

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

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

Submission No:11

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Secretary General

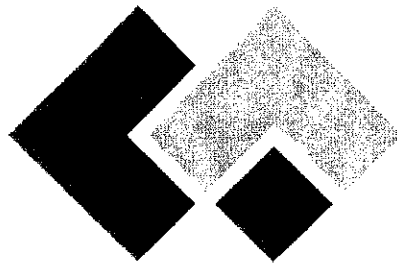
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SUBMISSION TO

**PARLIAMENTARY JOINT COMMITTEE ON THE
NATIONAL CRIME AUTHORITY**

ON THE

**AUSTRALIAN CRIME COMMISSION
ESTABLISHMENT BILL 2002**

14 October 2002



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1 EXECUTIVE SUMMARY

1.1 The Law Council of Australia (LCA) welcomes the opportunity to comment on the establishment of the Australian Crime Commission (ACC), but time limitations restrict the LCA's comments principally to the activation and use of the coercive powers by the ACC.

1.2 This submission briefly canvasses the existing structure, role and use of coercive powers by the NCA and that proposed for the ACC. The structures applying to the various State Crime Commissions are also briefly reviewed to place the ACC into a comparative context.

1.3 The LCA generally supports:

- (a) the focus of the ACC on intelligence gathering; and
- (b) the creation of the ACC Board with a membership drawn from state, territory and federal police, federal law enforcement and security agencies, but believes the Board should not have a final decision making role on the activation of coercive powers.

1.4 The LCA has concerns about:

- (a) whether the office of Examiner will have a sufficient 'whole of the organisation' outlook and will enjoy the same practical levels of independence when compared to that currently in place for a NCA Member; and
- (b) whether the office of CEO is sufficiently independent.

1.5 The LCA is opposed to the transfer from the IGC to the ACC Board of decision making powers on the activation of coercive powers. The LCA is not satisfied that the special voting majority required by the Board for decision on the activation of the coercive powers is a sufficient safeguard to overcome the police domination of the Board. The LCA believes:

- (a) as a matter of principle, police forces should not be able to self select the occasions on which coercive powers can be activated; and
- (b) as a matter of precedent, neither the NCA nor the State Crime Commissions currently allow the level of police force influence on the activation of coercive powers as will be the case with the ACC.

1.6 The LCA suggests that the IGC retain the decision making power on the activation of the special powers through a ratification process of a ACC Board recommendation on the activation of the powers.

2 INTRODUCTION

2.1 The Law Council of Australia (LCA) welcomes the opportunity to comment on the establishment of the Australian Crime Commission (ACC) as the replacement of the National Crime Authority (NCA) as the primary federal law enforcement agency to combat organised crime. The LCA notes that the Parliamentary Joint Committee on the NCA (PJC) has been given a very limited time to consider the Bill establishing the ACC, and despite the best efforts of the PJC, the LCA along with all interested parties, has had limited time to consider the detailed and complex issues involved with the ACC.

2.2 As a result, this submission concentrates on the issue of the access and use of coercive powers granted to the ACC. There may well be a range of other issues associated with the proposed ACC model which deserve careful consideration by the PJC and the Parliament which the LCA has not had the time to canvass. These issues may include:

- (a) the full rationale for the replacement of the NCA and the conclusions on the operation of the NCA contained in the Palmer-Blunn Report which has not been publicly released;
- (b) the constitutional underpinnings of the proposed scheme; and
- (c) the practical barriers in cross border law enforcement in terms of search warrants, and controlled operations.

2.3 Since its creation in 1984, the NCA has been periodically subject to controversy in relation to *inter alia* its performance, its role, the scope of its powers and its accountability mechanisms. The PJC has routinely and formally scrutinised the NCA's functions. The Leaders' Summit of 5 April 2002 marked a new approach to federal/state cooperation in tackling serious national crime with the agreement to create the ACC.¹

2.4 It is not surprising that this major reconsideration of the role and functions of the NCA has taken place. In retrospect, the NCA can be seen as a type of cutting edge experiment attempting new strategies and methodologies not tried before at the national level in Australia and in many respects, in order for the NCA to be created, significant compromises were required between the political parties who collectively fashioned the framework for the NCA in the early 1980's.

¹ The concept of a national crime Commission for Australia is not new. In 1982 the then Liberal government introduced a National Crimes Commission Act 1982 which was passed by both Houses on 14 December 1982. The Act lapsed with the election of the Labour government in March 1983. Prior to 1983 the parliamentary debates and media commentary do not once refer to a crime 'Authority' but always to a crime 'Commission'. The first reference the LCA has found to a crime Authority is in the 1983 Annual Report of Special Prosecutor Redlich (for the period 1982-1983).

2.5 Australian governments are now in a position to see what aspects of the experiment worked and which did not. The NCA itself has acknowledged over the years certain constraints that it operated under and the need for improvements in various areas. There is nothing intrinsically problematic with a proposal to revisit and restructure strategies to deal with criminal activities beyond the capacity of traditional state, territory, and federal police forces.

2.6 The *Australian Crime Commission Establishment Bill 2002* (the Bill) in some ways represents a fundamental shift in federal law enforcement strategies to deal with serious and national criminal activities. The ACC will incorporate most of the existing functions of the NCA as well as functions of the existing Australian Bureau of Criminal Intelligence (ABCI) and the Office of Strategic Crime Assessment (OSCA). The Bill effectively replaces the office of Chairperson (of the NCA) with the office of Chief Executive Officer (CEO) and replaces the offices of NCA Member and Hearing Officer with the office of Examiner.

2.7 Aside from the organisational changes, the ACC has three principal shifts in emphasis and operation compared to the NCA. These are:

- (a) the movement from an investigatory role to a proactive intelligence gathering role;
- (b) greater certainty in the identification of national priorities and coordination for law enforcement agencies; and
- (c) the transfer from the Inter Governmental Committee (IGC) to a governing board of the core governance responsibility for the ACC and decisions about investigations undertaken by the Commission.

2.8 It is the third of these changes which raises squarely the issue of the coercive powers. With the NCA, it is the IGC which 'refers' matters to the Authority for investigation. With the ACC, responsibility for the exercise of the coercive powers shifts from Ministers of the Crown to the Board of a Statutory Authority. This means, apart from determining how specified matters can be investigated, the Board will also determine which matters are to be investigated.

2.9 This reform by itself raises profound questions concerning which persons or bodies are the most appropriate at this level, to decide what matters should be investigated, when coercive powers can be activated, and what national strategies and directions should be put in place nationally to deal with the problems of "organised crime" at its broadest meaning. These apparently simple questions are surprisingly difficult but, it is suggested, there are two basic considerations.

2.10 First is the empirical question of which individuals or agencies have the most superior knowledge of organised and related crime so as to be able to provide the most informed and accurate input and guidance. Second, is the consideration of which individuals or agencies should as a matter of principle, be held responsible (in a liberal democratic society) for such key powers and roles? Whilst some analogies can be drawn from regulation and control of police forces, the proposed ACC is not a police force. Police forces cannot exercise coercive powers except to the extent permitted by statute or common law; the right to silence is still a foundation principle governing the operation of police forces.

2.11 Analogies can however be drawn from the structure, powers, and regulation of state crime Commissions. It will be submitted below that an analysis of the legislative structures of these Commissions show quite distinct patterns which raise serious concerns about the appropriateness of some of the proposed reforms in the ACC Bill. At the very least, if the proposals became law in their present form, there would exist significant disparities between the state and federal law enforcement regimes on the issue of the availability and use of coercive powers.

2.12 As a matter of principle, the LCA opposes the transfer of power and responsibilities from Ministers to a police dominated Board. It is undesirable for the police to have the power to decide which matters the ACC shall investigate and when the coercive powers can be exercised. As a matter of basic constitutional principle, Ministers are the appropriate office holders, acting on behalf of the community, to be ultimately responsible for such powers. The LCA believes the proposed model lacks transparency and adequate accountability mechanisms.

2.13 In this submission the LCA canvasses:

- (a) the current features of the NCA (Section 3);
- (b) the proposed features of the ACC (Section 4);
- (c) the features of Crime Commissions in the Australian states (Section 5); and
- (d) the LCA's concerns about the proposed ACC model and suggestions to address these concerns (Section 6).

3 THE FEATURES OF THE NCA MODEL

Structure

3.1 The NCA is a statutory authority consisting of a Chairperson and such number of Members as are appointed.² The Chairperson must have been a judge or legal practitioner for at least 5 years (s.7(a)). The staff of the NCA do not constitute the legal entity known as the NCA.

Basic Role

3.2 As a general proposition the basic role of the NCA has been to combat organised crime. The NCA has interpreted its role thus:

“The NCA’s mission is to counteract organised criminal activity and reduce its impact on the Australian community, working in co-operation and partnership with other agencies”³

3.3 In legal terms the NCA can be seen as operating at two levels. First, in the performance of its “general functions” (s.11(1)) and secondly, in the performance of its “special functions” (s.11(2)) utilising its coercive powers. This dichotomy represents a graduated response to organised crime. This graduated response was the result of political compromises during the passage of the NCA Bill in 1983.

3.4 Under its general functions the NCA performs 3 main roles:

- (a) collect, analyse and disseminate criminal information and intelligence to other law enforcement agencies (similar to the ABCI) (s.11(1)(a));
- (b) investigate “relevant criminal activity” (s.11(1)(b)). This would involve the use of conventional police criminal investigation methods and powers;
- (c) arrange Task Forces where necessary for the investigation of relevant criminal activities.⁴ State police officers and Australian Federal Police (AFP) members are seconded to the NCA to work

² For general overviews see A Leaver *Investigating Crime: A Guide to the Powers of Agencies Involved in the Investigation of Crime* (1997) LBC p.342-363; S Donague *Royal Commissions and Permanent Commissions of Inquiry* (2001) Butterworths p.6; C Corns ‘The National Crime Authority: An Evaluation’ 13 *Criminal Law Journal* p.233.

³ NCA *Corporate Plan July 1991-June 1994* (1991) p.3.

⁴ In performing its general functions the NCA can request (c/f compel) designated commonwealth agencies to provide information or documents. Seconded police officers are also able to utilise their original powers to conduct investigations eg interviewing and arrest. Police forces can recommend matters for the NCA to investigate under this general function, and have done so.

with lawyers, accountants, and other analysts in multi-disciplinary investigation teams.⁵

3.5 Under its special functions the NCA is required to investigate either relevant federal matters (s.11(2)(a)) or relevant state matters (s.11(2)(b)) which have been referred to it by either the federal Minister (s.13(1)) in relation to federal matters or the IGC (s.14(1)) in relation to state matters.⁶ To fulfil this function, the NCA can use its coercive powers. For the purposes of a special investigation, the NCA can hold (private) hearings (s.25(1)). Under s.28(1) a member of the NCA can summons a person to attend the hearing and give evidence or produce documents. Under s.29 a member can issue a Notice requiring a person to produce specified documents at a hearing. The holding of these hearings has proved to be an effective power for the NCA and no doubt will continue to be effective for the ACC, albeit under different terminology.

3.6 In terms of jurisdiction, the NCA can only exercise its functions in relation to 'relevant criminal activity'. This term is broadly defined but in essence means an offence against commonwealth or state law involving multiple offenders, sophisticated methods, and involving inter alia theft, fraud, tax evasion, drug offences etc.⁷

Coercive powers

3.7 As mentioned above, the NCA possesses a number of powers not possessed by traditional law enforcement agencies. These are;

- (a) The power to compel a person to attend a hearing "to give evidence and to produce such documents or other things as are referred to in the summons" (s.28(1)). Prior to 2001, a person was not permitted, without a reasonable excuse, to refuse or fail to answer questions or produce documents (s.30(2)(b)). However it was a reasonable excuse for a natural person if the answer to the question or production of the document "might tend to incriminate him" (s.30(4)). If however, a DPP had issued an undertaking to the witness (ie indemnity) then the witness could not claim the privilege against self incrimination (s.30(5)). This was changed however in 2001 to provide that a witness cannot claim the privilege but is automatically granted a use indemnity under the Act. Section 30(2) now provides that a person appearing as a witness at an NCA hearing shall not refuse to answer a question that he or she is required to answer or fail to produce a

⁵ C Corns 'Lawyers and Police: An Uneasy marriage in the NCA's Fight Against Organised Crime' (1992) *ANZ journal of Criminology* 25.

⁶ State underpinning legislation was required in order for each state and territory to endow the NCA with jurisdiction to investigate matters against state or territory law. In this sense the NCA is a creature of both federal and state legislation.

⁷ Section 4 defines the offences.

document that he or she is required to produce.⁸ However s.30(5) provides a use immunity in relation to the compelled answers or documents. These answers or documents are not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty.⁹ Before this immunity arises, the witness must first claim the privilege against self incrimination. It appears however that any evidence obtained as a result of, or derived from, the evidence provided, would be admissible in criminal proceedings against the person

- (b) The power to issue a Notice to a person to produce specified documents at a hearing (s.29).
- (c) If a person has been summoned to attend a hearing and a member of the NCA has reasonable grounds for suspecting that the person intends to leave Australia, then under s.24(1) a Member can apply to a Federal Court judge for an order to confiscate the person's passport.
- (d) The NCA can also apply for a warrant to arrest a person who has failed to attend a hearing (s.31(1c)) or is likely to abscond.
- (e) The NCA can apply to a Federal Court judge for the issue of a search warrant in particular circumstances.
- (f) Under s.20(1) and (2) the NCA can require designated commonwealth agencies to provide specified documents or information.

The Role of the Inter Governmental Committee

3.8 The IGC is a Ministerial Council consisting of the relevant Commonwealth minister and the relevant minister of each state and territory. The parliamentary debates preceding the passing of the NCA Act show that it was not the intention of the legislature for the NCA to be a self-referring body. Ministerial oversight and regulation was considered a critical pre-requisite for the creation of the NCA. In this limited sense, the NCA is not 'independent' given that, in theory, it relies on Ministerial directives in the form of references. For state matters, the IGC refers particular matters to the NCA for investigation and for federal matters, the federal minister is required to consult with the IGC before referring a matter to the NCA. The NCA is also able to request the IGC to refer a specified matter to it.

3.9 In deciding whether a matter should be referred to the NCA, the IGC must consider "whether ordinary police methods of investigation into the matter are

⁸ Legal professional privilege still applies.

⁹ The traditional proceedings in relation to providing false information or documents.

likely to be effective" (s.9(2)). In this way the IGC supervises which matters the NCA is to investigate. The IGC is also required to "monitor generally the work of the Authority" and to receive reports furnished to it by the NCA for transmission to governments represented on the IGC. The IGC can meet with the NCA to receive briefings from the NCA. The IGC is also empowered to create additional offices of Member as and when required and to recommend a person for appointment to such office (s.9(1)).

3.10 The IGC is thus an important check on the potential for inappropriate executive interference in the work of the NCA. Under s.9(3) however, a state is able to veto the NCA from carrying out a special investigation in that state.

3.11 Under s13(1) the federal Minister is able to refer a federal matter to the NCA but must first consult with the IGC. The IGC cannot however veto such a referral. Conversely the NCA can request the federal Minister to refer a matter to it (s.10(4)).¹⁰

3.12 It would appear that one problem experienced with the IGC is the time lapse between the date of the NCA request to refer a particular matter and the date of the actual referral. However, these claims need to be examined in more detail. It is possible, for example, that any time delays could be attributed to factors beyond the control of the IGC and in any event, it would not be particularly difficult to arrange administrative reforms to expedite requests for referrals. Given the state of electronic technology, it seems ludicrous to suggest such communication difficulties could not be addressed quickly and efficiently.

The Role of the PJC on the NCA

3.13 The PJC was created as the parliamentary 'watch-dog' of the NCA and has operated as the primary monitor.¹¹ Section 55 (1) of the Act sets out the duties of the PJC. In summary these are to monitor and review the NCA, report to parliament on any relevant matter, examine Annual reports of the NCA, examine trends in criminal activities and to inquire into any questions concerning the NCA referred to it by either House.

3.14 In order to carry out these functions, the PJC requires the NCA to provide all relevant information. There is no doubt that initially major problems were experienced by the PJC in obtaining such information from the NCA but those early conflicts appear to have been resolved.¹² The PJC appears to have performed its functions well and has published a number of detailed reports

¹⁰ Under s.10(4D) the NCA must, if requested by the commonwealth Minister, consult with the commonwealth Minister in relation to the NCA's request.

¹¹ Some sources refer to the JPC (Joint Parliamentary Committee) but the NCA Act itself uses the term PJC Parliamentary Committee.

¹² These problems arose from NCA interpretations of s.51 of the Act which restricted communications by NCA personnel.

regarding the operations of the NCA. One strength of the PJC is that it is a multi-party committee.

3.15 In summary, the NCA is a unique law enforcement agency because of its multi-jurisdictional capacity, its use of multi-disciplinary Task Forces, the role of multi-disciplinary governmental supervision and the multi-layered accountability mechanisms, and its possession of powers not possessed by police forces. An important feature of the NCA has been that the senior policy makers within the organisation have been lawyers rather than police members, and that key control powers have rested with Ministers of the Crown.

4 THE FEATURES OF THE ACC MODEL

Structure

4.1 The ACC is a statutory authority consisting of the CEO, the Examiners and staff of the ACC. However the Board of the ACC is not included as part of the ACC and the ACC "will not have a legal identity separate from its individual components".

The Board

4.2 The 13 voting members of the Board are the AFP Commissioner, the Secretary of the Attorney-General's Department (AGD), the CEO of the Australian Customs Service, the Chair of the Australian Securities and Investment Commission, the Director-General of ASIO, the Commissioner of Police of each state and the Northern Territory and the Chief Police Officer of the ACT. The CEO of the ACC is a non voting member of the Board.

4.3 Thus, 9 of the 13 voting Board members are police officers.

4.4 The Chair of the Board is the Commissioner of the AFP. The Board has extremely wide and powerful functions including to:

- (a) determine national criminal intelligence priorities;
- (b) provide strategic direction and priorities for the ACC;
- (c) authorise intelligence operations and/or investigations into federally relevant matters;
- (d) determine whether such an operation or investigation is a 'special' operation or investigation;
- (e) determine who shall head such operations or investigations;
- (f) establish Task forces;
- (g) disseminate criminal intelligence assessments; and
- (h) report to the IGC on performance of ACC.

4.5 s.7(2) of the Bill provides that in determining if an intelligence operation is a 'special' operation, the Board must consider whether methods of collecting the criminal intelligence that do not involve the use of powers in the Act have been effective. s.7(3) provides that in determining whether an investigation is a 'special' investigation the Board must determine 'whether ordinary police

methods of investigation into the matters are likely to be effective', the same test currently used by the NCA IGC to determine a reference.

4.6 In relation to determining if an intelligence operation is a special operation, the Board must first consider "whether methods of collecting the criminal and information intelligence that do not involve the use of powers in this Act have been effective". This second test is phrased in the past whilst the first test is phrased in the future. The classification of an operation or an investigation as 'special' means that the ACC is able to exercise its coercive powers in relation to either function.

Voting

4.7 The Board is required to meet a minimum of twice each calendar year. At a meeting a quorum is constituted by 7 members (not including the CEO). A question is to be determined by a majority of the votes and the person presiding has a deliberative vote and a casting vote. The CEO is not entitled to vote. In relation to voting for a special operation/investigation, at least 9 members of the Board (including two eligible Commonwealth Board members) must vote in favour of the determination.

4.8 What this means is that, given the CEO cannot vote, 9 of the 12 votes are by police officers and possibly 10 of the 12 votes if the Chair exercised a casting vote as well.

Role

4.9 The role of the ACC is, in summary (s.7A):

- (a) to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information. This is the general intelligence function of the ACC and does not require approval from the Board;
- (b) upon Board authorisation, to undertake intelligence operations. An intelligence operation is defined as 'the collection, correlation, analysis, or dissemination of criminal information and intelligence relating to federally relevant criminal activity'. It appears that in performing this function, the ACC is also performing function (a);
- (c) upon Board authorisation, to investigate federally relevant criminal activity. This function enables the ACC to use its coercive powers;
- (d) report to the Board on those operations or investigations;
- (e) provide strategic intelligence assessments to the Board; and

- (f) advise the Board on national criminal intelligence priorities.

4.10 These last three functions relate to, and are the basis of, the role of the Board in providing national, criminal intelligence priorities.

4.11 In terms of jurisdiction for investigations, the ACC can only investigate 'federally relevant criminal activity' which is defined in the same terms as 'relevant criminal activity' for the NCA except cybercrime and firearms has been added.

Coercive powers

4.12 Examiners will be able to utilise the same powers as members of the NCA could exercise and an Examination will be conducted in the same manner as the NCA hearings. Examiners are appointed by the Governor General for a period of 5 years and must have been enrolled as a legal practitioner for 5 years.

The role of the IGC

4.13 The IGC will continue to exist in its present form but it no longer has any power or role in referring or approving matters for the ACC to deal with nor any role in additional appointments to the ACC. Under the new s.9 the IGC has three functions:

- (a) to generally monitor the work of the ACC and the Board;
- (b) oversee the strategic direction of the ACC and the Board; and
- (c) receive reports from the Board for transmission to governments.

The Role of the PJC

4.14 The PJC will continue to exist under its present structure but under the new name of Parliamentary Joint Committee on the Australian Crime Commission. The PJC will perform the same basic role and functions as it did for the NCA outlined above.

5 FEATURES OF STATE CRIME COMMISSIONS

Structures in Other Jurisdictions

5.1 In Australia, apart from the proposed ACC, various forms of standing or permanent Crime Commissions have been created in NSW, Queensland, and Western Australia. It can be seen that the organisational structure and accountability mechanisms have emerged from, and are a result of, specific social, legal and political influences. What is appropriate in one jurisdiction is not necessarily appropriate in others. The statutory frameworks are attempting to achieve a balance between various competing considerations and interests.

5.2 However, superimposed over all of these Commissions is the notion that whoever holds key powers, whether as a referral agency or the investigatory agency, ought to be independent and impartial. This is reflected in, for example, criteria for appointment or background of persons exercising coercive powers, as well as the degree of ministerial or parliamentary controls over the Commission. This requirement for independence has two rationales.

5.3 First, is the danger of undue influence being exercised by an external 'interest'. This threatens the impartial application of, for example, statutory criteria or considerations in key decisions involving the liberty of the citizen. History shows, for example, the power of a truly Police State.

5.4 Second, independence is required in order for the community to have confidence in the integrity of our most powerful law enforcement agencies. Public confidence in this context is an important, though largely neglected, consideration. The notion of independence in this context of statutory authorities is, it is submitted, the same notion as used in the context of judicial independence and prosecutorial independence. The same values are involved.

New South Wales Crime Commission (NSWCC)

5.5 The current NSWCC originated from the State Drug Crime Commission Act 1985 (NSW). The Commission, created by the New South Wales Crime Commission Act 1985, is largely based on the NCA Act and in many ways can be seen as a state version of the federal NCA.¹³ The principal object of the Act is expressed to be the reduction in the incidence of illegal drug trafficking and the "secondary object of the Act is to reduce the incidence of organised and other crime" (s.3A).

5.6 The Commission consists of a Commissioner, and Assistant Commissioners. The Commission can hold hearings at which a witness is

¹³ Donague *op cit* p.11; C Coms 'The Big Four: Privileges and Immunities' (1994) 27 ANZ Journal of Criminology 133.

compelled to answer questions ie cannot claim the privilege against self incrimination but any evidence given cannot be used against that witness in any civil or criminal matter (s.18B). Section 24 creates a four person Management Committee which consists of:

- (a) The Minister for Police
- (b) The Commissioner of Police
- (c) Chair of the NCA
- (d) Commissioner of the NSWCC

5.7 This Management Committee performs similar functions to those currently performed by the NCA IGC, namely:

- (a) refers matters relating to relevant criminal activity to the Commission;
- (b) arranges Task Forces;
- (c) generally reviews and monitors the operations of the Commission;
and
- (d) gives approvals for dissemination of information.

5.8 The membership of this Committee illustrates how the question of what is 'appropriate' in any given jurisdiction is relevant to the specific social and political contexts and law enforcement needs. Here a balance has been reached between the interests, concerns, and skill of the relevant Minister, traditional policing, federal considerations, and the organisation itself.

New South Wales Independent Commission against Corruption

5.9 The NSW Independent Commission Against Corruption (ICAC) was established in 1988.¹⁴ The ICAC is a statutory authority headed by a single Commissioner. The basic functions of the Commission are:

- (a) to investigate allegations of corrupt conduct;
- (b) to investigate any matter referred to it by both Houses of Parliament;
- (c) to communicate results of investigations to relevant authorities;

¹⁴ G Sturgess 'Guarding the Polity: the NSW Independent Commission Against Corruption' in P Weller *Royal Commissions and the Making of Public Policy* (1994) Macmillan Education p.107.

- (d) to carry out a range of educative and proactive measures to reduce the incidence of public corruption; and
- (e) to assemble evidence for prosecution authorities.

5.10 The ICAC has the same type of coercive powers possessed by the NCA, including the holding of private or public hearings. At those hearings a witness cannot claim the privilege against self incrimination in relation to answers given or the production of documents (s.37(2)) but an automatic use indemnity is provided (s.37(3)).

5.11 The ICAC is managed by an 'Operations Review Committee' (ORC) created by s.58. The role of the ORC is:

- (a) to advise the Commissioner whether a matter should be investigated or discontinued;
- (b) to advise the Commissioner on any other matter the Commissioner may refer to the ORC;
- (c) to meet at least once every three months (s.59(2)). The members of the ORC are:
 - (i) the ICAC Commissioner;
 - (ii) the ICAC Assistant Commissioner;
 - (iii) the Commissioner of Police;
 - (iv) a person appointed by the Governor, recommended by Attorney-General; and
 - (v) four persons appointed by the Governor to represent community views.

5.12 Under Schedule 2 of the Act a Minister or a Parliamentary Secretary is not able to be appointed to the ORC (cl.4.13). The Act also establishes a Joint Committee on the ICAC. The functions of this Joint Committee are analogous to those performed by the NCA PJC namely:

- (a) to monitor and review the functions of ICAC;
- (b) to report to both Houses on the operations of ICAC;
- (c) to examine each annual report of ICAC;

- (d) to examine trends in corrupt conduct; and
- (e) to inquire into any matter referred to it by parliament.

5.13 The Joint Committee is empowered to veto any proposed appointment to Chair of the ICAC. The Joint Committee consists of eleven members, namely:

- (a) three members of Legislative Council; and
- (b) eight members of Legislative Assembly.

Queensland Crime and Misconduct Commission

5.14 The current Queensland Crime and Misconduct Commission (CMC) was created in 2001 as a statutory entity combining the former Queensland Crime Commission¹⁵ (established in 1997) and the former Criminal Justice Commission (established in 1989).¹⁶ Because the current Commission constitutes the merger of two separate bodies, the overall accountability mechanisms are to say the least, quite complex. In essence the CMC has two main roles. The first is to deal with major crime (s.25) and the second is to deal with misconduct in units of public administration (s.33).

5.15 The Commission can hold hearings under s.82 and s.176. It is not a reasonable excuse to refuse to produce a document or give evidence on the grounds the production of the document may self incriminate the witness (s.188(3)) but that evidence cannot be used against the witness in civil or criminal proceedings (except in relation to false evidence).

5.16 The Commission is specifically required to act "*independently, impartially and fairly having regard to ...the importance of protecting the public interest*" (s.57).

5.17 In relation to its major crime function, the governing body is the Crime Reference Committee (CRC). This Committee can refer specific major crime matters to the CMC of its own initiative or upon request from the Police Commissioner (s.275) and to coordinate investigations into major crime. The CMC must provide requisite information to the CRC. The CRC consists of:

- (a) the assistant Commissioner of the CMC (Chair of the CRC);
- (b) Chair of the CMC;

¹⁵ For operation of this Commission pre 2001 see T Carmody 'The Role of the Queensland Crime Commission in the Investigation of Organised and Major Crime' *paper at AIC Symposium* 21 June 2001.

¹⁶ The CMC is created by the Crime and Misconduct Act 2001 which repealed the Crime Commission Act 1997 and repealed the Criminal Justice Act 1989.

- (c) Commissioner of Police;
- (d) Commissioner for Children and Young People;
- (e) Chair of the NCA;
- (f) two persons appointed by Governor in Council as community representatives (one must have a demonstrated interest in civil liberties and one must be a female)(s.278).

5.18 In addition, a Parliamentary Crime and Misconduct Committee (PCMC) is established. This committee has 7 members (4 nominated by the Leader of the House and 3 nominated by the Leader of the Opposition). This Committee has similar, but broader, functions to the NCA. The role of the PCMC is to:

- (a) monitor and review the performance of the CMC;
- (b) report to parliament on matters relevant to the work of the CMC;
- (c) examine the CMC annual reports;
- (d) participate in the selection or removal of Commissioners; and
- (e) to issue guidelines to the CMC.

5.19 The PCMC has powers to examine witnesses, call for documents and inspect any non-operational documents. The PCMC can issue guidelines to the CMC "about the conduct and activities of the Commission" (s.296).

5.20 Further, the office of Parliamentary Crime and Misconduct Commissioner (PCMC) is created (s.303). This person must be a former judge (s.304). Section 314 sets out the broad array of functions and powers of this office holder. In summary the role is to monitor the operational functions of the CMC and to this end the PCMC has access to virtually all operational and non operational data held by the Commission. The PCMC also investigates complaints made against the CMC, and conducts an annual review of intelligence data in the possession of the Commission and the police service (s.320).

5.21 Finally, the office of a Public Interest Monitor (PIM) is also created whose role is to monitor the Commission's compliance under the Act in relation to covert search warrants and surveillance warrants. The PIM also appears in court as a type of 'Devil's Advocate' to test the validity of applications by the Commission for such warrants (including a power to cross-examine witnesses and make submissions).

5.22 In summary, the Crime and Misconduct Commission is clearly the most complex and sophisticated law enforcement body in Australia and is subject to an extraordinary array of multi-layered accountability mechanisms. This Commission needs to be seen in the context of the revelations and recommendations of the Fitzgerald Royal Commission of Inquiry in 1989. Perhaps the most striking feature of this agency is the degree to which the legislation strives to achieve maximum independence and accountability of key decision-makers.

Western Australia Anti-Corruption Commission

5.23 In 1997 the WA Anti-Corruption Commission was established to deal with corruption or serious improper misconduct of police and other public officials.¹⁷ The Commission consists of 3 members, namely a former judge and two persons who are not public officers. A serving judge or a *person who is or has been a police officer* is not eligible to be a member of the Commission (s.5(4)). The appointments are made in effect by the Chief Justice, the Chief Judge of the District Court, and the Solicitor General.

5.24 The basic role of the Commission is to receive allegations or complaints of corruption, consider them, and if necessary, to further investigate the matter. When appropriate, the Commission forwards material to the relevant prosecution authority. Matters for investigation can come from four main sources:

- (a) Principal Officers of public authorities are compelled to report suspected corrupt conduct to the Commission (s.14).
- (b) Any individual in WA can report suspect corrupt conduct in public administration (s.16).
- (c) In the course of investigating a matter, the Commission may discover fresh or new matters which are then the subject of separate investigation (s.13).
- (d) The WA DPP can report improprieties within the OPP (s.15)

5.25 These complaints are referred to the 3 member Commission via the usual administrative procedures.

5.26 For the purposes of carrying out an investigation, a 'special investigator' appointed under the Act has the powers of a Royal Commission and the Chairman of a Royal Commission (s.40(1)). The investigator can hold hearings, conduct searches and seize documents. Although the Act does not contain

¹⁷ The Commission is established by the Western Australian Anti-Corruption Commission Act 1988 as amended, and followed on from the Royal Commission of Inquiry into Commercial Activities of Government and other Matters (1992).

specific provisions relating to the privilege against self incrimination, given the Royal Commission powers, a witness would not be able to claim the privilege against self incrimination but would have a use indemnity.

5.27 The body overseeing the Commission is the Parliamentary Joint Standing Committee of 8 members of parliament. The PJC only has a monitoring role and cannot review any operational matters. The Commission reports directly to the Premier.

5.28 The points to note are the exclusion of police from any governance of the Commission and the requirement of a former judicial officer as head of the Commission.

The following table summarises the key features of the State Crime Commissions.

Agency	Chair/Governance	Is privilege recognised as a ground not to answer questions or produce documents?	Is use indemnity granted?	Review mechanism
NSW ICAC	.Commissioner .Assistant Commissioners (must be former judges)	No	Yes s.37(3)	Operations Review Committee .ICAC Comm .ICAC Ass Comm Comm of Police .Govt Appointee .4 community reps Joint Committee .3 Leg C .8 LA
NSW Crime Commission	.Commissioner .Assistant Commissioner (must have 'special legal qualifications')	No s.18B(1)	Yes s.18B(2)	Management Committee .Minister police .Comm Police NCA Chair .Comm ICAC
WA Anti-Corruption Commission	.1 former judge .2 non-public officials .No police	No	Yes, as per Royal Comm	PJC
Qld Crime and Misconduct Commission	.1 Chair (former judge) .4 P/T Commissioners (community reps either lawyer or community service)	No	Yes s.197(2)	Crime Reference Committee .Ass Comm CMC .Chair CMC .Comm Police

Agency	Chair/Governance	Is privilege recognised as a ground not to answer questions or produce documents?	Is use indemnity granted?	Review mechanism
	police ineligible (Sch 2)			.Comm Children and YP .NCA Chair Plty C & M Committee .4 House .3 Opp Plty C & M Commissioner .former judge Public Interest Monitor
NCA	.Chair (former judge) .Members .Hearing Officers	No	Yes	PJC IGC Commonwealth minister
ACC	CEO Examiners Staff **Board is not part of the ACC	No	Yes	IGC (monitor and oversee) PJC (monitor, review, report)

6 EVALUATION OF THE ACC MODEL

Criminal Intelligence Focus

6.1 The Bill envisages a clear shift away from an investigatory focus towards a more proactive strategy based on the collection and analysis of criminal intelligence and criminal information relating to federally relevant criminal activity, and the provision of strategic criminal intelligence assessments. The LCA supports this intelligence collection function.

6.2 It is increasingly recognised that traditional reactive based strategies to address criminal activity of any nature is severely limited. This trend can be seen in the operations and functions of the Queensland Crime and Misconduct Commission and the NSW Commissions. In this context 'getting smarter' can be a more powerful tool against crime than increasing physical resources. The addition of cybercrime to matters within the jurisdiction of the ACC is a logical step in this direction. This is not to suggest that the NCA was not involved in intelligence based investigation; to the contrary,¹⁸ but the Bill places a higher priority on this particular aspect.

6.3 However, the LCA is not in a position to know what the resource allocation implications of this shift might be. It would be a matter of concern if, for example, any increase in resourcing of intelligence operations at the federal level were at the expense of resourcing criminal investigations both within the ACC and at the state and territory level.

Combining Intelligence Databases, Functions and Resources

6.4 In order for the ACC to effectively carry out this intelligence function, it should have access to the maximum sources of relevant data and to this end, the relocation of the functions of the ABCI and the ASCA is supported by the LCA. Apart from creating greater efficacy, this reform should also result in improved resource allocation.

Creation of the Office of Examiner and Examinations

6.5 Prima facie it appears that the office of Examiner is basically a substitute for the office of NCA Member or Hearing Officer. However, there are important differences between the existing offices and the proposed office of Examiner. NCA members have played an important role in fashioning the overall direction and priorities of the NCA. Section 46A of the Act provides that the NCA Chair is required to generally manage the affairs of the NCA in accordance with the policy and directions of the NCA. Since the NCA consists of the Chair and the

¹⁸ Section 12(2) of the NCA Act for example, specifically requires the NCA to consult and co-operate with the ABCI.

Members, it follows that the views of the Members had been considered to be an important influence on the overall direction of the NCA. In addition, Members have to be appointed on a full time basis (s.7(5)) and under s.37(1A)) a Member is eligible for re-appointment. The Members have operated as an integral component of the whole organisation, providing continuity in practices. The office of Hearing officer was introduced following the last report of the PJC into the NCA. However, no persons had been appointed to that office.

6.6 By comparison, the proposed Examiners can be part-time appointments and are not eligible for re-appointment. This may not facilitate a 'whole of organisation' approach and could arguably lead to organisational fragmentation. There is no provision for Examiners to contribute to the overall direction of the ACC nor any provision for the Examiners to have any input into the operations of the Board. The CEO is empowered to decide which Examiner shall deal with a particular matter, and once that decision is made, the Examiner has full discretionary powers to decide when and how to exercise the coercive powers outlined above.

6.7 The LCA is concerned that this arrangement lacks adequate accountability, particularly given that the minimum prerequisite for appointment as Examiner is enrolment as a legal practitioner for 5 years. The Examiner model has features of a free ranging independent contractor not necessarily motivated by shared organisational goals and values.

Position of CEO

6.8 In many ways the proposed role of the CEO is similar to the current role performed by the NCA Chair. As stated above, under s.46A the NCA Chair is responsible for managing the affairs of the Authority in accordance with the policy directions given by the Authority (ie by the Chair and Members). Under s.24A the Chair may direct a Hearing Officer to hold a hearing. However, the Act also provides that the Chair must be either a serving or former judicial officer or, has been enrolled as a legal practitioner for at least 5 years. This requirement is clearly premised on the need for independence in decision making. This requirement for independence is reinforced by s.43(1) which provides that the appointment of a member (which includes the Chair (s.4)) can only be terminated by the Governor-General by reason of misbehaviour or physical or mental incapacity (essentially the same criteria for removal of a judge).

6.9 The role of the CEO includes managing the day to day administration of the ACC, in accordance with directions from the Board, co-ordination of ACC operations/investigations, and selection of Examiners. These are significant discretionary powers. Under s.43(1) the Minister is empowered to suspend the CEO if the Minister is of the opinion the performance of the CEO has been unsatisfactory and under s.44(3) the Governor General may terminate the appointment of the CEO if the Minister is of the opinion that the performance of

the CEO has been unsatisfactory. Thus, the degree of independence previously enjoyed by the NCA Chair is not shared by the CEO and the potential exists for 'political' (or other) interests to undermine the office of CEO.

Creation of a Board

6.10 In terms of membership, the type of Board created by s.7B is a positive development and arguably can be seen as formalising a previous practice. That is, in November 1990, when the then Chairperson of the NCA, Mr Justice Phillips established a 'Consultative Committee' to act as a primary mechanism for the selection of references and inquiries. The committee consisted of each of the Commissioners of Police in Australia, chair of the NCA, Chair of the Australian Securities Commission and representatives from the ABCI and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

6.11 The role of this committee was to broaden the input into deciding what matters should be the subject of NCA attention. It has been argued that prior to the establishment of the Consultative Committee, the personal philosophies and ideologies of each individual Chairperson overly influenced the general direction of the NCA and the methods used. The IGC welcomed the initiative of a Consultative Committee but insisted that it (the IGC) should retain ultimate responsibility for key decisions:

"The IGC also strongly endorses the Chairman's proposals for...the creation of a Consultative Committee to assist consideration of the need for NCA investigations in particular area...The advisory role proposed for the Committee will be of great assistance to the IGC in determining the nature and extent of new NCA references and in monitoring the progress of existing references. The IGC reaffirms its own role as the body with ultimate responsibility for referring matters to the NCA for investigation and will welcome advice from the Consultative Committee."¹⁹

6.12 It appears however that the informal Consultative Committee ceased to operate sometime after 1993.

6.13 There is a strong argument that national efforts to address serious national crime will benefit from the direct involvement of Police Commissioners and the leaders of key federal intelligence and law enforcement agencies. While an argument can be made about the precise membership of the Board, eg. should AUSTRAC be involved, the LCA supports the creation of the Board.

6.14 However, whether the proposed Board should have the powers outlined in the Bill is another matter. For reasons discussed below, the LCA submits that the Board should be renamed the 'Advisory Board to the ACC' and given formal

¹⁹ IGC Submission to the PJC (unpublished) (1991) p.11.

statutory recognition. As proposed under the current Bill, the Advisory Board would not form a constituent part of the ACC, but its role as the primary formal adviser should be recognised.

6.15 The integrated expertise of the Board can be utilised to fulfil the range of functions currently outlined in s.7C except for one key difference. Any decision of the Board which would otherwise determine when the coercive powers of the ACC can be activated (s.7C © &(d)), or determine national criminal intelligence priorities or ACC priorities, would have to be ratified by the IGC. A key role of the ACC CEO would be to facilitate this ratification process. Through this change, it is submitted the combined expertise of the Board can be retained but alongside appropriate Ministerial oversight.

Arguments why the Board should only possess an Advisory role rather than referral role.

6.16 The Board is clearly dominated by police representatives (9/12 votes). This is not to suggest some sort of conspiracy theory whereby 'the police' as a block have a specific agenda and will exercise their numbers to get particular matters through the Board. Rather, the dominance of the police on a decision making body regarding the exercise of coercive powers is *per se* the objection. All the State Crime Commissions in Australia either specifically exclude police from membership of governing positions or, require a person with a judicial background to act as key decision makers. The degree of independence found in all these other Commissions is not found in the ACC Bill. The potential for police interest to dominate key decisions may undermine public and governmental confidence in the ACC.

6.17 Whilst the state, federal, and territory Police Commissioners rightly exercise considerable influence over police priorities, policing methods, policing strategies and general operational matters, none of these police forces possess the type of coercive powers to be possessed by the ACC and activated by the Board. In effect, the idea of a police force having a power to compel a person to attend a 'hearing' and be compelled to provide answers is simply unheard of, in Australia.

6.18 This is a different argument than that which concerns the removal of the privilege against self incrimination. The argument here is that the police ought not decide in which cases the privilege can be removed. That decision should be made by a totally independent authority. In any event, even with the significant discretionary powers granted to Police Commissioners, some form of Executive control and accountability is fundamental.

6.19 In relation to state police forces and the AFP it is generally accepted that under the Westminster system, the relevant police minister is ultimately responsible (to parliament) for policing and law enforcement in his or her

particular jurisdiction. The difficulty is deciding what the term 'responsible' here means? On the one hand, as stated above, it is fundamental that the police should be independent from the Executive at least in terms of operational matters such as police priorities, methods, and practices. By analogy, case law refers to the 'original' rather than delegated authority of the police constable and their duty to 'the law'. If the Executive were able to influence policing on these conventional matters then the Rule of Law is itself threatened. On the other hand, accountability is equally important as independence in this context and a law enforcement agency, using the police as an example, must always 'account' to some person or body for their work and role otherwise the police would be beyond political or other control.

6.20 The McDonald Report into the Canadian Royal Mounted Police stated:

"We take it as axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives... the government must fulfil its democratic mandate by ensuring that in the final analysis it is the government that is in control of the police and accountable for it".²⁰

6.21 Take as an example the power to compel a person to attend an ACC Examination and to compel that person to answer questions even if the answers had a tendency to incriminate the witness. No Australian police force has the power to abrogate the pre-trial right of a citizen not to answer police questions, even though this issue has been considered closely by various law reform bodies in recent years. Although the ACC is not a police force, under the current Bill, the police as a collective on the Board do have, in effect, a power to remove the right to silence for those citizens compelled to attend an Examination.

6.22 The concerns of the LCA regarding the transfer of powers to the Board have greater cogency when the amendments to the NCA Act in 2001 regarding the abolition of the right to claim privilege are linked to the transfer of powers described above. Prior to the 2001 amendments, a witness before an NCA hearing could at least claim the privilege and that claim had to be considered by the NCA and if necessary, an indemnity granted from prosecution could be granted by the relevant DPP. Under the new provisions, the privilege is not recognised although an automatic use indemnity is provided. However, this does not prevent the ACC or prosecution authorities from using evidence derived from the compelled evidence given at the hearing. In effect, this places the police in a similar position to Royal Commissions and State Crime Commissions which are

²⁰ Canada 'Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police' Report (1981) p.1005, reprinted in G Orr 'Police Accountability to the Executive and Parliament' in N Cameron and W Young (eds) *Policing at the Cross Roads* (1986) Allen and Unwin at 46.

however, headed by an independent office holder and accountable to government.

Accountability of the Board

6.23 A key question in this context is to whom is the Board itself accountable?

6.24 Under s.55 of the Act the PJC lacks any power to direct or control the determination of matters for ACC investigation or to control the use ACC coercive powers. The role of the PJC as a monitor, reviewer, and reporter to parliament will remain unaltered.

6.25 Under s.9(a) the IGC can 'monitor' the work of the Board and to 'oversee' the work of the Board. A power to monitor or oversee is not adequate given the nature of the powers possessed by the Board. This would not enable the IGC to veto an investigation/operation which the IGC regarded as totally inappropriate for the ACC to deal with.

6.26 Under s.59(1) the Chair of the Board must keep the Minister informed of the general functions of the ACC. Although the federal and state Ministers have a power to request the Chair of the Board to provide information in relation to a specific matter, the Chair of the Board is not required to provide that information if, in the opinion of the Chair of the Board, the disclosure of that information could "prejudice the safety or reputation of persons or the operations of law enforcement agencies". Given that the Chair of the Board is the Commissioner of the AFP, the LCA has a significant concern that the perspective and interests of the police may be determinative in whether the IGC is provided with relevant information.

6.27 Under s.18(1) the Minister can give directions or guidelines to the Board regarding the general performance of the functions of the Board and under s.18(2) the Minister can give directions regarding a specific operation/ investigation but only if all members of the IGC vote in favour at a meeting. This power of the IGC however is limited to how the Board performs its functions not which matters it shall deal with.

6.28 In the view of the LCA, these are hardly adequate accountability mechanisms for such a powerful body. What is missing is the ability of the IGC to determine which matters are appropriate for ACC investigation/operation and when the coercive powers can be activated. The LCA believes decisions on the activation of the coercive powers should be restored to the IGC.