

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

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

**Submission No:12  
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**Parliamentary Joint Committee on the  
National Crime Authority**

***Australian Crime Commission  
Establishment Bill 2002***

***CPSU (PSU Group) Submission***



October 2002

## Recommendations

The CPSU recommends that the Committee:

1. Amend the Bill to include transitional provisions that make certain the continuation of existing terms and conditions of employment for transferring staff.
2. Make a number of minor and consequential changes to relevant Commonwealth legislation to ensure continuity of entitlements.
3. Support the employment of ACC staff under the Public Service Act 1999 to ensure the ACC has a strong regime of accountability, integrity and independence.

## Australian Crime Commission Establishment Bill 2002

### CPSU (PSU Group) Submission

#### Introduction

1. The PSU Group of the Community and Public Sector Union welcomes the opportunity to make a submission on the Australian Crime Commission Establishment Bill 2002 ("the Bill").
2. The CPSU is the major union within the Australian Public Service and has represented members performing non-policing functions within the National Crime Authority ("NCA") since its inception. These positions include intelligence analysts, corporate support, un-sworn investigators, financial investigators, information technology, legal, telephone intercept, technical surveillance and operational support roles. The performance of these roles involves approximately 250 staff. There are also approximately 20 secondees from other Commonwealth agencies (ACS, AUSTRAC, ATO) who contribute to NCA functions and whom are also represented by the CPSU.
3. Policing functions within the NCA are performed by approximately 130 secondees drawn from State and Federal police forces. This mix of staffing is proposed to continue under the Australian Crime Commission ("ACC").
4. The CPSU also represents employees within the Office of Strategic Crime Assessments ("OSCA") as well as staff who perform investigative functions in other Commonwealth Agencies including the Department of Immigration and External Affairs, the Customs Department, the Australian Quarantine and Inspection Service and the Australian Protective Service.

## Summary

5. CPSU wishes to address two issues in this submission. The first issue relates to the employment of ACC employees under the Public Service Act 1999 and the second relates to the maintenance of conditions and entitlements of ACC staff and the ongoing industrial stability of the organisation.

(i) Employment under the Public Service Act

The CPSU supports the proposal for the continued employment of ACC staff under the Public Service Act. We support this proposal because it better upholds the independence of the ACC, both in its day to day operations and in terms of the public perception of the organisation. This in turn better supports the proposed role and function of the ACC as a body able to investigate serious and organised crime where ever it may occur. It also ensures the continued application to staff of relevant and important pieces of Commonwealth legislation.

(ii) Employment conditions

In relation to the employment conditions of ACC staff, the CPSU submits that it is unclear whether the industrial instruments that currently apply to staff in OSCA, the Australian Bureau of Criminal Intelligence ("ABCI") and the NCA will continue, as a matter of law, to operate in the ACC. As a result, it is submitted that the Bill should be amended to include transitional provisions that make certain the status of industrial instruments currently applying to all staff who will be transferred into the ACC immediately upon the transfer taking effect, and providing for the means by which those conditions may be replaced by conditions more appropriate to the new structure and functions of the ACC. Furthermore, the CPSU submits that a number of minor and consequential amendments to relevant Commonwealth legislation must be made to ensure continuity of entitlements.

## **Background**

5. The CPSU supports the ACC's proposed role as an organisation which will perform both investigative and intelligence gathering functions, as the NCA does currently.
6. However, the combination of OSCA and the ABCI with the resources of the NCA will further extend and enhance the intelligence gathering and analytical functions that the NCA already performs.
7. The ACC will continue to operate, as the NCA now does, on the basis of multi-disciplinary teams which will incorporate a wide variety of staff who will provide specialist advice. This will continue to ensure that the necessary skills and expertise are made available to those charged with investigating serious and organised crime.
8. Provided of course that the ACC is properly resourced, it should be uniquely positioned to effectively set and co-ordinate national criminal intelligence priorities.

## **Employment under the Public Service Act**

9. Given the role of the ACC as described above, it is vital that the ACC is seen to be a body free from manipulation by political or other influences.
10. CPSU believes that the continuing employment of staff under the Public Service Act is an important aspect of the perception of the organisation as a body free from such influences.
11. The Public Service Act strives to ensure there is an apolitical service that is efficient and effective in serving Government, the Parliament and the Australian public. It establishes a legal framework for the effective and fair employment of

staff, and puts in place measures to ensure the highest levels of accountability and integrity.

12. Further, employment under the Public Service Act brings with it constraints with respect to the employment of staff which are aimed at preventing patronage and favouritism, nepotism and corruption, and which ensure a level of transparency in decision making.
13. There has been some suggestion that the Australian Federal Police Act provides a stronger regime of accountability and integrity than the Public Service Act. The CPSU believes that the APS Code of Conduct and associated Values provides an effective regime of integrity and a broader focus beyond merely policing functions. This reflects the ACC's charter which goes well beyond the policing role of the AFP.
14. As well, the CPSU believes the failure to engage staff under the Public Service Act would lessen the actual and perceived independence of the ACC among its partner agencies.
15. The ACC must be able to operate outside the umbrella of any of the relevant police forces. The ACC is not a police force, but a specialist national agency focusing on all aspects of organised and serious crime. At times this may entail investigation aspects of the police itself. Given this role, it is vital that the ACC is not able to be manipulated, and is not seen as being able to be manipulated, by any interests including police interests.
16. Finally, employment under the Public Service Act also ensures some of the continuity of employment matters for existing staff. This is further discussed below.

## Employment Conditions

17. In relation to employment conditions the following issues arise:

- Status of current terms and conditions of employment of transferring employees and future regulation of terms and conditions of employment in the ACC
- Coverage under the *Maternity Leave (Commonwealth Employees) Act 1973*, the *Long Service Leave (Commonwealth Employees) Act 1976* and the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, and their subordinate legislation.
- Maintenance of membership in the relevant public service superannuation funds

### Continuation of Terms and Conditions of Employment

18. The question of terms and conditions of employment is a matter of particular interest to the CPSU and its members. Stability in employment conditions positively contributes to the commencement of any new or changed organisation.
19. Whether or not current certified agreements and AWA's will continue to apply to staff is an area of some uncertainty.
20. There is legal authority for the proposition that there can be no transmission of business when the employer remains the Commonwealth (*Hillman v the Commonwealth* (1924) 35 CLR 260). In essence, the current employer cannot transmit to itself. If this is accepted, the agreements that apply to staff who will transfer into the ACC will not transmit to the ACC.
21. Nevertheless, it may be argued that the ACC is a continuation of the NCA. The ACC is being created by amendment to the NCA Act and the broad functions of the ACC will be the same as the functions currently performed by the NCA.



Similarly, the CPSU understands that at least initially the staff of the ACC will work in the same locations as staff of the NCA.

22. Further, consultants and legal practitioners engaged by the NCA will be taken to have been engaged under the ACC Act. Investigations commenced by the NCA will continue to be undertaken by ACC. All evidence, records, documents and other things in the possession of the NCA will be transferred to the ACC.
23. If this argument were accepted then the certified agreements applying to the NCA immediately prior to the date on which the ACC Act commences ("the NCA Agreement") might continue to apply to the ACC. The "part of the single business" to which the agreement applies can continue to be identified and the agreements can continue to operate.
24. The question of whether current AWAs will apply in the ACC depends in part upon an examination of the terms of each AWA itself. However, the same circumstances above can be applied.
25. There is therefore significant uncertainty in relation to the status that current certified agreements and AWAs may have within the ACC. The CPSU understands that legal advice obtained by the NCA from the AGS in August this year supports that uncertain situation.
26. Alternatively, if the ACC is a new organisation and the *Hillman* authority is not followed (it is noted that its continued application has not been tested since the decision, and recent decisions relating to transmission of business take a beneficial approach to the provisions) then arguments with respect to transmission of business become live. The experience of the CPSU following the Employment National litigation is that whatever the outcome, industrial stability and certainty is not forthcoming in the short term.
27. This not only creates uncertainty for current employees, it in turn may affect the ways in which conditions of employment are able to be regulated within the

ACC. The CPSU strongly believes this is an area which requires certainty and therefore clarification.

28. There are two possible options for ensuring certainty given the circumstances. The first is a determination by the CEO of the ACC under s.24(1) of the Public Service Act, consistent with the machinery of government change provisions of the Act and Regulations (s.72 and Regulation 8.1) (copies attached). The second is legislative amendment.
29. The CPSU recommends that a new clause be inserted into the transitional provisions of the ACC Act as follows:
  - (1) *For the purposes of this section "transferring employee" means an employee moved to the ACC by a determination of the Public Service Commissioner under paragraph 72(1)(a) or 72(1)(c) of the Public Service Act 1999.*
  - (2) *A transferring employee is taken, on the day the determination takes effect, to be employed on the same terms and conditions as applied to his or her employment, immediately before the commencement time.*
  - (3) *However, an award, certified agreement or AWA which commences on or after the commencement time and applies on its face to the transferring employee, will override those terms and conditions.*
30. The CPSU recommends legislative amendment rather than a determination of the CEO of the ACC under s.24(1) of the Public Service Act because legislative amendment will create immediate certainty and ensure industrial stability over the transition period, whereas any determination of the CEO of the ACC will not resolve matters as certainly or as quickly, and will not guarantee industrial stability.
31. The form of any determination under s.24(1) will depend on the view taken by the CEO as to the application of agreements and AWAs. This is because s.24(1) provides that a determination is of no effect to the extent that it would

reduce the benefit to any employee of any individual term or condition applicable to the employee under an award, certified agreement or AWA. Therefore, even if a determination were made its operation could be disputed by staff.

32. The proposed clause only provides for the conditions immediately upon the commencement of the ACC. It does not limit the ACC's ability to negotiate new AWAs or a certified agreement specifically for the ACC.
33. It is not inappropriate for staff to work side by side, in the short term, on different terms and conditions of employment. This simply ensures no disadvantage and provides a holding regime until such time as new conditions are negotiated. Further, such a practice would not be unusual in the ACC where seconded staff will have worked closely with former NCA staff but under different terms and conditions of employment in the past.
34. The CPSU notes that provisions of the kind proposed were present in the initial exposure draft of the legislation. Whilst the use of legislation might appear to be a blunt instrument to achieve an outcome that could possibly be achieved pursuant to an order of the CEO under the Public Service Act, it is our submission, that in the circumstances of this case it remains the preferred option. This is particularly the case given the important role that the ACC will carry out and the importance of industrial stability to the success of the ACC.
35. The CPSU also notes that the legislative amendments proposed are in keeping with the form of the provisions relating to machinery of government changes, and therefore broadly consistent with the intention of Parliament where such change occurs.

### *Application of Commonwealth Legislation*

36. It is proposed that staff of the ACC be employed under the Public Service Act 1999 in the same way that staff of the NCA are currently employed. The relevant clause is clause 47:

#### *47 Staff*

*(1) Subject to sections 48 and 49, the staff of the ACC shall be persons engaged under the Public Service Act 1999 .*

*(2) For the purposes of the Public Service Act 1999 :*

*(a) the CEO and the APS employees assisting the CEO together constitute a Statutory Agency; and*

*(b) the CEO is the Head of that Statutory Agency.*

37. As such, the Maternity Leave (Commonwealth Employees) Act 1973 will apply to all staff of the ACC who are employed under the Public Service Act. Similarly, the Long Service Leave (Commonwealth Employees) Act 1976 will also apply.

38. As employees of the ACC will continue in employment with the Commonwealth, and merely be transferred under the machinery of government provisions of the APS Act, continuity of service will be ensured for transferring staff for all purposes subject to the terms of the Act or other industrial instrument conferring the benefit that depends upon continuous service.

39. The service of employees who are transferred from the NCA and OSCA, where staff are employed under the Public Service Act, into the ACC will be continuous for the purposes of calculating long service leave. This is also the case for employees employed in the ABCI under the Australian Federal Police Act 1979 ("AFP Act") because AFP employees (within the meaning of the AFP Act) are deemed to be employed in government service for the purposes of the Long Service Leave Act.

40. The Occupational Health and Safety (Commonwealth Employees) Act 1991 and the Safety Rehabilitation and Compensation Act 1988 apply to persons employed by the Commonwealth and will therefore cover staff working in the ACC in respect of their employment by the Commonwealth.

#### *Superannuation*

41. Permanent staff of the NCA, OSCA and the ABCI are members of either the CSS or the PSS due to their status as Commonwealth agencies, or in the case of OSCA as part of a Commonwealth Department. These arrangements are proposed to be continued for the new ACC.
42. However, the appropriate CSS and PSS delegations will need to be in place prior to the transfer of staff. The time needed to establish these delegations needs to be taken into account when determining the commencement date of the ACC.
43. Superannuation arrangements for seconded staff of the ACC differs in that these staff will maintain their existing superannuation arrangements for the period of their secondment.

CPSU

14 October 2002



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## PUBLIC SERVICE ACT 1999 SECT 24

## 24 Remuneration and other conditions

- (1) An Agency Head may from time to time determine in writing the remuneration and other terms and conditions of employment applying to an APS employee or employees in the Agency. A determination is of no effect to the extent that it would reduce the benefit to an employee of any individual term or condition applicable to the employee under an award, certified agreement or AWA.

Note: Other Commonwealth laws deal with matters such as superannuation, compensation, long-service leave and maternity leave.

- (2) A determination under subsection (1) may apply, adopt or incorporate, with or without modification, any of the provisions of an award or certified agreement, as in force at a particular time or as in force from time to time.
- (3) The Public Service Minister may, by notice in the *Gazette*, determine the remuneration and other terms and conditions of employment applying to APS employees, if the Public Service Minister is of the opinion that it is desirable to do so because of exceptional circumstances.
- (4) A determination under subsection (3) overrides any determination under subsection (1), to the extent of any inconsistency.

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### PUBLIC SERVICE ACT 1999 SECT 72

#### 72 Machinery of government changes

- (1) The Commissioner may do any of the following, if the Commissioner is satisfied that it is necessary or desirable in order to give effect to an administrative re-arrangement:
- (a) move APS employees to another Agency (without anyone's consent), by a determination in writing;
  - (b) determine in writing that APS employees cease to be APS employees and become employees of a specified Commonwealth authority;
  - (c) determine in writing that non-APS employees cease to be employed as non-APS employees and become engaged as APS employees in a specified Agency;
  - (d) on behalf of the Commonwealth, engage any person as an APS employee in a specified Agency.
- (2) A determination by the Commissioner has effect according to its terms, by force of this section.
- (3) If an APS employee (the *transferred employee*) becomes an employee of a Commonwealth authority under paragraph (1)(b), the employee is entitled to remuneration and other conditions of employment that are not less favourable than the terms and conditions to which the employee was entitled as an APS employee, immediately before ceasing to be an APS employee, under:
- (a) an award, certified agreement or AWA; or
  - (b) a determination under this Act.
- (4) Subsection (3) ceases to have effect on the next occasion when there is a relevant variation in remuneration and conditions in the Commonwealth authority. For this purpose, *relevant variation* means a variation that:
- (a) results from the making or variation of an award, certified agreement or AWA; and
  - (b) applies to the transferred employee, or to a class of employees that includes the transferred employee.
- (5) The regulations may prescribe arrangements for determining any variation of the remuneration and other conditions of employment applicable to:
- (a) APS employees who are moved to another Agency under paragraph (1)(a); and
  - (b) persons who become APS employees under paragraph (1)(c).

- (6) In this section:

*administrative re-arrangement* means any increase, reduction or re-organisation in Commonwealth functions, including one that results from an order by the Governor-General.

*Commonwealth authority* includes a company in which the Commonwealth has a controlling interest.

*non-APS employee* means a person who is employed by the Commonwealth or by a Commonwealth authority, but does not include an APS employee.

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### PUBLIC SERVICE REGULATIONS 1999 REG 8.1

Part 8 Administrative arrangements and re-organisations Employment conditions after machinery of government changes — movement of APS employees (Act s 72)

- (1) For the purposes of paragraph 72 (5) (a) of the Act, this regulation prescribes arrangements for determining variations of the remuneration and other conditions of employment applicable to an APS employee who is moved to another Agency in accordance with a determination under paragraph 72 (1) (a) of the Act.
- (2) The annual salary that applies to the APS employee on the day when the move occurs is the greater of:
  - (a) the annual salary that applied to the APS employee immediately before the move; and
  - (b) the annual salary that would, apart from this regulation, apply to the APS employee after the move.
- (3) Before or after the move, the other conditions of employment of the APS employee may be varied:
  - (a) after consultation by the Agency Head with:
    - (i) the APS employee; or
    - (ii) that APS employee and any other APS employees who are to be or who have moved to the Agency; or
    - (iii) a class of the APS employees who are to be or who have moved to the Agency that includes the APS employee; and
  - (b) in accordance with a determination under subsection 24 (1) of the Act to the effect that some or all of the conditions of employment are to be the same as those that applied to the APS employee immediately before the move; and
  - (c) to have effect no sooner than the day when the move occurs.

*Note* A determination by an Agency Head under subs 24 (1) of the Act is of no effect to the extent that it would reduce the benefit to an APS employee of a condition of employment applicable to the employee under an award, certified agreement or AWA.

- (4) However, if:
  - (a) a determination mentioned in paragraph (3) (b) applies to the APS employee; and
  - (b) an award, certified agreement or AWA:
    - (i) commences on or after the day when the APS employee moves; and
    - (ii) applies on its face to the APS employee or to a class of APS employees that includes the APS employee;

the determination mentioned in paragraph (3) (b) ceases to apply to the APS employee, and the conditions of employment under the award, certified agreement or AWA (as the case may be) apply to the APS employee.

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Note: Other Commonwealth laws deal with matters such as superannuation, compensation, long-service leave and maternity leave.

- (2) A determination under subsection (1) may apply, adopt or incorporate, with or without modification, any of the provisions of an award or certified agreement, as in force at a particular time or as in force from time to time.
- (3) The Public Service Minister may, by notice in the *Gazette*, determine the remuneration and other terms and conditions of employment applying to APS employees, if the Public Service Minister is of the opinion that it is desirable to do so because of exceptional circumstances.
- (4) A determination under subsection (3) overrides any determination under subsection (1), to the extent of any inconsistency.

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#### 72 Machinery of government changes

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- (a) move APS employees to another Agency (without anyone's consent), by a determination in writing;
  - (b) determine in writing that APS employees cease to be APS employees and become employees of a specified Commonwealth authority;
  - (c) determine in writing that non-APS employees cease to be employed as non-APS employees and become engaged as APS employees in a specified Agency;
  - (d) on behalf of the Commonwealth, engage any person as an APS employee in a specified Agency.
- (2) A determination by the Commissioner has effect according to its terms, by force of this section.
- (3) If an APS employee (the *transferred employee*) becomes an employee of a Commonwealth authority under paragraph (1)(b), the employee is entitled to remuneration and other conditions of employment that are not less favourable than the terms and conditions to which the employee was entitled as an APS employee, immediately before ceasing to be an APS employee, under:
- (a) an award, certified agreement or AWA; or
  - (b) a determination under this Act.
- (4) Subsection (3) ceases to have effect on the next occasion when there is a relevant variation in remuneration and conditions in the Commonwealth authority. For this purpose, *relevant variation* means a variation that:
- (a) results from the making or variation of an award, certified agreement or AWA; and
  - (b) applies to the transferred employee, or to a class of employees that includes the transferred employee.
- (5) The regulations may prescribe arrangements for determining any variation of the remuneration and other conditions of employment applicable to:
- (a) APS employees who are moved to another Agency under paragraph (1)(a); and
  - (b) persons who become APS employees under paragraph (1)(c).
- (6) In this section:

*administrative re-arrangement* means any increase, reduction or re-organisation in Commonwealth functions, including one that results from an order by the Governor-General.

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- (2) The annual salary that applies to the APS employee on the day when the move occurs is the greater of:
  - (a) the annual salary that applied to the APS employee immediately before the move; and
  - (b) the annual salary that would, apart from this regulation, apply to the APS employee after the move.
- (3) Before or after the move, the other conditions of employment of the APS employee may be varied:
  - (a) after consultation by the Agency Head with:
    - (i) the APS employee; or
    - (ii) that APS employee and any other APS employees who are to be or who have moved to the Agency; or
    - (iii) a class of the APS employees who are to be or who have moved to the Agency that includes the APS employee; and
  - (b) in accordance with a determination under subsection 24 (1) of the Act to the effect that some or all of the conditions of employment are to be the same as those that applied to the APS employee immediately before the move; and
  - (c) to have effect no sooner than the day when the move occurs.

*Note* A determination by an Agency Head under subs 24 (1) of the Act is of no effect to the extent that it would reduce the benefit to an APS employee of a condition of employment applicable to the employee under an award, certified agreement or AWA.

- (4) However, if:
  - (a) a determination mentioned in paragraph (3) (b) applies to the APS employee; and
  - (b) an award, certified agreement or AWA:
    - (i) commences on or after the day when the APS employee moves; and
    - (ii) applies on its face to the APS employee or to a class of APS employees that includes the APS employee;

the determination mentioned in paragraph (3) (b) ceases to apply to the APS employee, and the conditions of employment under the award, certified agreement or AWA (as the case may be) apply to the APS employee.

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