

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

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

Submission No:3

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AUSTRALIAN CRIME COMMISSION BILL

SUBMISSIONS BY THE VICTORIAN BAR



1. The original charter for the NCA gave it powers analogous to a Royal Commission. Given the unprecedented nature of those powers, certain structural guarantees were built into the legislation to ensure the protection of citizens from abuse of those powers.
2. Those guarantees include:
 - The role of the IGC of Ministers to approve References for matters involving the use of special powers. This process was intended to set out

terms of reference – analogous to the terms of reference of a Royal Commission - which would identify the subject matter of the investigation prevent the NCA from becoming a “roving Royal Commission.” The Reference mechanism was intended to clearly identify the lawful ambit for the exercise of the special powers; (ss9, 13 and 14)

- The appointment by the Governor-General of the membership of the NCA, consisting of a chair who is a judge or a lawyer of not less than 5 years standing, plus two members one recommended by the Attorneys-General and the other by the Police Ministers; (s7)
- The NCA Act preserved the right of a person to rely on the privilege against self-incrimination unless he or she had been given a use and derivative use immunity, and the DPP had

certified that the answers to the questions is in the public interest (s30);

3. The proposed ACC legislation:

- Removes the function of the IGC in determining which matters will have priority;
- Removes the reference approval function of the IGC and gives the decision making power over the exercise of the special powers of the ACC to a 13 member Board of police commissioners and prosecution agency heads, chaired by the Commissioner of the Australian Federal Police; (s7C(1)(d) and (3));
- Provides for the appointment of a CEO with a “strong law enforcement background”. This is likely to mean a serving or retired police officer. The balancing perspective of a judge or senior lawyer is lost. Further, the independence of the CEO is compromised. The CEO is subject to

suspension by the Minister if the Minister considers the CEO's performance to be *unsatisfactory*, and this opinion forms a basis on which the Governor-General may terminate the CEO; (s43)

- Allows the Board to determine that a matter requires the use of the special powers on the most minimal criteria: “whether police methods of investigation are likely to be effective”; (s7C(2))
- Fails to provide for any level of specificity in relation to the Written Notice for a Special Investigation. The Notice requirement is meaningless in terms of imposing any clear or enforceable bound on the use of the special powers. It requires only a general description of the circumstances or allegations and does not even require the Board to specify the type of offence to be investigated; (s7C(4))

- Severely erodes the privilege against self-incrimination by failing to provide a derivative use immunity. Although the answer compelled cannot be used in evidence for a prosecution, the information it contains can be used in the prosecution. This continues the objectionable amendment to the NCA Act in 2001, but now confers that power on a police body which has also been stripped of the structural protections detailed above; (s30(4))
4. The effect of these changes is to place the powers of a Royal Commission into the hands of the heads of the police forces and prosecution agencies. They then have the power to write their own terms of reference on an *ad hoc* basis. This is not a roving Royal Commission. It is a roving police force with the powers of a Royal Commission.

5. The ACC Bill inverts the constitutional division of powers between Federal and State governments in relation to the criminal law. It creates an extremely powerful Commonwealth police agency with jurisdiction over almost every criminal offence when the constitution confers primary responsibility for the criminal law on the states. Indeed the definition of the types of criminal offence which can constitute “serious and organised crime” could be extended even by Commonwealth Regulation. (s4(d))

6. The Bill alters the constitutional division of powers over the criminal law by means of a co-operative scheme between governments which is not provided for in the Constitution: see *Re Wakim* (1999) 198 CLR 511. These are police powers that radically alter the balance of powers between citizens and the state. As a matter of general principle and as a matter of constitutional principle, the

method of effecting these far-reaching changes is a matter of serious concern.

9 October 2002