

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

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

Submission No:13

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SUBMISSION of Frank Costigan QC

Re: The Australian Crime Commission Bill

Preliminary Remarks

- 1. On 6 April 1998 the Parliamentary Joint Committee on the National Crime Authority tabled its 3rd Evaluation of the National Crime Authority.**
- 2. The Evaluation was a substantial one. The Committee had received some 50 submissions from a range of persons and institutions. It held a series of public hearings between May and October 1977 in Adelaide, Brisbane, Canberra, Melbourne and Sydney. At these public hearings 68 persons were heard. Some 1200 pages of oral evidence was produced. An unknown number of in camera hearings also took place. In addition a large number of exhibits were produced.**
- 3. The Evaluation comprised some 230 pages. It contained 30 recommendations. On any view it was a significant piece of work and reflected great credit on the Committee and its secretariat.**

4. The Government Response was tabled in the Senate on 7 December 2000, 32 months later. It was tabled by Senator Ellison in his capacity as Special Minister of State. Senator Ellison on behalf of the Government stated that it was confident:

“..in the ongoing capability of the National Crime Authority to continue its role in the fight against organised crime.”

5. Within 12 months that confidence seems to have been so eroded that it became Government policy to abolish it.
6. **In late December 2001 the Government commissioned a fresh “review” of the NCA. The reviewers were Mick Palmer, former AFP Commissioner, and Tony Blunn, recent head of the Attorney-General’s Department. The Review was to be done in four weeks over the Christmas holidays. The review was done and presented for Cabinet approval. It comprised 20 pages. It is confidential. It has never been made public.**
7. **A number of questions arise out of this short history.**
 - a. **Why was the review limited to the AFP and A-G?**
 - b. **Why did the Government not seek the opinion of the Joint Parliamentary Committee, the parliamentary body with most experience and expertise in this area?**
 - c. **Why has the review not been released?**

8. It is not possible to treat this secret “review” as a serious exercise.
9. There has not yet been any explanation why it is necessary to abolish the NCA rather than improve it, if improvement is necessary. All the public has been given are motherhood statements like:-
“The Prime Minister and State and Territory Leaders agreed that a new national framework is needed to meet the new challenges of combating terrorism and multi-jurisdictional crime.” (see AG’s Overview, Attachment A).
10. The discussions between our various governments, so far as a member of the public can tell from the media, seem to have been substantially concerned with questions of money and resources. They have taken place on an executive level, without any public input. Those governments have engaged in no public debate directed to the justification of a new body as opposed to some changes in the existing structure; nor has there been any concern expressed at the apparent transfer of special powers from a fiercely independent NCA to a body controlled by police forces and to be exercised , not by a Chairman and members of the NCA, but by lower level “examiners”. More of that later!
11. The Australian Crime Commission Bill 2002 was presented to Parliament on 26 September. The second reading speech of the Attorney-General on that day was a short one, less than two pages of Hansard. It contains a very short history

of the National Crime Authority, about 8 centimetres of one column. Reference is then made to the events of September 11 and “*the new and emerging threats*”. Immediately following that reference the Attorney said
“It is timely, therefore, to reassess whether the NCA in its present form is best placed to combat such threats in Australia in the 21st century.”

12. He then said:

“Leaders considered this very issue and agreed, in order to strengthen the fight against organised crime, to replace the NCA with an Australian Crime Commission...the ACC”:

Once again there is no explanation why “*the new threats*” require the abolition of the NCA, rather than any improvement to it, or strengthening of it.

13. I think it is a matter of great concern that these various very significant changes in such important legislation have been propelled by discussion at an executive level over a period of many months with no input sought or allowed from the public. Complicated legislation has now been presented to Parliament with a timetable which allows insufficient time for proper consideration. At the same time the NCA is being wound down even before the legislation is debated and/or passed.

14. This is a very bad process by which to change a law which requires serious and prolonged consideration by Parliament,

and which is intended to affect in a significant way the powers given to police forces in this country.

15. When the second reading speech came to an end, it was resolved that the Bill be referred to the Parliamentary Joint Committee on the National Crime Authority for consideration and an advisory report by 6 November 2002, 5 weeks later. I have to say that I believe that this very short period is imposing a quite unfair burden on the Committee.

Note to these submissions

16. In these submissions I have attempted to deal with the central structure of the Bill. My view is that this structure is fundamentally flawed. Accordingly I have not dealt with many other detailed matters of concern.

Background to the NCA legislation

17. The NCA was set up in 1984 after very widespread discussion in the community and in the Parliament. Prior to the legislation being drafted there was a two day Crime Summit held in the old Parliament House in Canberra. Attendance at the Summit was widely representative of a range of interests and opinions. A number of principles were regarded as basic to the discussion at that Summit:
 - a. It was recognised that there was a serious problem in the investigation of organised crime which of its nature crossed jurisdictions.

- b. Experience from police forces and a number of Royal Commissions had shown that, in such investigation, there was a need to have recourse to powers greater than those traditionally available to investigative agencies.
- c. There was a unanimous acceptance of the fact that the exercise of those powers would necessarily have an effect on the privacy and civil liberties of citizens. Accordingly any legislation must be sensitive to the appropriate balance in this area.
- d. it would not be appropriate to give these wide compulsive powers to a police force.
- e. the new body, the NCA, must be independent of political or other outside influence. It was regarded as crucial that the actions of the NCA should not be affected, even subconsciously, by the desire for members to be reappointed, or to receive some advancement in their career. Accordingly a limit on the tenure was fixed, now 6 years (s 37).
- f. it should remain accountable to the Joint Parliamentary Committee and the Intergovernmental Committee.
- g. its investigations should not be in the public arena.
- h. the success of the NCA depended on its being able to work in a co-operative way with other agencies, and, very importantly, involved an ability to set up and

administer task forces from various Commonwealth and State agencies.

18. In many ways the legislation was flawed, but it was a courageous start. It has now been in operation for 18 years. It was entirely appropriate that a substantial review be undertaken, as it was in 1998. As I have already pointed out that review attracted a very favourable response from the Government in December 2000. Despite that response, and the confidence expressed by the Government in the NCA, a decision has now been made to abolish it and replace it with a body of a completely different nature and quite different control. The justification seems to be centered on the events of September 11, the same justification proposed for the draconian, and quite unjustified, amendments to ASIO powers.

The ACC Bill

19. **There is a special skill to be found in the offices of the Commonwealth Parliamentary draftsman. That skill has been honed over the years by regular trips to the income tax legislation. It operates in a world of codes and mysteries; it composes its thoughts in an inscrutable and complicated way. The Australian Crime Commission Bill is a triumph of its art. So incomprehensible is the Bill that a mock up is required to make any sense of it. One yearns for the simple, engaging and easily understood English prose to be found, for example, in the Goods Act.**

- 20. Although the purpose of the Act is to establish an Australian Crime Commission, it does not attempt that establishment by a fresh Act. Rather it does so by the curious device of taking hold of the National Crime Authority Act and amending that Act by a number of Schedules. Schedule 1, which is devoted to amendments to the NCA Act, runs to some 64 pages. Schedule 2, described as “other amendments”, has 30 pages. Schedule 3, described as “contingent amendments’ has a mere 5 pages. Thus the various amendments, consigned to the three schedules, occupy 99 pages. The Act itself is only 3 pages.**
- 21. By adopting this course the Bill has to resort to the insertion of sections into the old NCA Act such as 19A, 24A etc and the deletion of sections such as 13 and 14. Thus a Bill which is setting up a new body commences with sections which are not numbered correctly.**
- 22. This is a terrible way to prepare legislation. No wonder a mock-up has been prepared to make some sense of it.**
- 23. One result of this process is that it became necessary to graft the new structure onto the old bones of the existing NCA. It would have been much simpler to have started from scratch.**

Structure of the NCA and the ACC

- 24. The structure of the NCA can be described in simple terms. The Authority consists of a Chairperson and members. Its functions are set out in section 11 of the NCA Act.**

Section 11 Functions of Authority

- (1) *The general functions of the Authority are:***
- (a) *to collect and analyse criminal information and intelligence relating to relevant criminal activities and disseminate that information and intelligence to:***
 - (i) *law enforcement agencies; and***
 - (ii) *any person authorized by the Governor-General, the Governor of a State, a Minister of State of the Commonwealth or a Minister of the Crown of a State to hold an inquiry to which the information or intelligence is relevant;***
 - (b) *to investigate, otherwise than pursuant to a reference made under section 13 or in accordance with section 14, matters relating to relevant criminal activities;***
 - (c) *where the Authority considers it appropriate to do so for the purpose of investigating matters relating to relevant criminal activities:***
 - (i) *to arrange for the establishment of Commonwealth Task Forces;***
 - (ii) *to seek the establishment by a State, or the joint establishment by 2 or more States, of State Task Forces; and***
 - (iii) *with the concurrence of the States concerned, to arrange for the establishment of joint Commonwealth and State Task***

**Forces, or for co-operation between
Commonwealth Task Forces and State Task
Forces; and**

(d) *to co-ordinate investigations by Commonwealth Task Forces, and, with the concurrence of the States concerned, to co-ordinate investigations by State Task Forces and by joint Commonwealth and State Task Forces, being investigations into matters relating to relevant criminal activities, but not so as to preclude the making of separate bilateral or multilateral arrangements between such Task Forces.*

(2) **The special functions of the Authority are:**

(a) ***where a reference to the Authority made under section 13 is in force in respect of a matter relating to a relevant criminal activity—to investigate the matter in so far as the relevant offence is, or the relevant offences are or include, an offence or offences against a law of the Commonwealth or of a Territory; and***

(b) ***where a reference to the Authority made in accordance with section 14 by a Minister of the Crown of a State is in force in respect of a matter relating to a relevant criminal activity—subject to subsection 14(1), to investigate the matter in so far as the relevant offence is, or the relevant offences are or include, an offence or offences against a law of the State.***

25. These powers were given to members of the Authority, not to members of the staff of the Authority, or any other person. The special functions were given to the Authority only in respect of a special investigation. For that purpose the Authority could hold hearings. The hearings must be before one or more members of the Authority. It is the members of the Authority who are

given the power to summons witnesses to give evidence and/or produce documents, to seek information from Commonwealth agencies, to make application for telephone intercepts or to apply for search warrants. The whole thrust of the Act was to identify with precision, and to limit the number of, those persons who could use those special powers, and who could decide to use them.

26. The contrast with the ACC Act is stark. Instead of an Authority with a small number of members there is put in place a body described in Clause 7 as the Australian Crime Commission consisting of:
 - a. The CEO
 - b. the examiners, and
 - c. the staff of the ACC
27. There is also established a Board consisting of 9 Police Commissioners, the CEO, representatives of Customs, ASIC and ASIO, and the Secretary of the Department: a total of fourteen. The Chair is the Commissioner of the AFP.
28. The Board has a number of functions. Perhaps the most important one is its power to determine whether an intelligence operation is a special operation or an investigation is a special investigation. The next most important function is to determine who shall be the head

of such operation or investigation. There must be a minimum of two board meeting each calendar year.

29. By establishing a large Board with significant functions the process of making speedy decisions is made very unwieldy, as contrasted with the simplicity to be found in the NCA. The solution found in the Bill is to enable the Board to establish a committee to assist in carrying out the functions of the Board, including the function of determining whether an operation or investigation is special.
30. A CEO is to be appointed by the Governor-General for a term not to exceed 5 years. Under clause 44(3) his appointment may be terminated if the Minister is of the opinion that the performance of the CEO is unsatisfactory. So much for independence!!
31. Under clause 46A the CEO must manage the day to day administration of the ACC in accordance with the policy of, and any directions given by, the Board. The CEO is also to co-ordinate ACC operations/investigations and to choose the examiner who is to exercise his or her special powers.
32. Under clause 46B examiners are to be appointed by the Governor-General for a term not to exceed 5 years.
33. Under the NCA Act only members can apply for a search warrant or a telephone interception. Under the ACC Act

any eligible person can so apply: “Eligible person” is defined to include any police officer who is a member of the staff of the ACC. “Member of the staff of the ACC” is defined very widely to mean:

- a. a member of the staff referred to in subsection 47(1); or**
- b. a person participating in an ACC operation/investigation;**
- c. a member of a task force established by the Board under paragraph 7C(1)(f); or**
- d. a person engaged under subsection 48(1); or**
- e. a person referred to in section 49 whose services are made available to the ACC; or**
- f. a legal practitioner appointed under section 50 to assist the ACC as counsel.**

34. This is a very significant change to the present position. Whereas under the NCA Act only members could make such an application, now a very large number of police officers, including an unspecified number in task forces, can do so. Again, under the NCA Act the things seized pursuant to such warrant are disposed of in accordance with the direction of the Authority, that is the body which applied for the warrant: under the ACC Act the disposition of such things is determined by the head of the special operation/investigation.

35. Many of the problems under the new legislation flow from the awkward structure which is set up. Under the

NCA Act there was a clear line of authority. Power , and accountability, rested in the Chairman and members.

- 36. Under the ACC Act power is given to the Board, dominated by police. The Chairperson of the Board is always to be the Commissioner of the Australian Federal Police. The Board, or its committee, can give directions to the CEO. It can also appoint the head of any special investigation. No doubt it can revoke that appointment. It is by no means clear what is the relationship between the CEO and the head of a special investigation. The CEO is given power to co-ordinate ACC operations/investigations. That power is given in the context of his responsibility for administration. The CEO seems to have no other control over the appointed head. However the CEO can choose a particular examiner to exercise the special powers in relation to a special investigation. Does this mean no other examiner can intrude into that investigation? It would seem so. Accordingly you can have only one examiner who can make application for search warrants or telephone interceptions whilst there is an unlimited number of police officers who can do so. Moreover there is no role for the head of the investigation in the choice of the examiner.**
- 37. The role of the examiner is also curious. Under the NCA Act the exercise of special powers was central to the working of the Authority and was vested in those who**

were responsible for the control of the Authority. The examiners under the ACC Act are far removed from this position. They are not under the control of the head of the special investigation, or of the Board or of the CEO. This isolation no doubt springs from a desire to proclaim for them an independence which is not to found in the other organs of the ACC. The result is they are rendered peripheral to any serious investigation. Unless they are at the centre of the investigation, how can they sensibly decide whether a particular summons should be issued, whether a particular witness should be subpoenaed!!

38. In the end we have a new body to be set up, dominated by police forces and possessed of powers which the Parliament has always refused to give to police forces. This has been done without any sensible justification for the abolition of the National Crime Authority. There is no good reason why the structure of the National Crime Authority cannot be maintained with such limited amendments as may be necessary.

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