ABCI has to carefully select which areas will attract analysis. At present the ABCI deploys:

- Four officers on organised crime
- Three officers on drug investigations
- Three officers on fraud and e-crime
- One officer on national missing persons
- Two officers on violent crime, including child sexual abuse
- One officer on terrorist issues.

These officers are assisted by intelligence support staff in project management, editorial assistance, statisticians and data entry. This totals an additional seven officers. The remainder of staff are deployed against a range of IT duties as well as corporate support.

It is important that staff at the ABCI come from police services for a number of reasons. Most importantly if there are concerns on corruption issues the officer can be quickly removed from the workplace by sending them back to their home force. Also of importance is the skills and knowledge sets that police employees, either sworn or unsworn bring to the ABCI. While these may in some cases be similar to that of other areas of the public sector it is crucial that intelligence staff are able to interpret government policy accurately into the law enforcement environment. Without a background in law enforcement this process is unlikely to happen smoothly with a subsequent dysfunctional outcome for both government and the community.

It is these unique issues that demand that the new ACC be established with a similar employment framework to the existing ABCI model. The existing ABCI function and future ACC model require the highest

level of integrity by employees and accountability well beyond any protections created under employment through the Public Service Act.

The AFPA is firmly of the belief that the new ACC must demand the highest level of accountability of its staff, well beyond that of the existing NCA Act. For this reason we do not support the existing Act being utilised as the vehicle for the ACC and seek new purpose built legislation referencing the AFP as the Statutory Employer.

C.3 What Could the ABCI/ACC do?

With a minor increase in resources the ABCI, or its possible ACC alternative, could provide a 24 hour seven day a week service to clients, instead of the current nine to five, Monday to Friday service. Ideally the ABCI/ACC should be able to access all Australian police data so that any one jurisdiction only has to ask the ABCI/ACC for assistance instead of seven other jurisdictions.

Given access to data the ABCI/ACC must inevitably produce national criminal intelligence assessments, a product that is not really available to decision makers at this time. This would provide governments and senior law enforcement officers with timely and accurate data so that they could make more informed policy decisions.

The Police Federation of Australia (PFA) National Council previously resolved that the NCA public service investigators should not conduct criminal investigations as those functions should be the responsibility of Police not public service investigators. This equally applies to the ACC model.

C.3.1 Towards the New ACC

The AFPA has been lobbying for a restructure of OSCA, ABCI, and NCA into a national criminal intelligence agency and that the intelligence product developed should be provided to the appropriate Police Commissioner to investigate either alone or in charge of a multi agency team, if required. In April 2001 the AFPA submission to the Senate Inquiry into the AFP and NCA stated:

In 2002 the Government announced an amalgamation of the OSCA, ABCI and the NCA to be titled the Australian Crime Commission (ACC). The AFPA has been lobbying for the ACC not to be limited to organised crime intelligence but for it to develop strategic, operational and tactical intelligence in relation to all crime impacting on Australia.

The Attorney General is apparently intending to only amend the current NCA Act with employee conditions remaining under the Australian Public Service Act with no special integrity provisions or

police professional accountability regime being attached to the ACC Act. The AFPA rejects this position outright and supports new specific purpose legislation being introduced.

The AFPA supports the ACC being a national criminal intelligence agency to provide intelligence product to the most appropriate Police Service to investigate individually or as a multi agency investigation, if appropriate.

The AFPA opposes the ACC having its own public services investigative section as that function should be the responsibility of Police Investigation Teams to ensure a further layer of transparency and accountability.

The Police Federation of Australia has already opposed the NCA conducting investigations on the basis that it is a Police function.

The AFPA believes that the personnel within the ACC must be subject to the same integrity and professional regime as all other Police Service sworn and non sworn employees.

The ACC should have a Board comprising of the AFP-APS Commissioner and State & Territory Police Commissioners. Other agencies such as ASIO, ACS, AGD, DPP ATO etc could advise the Board but not sit on it.

The ACC should have coercive powers and pro-actively collect intelligence about criminal trends, networks and criminal enterprises.

The ACC should utilise Australian Police service employees and special members (sworn & unsworn) on secondment agreements (up to 5 years) to give effect to its Corporate function within the ACC. They must be subject to the same integrity and professional regime as all other Police Service sworn and non sworn employees.

All employees of the AFP including sworn, non sworn, and special members, are subject to the rigorous AFP integrity and professional accountability regime. On behalf of the Commonwealth, the AFP could therefore supply on secondment a significant proportion of Corporate Administration and Intelligence Function personnel, from within and outside the AFP. Via the AFP special member status it could also supply specialists from other Commonwealth agencies, after those employees are approved as special members of the AFP and therefore subject to the rigorous AFP integrity and professional accountability regime.

The ACC should focus on criminal intelligence collection and should establish national criminal intelligence priorities. This nationally integrated criminal intelligence model should develop national criminal intelligence on all crime trends impacting on Australian

policing and not be limited to organised crime references. This general intelligence will lead to the targeting of criminal enterprises by the ACC and appropriate Police services.

The ACC should utilise Australian Police service sworn members on short term detachment (for the duration of the specific investigation only) for specific criminal investigations. Those Police Investigation Teams should be under the control of the most appropriate Commissioner of Police, in consultation with the AFP Commissioner who represents the Commonwealths interest.

The intelligence product developed should be referred to the most appropriate Police Commissioner. The Police Commissioner of that service may request the formation of an ACC multi agency Police Investigation Team, if appropriate. Such multi agency Police Investigative teams would be under the control of the appropriate Police Commissioner.

The costs of the Police Investigative Teams should be reimbursed out of the ACC budget and not deployed without the prior authorisation of the appropriate Commissioner(s).

C.3.2 The ACC Board

The ACC Board should prioritise criminal targets based on intelligence analysis derived by the ACC. It should arrange lead agency control and composition of Police Investigation Teams.

The Chair of the Board must be (and has now been announced as) the AFP Commissioner representing the Commonwealths interests in a largely Commonwealth funded agency.

The Board should be responsible for;

- Determining priorities for the ACC's Intelligence Function, including Target Development, based on ACC national intelligence collection
- Overseeing the strategic direction of the ACC
- Ratifying use of the coercive powers by the ACC Criminal Intelligence Monitoring Team (CIMT) in relation to Intelligence Functions, including Target Development
- Arranging appropriate long term secondment of Police Service employees and special members for Corporate Administration and Intelligence Functions, including Target Development
- Arranging appropriate Police Service short term detachment for ACC Police Investigation Teams for criminal investigations formed as a result of successful Target Development outcomes;

C.3.3 Criminal Intelligence Monitoring Team

The CIMT should establish intelligence teams and authorise the use of the coercive hearing powers to assist intelligence teams in support of the ACC's intelligence function. The CIMT should comprise the Chair of the Board, the Head of the ACC and any other member of the Board representing an agency participating in, or likely to participate in a criminal investigation formed as a result of successful Target Development outcomes. It should report to the Board in relation to outcomes.

C.3.4 Corporate Administration, Intelligence Function & Police Investigation Teams

- "Corporate Administration" means ACC People and Finance administration and management functions. It is envisaged that Corporate Administration would be undertaken by in-house non sworn members and special members seconded from a police service or agency on long term secondment arrangements (Up to 5 year agreements)
- "Intelligence Function" means a project approved by the Board for intelligence purposes. It is envisaged that the Intelligence Function would be undertaken by in-house specialist investigators, analysts, lawyers, accountants, who are members and special members seconded from a police service or agency on long term secondment arrangements (Up to 5 year agreements)
- "Police Investigation Team" means a team of sworn members investigating a person or persons suspected of having engaged in serious or organised crime identified as a result of outcomes of the ACC Intelligence Function. It is envisaged that it would cover investigation, arrest and prosecution. It is envisaged that Police Investigation teams would comprise of sworn police members responsible to the appropriate Police Commissioner (multi agency teams would consist of secondees to that investigation team from other agencies or police services). The resourcing of that Police Investigation Team would be the responsibility of the appropriate Police Commissioner. The costs of such investigation would be reimbursed to that service out of the ACC budget allocation and Proceeds of Crime.

The Head of the ACC should be responsible for:

- Maintaining an overview of Intelligence Functions and Police Investigation Teams to ensure a coordinated and consistent national approach
- Advising the Board in relation to the Intelligence Function and Police Investigation Teams outcomes

- Advising the Board on the changing priorities
- Advising the Board on the utilisation of the ACC coercive powers.
- Employing core staff utilising S.37 of the AFP Act

C.3.5 Intelligence Function

The ACC's coercive hearing powers and other powers (including surveillance, controlled operations, obtaining documents etc) should be available in support of the ACC Intelligence Function.

There should be in-house personnel on long term secondment to support the Intelligence Function supplemented as required by short term detachment of police employees.

C.3.6 Police Investigation Teams

The ACC's role in relation to assisting Police Investigation Teams should not detract from its ability to develop any project within its Intelligence Function.

The ACC should have the capacity to participate in, but not lead Police Investigation Teams.

The ACC Board should arrange the establishment of Police Investigation Teams and specifically authorise the Police Investigation Teams to have access to coercive hearing powers upon a request of assistance from a Police Commissioner. Those Police Investigation Teams would then be generally authorised to apply to a Coercive Hearings Officer and that independent person would then assess requests on a case by case basis.

C.3.7 Use of Proceeds of Crime to supplement ACC costs

The Proceeds of Crime Bill 2002 and relevant State and Territory legislation should be utilised for the purpose of seizing criminal assets identified as a result of the ACC.

The AFPA envisages the Commonwealth legislation being strengthened to include the use of Telephone Intercept material in relation to civil forfeiture and the inclusion of unexplained wealth declarations. Further, that forfeiture funds be directed into the administration and operation of the Bill including the reimbursement of Police Investigation Teams expenses back to the relevant jurisdictions involved in specific investigations.

C.3.8 Coercive Powers

Authorisation for the use of the ACC's coercive powers should be given to CIMT (Chair of the Board, Head of the ACC and any other member of the Board participating or likely to participate, in the criminal investigation).

Such authorisation should be ratified by the ACC Board at a later date.

The authorisation of the use of coercive powers should be kept separate and distinct from those requesting those powers. The Coercive Hearing powers should be vested in an independent statutory officer or officers. Those Coercive Hearing Officers should assess requests from the ACC Intelligence Function or from Police Investigation Teams on a case by case basis.

Currently the use of the coercive powers and most investigative tools are predicated on the investigation of a criminal offence or offences. The ACC legislation must allow coercive and other powers to be used for intelligence purposes such is the case with numerous State Commissions of inquiry.

C.4 PFA/AFP/AFPA NCA/ACC Policy

The following is the final Police Federation of Australia Policy as endorsed at a recent National Executive meeting:

- "The ACC have an intelligence & investigative function performed by sworn police and the ACC be staffed by employees of police services on secondment from all jurisdictions.
- That the ACC have a judicial officer with the power to exercise the coercive powers of the ACC & to conduct hearings but not be involved or have control over the operational or investigative arm of the ACC
- The operational and investigative arm of the ACC be under the control of a senior police officer (the Chief Executive Officer) with extensive investigative experience. This position could be staffed on rotation among the Australian Police Forces or on selection by the ACC Board
- The precise roles, relationships & responsibilities of the judicial officer and the CEO be the subject of further discussion
- The Boards of the ACC be made up of all Police Commissioners plus the Judicial Officer of the ACC. The Commissioner of the Australian Federal Police be the Chair of the Board & the CEO report directly to the Board
- An Intergovernmental Committee of State and Commonwealth Ministers provide a Ministerial oversight of the Board
- Commonwealth groups such as Customs, the Australian Securities and Investments Commission, Attorney General's Department, the Director General of Security, the Australian Crime Commission, Taxation and any State or Territory based agency deemed appropriate, be used to give advice to the ACC Board to assist them in their deliberations
- That legislation be enacted to allow for the sharing of information between the ACC and other federal agencies in circumstances where the

information would assist in an ACC investigation and current law prevents the easy sharing of such information.”

C.4.1 Intelligence Function

The ACC’s coercive hearing powers and other powers (including surveillance, controlled operations, obtaining documents etc) should be available in support of the ACC Intelligence Function.

C.5 Conclusion

The existing ABCI has done a great deal on a very limited budget. The current funding of the Bureau does not allow governments, especially the Commonwealth to maximise their policy options. In essence governments expect the existing ABCI to do for criminal intelligence what ASIO does for national security on a fraction of the budget. If this situation continues under the proposed ACC, criminals and possibly terrorists will be the only ones to benefit.

C.6 Recommendations

Recommendation C.1

The new ACC be established with a similar employment framework to the existing ABCI model,

Recommendation C.2

The new ACC must demand the highest level of accountability of its staff, well beyond that of the existing NCA Act.

Recommendation C.3

The ACC be created out of new purpose built legislation referencing the AFP as the Statutory Employer.

Recommendation C.4

The ACC should be able to access all Australian police data so that any one jurisdiction only has to ask the ABCI/ACC for assistance instead of seven other jurisdictions.

Recommendation C.5

The ACC must produce national criminal intelligence assessments for decision makers. This would provide governments and senior law enforcement officers with timely and accurate data so that they could make more informed policy decisions.

Recommendation C.6

The ACC should not have its own investigative section (other than Police secondees) as that function should be the responsibility of seconded Police Investigation Teams to ensure a further layer of transparency and accountability.

Recommendation C.7

The ACC employees must be subject to the same integrity and professional regime as all other Police Service sworn and non sworn employees.

Recommendation C.8

The ACC should focus on criminal intelligence collection and should establish national criminal intelligence priorities.

Recommendation C.9

The ACC should develop national criminal intelligence on all crime trends impacting on Australian policing and not be limited to organised crime references.

Recommendation C.10

The ACC should have a Board comprising of the AFP-APS Commissioner and State & Territory Police Commissioners. Other agencies such as ASIO, ACS, AGD, DPP ATO etc could advise the Board but not sit on it.

Recommendation C.11

The ACC should have coercive powers and pro-actively collect intelligence about criminal trends, networks and criminal enterprises.

Recommendation C.12

The ACC should utilise Australian Police service employees and special members (sworn & unsworn) on secondment agreements (up to 5 years) to give effect to its Corporate within the ACC must be subject to the same integrity and professional regime as all other Police Service sworn and non sworn employees.

Recommendation C.13

The ACC should utilise Australian Police service sworn members on short term detachment (for the duration of the specific investigation only) for specific criminal investigations. Those Police Investigation Teams should be under the control of the most appropriate Commissioner of Police, in consultation with the AFP Commissioner who represents the Commonwealths' interest.

Recommendation C.14

The ACC Board should prioritise criminal targets based on intelligence analysis derived by the ACC. It should arrange lead agency control and composition of Police Investigation Teams.

Recommendation C.15

The ACC The Board should be responsible for;

- Determining priorities for the ACC's Intelligence Function, including Target Development, based on ACC national intelligence collection
- Overseeing the strategic direction of the ACC
- Ratifying use of the coercive powers by the ACC Criminal Intelligence Monitoring Team (CIMT) in relation to Intelligence Functions, including Target Development
- Arranging appropriate long term secondment of Police Service employees and special members for Corporate Administration and Intelligence Functions, including Target Development
- Arranging appropriate Police Service short term detachment for ACC Police Investigation Teams for criminal investigations formed as a result of successful Target Development outcomes.

Recommendation C.16

The ACC CIMT should establish intelligence teams and authorise the use of the coercive hearing powers to assist intelligence teams in support of the ACC's intelligence function. The CIMT should

comprise the Chair of the Board, the Head of the ACC and any other member of the Board representing an agency participating in, or likely to participate in a criminal investigation formed as a result of successful Target Development outcomes. It should report to the Board in relation to outcomes.

Recommendation C.17

The Head of the ACC should be responsible for:

- Maintaining an overview of Intelligence Functions and Police Investigation Teams to ensure a coordinated and consistent national approach
- Advising the Board in relation to the Intelligence Function and Police Investigation Teams outcomes
- Advising the Board on the changing priorities
- Advising the Board on the utilisation of the ACC coercive powers.

Recommendation C.18

The ACC's coercive hearing powers and other powers (including surveillance, controlled operations, obtaining documents etc) should be available in support of the ACC Intelligence Function.

Recommendation C.19

The Proceeds of Crime Bill 2002 and relevant State and Territory legislation should be utilised for the purpose of seizing criminal assets identified as a result of the ACC.

Recommendation C.20

Commonwealth legislation being strengthened to include the use of Telephone Intercept material in relation to civil forfeiture and the inclusion of unexplained wealth declarations. Further, that forfeiture funds be directed into the administration and operation of the Bill including the reimbursement of Police Investigation Teams expenses back to the relevant jurisdictions involved in specific investigations.

Recommendation C.21

Authorisation for the use of the ACC's coercive powers should be given to CIMT (Chair of the Board, Head of the ACC and any other member of the Board participating or likely to participate, in the criminal investigation). Such authorisation should be ratified by the ACC Board at a later date.

Recommendation C.22

The authorisation of the use of coercive powers should be kept separate and distinct from those requesting those powers. The Coercive Hearing powers should be vested in an independent statutory officer or officers. Those Coercive Hearing Officers should assess requests from the ACC Intelligence Function or from Police Investigation Teams on a case by case basis.

Recommendation C.23

The ACC legislation must allow coercive and other powers to be used for intelligence purposes such is the case with numerous State Commissions of inquiry. The ACC's coercive hearing powers and other powers (including surveillance, controlled operations, obtaining documents etc) should be available in support of the ACC Intelligence Function.