

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

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

Submission No:10

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**SUBMISSION TO
THE PARLIAMENTARY JOINT COMMITTEE
ON THE NATIONAL CRIME AUTHORITY
ON THE AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL
2002**

Introduction

In the course of the 2001 election campaign, the Prime Minister announced his intention to convene a Summit of State and Territory Leaders to consider enhanced national frameworks to deal with transnational crime and terrorism, including the possible reformation, replacement or abolition of the NCA.

At the Leaders' Summit held in Canberra on 5 April 2002 the Prime Minister and State and Territory Leaders agreed on the creation of the ACC to strengthen the fight against nationally significant crime and build on the successes of the NCA while removing current barriers to its effectiveness. The ACC would replace the NCA and incorporate the ABCI and OSCA.

Apart from the Leaders' Summit, there have been a number of calls for a review of the current intelligence procedures and a questioning of the adequacy of existing arrangements in recent years through fora such as the 1994 Review of Commonwealth Law Enforcement Arrangements, the Ayers Review of the Australian Federal Police (AFP), the Senate Legal and Constitutional References Committee Report into the Adequacy of the Management and Funding Arrangements of the National Crime Authority (NCA) and the AFP (the McKiernan Report, 2001) and various Australian Bureau of Criminal Intelligence (ABCI)/State reviews.

The changes in the global environment following September 11 have underscored the desirability of reviewing these arrangements, with a view to ensuring that Australian law enforcement is best placed to meet the emerging demands.

Although the current agencies of the NCA, ABCI and the Office of Strategic Crime Assessments (OSCA) have all produced very important work and had some major successes, some deficiencies associated with the current arrangements have been identified.

The NCA was established in 1984 as a national law enforcement agency whose purpose is to combat serious and organised crime. It was designed to overcome the barriers to effective law enforcement caused by jurisdictional boundaries in the Australian federal system. The problems caused by serious and organised crime operating across jurisdictional boundaries continue to pervade all levels of Australian society. Since 1984 the globalisation of markets has brought with it the globalisation of crime. We have also seen convergence between organised crime and terrorism. It was therefore timely to reassess whether the NCA in its present form was still best placed to combat the new and emerging criminal threats Australia faces in the twenty-first century.

Concerns have been expressed about inefficiencies associated with the NCA reference system, in particular the timing and logistical constraints in obtaining agreement and sign-off from all members of the Inter-Governmental Committee of the NCA (Commonwealth, State and Territory Police/Justice Ministers).

In addition, there are concerns that the NCA has failed to meet its strategic national intelligence role, and that the internal governance arrangements for the NCA and the Authority structure are not effective. Because the NCA was created as a necessarily

cooperative body, there is a perception that it has worked to retain State support and as a consequence has tended to do “State business” rather than target organised national crime. Concerns have been expressed that State offices have tended to work as independent units rather than as part of a cohesive national organisation. The NCA's investigative choices have been driven by its statutory requirement to gather admissible evidence for prosecution, with the development of better intelligence as a focus for target identification taking second place.

The other deficiencies relate to the gathering, analysis and dissemination of intelligence, and particularly the need for better sharing and coordination. There is a clear need for better linkages between Commonwealth and States, between national security and law enforcement interests, and between routine intelligence gathered by jurisdictional police and that collected as part of a specifically targeted operation.

One of the issues emerging has been a concern that the ABCI is being underutilised by the States and Territories and other law enforcement agencies, partly because of a reluctance, fortunately diminishing, to share information. For instance, there is a higher than acceptable use of caveats to limit categories of documents. Also, the efficacy of the ABCI in providing a national criminal information and intelligence capability has been constrained by a lack of resources and by inconsistent technical capabilities in the jurisdictions.

Similarly, there has been a concern that the assessments produced by OSCA have had a limited influence on both operational priority setting and policy development.

Leaders resolved to deal with the ACC in the following manner:

7. To strengthen the fight against organised crime it is agreed to replace the National Crime Authority (NCA) with an Australian Crime Commission (ACC) that builds on the important features of the NCA for effective national law enforcement operation in partnerships with State and Territory police forces whilst removing the current barriers to its effectiveness.
8. The ACC to be focussed on criminal intelligence collection and establishment of national intelligence priorities.
9. The ACC to have access to taskforce investigative capability to give effect to its intelligence functions and to support its overall operations. The ACC to include the Office of Strategic Crime Assessments and the Australian Bureau of Criminal Intelligence.
10. The Board of the ACC to include representatives from all States and Territories. Ministerial oversight will be retained by having the Board report to an Inter Governmental Committee of State and Commonwealth Ministers.
11. To streamline the process for obtaining investigation references.

12. The ACC will retain the capacity to use coercive powers and to investigate criminal activity of national significance;
13. Other details to be settled by mutual agreement with the new body to come into operation by 31 December 2002.

Commonwealth, State and Territory Police Ministers met in Sydney on 9 August 2002 to progress the implementation of the Leaders' agreement of 5 April 2002 and agreed to a set of 11 principles to give effect to the agreement.

The Bill was drafted in consultation with the States and Territories to give effect to these agreed principles. **Attachment A** sets out the relationship between the provisions of the Bill and the agreed principles.

The existing NCA regime

The management of the NCA is vested in the Authority which consists of the Chair and the members. They are independent statutory officers who are lawyers, and they are responsible for the management of the organisation as well as the exercise of statutory powers under the NCA Act. Once a Reference has been granted by the IGC-NCA in accordance with the Act it is a matter for the Authority how that Reference is pursued. The Authority is in charge of, and responsible for, the investigation.

Issues that have arisen from time to time include the conflict that can arise in having an independent agency pursuing investigations that can overlap with the jurisdictions of existing Commonwealth, State and Territory law enforcement agencies, and the managerial abilities of persons who are selected, in the main, for their legal ability and standing rather than management ability. The NCA is unique in that it is the only law enforcement agency that has lawyers rather than trained investigators in charge of investigations.

While the NCA has a criminal intelligence function it is primarily focussed on operational or tactical intelligence akin to the intelligence role in other police forces and law enforcement agencies and is a by-product of, or adjunct to, investigations.

The proposed ACC regime

There are a number of fundamental differences between this approach and that proposed for the ACC. All Australian Governments are agreed that the responsibility for significant criminal investigations should be given to those best trained and best placed to undertake them, the heads of police forces and key Commonwealth law enforcement agencies. This is to be achieved through the creation of a Board to enable and facilitate greater coordination of Australia's national law enforcement effort. The Board is to collegiately decide on significant national criminal priorities. It will be answerable to an IGC of ministers and to a Commonwealth Parliamentary Committee.

In order to provide the Board with the best possible information on which to base decisions about national criminal priorities, the ACC is to have a significantly increased criminal intelligence capability. Combining the ABCI and OSCA with the

NCA intelligence operation will provide the nucleus for an enhanced criminal intelligence function including a strategic intelligence function. It is anticipated that this capability will not be limited to the ACC but would be the basis of a truly national criminal intelligence system, available to key Commonwealth, State and Territory law enforcement agencies.

The current Reference process is cumbersome and unwieldy. When the NCA was established in 1984 it was considered appropriate that it be undertaken at the political level by Commonwealth, State and Territory ministers sitting as the Inter-Governmental Committee of the NCA. Those ministers relied heavily on advice from their police commissioners when approving a Reference. In light of almost 20 years experience with the Reference process those ministers now all agree that it is appropriate that those police commissioners, sitting as the Board of the ACC, should be able to decide when to authorise the use of coercive powers, subject to the safeguards provided in the Bill. The IGC would monitor the Board's use of the authorisation power.

The functions and responsibilities of the Authority (the Chair and the members) have also been reconsidered. Under the ACC the managerial functions would reside with the CEO. The exercise of statutory powers will vest in independent statutory officers to be called examiners. The responsibility for an operation or investigation will rest primarily with the head of that operation or investigation, who will be nominated by the Board when the operation or investigation is authorised. While examiners will report for administrative purposes to the CEO, the CEO will have no power to direct the examiners in the exercise of their statutory functions. Ordinarily the conduct of operational matters would be left to the head of the operation or investigation. However, as the CEO would be accountable to the Board generally for operations and investigations, the CEO would have the capacity to intervene in operational decision making should he or she consider that necessary.

These changes would ensure that the ACC has a clear and well understood place in national law enforcement, designed to complement rather than compete with existing police and law enforcement agencies. It would provide for the first time the framework necessary for truly national law enforcement cooperation in our federal system.

Advantages of the ACC

The establishment of the ACC as a new body with its own focus, but building on the combined strengths and attributes of the NCA, ABCI and OSCA, presents an important new opportunity to address major criminal threats in Australia. The ACC will have a clear strategic role in Australian law enforcement, and there will be an enhanced capacity to develop and coordinate research and criminal intelligence to support law enforcement across the country.

The streamlined access to the coercive powers of the NCA, with the Board giving authorisation to that access, and the use of those powers to assist in intelligence gathering, should lead to more effective investigations and a more strategic approach to law enforcement policy setting. This will be complemented by a capacity to

analyse information from a wider range of sources and identify long-term crime trends.

The combination of the intelligence resources of the NCA, ABCI and OSCA will help forge a cohesive and incisive intelligence-focussed crime-fighting body. Not only will the coordinated intelligence underpin the investigation activities of the ACC and the task forces, it will also be used to inform Commonwealth and State law enforcement policy and national law enforcement directions, and provide advice to legislators.

Bringing the functions of the ABCI and OSCA into the broader remit of the ACC will result in a more integrated and closer alignment between strategic and tactical intelligence. It should also have the effect of engaging the State and Commonwealth agencies in the better utilisation of the intelligence services offered.

With relevant agency heads being involved in priority setting and determining investigation directions, there is likely to be less confusion and overlap in investigations than is currently the case. However, the success of the taskforce approach to operations and intelligence gathering will depend upon the level of commitment by State/Territory Police Commissioners and other agency heads.

The establishment of the ACC will provide an opportunity to rationalise resources in areas of overlap or duplication. This should have the effect of better focussing the resources on the priority requirements of the new agency.

In answer to criticism, there will also be scope to rationalise several existing inter-departmental or inter-agency intelligence committees. The ACC will assume the responsibility for new national arrangements.

However, the services currently being delivered to police services by the ABCI are to be maintained, and existing safeguards and protocols relating to the protection of State and Territory data provided to the ABCI will continue.

The involvement of key stakeholder agencies in the Board of the ACC will allow decisions regarding targeting of operations and intelligence to take into account the priorities of both Commonwealth and State agencies, and will enable resourcing decisions to be taken by the affected agencies. In addition, because the Board will determine the priorities and make the resourcing decisions required to support those priorities, the relevant Board members will be able to ensure that their agencies give the required level of support to each project.

Bringing the three agencies together will ultimately result in a more effective use of intelligence to drive investigations and enhance law enforcement capacity to disrupt the activities of serious and organised crime. Through the partnerships it will develop, the ACC will be uniquely placed to ensure that this capacity is truly nationally focussed.

Outline of the Bill

Schedule 1 of the Bill would amend the *National Crime Authority Act 1984* (NCA Act) to replace the NCA with the ACC. The proposed functions of the ACC are set out in the Bill and reflect the role that the new body would have in relation to both criminal intelligence and the investigation of federally relevant criminal activity.

The Bill sets out the governing regime for the ACC, including the establishment of a Board comprising the major players in law enforcement in Australia from the Commonwealth, and the States and Territories. The Board would have a pivotal role in determining national criminal intelligence priorities and in overseeing the strategic direction of, and the priorities for, the ACC.

The Bill would also create an office of Chief Executive Officer (CEO) of the ACC, who would be responsible for managing the administrative and day-to-day affairs of the ACC in accordance with the directions of the Board. The CEO would be responsible for coordinating the ACC operations and investigations to prevent duplication of effort and to ensure that resources are used as effectively and efficiently as possible to implement the priorities of the Board. The CEO would ensure that the ACC maintains its national focus by facilitating the dissemination of criminal information and intelligence to relevant agencies.

While the Bill would retain the existing Inter-Governmental Committee (IGC), the functions of the IGC would be amended to reflect the existence of the Board and to ensure that the IGC maintains an appropriate monitoring and oversight role. Of importance, however, are the amendments that would streamline the existing reference system to ensure that cumbersome administrative processes do not hinder the ACC while at the same time ensuring that the necessary accountability exists.

The Bill would maintain the existing powers that are available to the NCA and amend the provisions to enable the ACC to have access, in accordance with a determination of the Board, to investigatory powers in order for it to carry out both its criminal intelligence and its investigatory roles.

The Board would have the power to authorise the use of coercive powers for special intelligence operations or investigations. However, the Bill sets out special requirements for the composition of the Board, or a committee of the Board, and special voting requirements in relation to authorisation applications. While the Board, or a committee of the Board, could authorise the availability of coercive powers, the powers would be exercised by independent statutory officers called examiners.

Examiners would exercise the coercive powers currently available to the NCA. These powers would be available for special operations or investigations when the Board has determined that this is necessary in accordance with the specified threshold test. While the CEO could direct an examiner to participate in a special ACC operation or special investigation, the CEO would not have the power to direct the examiner as to whether or how those powers are to be exercised.

The Bill would also ensure that, where State legislation confers a function, duty or power on the ACC, then the ACC could undertake that function or exercise that power or duty, in the same way that the NCA can currently under State legislation.

Schedule 1 of the Bill includes transitional provisions to ensure that there would be a seamless transition from the NCA, ABCI and OSCA to the ACC.

Schedule 2 of the Bill would amend a number of other Commonwealth Acts consequential on the replacement of the NCA, ABCI and OSCA by the ACC, and on the need to ensure that those Acts operate consistently with, and facilitate the criminal intelligence role of the ACC.

Schedule 3 of the Bill contains amendments that are contingent on the commencement of other Bills, in order to ensure that there would be no gaps in the statutory framework within which the ACC would operate.

Specific Issues

Against this background this submission elaborates on the following key aspects of the Bill that might inform the Committee's consideration.

- Coercive powers
- Authorisation of coercive powers
- Use of coercive powers for investigations
- Use of coercive powers for intelligence operations
- Safeguards
- Examiners
- Sharing of criminal intelligence
- Relationship between ACC and ASIO
- Privative Clause

The coercive powers

The Bill does not create new powers for the ACC. As part of the focus on the intelligence role the ACC is intended to perform, the Bill expressly provides for both a general intelligence function and an intelligence operations function, as well as the investigatory function. Because it articulates the proposed functions of the ACC in this different way, the Bill describes the circumstances in which the powers currently available to the NCA may be exercised by the ACC in different terms. This may give the impression that the scope of the coercive powers would be altered but closer analysis shows that this is not the case.

There are two categories of coercive powers:

- (a) the official information gathering powers (see sections 19A and 20), and
- (b) the hearing powers (see sections 28, 29 and 30).

The Bill does not change these powers.

The hearing powers, which are currently available to the NCA for use in investigations under references from the IGC, would be available to ACC examiners for use in special intelligence operations and special investigations. The official

information gathering powers which are available to the NCA for use in investigations of all matters relating to ‘relevant criminal activities’ would be available to ACC examiners for use in any ACC intelligence operation or investigation authorised by the Board of the ACC.

Attachment B sets out a list of the coercive powers and a detailed comparison of the situations in which they may be used under the NCA Act as it stands and under the changes proposed in the Bill.

Authorisation of coercive powers

The reference process under the NCA Act would be replaced by a determination by the Board that an authorised ACC intelligence operation or investigation is a ‘special operation/investigation’ (proposed subsections 7C(2) and (3)).

Before the Board determines that an investigation or intelligence operation is ‘special’ it must consider whether methods of collecting the criminal information and intelligence that do not involve the use of the coercive examination powers have been (in the case of an intelligence operation) or are likely to be (for an investigation) effective. These requirements are similar to, and no less strict than, the current requirements of subsection 9(2) of the NCA Act in relation to approval of references by the IGC.

Special voting rules: To ensure that the decision is not made solely by police commissioners there would be special rules about the composition of the Board and the manner of voting before a determination that an investigation or operation is a special investigation or operation could be issued:

- (i) when the Board was meeting as a whole, at least nine Board members, including at least two eligible Commonwealth members, would have to vote in favour of the determination (proposed subsection 7G(4)), and
- (ii) when a committee of the Board was undertaking this function, the committee would have to include at least two eligible Commonwealth members and all members of the committee would have to vote in favour of the determination (proposed subsection 7K(8)).

It has been suggested that an additional check or balance could be that the IGC has a residual power to refer matters to be the subject of a special investigation or operation to the Board. It is understood that the IGC would only be likely to exercise that power in exceptional circumstances. If it was decided that such a residual power was desirable then it could be achieved by suitable amendment of the Bill.

It is also understood that there is view that the legislation as drafted—section 55A(3)—would permit the use of coercive powers in relation to State offences by operation of that provision alone, ie that the use of coercive powers for investigation of State law would *not* be subject to the special authorisation provisions. This was not the intention and is not the agreement reached with the States and Territories. It was always intended that any use of coercive powers would need to be subject to the special authorisation provisions. This would be achieved by mirror provisions in the complementary State and territory laws that will underpin the ACC (as is the case at

present with the NCA). Parliamentary Counsel's Committee (PCC) has commenced work on drafting a model ACC Bill for the States and Territories and that is what they are proposing to include in it. However, we will liaise further with the PCC drafter and amend section 55A to put the matter beyond doubt.

Use of coercive powers for investigations

There is a threshold test for a determination by the Board that an authorised ACC investigation is a special investigation. The Board would be required to consider whether ordinary police methods of investigation into the matters are likely to be effective (proposed subsection 7C(3)). This is the same test the IGC is currently required to apply under subsection 9(2) of the NCA Act when considering whether a matter should be referred to the NCA.

Use of coercive powers for intelligence operations

A primary objective of the ACC proposal as agreed between the Commonwealth and the States and Territories is to enhance national law enforcement capacities by providing a coordinated national criminal intelligence framework and improved criminal intelligence and analysis and setting clear national criminal intelligence priorities to avoid duplication. This is supported in the Bill by provisions for the use of coercive hearing powers in intelligence operations. A case study on how coercive powers would be used for intelligence purposes is at **Attachment C**.

These powers include summoning witnesses, taking evidence and obtaining documents by notices to produce (sections 28 and 29). It is an offence for a person to fail to comply with the summons or notice or to refuse to answer questions (section 30). These powers are currently available to the NCA for use in special investigations.

The NCA can exercise coercive powers in relation to the investigation of a matter relating to federally relevant criminal activity that has been referred to the Authority by a reference issued by a Minister (subsection 11(2), NCA Act). A reference may be issued for investigation of any circumstances implying, or any allegations, that a 'relevant offence' may have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State (provided that the latter has a federal aspect) (definition of 'federally relevant criminal activity', subsection 4(1), NCA Act).

This means, among other things, that the NCA can exercise coercive powers to investigate an existing suspicion that a person may commit an offence in the future, provided that the circumstances indicating that the relevant offence will be committed exist at the date of the reference. This is not an investigation of an offence in the traditional sense. Under the present NCA Act the coercive powers can therefore be used in relation to past present or future criminal activity providing there is some basis on which to do so. Because of the width of the ambit it is therefore possible to use the coercive powers for intelligence purposes under the existing regime.

Before the offence is committed the NCA can use the coercive powers to gather intelligence in relation to relevant criminal activity. However, this capacity arises only if the IGC is satisfied that it is appropriate for the NCA have access to coercive powers to *investigate* the matter.

The Bill would clearly separate the intelligence function from the investigative function and, in consequence, would make separate provision for use of the coercive powers in an *intelligence* operation. The ambit of the use of coercive powers for intelligence purposes under the ACC Bill is no wider than under the existing NCA regime.

The amended Act would expressly permit the use of the coercive powers in an intelligence operation, but only if the Board had determined that it was a special operation (proposed new section 24A). The Bill includes a number of safeguards to ensure that this change would not lead to the use of the coercive powers for ‘fishing expeditions’:

- (a) **Threshold test:** The Board would be required to consider whether methods of collecting the criminal information and intelligence that did not involve the use of the coercive examination powers had been effective (proposed subsection 7C(2)). This test is more restrictive than the test to be applied to special investigations.
- (b) **Link to identified circumstances or allegations:** The determination by the Board would be required to include:
 - (i) a description of the general nature of the circumstances or allegations that indicate that an offence has been, may be or may in the future be committed, and
 - (ii) a statement that the serious and organised crime is, or the serious and organised crimes are or include, an offence or offences against a law of the Commonwealth, a law of a Territory or a law of a State (but need not specify the particular offence or offences), and
 - (iii) set out the purpose of the operation (proposed subsection 7C(4)).

This information would set the parameters for the exercise of coercive powers for the intelligence operation.

The effect of these changes is simply that powers which can now be exercised for an investigation would be able to be exercised for an equivalent intelligence operation. Such an intelligence operation would correspond to the early phases of an investigation of prospective offences under the existing legislation

Even when authorised, these are not powers that would be used lightly in the intelligence gathering context. Before using the powers an examiner would need to consider carefully the likely impact on the intelligence operation and on any related investigation that might be underway.

Gathering intelligence on a person is an inherently secret exercise and uses covert methods in the vast majority of cases. There are many less obtrusive non-coercive ways in which criminal intelligence and information can be obtained: for example, informants, bank records (using the FTR regime), and cross sharing of information between regulatory agencies. (There are other techniques that are based in legislation, including controlled operations, assumed identities, telephone intercepts and listening devices. However, as such techniques are generally aimed at obtaining evidence in support of prosecution for a particular offence, they are of limited availability for intelligence operations.)

As is currently the case, disclosure of information about evidence, witnesses and things produced at hearings, and about associated summonses and notices, could be prohibited under the Bill (proposed subsection 25A(14), and subsections 29B(1) and (3) as proposed to be amended). Realistically, however, if a person suspected of involvement in ‘relevant criminal activity’ is summonsed to give evidence or given a notice to produce documents or other articles, that person, and probably also his or her criminal associates, will become aware of law enforcement interest in their activities and it is likely that intelligence gathering will become more difficult as a result.

Safeguards

Independent exercise of powers: The coercive powers would be exercised by an examiner, an independent statutory officer who would not be subject to direction by the Board or the CEO in the exercise of these powers.

There are also a number of more general safeguards which would affect the exercise of the coercive powers in investigations and intelligence operations:

- (a) a person who was issued with a notice to attend before an examiner or to produce documents would be entitled to seek legal advice and to have legal representation while being questioned (subsections 25A(2) and 29B(2))
- (b) the Ombudsman would retain the jurisdiction to deal with complaints against the ACC (Schedule 2 to the Bill, items 84 to 98)
- (c) the IGC would remain responsible for overseeing the activities of the ACC (proposed new section 9). And the PJC-ACC would continue to provide parliamentary oversight (proposed amended section 55), and
- (d) any action taken by the ACC could be challenged in a court of law.

Examiners

Under the NCA Act the Chair or members of the Authority exercise the statutory coercive powers. The Chair and up to two members are full time officers (subsections 7(4) and (5)). As well as the full time Chair and members, the NCA Act provides for hearing officers, who may conduct hearings when directed to do so by the Chair (paragraph 24A(b)).

The scheme of the legislation envisages that hearing officers would be practising barristers appointed to a panel from which the Chair could select (subsections 25A(1)

to (3)). Remuneration for hearing officers would then be on an hourly or daily rate (subsections 38(1) and (2)). This scheme was instituted to provide for the ability for hearings to be undertaken at short notice throughout Australia.

Under the ACC Act the coercive powers now exercised by the Chair, members and hearing officers would be exercised by examiners.

Examiners would be independent statutory officers. Their appointment and the terms and conditions of their employment would be subject to provisions similar to those that now apply to the Chair, members and hearing officers of the NCA (proposed sections 46B to 46J; compare existing sections 7, 25 and 37 to 43). To ensure their independence they would be limited to a maximum term of 5 years and would not be eligible for reappointment thereafter (proposed subsection 46B(4)).

They would be subject to managerial oversight by the CEO who would be responsible for allocating them to special investigations and special intelligence operations (subsection 46A(3)). The CEO would have no power to direct the examiners in the exercise of their statutory powers.

There would be provision for appointment of both full-time and part-time examiners (proposed subsection 46B(5)). It is envisaged that 2 or 3 full-time examiners might be appointed but that there could also be permanent part-time examiners. While a panel approach might be appropriate for hearing officers under the NCA Act it is considered that permanent part-time appointments would be preferable given the independence expected of examiners.

The CEO is to be appointed by the Governor-General on the nomination of the Commonwealth Minister, who must first consult with the Board and the IGC (proposed section 37). In managing the administration of the ACC the CEO is responsible to the Board (subsection 46A(1)). The IGC and the PJC provide oversight to the Board (proposed section 9 and current subsection 55(1) of the Act). The CEO therefore cannot act in an arbitrary or capricious way, as he or she will be fully accountable for his or her performance.

This is a significant improvement over the present accountability arrangements with the NCA. At the present time the Chair is an independent statutory officer who can decide how matters are to be allocated between the Chair and members. The Chair can direct a hearing officer to hold a hearing (paragraph 24A(b), NCA Act). While subject to oversight by the IGC and the PJC the Chair is protected from any sanction by the NCA Act.

The ACC model provides greater accountability for the CEO than the NCA Act provides for the Chair (compare current and proposed sections 43 and 46A of the Act). Thus it provides a greater safeguard against arbitrary, capricious or biased decision making.

Sharing of criminal intelligence

The first function assigned to the ACC by the proposed new section 7A is “to collect, correlate, analyse and disseminate criminal information and intelligence and to

maintain a national database of that information and intelligence”. This raises the question how information and intelligence are to be collected and disseminated.

Provision of information to the ACC

In addition to general non-legislative sources of information and intelligence, there are a number of specific legislative provisions. For example, the ACC can request information from or require information to be provided by Commonwealth agencies where that information relates to an ACC operation or investigation (sections 19A and 20). There are penalties for non-compliance. But these provisions do not deal with the transfer of general criminal intelligence and information. **Attachment D** sets out proposed amended provisions in other Commonwealth Acts which would provide expressly for information to be given to the ACC. (Existing provisions for disclosure of information to Commonwealth agencies generally for law enforcement purposes, such as section 16 of the *Customs Administration Act 1985*, would enable information to be given to the ACC without amendment.)

There are no provisions compelling State authorities to provide information to the NCA (or ACC). There are no provisions equivalent to sections 19A and 20 in the State underpinning legislation that enable the NCA/ACC to require State authorities to provide information to the NCA/ACC.

A provision in the Commonwealth legislation that required the State agencies to provide information to the ACC would be largely ineffective without a penalty for non-compliance. However, the inclusion of a coercive power of this nature would be contrary to the nature of the proposed ACC as a nationally coordinated and cooperative law enforcement body. In addition, it would tend to be counter-productive as it would be badly received by the States.

There are provisions in the Act that would enable the Board or the CEO to enter into arrangements with State, Territory and private bodies for the provision of information and intelligence to the ACC. There are reciprocal provisions in the State underpinning legislation for the NCA.

An existing provision (section 17) places an obligation to cooperate on the NCA and not on the other law enforcement agencies. The Bill would repeal this provision. As the key law enforcement agencies would be represented on the Board of the ACC, the Government concluded that a specific provision requiring working in co-operation with those agencies, particularly one that only said ‘so far as is practicable’, was unnecessary.

The ACC Act would give the Minister power to issue guidelines in relation to the sharing of information by Board members as this relates to the performance of the functions of the Board. The Board cannot determine national criminal intelligence priorities without the necessary information. The legislation is silent on the need to consult the IGC before such guidelines are issued, but the Department envisages that the Minister would consult the IGC on this issue and issue a direction with its agreement.

Dissemination of information by the ACC

In recognition of the intelligence coordinating function envisaged for the ACC, it is important that it should have an adequate capacity to share the information it obtains with other law enforcement agencies.

The Bill is premised on there being mutual cooperation in sharing information amongst the law enforcement agencies represented on the Board. This would be based on consensual cooperation, not compulsion.

The Act facilitates the creation of agreements between the Commonwealth, States and Territories for the sharing of information (section 21). As with ABCI, there would be agreements in place controlling access to the information. The ABCI agreements deal in considerable detail with the restrictions on access and use of the information.

However, the Act does provide safeguards. For example, the information can only be disclosed to law enforcement and other agencies as prescribed where:

- (a) to do so would not be contrary to the law (for example, the FTR Act, T(I) Act or Taxation Administration Act); and
- (b) the information is relevant to the activities of that agency; and
- (c) the CEO is satisfied that it is appropriate to disclose that information (taking into consideration, for example, whether it would impact on the functions of the ACC, whether it is consistent with the agreements that have been entered into, and whether it would prejudice the safety or reputation of an individual).

The Act also enables the Minister to issue directions and guidelines to the Board in relation to the performance of its function (section 18, which would be amended by items 59 to 62). This could be one of the first matters to be addressed by the IGC-ACC.

The Act also expressly authorises disclosure of information in a number of cases.

Attachment E lists, and summarises the terms of, all provisions under which information could be disseminated by the ACC under the Act as amended by the Bill and notes equivalent provisions of the NCA Act as currently in force.

Relationship between the ACC and ASIO

Given the enhanced role the ACC will have in relation to criminal intelligence, it is important that there be good links with the security intelligence community. For this reason it is proposed that the Director-General of Security will be a member of the Board of the ACC (proposed paragraph 7B(2)(e) of the Act).

The presence of the Director-General will foster the relationship between law enforcement and national security authorities to provide a better understanding of the activities undertaken by each and the links that might exist between their separate but often interrelated functions. This would not compromise the role of ASIO or national security.

There would be no change to functional arrangements that exist at the moment. ASIO would continue to have responsibility for security intelligence and the AFP would continue to have responsibility for the investigation of terrorism offences.

The presence of the Director-General on the Board of the ACC would not replace the existing arrangements for sharing of information between ASIO and law enforcement agencies. Those would continue and the relevant legislative and administrative agreements would continue to apply, with minor modification to take into account the replacement of the NCA with the ACC.

Under the ACC Act, as at present under the NCA Act (see subsection 59(11)), the CEO would be able to provide information to ASIO where it appeared that it was appropriate to do so and where that information was relevant to security as defined in the ASIO Act.

Under paragraph 18(3)(a) of the ASIO Act, as amended by Schedule 2 of the Bill, the Director-General would be able to communicate information that related or might relate to the commission of an indictable offence against the law of the Commonwealth or of a State or Territory to an officer of the relevant police force or to the CEO, or a member of the staff, of the ACC.

In addition, under paragraph 18(3)(b) of the ASIO Act as amended by Schedule 2 of the Bill, where the information had come into the possession of ASIO outside Australia or concerned matters outside Australia and the Director-General was satisfied that the national interest required the communication, the information could be communicated to an officer of a relevant police force or the CEO or a member of the staff of the ACC.

As at present, these arrangements would relate to information relevant to criminal activity that comes to the attention of ASIO in the performance of its functions but would not extend to general national security intelligence.

Privative clause

Under section 16 of the NCA Act, when acts are done by the NCA on the basis that a reference has been issued, a person cannot challenge those acts solely on the ground that the reference was not lawfully made.

The Bill would enact a new section 16 which would operate in the same way in relation to a determination by the Board that an intelligence operation is a special operation or that an investigation is a special investigation. If an ACC operation or investigation is determined by the Board to be a special operation or investigation, then coercive powers are available to undertake that function. The new section 16 would operate to prevent a challenge to acts done by the ACC because of such a determination, if the sole basis for the challenge is an argument that the determination was not lawfully made.

This does not mean that the merits of the ACC's acts could not be the subject of judicial challenge or review. For example, if the Board determined that an ACC

operation/ investigation was a special operation/investigation, an examiner could decide to issue a notice to produce documents. The examiner's decision to issue the notice could still be challenged, but not on the ground that the jurisdictional basis for the exercise of that decision was unlawful.

As noted above, this provision is not new. There is no evidence to suggest that the existing section 16 of the NCA Act has significantly inhibited the making of judicial challenges to the merits of NCA actions.

**AN EXAMINATION OF THE BILL
AGAINST THE AGREEMENT REACHED AMONG
THE COMMONWEALTH, THE STATES AND THE TERRITORIES**

To give effect to the 5 April 2002 Leaders' Summit outcomes in relation to the establishment of a new Australian Crime Commission (ACC), Commonwealth, State and Territory Governments agreed on 9 August 2002 to the following principles:

1. Function

The National Crime Authority (NCA), Office of Strategic Crime Assessments (OSCA) and the Australian Bureau of Criminal Investigation (ABCI) will be replaced by the ACC. The ACC will provide an enhanced national law enforcement capacity through:

- *Improved criminal intelligence collection and analysis;*
- *Setting clear national criminal intelligence priorities; and*
- *Conducting intelligence led investigations of criminal activity of national significance including the conduct and/or coordination of investigative and intelligence taskforces as approved by the Board.*

Commentary

Part II (Item 33) establishes the ACC.

New sections 7 and 7A (Item 35) establish the ACC and give effect to the agreed functions.

A broad definition of 'serious and organised crime' (Item 25) is inserted into subsection 4(1). States and Territories will need to amend their legislation to give the ACC jurisdiction in relation to State and Territory offences.

2. Intelligence

The ACC will:

- *Provide a coordinated national criminal intelligence framework;*
- *Set national intelligence priorities to avoid duplication;*
- *Allow areas of new and emerging criminality to be identified and investigated;*
and

- *Provide for investigations to be intelligence driven.*

Commentary

This is also given effect to in new section 7A and in the provisions establishing the Board (see below).

The new definition of ‘ACC operation/investigation’ (Item 4) inserted into subsection 4(1) will operate throughout the legislation (both the NCA Act and other Commonwealth legislation such as the *Telecommunications (Interception) Act) 1979* to give effect to intelligence driven investigations.

There has also been an extensive review of the ‘dissemination’ provisions in the NCA Act. There are a number of provisions that limit the circumstances in which information in the possession of the NCA may be disclosed. While there is a need to similarly protect like information that will be in the possession of the ACC, the ACC will need to be able to disseminate intelligence information and assessments broadly throughout the law enforcement community.

3. Governance

The Inter-Governmental Committee of the NCA (IGC-NCA) will be renamed the IGC-ACC and it will comprise eight State and Territory representatives and one Commonwealth representative. Its responsibilities will include the identification of strategic crime priorities.

Nothing in this agreement is intended to preclude any Head of Government from raising substantive issues of concern at COAG level.

As a Commonwealth law enforcement agency, the ACC will be constituted under the Australian Crime Commission Act 2002 to give effect to the principles agreed between the Commonwealth, State and Territory Governments.

There will be discussions between jurisdictions during the drafting of the ACC Bill.

The Federal Parliamentary Joint Committee (PJC-NCA) overseeing the operations of the NCA will continue its current role and function in overseeing the operation of the ACC.

Commentary

Part II Division 1 Subdivision C (Items 36 to 38) retains the IGC and sets out its revised functions. (The Act simply refers to ‘the Inter-Governmental Committee’ but it will be known as the IGC-ACC once the ACC replaces the NCA.

The role of the PJC is amended at Part III (Items 216 to 224).

4. Board and Chair

The new ACC Board shall consist of thirteen voting members and the Chief Executive Officer as a non-voting member. The Chairman of the Board shall be the Commissioner of the Australian Federal Police.

The voting members of the Board will be:

- *Eight State and Territory Police Commissioners (New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, Northern Territory and the Chief Police Officer of the Australian Capital Territory) and:*
- *Five Commonwealth Agency Heads – Commissioner of the Australian Federal Police, Director General of Intelligence, the Chair of the Australian Securities and Investments Commission, the CEO of the Australian Customs Service and the Secretary of the Attorney General’s Department.*

Commentary

Part II Division 1 Subdivision B (Items 34 and 35) establishes the Board. Section 7B establishes the Board and section 7C sets out the functions of the Board, including its role in determining that an ACC intelligence operation or investigation is a special operation or investigation, which will make the coercive powers available.

The agreement specifies that the designated officers are to constitute the Board and to make it clear that they are expected to do so personally there is no provision for the appointment of delegates. When the Chair is unable to attend he is able to appoint another Commonwealth Board member to Chair in his absence.

There are standard provisions about quorums and the establishment of committees and the legislation expressly provides that the CEO is a non-voting member of the Board.

In relation to the approval of special operations/investigations (ie the mechanism for approving the availability of coercive powers) there are special requirements for the composition of the Board, and for the composition and agreement needed by a committee of the Board, considering such approvals.

5. Chief Executive Officer (Director)

The Chief Executive Officer /Director to manage ACC operations will be appointed by the Governor-General on the recommendation of the Commonwealth Minister and Federal Cabinet. Before recommending an appointment, the Commonwealth Minister would accept nominations from members of the Board and consult with members of the Inter-Governmental Committee.

The CEO/Director will be an individual with a strong law enforcement background.

Commentary

The CEO is established under Part II Division 3 Subdivision A (Item 197).

New subsection 37(2) imposes pre-appointment obligations on the Minister in accordance with the agreement reached.

There are provisions relating to terms and conditions, suspension, termination and the legislation also provides for the ability to appoint an acting CEO.

6. Staffing

On establishment, the ACC will maintain the current combined operational staffing levels of the NCA, ABCI and OSCA. Over time this would be subject to the operational requirements of the ACC Board and CEO.

The ACC will have a standing in-house investigative capacity. The mix and composition of in-house and taskforce intelligence and investigative capabilities will be determined by the Board and Chief Executive Officer in accordance with operational priorities.

Commentary

All members of the staff of the NCA under section 47 of the NCA Act and of the staff of ABCI and OSCA will transfer to the ACC under provisions of the *Public Service Act 1999*.

Paragraphs 7C(1)(c) to (f) (Item 35) give the Board the functions of authorising the ACC to undertake intelligence operations or investigations, determining whether these are special operations/investigations, determining the leadership and the class or classes of persons conducting ACC operations/investigations and establishing task forces.

Other aspects of this part of the agreement are administrative and not reflected in the Bill.

7. Offices

On establishment, ACC offices will remain in all current NCA locations at current operational staffing and funding levels. Over time this will be subject to the operational requirements of the ACC Board and CEO. The ACC headquarters will be located in Canberra.

Commentary

This again will be achieved by administrative action and is not reflected in the Bill.

8. Powers

The ACC will have in-house and taskforce access to all coercive and investigatory powers currently available to the NCA, which include coercive hearing and telephone interception powers, and a capability for State and Territory access to these powers where appropriate.

The Board will approve the use to which coercive hearing powers can be applied.

Coercive hearing powers would be exercised through independent statutory officers.

Commentary

New paragraphs 7(1)(c) to (f) empower the Board to authorise ACC intelligence operations and investigations, and to determine the availability of coercive powers.

Part II Division 2 provides for coercive powers to be exercised by statutory officers titled examiners in a proceeding called an examination (Items 118 and 120). Part II Division 3 Subdivision B (Item 197) provides the appointment process for examiners.

9. Investigations

Investigative and operational priorities will be determined by the Board in accordance with operational priorities.

The first priority taskforce for the ACC will be illegal handgun trafficking both into and within Australia.

Commentary

This function is set out in new paragraph 7C(1)(b) (Item 35).

The determination of the ACC's first priority is an administrative matter and is not appropriate for legislation.

10. Operational Expenses

The ACC will fund all in-house resources and operational costs (including salaries, staff overtime and travel allowances) under the same arrangements as currently apply to the National Crime Authority and ABCI. The ACC will fund current NCA references as budgeted for in the Commonwealth forward estimates and during that time would maintain its commitment to in-house investigations subject to the operational requirements of the Board.

Decisions regarding the composition of taskforces and the contributions of jurisdictions to these taskforces would be determined by agreement between the Board, CEO and relevant jurisdictions.

This includes a commitment by Commonwealth, State and Territory police forces to cover salary and salary related and other costs of secondees to additional ACC taskforces they participate in as agreed by the Board and CEO.

After three years of operation a review will be conducted into the balance and mix of the in-house investigative capacity by the IGC.

Commentary

These are administrative matters and not appropriate for legislation. However, it is noted that section 58 of the Act (dealing with administrative arrangements with the States) will continue to apply to the ACC in modified form and that arrangements in force under paragraph 58(1)(b) are preserved (Items 252 and 322).

11. Budget

It is recognised that almost all of the funding of the ACC is to be provided by the Commonwealth.

The Commonwealth confirms that the current levels of funding provided for the agencies as stipulated in the Forward Estimates by the Commonwealth will be provided to the ACC.

It is accepted by all parties that future funding levels will be subject to the normal budgetary processes.

Commentary

These are administrative matters and not appropriate for legislation.

ATTACHMENT B

Table 1: Comparison of availability of coercive powers to NCA and ACC, by function and conditions

Power	National Crime Authority	Australian Crime Commission
Coercive examination/hearing powers'	<p><u>References:</u></p> <p>Investigate matters relating to federally relevant criminal activity that have been referred to the Authority by a reference issued by the IGC</p> <p>The NCA can investigate any circumstances implying, or any allegations, that a relevant offence may have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State (provided that the latter has a federal aspect).</p> <p>A reference must specify the nature of the allegations, that they relate to a relevant offence and the purpose of the investigation.</p> <p>Before issuing a reference the IGC must consider whether ordinary police methods of investigation into the matter are likely to be effective.</p>	<p><u>Special intelligence operations:</u></p> <p>Collect, correlate, analyse and disseminate criminal information and intelligence relating to federally relevant criminal activity when the Board has determined that the intelligence operation is a special operation.</p> <p>The ACC can collect and analyse criminal information and intelligence relating to any circumstances implying, or any allegations, that a serious and organised crime may have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State (provided that the latter has a federal aspect).</p> <p>The Board's determination must specify the nature of the allegations, that they relate to a serious and organised crime and the purpose of the operation.</p> <p>Before issuing a determination, the Board must consider whether methods of collecting the criminal information and intelligence that do not involve the use of the</p>

		<p>coercive examination powers have been effective.</p> <p><u>Special investigations:</u></p> <p>To investigate matters relating to federally relevant criminal activity when the Board has determined that such an investigation is a special investigation.</p> <p>The ACC can investigate any circumstances implying, or any allegations, that a serious and organised crime may have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State (provided that the latter has a federal aspect).</p> <p>The Board’s determination must specify the nature of the allegations, that they relate to a serious and organised crime and the purpose of the investigation.</p> <p>Before issuing a determination the Board must consider whether ordinary police methods of investigation into the matter are likely to be effective.</p>
<p>Commonwealth agency information powers</p>	<p><u>General investigations:</u></p> <p>The NCA may investigate, otherwise than pursuant to a reference, matters relating to relevant criminal activities.</p> <p>The NCA can investigate any circumstances implying, or any allegations, that a relevant offence may</p>	<p><u>Intelligence operations:</u></p> <p>The ACC may, when authorised by the Board, collect, correlate, analyse and disseminate criminal information and intelligence relating to federally relevant criminal activity.</p> <p>The ACC can, when</p>

	<p>have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State.</p>	<p>authorised by the Board, collect and analyse criminal information and intelligence relating to any circumstances implying, or any allegations, that a serious and organised crime may have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State (provided that the latter has a federal aspect).</p> <p><u>Investigations:</u></p> <p>The ACC may investigate, when authorised by the Board, matters relating to federally relevant criminal activity.</p> <p>The ACC can, when authorised by the Board, investigate any circumstances implying, or any allegations, that a serious and organised crime may have been, may be being, or may in future be, committed against a law of the Commonwealth or of a Territory, or a State (provided that the latter has a federal aspect).</p>
<p>No coercive powers</p>	<p>Nil</p>	<p><u>General intelligence:</u></p> <p>The ACC may collect, correlate, analyse and disseminate criminal information and intelligence and maintain a national database of that information and intelligence.</p> <p>Within the priorities determined by the Board,</p>

		<p>the ACC can pursue lines of inquiry, receive information and assess the value of that information. The power is not limited by reference to any offence or criminal activity and nor is it linked to any particular investigation or other function of the ACC. However, for the information and intelligence to be “criminal information and intelligence” there must be a nexus between that information or intelligence and, for example, past, present or future criminal offences, activities or associations.</p>
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Table 2: Complete list of coercive powers, indicating who may exercise the power for what purposes under the NCA Act and the proposed ACC Act

Exercised by whom	What power	For what purpose
Examiner it is <u>currently</u> “a member”	request information from Commonwealth agencies (including provision of documents) (section 19A)	relevant to an ACC operation/investigation Note: penalties for non-compliance
Examiner it is <u>currently</u> “a member”	require information from Commonwealth agencies in certain cases (subsection 20(1))	relevant to an ACC operation/investigation Note: penalties for non-compliance - notwithstanding secrecy provisions other than taxation secrecy provisions, and those prescribed in Schedule 1 to the Act.
Examiner it is <u>currently</u> “a member”	require principal officer of the Commonwealth agency to attend, at a time and place specified in the notice, before the CEO or a member of the staff of the ACC and to produce (subsection 20(2))	relevant to an ACC operation/investigation Note: penalties for non-compliance - notwithstanding secrecy provisions other than taxation secrecy provisions, and those prescribed in Schedule 1 to the Act

The following powers are available for special ACC operations and investigations.

Exercised by whom	What power	For what purpose
<p>eligible person</p> <p><i>eligible person</i> means: an examiner; or a member of the staff of the ACC who is also a member of: the AFP; or the Police Force of a State.</p> <p>it is <u>currently</u> a member, or a staff of the NCA who is also a member of: the AFP; or the Police Force of a State.</p>	<p>search warrants:</p> <p>the eligible person believes on reasonable grounds that, if a summons were issued for the production of the thing or things, the thing or things might be concealed, lost, mutilated or destroyed</p> <p>(section 22)</p>	<p>seizing material connected with a special ACC operation/investigation</p>
<p>eligible person</p> <p>as above</p>	<p>search warrants by telephone</p> <p>(section 23)</p>	
<p>examiner</p> <p>it is <u>currently</u> “a member”</p>	<p>application for an order for seizure of passport</p> <p>(section 24)</p>	
<p>examiner</p> <p>is <u>currently</u> the Authority and hearing officers</p>	<p>examinations (hearings)</p> <p>(sections 24A and 25A)</p>	<p>These provisions set out the administration and procedures for the examinations. The power to summon witnesses and take evidence is in section 28 and to obtain documents is in section 29.</p>

Exercised by whom	What power	For what purpose
examiner it is <u>currently</u> “a member”	power to summon witnesses subsection 28(1)	issuing a summons for a person to appear before the examiner at an examination to give evidence and to produce documents failure to do so is an offence: section 30
examiner is <u>currently</u> the Authority and hearing officers	power to take evidence on oath or affirmation and to require a person to take an oath or make an affirmation subsection 28(5)	failure to do so is an offence: section 30
examiner it is <u>currently</u> “a member”	power to obtain documents section 29	issue a notice to a person to attend and to produce documents or things relevant to the special investigations failure to do so is an offence: section 30

CASE STUDY
ACC INTELLIGENCE OPERATIONS

The proposal to permit the ACC's coercive powers to be used for intelligence operations will enable Australian law enforcement to scope serious and organised crimes where more traditional intelligence methods have not been successful. This will facilitate more strategic and better focussed responses to such crimes.

CASE STUDY

Following is an example of how the ACC would use its coercive powers for the purposes of an intelligence operation.

Illegal handgun trafficking

Australian law enforcement agencies have a collection of intelligence holdings relating to illegal handgun trafficking deriving from many sources, including investigations undertaken by those agencies. Traditional law enforcement responses have not been successful in dealing with illegal handgun trafficking, most graphically illustrated by gun violence on the streets of Sydney. There are large gaps in law enforcement's intelligence holdings relating to the way in which the illegal handgun market operates.

Available intelligence suggests that illegal handgun trafficking is multi-jurisdictional and if left unchecked will continue to constitute a significant threat to public safety as illegal firearms continue to find their way into the hands of violent criminals and gangs.

The ACC Board will be able to approve the conduct of an ACC intelligence operation with access to coercive powers to further develop current intelligence holdings. The ACC intelligence operation will build on available information to develop an holistic picture of how this type of serious and organised crime operates in Australia. This might include use of the power to order the production of documents to develop a profile of the illegal handgun market through access to consignment details, bank records and business records of suspect dealers. The hearings power might be used to question suspect importers, their business associates and criminals previously apprehended and convicted for illegal firearm offences.

The ultimate aim remains to identify and prosecute those individuals and groups responsible for the trade in illegal firearms. The capacity to conduct the intelligence operation with access to ACC coercive powers will facilitate the development of a better profile of the activity, the individuals and groups involved, their strengths and vulnerabilities and options for responding to this crime type.

Based on the improved intelligence assessment, the ACC Board will have a range of responses open to it. Often intelligence operations will lead directly to criminal

investigations against identified targets. These may be conducted by the ACC or by individual agencies, depending on the intelligence operation and assessments.

Responses will not be limited to investigations. There may be appropriate and effective regulatory and administrative responses. This might include changes to Customs cargo profiling to improve rates of interdiction of imported illegal handguns, tightening of regulatory controls over legal firearms dealers, administrative action by the ATO to recover undeclared tax from earnings in illegal handgun trade, or further legislative reform to Australia's national gun laws. Criminal intelligence may also be used to develop preventative measures and to enable the development of proactive crime prevention strategies.

**DISSEMINATION OF INFORMATION TO THE ACC
UNDER OTHER COMMONWEALTH LEGISLATION
AS IT WOULD BE AMENDED BY THE BILL**

Australian Securities and Investments Commission Act 2001

Section 18 provides that where a report, or part of a report, under this Division relates to a serious contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, ASIC may give a copy of the whole or a part of the report to, amongst other agencies, the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*).

Australian Security Intelligence Organisation Act 1979

Section 18 provides that the Director-General or an officer authorised for the purpose by the Director-General may communicate information that has come into the possession of the Organisation in the course of performing its functions:

- (a) where the information relates, or appears to relate, to the commission, or intended commission, of an indictable offence against the law of the Commonwealth or of a State or Territory—the information may be communicated tothe Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC; or
- (b) where the information has come into the possession of the Organisation outside Australia or concerns matters outside Australia and the Director-General or the officer so authorised is satisfied that the national interest requires the communication—the information may be communicated to:
 - (vi) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC.

Corporations Act 2001

Under sections 794C, 823C and 823CA, if an assessment relates to a serious contravention of a law of the Commonwealth or of a State or Territory, ASIC or the Reserve Bank (as relevant) may give a copy of the written report on the assessment, or the relevant part of the report, to the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*).

Financial Transaction Reports Act 1988

Section 16 is amended to allow the communication of reports made by cash dealers in relation to suspect financial transactions to be made to the ACC. Section 26 is

amended to allow information communicated to an investigating officer under section 16 to be communicated to the ACC. Section 27 also restricts the circumstances under which the ACC may communicate information obtained in relation to financial transaction reports.

Retirement Savings Account Act 1997

Under section 114, if a report, or a part of the report, relates to a contravention of a law of the Commonwealth, of a State or of a Territory, the Regulator (APRA or ASIC) may give a copy of the whole or a part of the report to the Chief Executive Officer of the Australian Crime Commission.

Royal Commissions Act 1902

Section 6P provides that where, in the course of inquiry into a matter, a Commission:

- (a) obtains information;
- (b) takes evidence; or
- (c) receives a document or thing;

that, in the opinion of the Commission, relates or may relate to the performance of the functions of the Australian Crime Commission, the Commission may, if in its opinion it is appropriate so to do, communicate the information or furnish the evidence, document or thing, as the case may be, to the Chief Executive Officer of the Australian Crime Commission.

Superannuation Industry Supervision Act 1993

Under section 284, if the report, or a part of the report, relates to a contravention of a law of the Commonwealth, of a State or of a Territory, the Regulator (ASIC, APRA or the Commissioner of Taxation as the case may be) may give a copy of the whole or a part of the report to the Chief Executive Officer of the Australian Crime Commission.

Taxation Administration Act 1953

Under section 3D of the amended legislation, the Commissioner is authorised to disclose information to the ACC for the purposes of a tax-related investigation. The legislation also authorises a Royal Commission or State Commissioner to disclose tax information to the ACC without breaching the Act. Further, the ACC may apply to a judge to have access to particular information that it believes may have been communicated to the Commissioner of Taxation. Section 3D also places restrictions on the distribution of information by the ACC.

ATTACHMENT E

POWERS TO DISSEMINATE INFORMATION UNDER THE ACC ACT

By whom	What information	To whom
ACC	criminal information and intelligence (paragraph 7A(a))	by agreement/MOUs
Board	strategic criminal intelligence assessments (paragraph 7C(e))	law enforcement agencies (as currently defined) <ul style="list-style-type: none"> • the Australian Federal Police; • a Police Force of a State; or • any other authority or person responsible for the enforcement of the laws of the Commonwealth or of the States. foreign law enforcement agencies (as currently defined) <ul style="list-style-type: none"> • a police force (however described) of a foreign country; or • any other authority or person responsible for the enforcement of the laws of the foreign country. any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations (new)

By whom	What information	To whom
CEO (was the Authority)	evidence of a Commonwealth, State or Territory offence, being evidence that would be admissible in a prosecution for the offence (subsection 12(1))	the Attorney-General of the Commonwealth or the State the relevant law enforcement agency; or the relevant prosecuting authority
Chair of the Board (was the Authority)	when requested by the Minister - information concerning a specific matter relating to the ACC's conduct in the performance of its functions (subsection 59(1))	the Minister (note limitation in subsection 59(2))
Chair of the Board (was the Authority)	when requested by the Minister from a State/Territory - information concerning a specific matter relating to the ACC's conduct in the performance of its functions, being conduct that occurred within the jurisdiction of that State (subsection 59(1A))	the Minister for that State or Territory (note limitation in subsection 59(2))
Chair of the Board - when requested by the IGC (was the Authority)	when requested by the IGC - information concerning a specific matter relating to an ACC operation/investigation that the ACC has conducted or is conducting (paragraph 59(3)(a))	the IGC

By whom	What information	To whom
<p>Chair of the Board- when requested by the IGC or when considers appropriate</p> <p>(was the Authority)</p>	<p>general conduct of the operations of the ACC</p> <p>(paragraph 59(3)(b))</p>	<p>the IGC</p>
<p>Chair of the Board</p> <p>(was the Authority)</p>	<p>a report of the findings of any special ACC operation or investigation conducted by the ACC</p> <p>(subsection 59(4))</p>	<p>the IGC for transmission to the Governments represented on the IGC</p> <p>Note limitations in subsection 59(5)</p>
<p>Chair of the Board - when requested by the PJC</p> <p>(was the Authority)</p>	<p>information concerning a specific matter relating to an ACC operation/investigation that the ACC has conducted</p> <p>(paragraph 59(6A)(a))</p>	<p>the PJC</p>
<p>Chair of the Board- when requested by the PJC or when considers appropriate</p> <p>(was the Authority)</p>	<p>general conduct of the operations of the ACC</p> <p>(paragraph 59(6A)(b))</p>	<p>the PJC</p> <p>Note limitations in sections 59(6B) to 59(6D)</p>

By whom	What information	To whom
<p>CEO</p> <p>subsection 59(7) enables the Chair to give the information to law enforcement agencies and subsection 59(12) enables the Chair to give the information to foreign law enforcement agencies.</p>	<p>any information that is in the ACC's possession and that is relevant to the activities of that agency or body</p> <p>(subsection 59(7))</p>	<p>any law enforcement agency; or</p> <p>any foreign law enforcement agency; or</p> <p>any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations</p> <p>Note the information must be relevant to the activities of that agency or body; and the CEO must think that it is appropriate to do so; and to do so would not be contrary to a law of the Clth a State or a Territory that would otherwise apply (59(12))</p>
<p>CEO</p> <p>(Chair has this power under subsection 59(8))</p>	<p>any information that has come into the possession of the ACC and that may be relevant for the purposes of taking civil remedies in respect of matters connected with, or arising out of, offences against the laws of the Commonwealth, of a State or of a Territory</p> <p>(Subsection 59(8))</p>	<p>to authorities and persons responsible for taking civil remedies by or on behalf of the Crown in right of the Commonwealth, of a State or of a Territory</p> <p>CEO must consider it appropriate to do so.</p>

By whom	What information	To whom
<p>CEO</p> <p>subsection 59(7) enables the Chair to give the information to law enforcement agencies and subsection 59(12) enables the Chair to give the information to foreign law enforcement agencies.</p>	<p>any information that is in the ACC's possession and that is relevant to the activities of that agency or body</p> <p>(subsection 59(7))</p>	<p>any law enforcement agency; or</p> <p>any foreign law enforcement agency; or</p> <p>any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations</p> <p>Note the information must be relevant to the activities of that agency or body; and the CEO must think that it is appropriate to do so; and to do so would not be contrary to a law of the Clth a State or a Territory that would otherwise apply (59(12))</p>
<p>CEO</p> <p>(Chair has this power under subsection 59(8))</p>	<p>any information that has come into the possession of the ACC and that may be relevant for the purposes of taking civil remedies in respect of matters connected with, or arising out of, offences against the laws of the Commonwealth, of a State or of a Territory</p> <p>(Subsection 59(8))</p>	<p>to authorities and persons responsible for taking civil remedies by or on behalf of the Crown in right of the Commonwealth, of a State or of a Territory</p> <p>CEO must consider it appropriate to do so.</p>

By whom	What information	To whom
<p>CEO</p> <p>(Chair has this power under subsection 59(9))</p>	<p>information relating to the performances of the functions of the “agency” (see next column) that comes into the possession of the ACC in the course of any operation or investigations (subsection 59(9))</p>	<p>a Department of State of the Commonwealth or of a State;</p> <p>the Administration of a Territory; or</p> <p>an instrumentality of the Commonwealth, of a State or of a Territory;</p> <p>The CEO must consider that it is desirable to do so.</p> <p>May also make recommendations relating to performance.</p>
<p>CEO</p> <p>(Chair has this power under subsection 59(11))</p>	<p>any information that has come into the ACC’s possession and that is relevant to security as defined in section 4 of the <i>Australian Security Intelligence Organisation Act 1979</i>.</p> <p>(Subsection 59(11))</p>	<p>ASIO</p> <p>CEO must consider it appropriate to do so.</p>