

CHAPTER 2

LEGISLATIVE BASIS OF THE AFP AND THE NCA

The Australian Federal Police

Background to the legislation

2.1 The AFP is a statutory body established by the Australian Federal Police Act 1979 (AFP Act).

2.2 The creation of the Federal Police was the recommendation of the report of Sir Robert Mark in April 1978, to the Minister for Administrative Services, *The Organisation of Police Resources in the Commonwealth Area and Other Related Matters*.¹ On 28 July 1978, the Ministers for Administrative Services and the Capital Territory announced their approval 'in principle' of this recommendation. On 13 December 1978, those Ministers announced that the Government would proceed with the creation of the Federal Police and the legislation would be introduced in the Autumn sittings of the Parliament.²

2.3 The *Australian Federal Police Bill 1979* was introduced into the Senate on 7 June 1979. In his second reading speech, Senator Chaney, then Minister for Aboriginal Affairs, outlined the purpose of the bill:

The purpose of the Australian Federal Police Bill is to give effect to the Government's decision, announced on 13 December 1978, to create the Australian Federal Police which will incorporate the existing Australian Capital Territory and Commonwealth Police Forces.

The Government, in implementing this recommendation by proposing to the Parliament the creation of the new single Federal Police, was concerned to:

- (i) overcome the problems that are associated with ... jurisdictional boundaries for the functions of police organisations not only throughout Australia, but also in the Australian Capital Territory;
- (ii) provide a firm basis for more effective cooperation between the Commonwealth and the States in the law enforcement area; and
- (iii) more effectively and economically coordinate police resources in the Commonwealth area.

1 See above, Chapter 1, Footnote 4

2 Explanatory Memorandum, *Australian Federal Police Bill 1979*, p. 2

... thus enabling the police to cope more effectively with the increasing complexity of terrorist acts of violence as well as international and national white collar crimes and other crimes against the Commonwealth.

The Government believes that the establishment of a single Federal Police as proposed by the Bill will provide a basis for many of the current problems experienced between law enforcement authorities within Australia to be overcome or reduced, and thus achieve more effective cooperation and coordination of resources in the Commonwealth area.³

2.4 While there was agreement across parties about the general purpose of the Bill, certain aspects met with opposition,⁴ including the division of the Commonwealth force into two components (the separation of the protective service officers from the police),⁵ industrial aspects, mechanisms for dealing with complaints, and the definition of areas of responsibility. After numerous amendments, the Bill was passed, and was given Royal Assent on 15 June 1979.

Role of the AFP

2.5 The original intention of the legislation was to create a police force which was effective and co-ordinated. There was no specific objective in 1978-1979 of creating a 'different' police organisation, and although various changes were made in the 1980s tending towards a less rigid and authoritarian structure, these did not change the nature of the organisation. In spite of attempts to move towards a more flexible approach, valuing innovation and abilities as opposed to seniority, the AFP was seen in 1995 as still somewhat authoritarian.⁶

Provisions of the AFP Act

Functions of the AFP

2.6 The main functions of the AFP, as outlined in the Act⁷ include:

- The provision of police services to the ACT;
- The provision of police services in relation to the Jervis Bay Territory; and
- The provision of police services in relation to:
 - laws of the Commonwealth;

3 *Senate Hansard*, 7 June 1979, p. 2809

4 See *Senate Hansard*, pp. 2896-2951

5 In 1984 the separate Australian Protective Services was established, removing this component from the Australian Federal Police altogether, with the exception of protection for small categories of persons such as Federal Court judges

6 See above, Chapter 1, Paragraph 1.13

7 *Australian Federal Police Act 1979*, s. 8

- property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth; and
- the safeguarding of Commonwealth interests.

2.7 Other functions include those relating to the *Witness Protection Act 1994* and any similar State or Territory legislation, arrangements entered into by the Minister and the ACT and/or the Administrator of an External Territory for the provision of services, the provision of services in relation to a Commonwealth place in a State and anything incidental or conducive to the provision of services.⁸

The Positions of Commissioner and Deputy Commissioners

2.8 Under the Act, the Commissioner and one or more Deputy Commissioners of Police are to be appointed by the Governor-General by Commission.⁹ The Commissioner and a Deputy Commissioner can be appointed for a period not exceeding 7 and 5 years respectively. Both positions are eligible for reappointment.¹⁰

2.9 The Commissioner holds office on such terms and conditions as determined by the Governor-General, in respect of matters not provided for by the Act, and the Deputy Commissioner holds office on such terms and conditions as determined by the Commissioner in like circumstances.¹¹

AFP Employees

2.10 The Commissioner, under section 23 of the Act, employs staff on behalf of the Commonwealth.¹² The general requirements of employment for all Commonwealth employees apply to employees of the AFP and include conditions relating to probation, citizenship, formal qualifications, security and character clearances and the like.

2.11 Under section 27 of the Act, the Commissioner may determine in writing the conditions and other terms and conditions of employment. This also allows the

8 *Australian Federal Police Act 1979*, s. 8

9 *Australian Federal Police Act 1979*, s. 17(1)

10 *Australian Federal Police Act 1979*, ss. 17(2)-17(3)

11 *Australian Federal Police Act 1979*, ss 17(4)-17(4A). The Act states that remuneration for the position of Commissioner is to be determined by the Remuneration Tribunal; the Commissioner will also be paid such allowances as are prescribed. Remuneration and allowances for the position of Deputy Commissioner are determined by the Commissioner in writing – *Australian Federal Police Act 1979* ss 20(1)-20(3). In respect of termination of appointments, the termination of appointment of the Commissioner and Deputy Commissioner is outlined in s22. The Governor-General is responsible for the termination of appointment of the Commissioner or Deputy Commissioner and may terminate these appointments for several reasons

12 See below, Paragraphs 2.22, 2.25

Commissioner to apply, adopt or incorporate any of the provisions of an award or certified agreement.¹³

2.12 The Commissioner at any time, by notice in writing, and subject to the rules outlined in the *Workplace Relations Act 1996*, may terminate the employment of an AFP employee under section 28 of the AFP Act. Numerous other provisions outline the conditions for resignation and retirement of AFP employees.¹⁴

Commissioner's command powers - Administration and Control

2.13 Under the Act, the Commissioner has the general administration of, and the control of the operations of, the AFP. In addition, the Minister may give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions and the use of common services¹⁵ in accordance with other arrangements of the AFP.¹⁶

2.14 These 'other arrangements' include those made between the Minister and the appropriate Minister of a State for the provision or development of common services and for the use of those common services by the AFP and the Police Force of the State.¹⁷

2.15 The Commissioner may also declare an AFP employee to be a member of the AFP if the Commissioner is satisfied that the employee meets either or both of the following requirements:

- a) Competency requirements; and
- b) Qualification requirements.¹⁸

2.16 Other powers of the Commissioner outlined in the Act include those in relation to commissioned officers, special members, secondment, the assignment and suspension of duties, declarations of serious misconduct, submission of financial statements and drug testing of AFP employees.¹⁹ These amendments were an important part of the *Australian Federal Police Legislation Amendment Act 2000*,

13 The *AFP Certified Agreement 1999-2002* is considered in more detail in Chapter 5, and the issue of discipline and grievances is considered in Chapter 6

14 *Australian Federal Police Act 1979*, ss. 30-34

15 Under the AFP Act, 'common services' includes services consisting of, or provided by means of: (a) computer systems; or (b) forensic science laboratories; or (c) research and planning systems; or (d) training institutions; or (e) anything of a like nature: *Australian Federal Police Act 1979*, ss 37(7)

16 *Australian Federal Police Act 1979*, ss. 37(1)-37(3)

17 *Australian Federal Police Act 1979*, s. 37(5)

18 *Australian Federal Police Act 1979*, ss. 40B-40C

19 *Australian Federal Police Act 1979*, ss. 40F-40Q. See also Parliamentary Library, *Bills Digest No. 90* (1999-2000), p. 14 with respect to *Anderson v Sullivan* (1997) 148 ALR 633 concerning the powers of the Commissioner with respect to drug testing

marking both an increase in the Commissioner's powers in relation to staff and the presentation of the AFP as a professional organisation of high personal standards of behaviour. The provisions relating to 'serious misconduct', for example, refer to conduct which:

Is having, or is likely to have, a damaging effect on:

- (i) The professional self-respect or morale of some or all of the AFP employees; or
- (ii) The reputation of the Australian Federal Police with the public, or with any section of the public, or with an Australian or overseas government or law enforcement agency.²⁰

General Administration and Control – Ministerial Direction

2.17 The Minister is accorded certain powers in relation to the general policy to be pursued by the AFP in the performance of its functions, under S37 of the Act. After obtaining and considering the advice of the Commissioner and the Secretary, the Minister may give written directions to the Commissioner on such matters. Directions may also be given on the development or use of common services,²¹ and all directions must be complied with by the Commissioner.

2.18 On 25 February 1999, the then Minister for Justice and Customs, Senator the Hon. Amanda Vanstone issued a Ministerial Direction²² under section 37 of the Act. This Ministerial Direction outlined special areas of focus as follows:

- Countering and otherwise investigating illicit drug trafficking, organised crime, serious fraud against the Commonwealth; money laundering and the interception of assets involved in or derived from these activities;
- Providing community policing services in the ACT, Jervis Bay and external territories;
- Providing protective security services to the Governor-General, federal parliamentarians, internationally protected persons, other persons who are of specific interest to the Commonwealth, witnesses and special events; and
- Investigating special references and performing special taskings from the Government.

20 *Australian Federal Police Act 1979*, ss. 40K(1)(b)

21 *Australian Federal Police Act 1979*, s37

22 See *Submission 6*, Australian Federal Police, Attachment F, or at www.afp.gov.au/corp/s13.htm. A Supplementary Ministerial Direction was issued on 27 September 2000, and a copy of this may be found at www.afp.gov.au/corp/supp.htm

The AFP should, in particular, ensure that it provides an effective contribution to the implementation of the Government's 'Tough on Drugs' strategy and to the conduct of the 2000 Olympics.

The AFP should also continue to develop a capacity to deal with new forms of criminal activity. Special attention should be directed at the investigation of economic crime, in all its forms, transnational crime and crime involving information technology and communications (including electronic commerce).²³

2.19 The 1999 Ministerial Direction also instructed the AFP on the implementation of the reform program²⁴ including the recruitment of staff and the restructure of its employment base. It emphasised the establishment of improved management structures, the requirement of achieving the internal efficiencies identified by the Government, and the expectation of quarterly reporting to the Minister for Justice and Customs on its performance.

2.20 The Supplementary Ministerial Direction was a response to the emerging crime of 'people smuggling'.²⁵ It added another requirement in terms of special areas of focus, requiring the AFP to 'give special emphasis to countering and otherwise investigating organised people smuggling'. It also stated that the AFP should 'ensure that it provides an effective contribution to the implementation of the Government's whole of government approach to unauthorised arrivals'.

2.21 The power provided by s 37 can be used by Government to firmly direct the focus and activities of the AFP. However, s37 effectively replaces the repealed s13²⁶ and most of the Ministerial powers were already in existence.

Amendments to the Original Act

2.22 The AFP Act has been subject to considerable amendment. Amendments in the *Australian Federal Police Legislation Amendment Bill 1979*, for example, deal with the then new AFPAS arrangements and the employment of staff on a contract basis, reflecting both the need for major change in management of staff, and the compensatory arrangements put in place for loss of tenured employment.²⁷

23 *Submission 6*, Australian Federal Police, Attachment F, p. 2

24 That is, the reforms arising from the Ayers report which is discussed in detail in Chapter 3

25 People smuggling is an offence under the *Migration Act 1958*, and is defined as organised illegal entry of individuals or groups; the penalty for 'knowingly organising the illegal entry of groups of five or more people' carries a 20 year jail penalty, Australian Federal Police, Media Release, 'People smugglers with plenty of time on their hands', 1 June 2001. In 1998-1999, the numbers of persons detected entering Australia illegally ('unauthorised arrivals') was 3009, increasing in 1999-2000 to 5869 (Tony McInerney, 'People Smuggling – an inhuman trade', www.afp.gov.au/raw/Publications/Platypus, p. 1

26 S 13 was repealed by the *Australian Federal Police Legislation Amendment Act 2000*

27 See below, Chapter 5

2.23 The amendments of greatest relevance to this inquiry are those in the *Australian Federal Police Legislation Amendment Act 2000*, which limits the operation of the Workplace Relations Act 1996 in relation to the AFP.

2.24 The Government explained the need for reform as follows:²⁸

Under the [AFP] reform program, significant progress has been made in both management and operational areas. The key to building further on the current strengths of the AFP is to create a more flexible and highly skilled workforce. Currently, highly prescriptive provisions under the *AFP Act* govern employment in the AFP. Accordingly, amendments to the Act and Regulations are required if the reform program is to be completed.

This Bill amends the Act to replace the statutory employment regime with a general employment power vested in the Commissioner.

There is a need for the AFP to balance greater operational flexibility with the requirement to remain a disciplined force. The amended Act expressly recognises command and discipline issues and distinguishes them from matters relating to employment. The character of the AFP as a disciplined organisation is emphasised in the Commissioner's power to issue binding orders. The obligation to obey lawful orders is now placed in the Act. It was formerly in the Regulations. The Commissioner's power to deploy AFP employees and to assign duties is reinforced as an important element of command in a police organisation in relation to both domestic and international policing activities...

2.25 The main concerns of witnesses at the Senate Legal and Constitutional Legislation Committee's inquiry into this bill related to the separation between the Commissioner's command powers and general employment powers.²⁹ While a number of employment issues are covered by the Workplace Relations Act 1996, that Act does not apply to 'matters covered by Divisions 2-8 of Part IV, disciplinary matters, entitlements to adjustment payments or any matter prescribed by regulation.'³⁰ The legislation seeks to combine two opposing approaches, that of a modern, flexible, innovative organisation, with one that retains residual control and command powers more appropriate to the traditional police force which the AFP did not want to emulate. As stated in the Explanatory Memorandum, 'the police force must accept a curtailment of freedoms which other public sector employees enjoy.'³¹

2.26 Issues relating to management reform and the current certified agreement are discussed in greater detail in Chapters 3, 5, and 6. Chapter 6 in particular considers

28 *Senate Hansard*, 21 October 1999, p. 10211

29 See in particular s69B, *Australian Federal Police Act 1979*

30 Parliamentary Library, *Bills Digest No. 90* (1999-2000), p. 10

31 Parliamentary Library, *Bills Digest No. 90* (1999-2000), p.10. Nonetheless, the limitations are not different in kind to those imposed on other public sector employees. It is rather that the police have a more direct contact with the public and this requires a uniform high standard of behaviour

the issues relating to the command powers of the Commissioner and whether these are being used in the most appropriate fashion.

The National Crime Authority

Background to the legislation

2.27 The NCA is a statutory body established by the *National Crime Authority Act 1984* (the NCA Act).

2.28 A series of inquiries were held during the 1970's and early 1980's, including the Moffit Royal Commission (1974), the Woodward Royal Commission into Drug Trafficking (1979) and the Williams Australian Royal Commission of Inquiry into Drugs (1980). According to the NCA, these inquiries revealed the existence of 'complex criminal networks whose increasingly sophisticated activities transcended State and Territory borders and, in some cases, entered into the international arena'.³²

2.29 According to the NCA, these inquiries demonstrated that 'no existing Australian law enforcement agency had the necessary powers or national scope to effectively counter this threat'.³³ In response, the NCA was established to counter this emerging problem.

Need for a 'national' body

2.30 The *National Crime Authority Bill 1983* was introduced into the Senate on 10 November 1983. In his second reading speech, the then Attorney-General, Senator Gareth Evans, stated that the NCA would 'effectively coordinate and lead on a national basis the attack against organised crime.' He also emphasised that:

... the Authority will nonetheless be constructed in such a way, and with such checks and balances and limitations on its powers that prejudice to the rights and liberties of individuals will be avoided. The Authority will be established by Commonwealth legislation, but with provision for extensive State participation in its operations.³⁴

2.31 The model for the NCA developed out of lengthy consultation, culminating in a meeting of Attorneys-General and Police Ministers in September 1983. The then Labor Government believed that the proposed Authority would meet the objectives and concerns that emerged from the public debate on the Crime Commission. The major objectives and concerns were as follows:

- The need to avoid the fragmentation of effort in the previous series of *ad hoc* royal commissions, and to ensure coordination and continuity in the fight against organised crime;

32 *Submission 7*, National Crime Authority, p. 6

33 *Submission 7*, National Crime Authority, p. 6

34 *Senate Hansard*, 10 November 1983, pp. 2491-2492

- The need to maintain intact the resources, and expertise of the Costigan Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, and to ensure the continuation of its work;
- The need to take account of the many fears and concerns expressed about a permanent criminal investigation body with unlimited terms of reference and uncontrolled investigative powers; and
- The need to secure the active involvement and cooperation of the States.³⁵

2.32 The new Authority would need certain powers to detect and fight organised crime, because ordinary police investigations proceed on a different basis:³⁶

Police investigations are concerned essentially with particular offences known or reasonably believed to have been committed, with the starting point usually being the complaint of a victim or discovery by the police of the results of crime.

However, it is of the nature of organised and sophisticated crime that particular manifestations of that crime – particularly in the areas of drug importation, corporate fraud and tax evasion – may not come to the attention of the police forces.

2.33 Following Committee scrutiny and substantial amendment to the original bill, the *National Crime Authority Act 1984* was enacted on 1 July 1984.

The role, functions and powers of the NCA

2.34 The Chairman of the NCA emphasised that:

The NCA is not a federal body. The NCA is a national body and most advisedly, after very careful thought at its birth, is a creature of both the Commonwealth and the states.³⁷

2.35 The NCA differs markedly from the AFP in that the latter is technically a ‘federal’ body. As much of the criminal law in Australia is within the province of the states rather than Commonwealth,³⁸ the objective of the NCA was to address the problem that ‘crime knows no boundaries’.³⁹ The bridging of the gap, seen as necessary in 1984, was endorsed by the 1998 review of the Parliamentary Joint Committee on the National Crime Authority.⁴⁰

35 *Senate Hansard*, 10 November 1983, p. 2492

36 *Senate Hansard*, 10 November 1983, p. 2492

37 *Transcript of evidence*, National Crime Authority, p. 52

38 See above, Chapter 1, Paragraph 1.29

39 *Transcript of evidence*, National Crime Authority, p. 53

40 *Transcript of evidence*, National Crime Authority, pp. 52-53

2.36 In its submission, the NCA provided details on its role, functions and powers. The most significant of these are outlined below:

- The NCA is Australia's only 'national' law enforcement agency and the only agency with a specific charter to investigate complex major organised crime;
- It is the duty of the NCA to 'protect' the national interest whilst taking into consideration the interests of both the Commonwealth and the States;
- Legislation in all States and Territories underpins the Commonwealth legislation which gives the NCA jurisdiction to investigate organised crime that involves multi-jurisdictional offences; this distinguishes the NCA from the AFP and other law enforcement bodies which are limited in the scope of their actions;⁴¹
- The Charter of the NCA is to investigate complex organised crime ('relevant criminal activity') on a national basis and to collect, analyse and disseminate criminal information and intelligence; and
- The NCA does not conduct prosecutions, rather, it collects admissible evidence and provides it to the appropriate prosecuting authority.

Powers

2.37 The NCA, to facilitate its task, has been entrusted with powers beyond those given to any police force,⁴² including the power to obtain documents and other evidence, and to summons a person to appear at a hearing and give evidence under oath. The NCA regards the exercise of these powers as one of its most important responsibilities,⁴³ but one witness noted that such powers were not unique, being held by other Commonwealth agencies such as the Australian Taxation Office (ATO) and market and corporate regulators.⁴⁴

2.38 These powers are used to obtain information which may not otherwise be provided, in respect of matters which the NCA is authorised to investigate:

... before a reference is given to the NCA the colloquium of ministers, both state and federal, have to be satisfied that the area which the NCA is empowered to investigate and use its special powers is in something that is unlikely to produce acceptable results by the use of ordinary police powers.

41 See, in particular, the *Measures to Combat Serious and Organised Crime Bill 2001* and the Senate Legal and Constitutional Legislation Committee's report on this bill, published in 2001; the bill sought, among other matters, to extend the use of controlled operations to all Commonwealth crimes and to exempt AFP officers and others from liability for various crimes against State law

42 According to the NCA, these 'special powers' are utilised in a confidential manner, to protect not only the integrity of investigations, but also to protect the privacy and safety of people called to give evidence or in relation to whom documents are requested – see below, Paragraphs 2.68-2.69. See also *Transcript of evidence*, National Crime Authority, p. 62

43 *Submission 7*, National Crime Authority, p. 7. See also below, Paragraphs 2.65-2.67

44 *Submission 2*, Mr John Broome, p. 5

So the parliament has created a threshold and the custodians of that threshold are this colloquium of state and federal ministers before the power is given.⁴⁵

2.39 It is these powers in particular which distinguish the NCA from police forces, even those non-traditional forces such as the AFP. The Commissioner of the AFP stated:

It is inappropriate for any police organisation to have the special powers conferred upon the NCA.⁴⁶

2.40 Other witnesses also emphasised the need to separate these powers from those utilised by police forces. Even those suggesting the development of a ‘super force’, emphasised the importance of this separation,⁴⁷ to demonstrate that the capacity to call in and question, and seize documents and other items, should be distinguished from the more circumscribed powers of police.

Establishment and Constitution of the NCA

2.41 Section 7 of the NCA Act outlines the establishment and constitution of the NCA. It is to consist of:

- a) A Chairperson;
- b) A member holding the office to which subsection (7)⁴⁸ applies;
- c) A member holding the office to which subsection (8)⁴⁹ applies; and
- d) Any member or members holding an office or offices created under subsection (8AA).

2.42 The Chairperson and other members are to be appointed by the Governor-General in those cases, other than those under subsection 8AA,⁵⁰ where the Inter-Governmental Committee (IGC) may recommend a person for appointment.

45 *Transcript of evidence*, National Crime Authority, p. 61

46 *Transcript of evidence*, Australian Federal Police, p. 27

47 *Transcript of evidence*, Australian Federal Police Association, p. 164; however, see also *Transcript of evidence*, Australian Federal Police Association, p. 158 which suggests this evidence would then be available to others under a new model of integration

48 Subsection 7 refers to advice to the Governor-General regarding any person who is unanimously recommended for appointment by Commonwealth and States Attorneys-General

49 Subsection 8 refers to advice to the Governor-General regarding any person who is unanimously recommended for appointment by Commonwealth and States police ministers

50 Subsection 7(8AA) refers to the IGC unanimously recommending the appointment of another member having regard to the work of the Authority

Functions of the NCA

2.43 The NCA has emphasised that its legislation is fluid with respect to its tasks insofar as no specific terminology is used. The key term is ‘relevant criminal activity’, which is intended to be broad so that new forms of crime may be added as required.⁵¹

The NCA investigates matters relating to ‘relevant criminal activity’, which is defined to mean ‘any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, committed against any law of the Commonwealth, of a State or of a Territory’. Further, the definition of ‘relevant offence’ indicates that the Authority is charged with investigating criminal offences of a serious nature which have certain characteristics:

- Multiple participants;
- Substantial planning and organisation;
- Use of sophisticated methods and techniques; and
- Of a national significance where normal policing methods would not be successful.⁵²

2.44 The general functions of the NCA are:

- To collect and analyse criminal information and intelligence relating to relevant criminal activities and disseminate that information and intelligence to:
 - Law enforcement agencies; and
 - Any person authorised 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;
- To investigate, otherwise than pursuant to a reference made under section 13 or a law of a State or in accordance with section 14, matters relating to relevant criminal activities;
- Where the Authority considers it appropriate to do so for the purpose of investigating matters relating to relevant criminal activities:
- To arrange for the establishment of Commonwealth Task Forces;

51 See also Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, p. 46

52 Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, p. 46

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- To seek the establishment by a State, or the joint establishment by 2 or more States, of State Task Forces; and
 - 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
 - To coordinate 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 criminal activities, but not so as to preclude the making of separate bilateral or multilateral arrangements between such Task Forces.

2.45 The special functions of the NCA are:⁵³

- Where a reference to the Authority made under section 13 is in force in respect of a matter relating to a federally relevant criminal activity – to investigate the matter; and
- 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 federally 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.

2.46 When, in the performance of its functions, the NCA obtains evidence of an offence against a law of the Commonwealth or a State, the NCA must assemble the evidence and give it to the Attorney-General of the Commonwealth or State (dependent on the case), the relevant law enforcement agency or any person or authority (other than a law enforcement agency) that is authorised to prosecute the offence.⁵⁴

2.47 The NCA is also required to cooperate and consult with the Australian Bureau of Criminal Intelligence (ABCI) in the performance of its functions and may make recommendations for reform of the law, administrative practices or administration of the courts to the relevant State or Commonwealth Minister.⁵⁵ However, in the investigation of references, the NCA is not given the power to interview a person in relation to an offence that the person is suspected of having committed, except in a case where the person has been served a summons to appear as a witness at a hearing before the NCA.⁵⁶

53 *National Crime Authority Act 1984*, s. 11(2)

54 *National Crime Authority Act 1984*, s. 12

55 *National Crime Authority Act 1984*, s. 12

56 *National Crime Authority Act 1984*, s. 12(4)

Issues of overlap

2.48 Neither the NCA nor the AFP considered that their work was the same, although similar crime (such as fraud, drugs, and people smuggling) are priorities for both organisations. However, the AFPA believed the NCA was trespassing on AFP territory by moving into transnational crime,⁵⁷ and that it was doing this partly because its own territory had been eroded through the development of state crime commissions.⁵⁸

2.49 Although the NCA, like the AFP, refines and reshapes its activities, this is a result both of Government direction and the identification of priorities based on shared strategic intelligence. Limited funds and the increasing sophistication of organised crime requires careful prioritisation, as well as the involvement of a national body:

[Complex organised crime is] more sophisticated, it involves numerous jurisdictions, it involves a high degree of planning and it very frequently involves a multiplicity of criminality, not just simply drug trafficking at one level. It might involve drug trafficking, murder, extortion – crimes of that nature.⁵⁹

2.50 The areas in which the NCA is working are those where complex organised crime is developing most rapidly, and where the various layers of crime are closely linked.⁶⁰

Report to government

2.51 The NCA is likely to be subject to changes in direction because of government priorities and also because it needs to maintain its standing in a competitive law enforcement climate. However, this does not necessarily mean a change in basic objectives as opposed to using new technologies and strategies to keep ahead. The Committee notes, for example, the NCA's recently published update on crime, which it had advised would be a part of its ongoing responsibilities to provide reports to government as well as law enforcement bodies on the trends in crime:

The commentary ...will be a composite of that [ABCI and other agency reports] but, because of the responsibility to report on the need for reform of the law, it will also contain elements which will go towards what should be

57 *Transcript of evidence*, Australian Federal Police Association, p. 151

58 *Transcript of evidence*, Australian Federal Police Association, p. 151. Insofar as the AFPA also saw the NCA being inappropriately involved in investigations, as well as in areas of crime that were seen as the AFP's territory, the Committee notes that it is the NCA's job to investigate, in order to determine the issues that are then handed over for prosecution (*Submission 2*, Mr John Broome, pp. 3-4). The fact that the NCA is now considering employing its own investigators in order to overcome some of the problems associated with secondments (*Transcript of evidence*, National Crime Authority, p. 65) should not be seen as the NCA undertaking tasks outside its powers

59 *Transcript of evidence*, National Crime Authority, p. 72

60 Such as cybercrime, money laundering and proceeds of crime, *Transcript of evidence*, Australian Federal Police Association, p. 164

looked at by governments more broadly to put crime – particularly organised crime – on a different footing than it is currently.⁶¹

2.52 Such reports should assist in providing a better overall picture than currently appears to be available.⁶²

Establishment and Functions of the Inter-Governmental Committee (IGC) of the NCA

2.53 The Inter Governmental Committee of the NCA is established to direct the operations of the NCA. Section 8 of the NCA Act establishes the IGC, comprising:

- A member to represent the Commonwealth, being the Commonwealth Minister; and
- In the case of each participating State – a member to represent that State, being a Minister of the Crown of that State nominated by the Premier of that State.

2.54 The functions of the IGC⁶³ are:

- To create offices of member of the Authority under subsection 7(8AA) and to recommend persons for appointment to those offices;
- Where the Commonwealth Minister proposes to refer under section 13 a matter relating to a federally relevant criminal activity to the Authority for investigation – to consult with the Commonwealth Minister in relation to the proposed reference;
- To consider whether approval should be given for a matter relating to a federally relevant criminal activity to be referred in accordance with section 14 by a Minister of the Crown of a State, or by Ministers of the Crown of 2 or more States, to the Authority for investigation;
- To consider whether approval should be given for a matter relating to a relevant criminal activity (other than a federally relevant criminal activity) to be referred, under a law of a State, by a Minister of the Crown of a State, or by Ministers of the Crown of 2 or more States, to the Authority for investigation;
- Such other functions as are conferred on the Committee by other provisions of this Act;
- To monitor generally the work of the Authority; and
- To receive reports furnished to the Committee by the Authority for transmission to the Governments represented on the Committee and to transmit those reports accordingly.

61 *Transcript of evidence*, National Crime Authority, p. 71; see also Chapter 3, Paragraphs 3.83-3.89

62 See above, Chapter 1, Paragraphs 1.49-1.51. See also below, Chapters 3 and 8

63 *National Crime Authority Act 1984*, s. 9

2.55 The IGC, before approving a reference, must consider whether ordinary police methods of investigation into the matter are likely to be effective.⁶⁴ The NCA, if it considers it appropriate to do so, may also request the IGC to give approval for a matter relating to a relevant criminal activity to be referred by a Minister.⁶⁵

References by the Commonwealth

2.56 Section 13(13) of the NCA Act allows for the referral of a matter to the Authority by the Minister (after the Minister has consulted with the IGC). In a reference, the Minister must outline the general nature of the circumstances or allegations, state the relevant offence and set out the purpose of the investigation. The withdrawal of a reference requires the approval of each House of Parliament.⁶⁶

Limits to Action

2.57 The NCA is necessarily limited to the field of major complex organised crime, and to activities which cannot effectively be undertaken by police forces. It is also limited by the fact that it is primarily an investigative and analytic organisation, and is not responsible for prosecution.

2.58 Like other bodies, including the Australian Federal Police, the NCA is limited by available funding and is obliged to prioritise its activities:

We have to be very careful about what matters we give priority to. We have now developed a very sophisticated filtering system about what things we will be able to grant resources to, in the sense of complex national organised crime, in the sense of truly national operations....

...there is a finite limit and, having committed ourselves to one or two of these things, we have to think even more carefully about the next one.⁶⁷

Functions under State laws

2.59 Each state and territory has its own legislation implementing the NCA,⁶⁸ which mirrors the provisions in the NCA Act.⁶⁹ In NSW, the relevant Act is the *National Crime Authority (State Provisions) Act 1984*. This legislation, by and large, is identical to the Commonwealth legislation with the exception of obvious sections such

64 *National Crime Authority Act 1984*, s. 9(2)

65 *National Crime Authority Act 1984*, s. 10(1)

66 *National Crime Authority Act 1984*, s. 13(3)

67 *Transcript of evidence*, National Crime Authority, pp. 62,66-67

68 See *National Crime Authority (State Provisions) Act 1984* (NSW); *National Crime Authority (State Provisions) Act 1985* (Qld); *National Crime Authority (Territory Provisions) Act 1991* (ACT); *National Crime Authority (Territory Provisions) Act 1996* (NT); *National Crime Authority (State Provisions) Act 1984* (SA); *National Crime Authority (State Provisions) Act 1985* (Tas); *National Crime Authority (State Provisions) Act 1985* (WA); and *National Crime Authority (State Provisions) Act 1984* (Vic)

69 *National Crime Authority Act 1984*, s. 14

as section 28, ‘Administrative arrangements with the Commonwealth’ as opposed to section 58 of the Commonwealth Act, ‘Administrative arrangements with the States’. Another obvious exception is that State Ministers cannot give directions to the Authority as the Commonwealth Minister can. For the purposes of this commentary, it is sufficient to acknowledge that implementing legislation exists in all jurisdictions.

2.60 The relevant State Minister may also refer matters for investigations following the same guidelines as the Commonwealth Minister.

Directions and Guidelines to the National Crime Authority

2.61 The Minister may, as in the case of the AFP, ‘give directions or furnish guidelines to the Authority with respect to the performance of its functions’ which the Authority must follow. However, the Minister, without the approval of the IGC, may not give any directions or guidelines to the Authority in relation to particular cases, nor may the Commonwealth Minister give directions or guidelines to the Authority in relation to a matter referred by a State Minister (unless by consent of the State Minister).⁷⁰

2.62 There has been only one Direction from the Federal Minister, which concerned the provision of information to Parliamentary Committees.⁷¹ The NCA Member commented that ‘s18 does not vest the Minister with an absolute power’, and noted also that, since the Authority’s work was effectively referred and monitored by the IGC, there was a potential for Directions to ‘cut across that process.’⁷²

2.63 Another form of Governmental direction can be ‘tied funding’ which has become commonplace for the NCA. Tied funding is discussed in more detail in Chapter 4. While welcoming the additional funding made available through this means,⁷³ the NCA also indicated that it was more limited in its capacity to transfer excess or unused funds than was the AFP.⁷⁴

Performance of functions

2.64 In the performance of its functions, the NCA, in so far as is practicable, is to cooperate with law enforcement agencies and coordinate its activities with the activities of overseas authorities.⁷⁵ The NCA may also request information from Commonwealth agencies and make arrangements to obtain information or intelligence.⁷⁶

70 *National Crime Authority Act 1984*, s. 18

71 *Submission 7H*, National Crime Authority, p. 1

72 *Submission 7H*, National Crime Authority, p. 1

73 *Transcript of evidence*, National Crime Authority, p. 70

74 *Transcript of evidence*, National Crime Authority, pp. 58-59

75 *National Crime Authority Act 1984*, s. 17

76 *National Crime Authority Act 1984*, ss. 19A-21

Hearings

2.65 The NCA also has the capacity to hold private hearings,⁷⁷ and may do so for the purposes of a special investigation. For the purpose of such hearings, the NCA may be constituted by one or more members, who manage the hearing proceedings in a manner which they judge to be appropriate

2.66 The NCA may direct that any evidence given before it; the contents of any document, the description of any thing produced or seized by a warrant; or any information that might identify a person as having given or about to give evidence at a hearing, shall not be published. In so far as a person is charged with an offence before a court, and the court requests evidence given before the NCA, it must provide that evidence.

2.67 The NCA has the power under the Act to summon witnesses and take evidence and the power to obtain documents.⁷⁸ Where a witness fails to attend or answer questions, the witness may be subject to a fine and/or imprisonment and a warrant for the arrest of the witness may be executed.⁷⁹

Administrative provisions – terms and conditions of appointment

2.68 Under section 37 of the NCA Act, the Chairperson and members of the Authority may be reappointed for one or more terms, the total period not exceeding four years.⁸⁰ The main reason for this is presumably to limit the possibility of one individual retaining too much power or knowledge.⁸¹

2.69 It could be argued that the absence of an effective high-level management body – as opposed to a Chairman and Members – affects the capacity of the NCA to function as an ongoing and flexible organisation. The presence of a General Manager Operations does not prevent the changing staffing situation affecting aspects of the actual operations of the NCA. In such cases, the Chairman and Members may be overly involved with administrative rather than organisational issues.⁸² The turnover

77 *National Crime Authority Act 1984*, s. 25

78 *National Crime Authority Act 1984*, ss. 28-29

79 *National Crime Authority Act 1984*, ss. 30-31

80 The Parliamentary Joint Committee on the National Crime Authority stated that this provision is colloquially referred to as the ‘J Edgar Hoover’ clause, in that it was designed to avoid the situation that arose in the United States where Hoover entrenched himself as FBI Director and, because of the politically sensitive information he acquired, proved impossible to remove: see Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, 1998, p. 193

81 Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, 1998, p. 193

82 *Transcript of evidence*, National Crime Authority, p. 63

of seconded staff⁸³ leads to high demands in respect of training which could affect the capacity of the NCA to meet its obligations to the IGC.⁸⁴

2.70 The termination of employment of a Member of the NCA may occur for the same reasons as for the Commissioner and Deputy Commissioner of the AFP.⁸⁵ In addition, Members of the NCA may also have their appointment terminated if they fail to comply with their obligations under s42 of the NCA Act relating to the disclosure of interests.⁸⁶

Employment of other staff

2.71 Staff of the NCA are employed under the *Public Service Act 1999* and the Chairperson has the authority to employ consultants where necessary. In addition, the NCA is assisted by members of the AFP, officers and employees of authorities of the Commonwealth such as the ATO, and persons made available through administrative arrangements with the States.⁸⁷ These staff are seconded to the NCA. One of the issues that has been raised in relation to the secondment process has been the benefits and drawbacks for both parties. The AFP may be without up to 150 staff at a time,⁸⁸ which can affect its operational strength substantially.⁸⁹ On the other hand, both the AFP and the NCA (and state police forces) should receive benefits from the skills and experience of appropriately trained staff who have experience of working with multi-disciplinary teams.⁹⁰ It was stated by one witness that many of the AFP staff had not been trained to the required standard at the time they went to the NCA.⁹¹ The NCA therefore had to expend funds on required training, which would be a long-term benefit to the AFP when their staff returned.⁹²

2.72 Further problems may also arise when staff complete their secondment, if an inquiry in which they have been involved may be continuing:

Senator Ludwig: A high proportion of your 400 people are seconded and it looks like they rotate between two and three years. You then have people who might be midstream through a process or an investigation, you have people leaving before tasks are completed, people who come in halfway

83 See, for example, *Transcript of evidence*, National Crime Authority, p. 63

84 *Transcript of evidence*, National Crime Authority, p. 66. See below, Paragraphs 2.72- 2.74

85 See above, Footnote 11

86 *National Crime Authority Act 1984*, s. 43

87 *National Crime Authority Act 1984*, s. 49

88 See *Transcript of evidence*, Australian Federal Police Association, pp.165-166

89 Nonetheless, the AFP also stated that technology was becoming as necessary as people; on this basis, they may find the arrangement beneficial in that staff do receive additional experience which the AFP does not have to fund. See also *Transcript of evidence*, Australian Federal Police Association, p. 165

90 *Transcript of evidence*, National Crime Authority, p. 64

91 *Submission 2*, Mr John Broome, p. 10

92 *Submission 2*, Mr John Broome, pp. 10-11

through a task and then have to get up to speed...How do you manage that effectively?Mr Crooke: We manage it with difficulty.⁹³

2.73 However, the NCA also noted that, although sometimes it was a disadvantage to lose seconded staff during an investigation, the individuals themselves appeared to be able to work under such conditions. Further, the nature of the arrangement was such that if there were insufficient funds, then secondments would be terminated, which allowed some financial flexibility.⁹⁴

2.74 The current Chairman of the NCA also advised the Committee that the NCA was working on the idea of permanent NCA investigators, to 'try to overcome this two-to three-year changeover.'⁹⁵ However, it is not clear that such staff would be permitted under legislation before the Parliament in August 2001.⁹⁶

Parliamentary Joint Committee on the National Crime Authority (PJCNCA)

2.75 Part III outlines the establishment of the PJCNCA. The duties of the PJCNCA are outlined as follows:⁹⁷

- To monitor and to review the performance by the Authority of its functions;
- To report to both Houses of the Parliament, with such comments as it sees fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the PJCNCA, the attention of the Parliament should be directed;
- To examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
- To examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the PJCNCA thinks desirable to the functions, structure, powers and procedures of the Authority; and
- To inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

2.76 The PJCNCA is not authorised to investigate a matter relating to a relevant criminal activity or reconsider the findings of the Authority in relation to a particular investigation.

93 *Transcript of evidence*, Senator Ludwig/National Crime Authority, pp. 63-64

94 *Transcript of evidence*, National Crime Authority, p. 69. The AFP is in receipt of funding for salaries for such staff, but it pays only the on-costs. The NCA must refund the salary to the AFP. See also *Transcript of evidence*, Mr John Broome, p. 109

95 *Transcript of evidence*, National Crime Authority, p. 65; see also above, Chapter 1, Paragraph 1.42

96 See below, Paragraph 2. 81

97 *National Crime Authority Act 1984*, s. 55

2.77 To date, the PJCNCA has completed a number of reports relating to the performance of the NCA, on its annual reports, and in relation to legislation proposed to amend the NCA Act. Issues have arisen in relation to the effectiveness of the PJC and how accountable the NCA is, or can be, to the Committee, given the sensitive nature of much of the information relating to the NCA. These issues were considered most recently in the PJCNCA report, the *Third Evaluation of the National Crime Authority*.

Legislative change

2.80 The *National Crime Authority Legislation Amendment Bill 2000* was introduced by the Government into the Senate on 7 December 2000. On the same day, it was referred to the PJCNCA on the motion of the Government. The PJCNCA tabled its report on the Bill on 1 March 2001. After numerous amendments, mostly moved by the Government, the Bill was passed by the Senate on 8 August 2001. As at 20 August 2001, it had not been introduced into the House of Representatives.

2.81 The Bill would increase the maximum total period for which the Chairperson and members can be appointed/reappointed from 4 to 6 years. The proposed provision for the NCA to be able to employ people other than public servants, seconded staff and consultants was deleted. The Bill also provides that the NCA must inform the PJCNCA about the general conduct of its operations and, unless this would prejudice a person's safety or reputation or the operations of a law enforcement agency, give the PJCNCA information relating to a specific investigation. The NCA's refusal to give such information would be subject to appeal to the Minister.

