

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

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

Submission No:8

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The Secretary
Joint Committee on the National Crime Authority
Parliament House
Canberra

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Dear Secretary

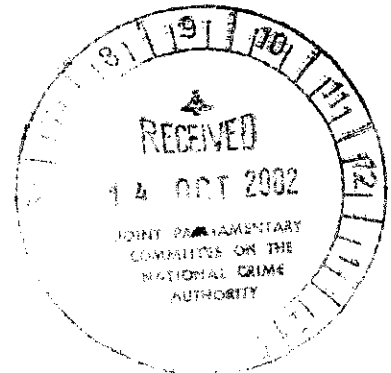
Attached for the Committee's consideration is a submission on the Australian Crime Commission Establishment Bill 2002.

As an officer of the Department of the Special Minister of State in 1984, I was involved in establishing the National Crime Authority, and I later became the Authority's Chief Executive Officer. The position was subsequently abolished, and I left the Authority in 1993. Later I worked for the NSW Police Royal Commission and the NSW Police Integrity Commission.

I would be happy to elaborate on the matters raised in the submission should the Committee so wish.

Yours sincerely

Denis Lenihan



The NCA and the ACC

1. Under the present arrangements, the NCA

- (a) consists of the Chair and normally two other members; the Chair must be a lawyer (two have been judges and two silk); the other members have also been lawyers;**
- (b) obtains references (under which it exercises its special investigative powers) from one or more members of the Inter-Governmental Committee (IGC), to which it is accountable generally; the NCA must provide to individual Ministers who issue references such information concerning operations as those Ministers request, in spite of the fact that public disclosure of such information could prejudice the safety or reputation of persons or the operations of law enforcement agencies;**
- (c) conducts only investigations into relevant criminal activity.**

2. Under the arrangements proposed, the ACC will

- (a) be managed by a Chief Executive Officer, under a Board; the CEO will also co-ordinate ACC operations and investigations; the Attorney General said in his second reading speech on the bill that 'The CEO will be an individual with a strong law enforcement background';**
- (b) be controlled by a Board, consisting of nine police officers (one of whom is the Chair), two public servants and two holders of statutory offices (one of them the Director-General of Security); it is the Board, or a committee of the Board, which will authorise special investigations or operations under which the ACC will exercise its special powers;**
- (c) conduct both special investigations and special (intelligence) operations into serious and organised crime;**
- (d) be responsible to the IGC through the Board; but the Chair of the ACC must not provide the Commonwealth or relevant State Ministers information they may request about specific matters where the Chair considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies.**

3. These matters appear to be the essential differences between the Authority and the Commission. Each is in its own way extraordinary, as discussed below. It is worth noting as a preliminary that their general effect is to complete a process which began about ten years ago. At that time, lawyers held the principal positions in the NCA: the Chair and members, those in charge of State offices, and leaders of investigative teams. The senior police officer was the Director of Investigations, whose authority extended only to other police officers working with the NCA, but whose influence could extend more widely depending upon the individual who filled the position. In 1992 the newly-created position of General Manager Operations was filled by a police officer whose authority extended to all NCA staff. Since then lawyers have been supplanted by police officers, or former police officers, so that now the General Manager and all five operational National Directors (who are also in charge of 'operational centres' as the State offices are now called) are police officers or former police officers. The process does not stop

there: the Perth operational centre is now located with the AFP Perth office.¹

4. If the ACC bill is passed in its present form, this 'blueing' process of the NCA will be complete. The Chair and the majority of the Board members will be police officers, which increases the probability that the CEO will likewise be from their ranks. Public speculation as to who might be the CEO has included the name of a former police officer. Before the IGC issues a reference to the NCA, or before the Board of the ACC determines that an investigation is a special investigation, each shall or must 'consider whether ordinary police methods of investigation into the matter are likely to be effective'. Is it not paradoxical - or even suspect - that persons from those very agencies whose methods have been ineffective will now be in the position of authorising the exercise of powers designed to remedy those defects?

5. To return to the differences between the NCA and the ACC, authorisations to conduct special operations/investigations may as noted be issued by the Board or one of its committees. No quorum is set for committees, but they must include two eligible Commonwealth Board members. Authorisations may thus be issued by a committee consisting of the Chair, the Director General of Security, and two State or Territory Police Commissioners (or indeed only the first two). All are bound by secrecy provisions, and the Chair as noted *must not* tell relevant Ministers particular information if it falls within broad parameters. The prospect of coercive powers being authorised by such a group is troubling: is there a precedent in Australia in the criminal justice field for such powers to be authorised by persons who are police officers and public servants - and none of whom need be a lawyer? Is there a parallel for keeping Ministers in the dark, and does this go against all traditions of Ministerial responsibility and accountability?

6. Note also that such a group may authorise a special intelligence operation as well as an investigation. The definition of an intelligence operation (clause 15) doesn't take us very far. The drafter of the explanatory memorandum seeks to be helpful: "'intelligence operation" has a broad meaning to ensure that, within constitutional limitations, the ACC is able to undertake a criminal intelligence role' (page 5). Since every other clause in the bill is likewise subject to constitutional limitations, and the memorandum is silent on what constitutional provisions might be relevant to intelligence, that doesn't take us very far either. The scope for fishing expeditions is considerable, and troubling, as is the provision that before determining whether an intelligence operation is a special operation, the Board 'must consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers in this Act have been effective' (see paragraph 4 above).

7. There is a further troubling aspect to the bill. The ACC will evidently be able to conduct investigations or operations in a State without the approval - or indeed against the wishes - of

¹ I should emphasise here that I am not casting any aspersions on the occupants of those positions, a number of whom I know and have worked with (as police officers) and for whom I have a high regard.

that State. The relationship between the powers of the Board committees (Clause 7K) and the powers of the ACC and the CEO under State laws (Clause 228) is not clear, but even if the latter mean that only the full Board and not a committee may consent to the ACC conducting operations/investigations in a State, there is no requirement for the Board representative of the State concerned to agree. This is in contrast to the NCA Act, where the relevant State minister must consent. Is this an attempt to increase the powers of the Commonwealth in these areas and to diminish those of the States?

8. Putting all these considerations together, reasonable observers might be moved to ask: is this a step towards a police state? This uneasiness is not alleviated by the Attorney General's remark in his second reading speech (with some apparent disregard for due process) that 'the first priority task force for the ACC will be illegal hand gun trafficking, both into and within Australia'. This is plainly a police priority. I ask members of the Committee: to your knowledge, is this the most important matter requiring investigation in the area of serious and organised crime?

The Events Leading to the Bill

9. In his second reading speech on the bill, the Attorney General set out the sequence of events which led to the introduction of the bill. The first was the announcement by the Prime Minister during the election campaign last year that he would convene a summit of State and Territory leaders to deal with transnational crime and terrorism. The Attorney General did not quote what the Prime Minister said at the time about the NCA. It was as follows:

One difficulty in the Commonwealth's ability to effectively fight transnational crime and terrorism is that the offences committed by these criminal groups may not be strictly federal offences.

The present scope for AFP officers to investigate State offences is very limited and the only way that the Commonwealth can intervene is through referral of investigations to the National Crime Authority.

However, this referral process is a complex co-operative scheme which can be very time consuming in commencing investigations and therefore making it difficult to deal with crime syndicates effectively.

...

The summit would seek outcomes on:

...

* Options for reforming or replacing the National Crime Authority to ensure that we have a national body fully equipped to deal with future transnational criminal activities.

10. As the Attorney General noted, the summit took place on 5 April 2002. The resulting

communiqué recorded seven points of agreement (numbers 7-13) by the Prime Minister and the State and Territory leaders concerning organised crime. These included replacing the NCA with the ACC, and other matters reflected in the bill.

11. There is clearly a huge gap between what the Prime Minister said last year and what the leaders agreed to in April this year. A reservation about the time taken for the NCA to get references (which could have been fixed by some amendments to the relevant sections of the NCA Act) is transformed into a proposal for a new agency with profound and troubling differences from the NCA.

12. Plainly there are other agendas running here. Why are they not being made public?

Miscellaneous

13. It is regrettable that (unlike the period preceding the establishment of the NCA) there was no prior public discussion of the issues before the summit reached its conclusions, particularly since there was no previous indication that such sweeping conclusions would be reached. One alternative which might have been canvassed is that the NCA and the AFP should be folded into a new organisation resembling the FBI.

14. Consideration might also have been given to possible alterations to the ways in which the NCA/ACC operate or will operate. The present requirement to hold all hearings in private might have been reviewed in light of the experience of recent and current Royal Commissions and the Police Integrity Commission. The allied questions of whether the NCA/ACC should seek to obtain admissible evidence of offences, or concentrate on uncovering the truth, and the right of witnesses to refuse to answer questions, might also have been worth scrutiny.

15. Last but not least, some other name should be found for the ACC. The scope for confusion between the ACC and the ACCC is infinite.