



COMMONWEALTH OF AUSTRALIA

JOINT COMMITTEE

on

THE NATIONAL CRIME AUTHORITY

Reference: Evaluation of the National Crime Authority

CANBERRA

Wednesday, 4 June 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT COMMITTEE
ON
THE NATIONAL CRIME AUTHORITY

Members:

Mr Bradford (Chair)

Senator Conroy	Mr Filing
Senator Ferris	Mr Sercombe
Senator Gibbs	Mr Truss
Senator McGauran	Mrs West
Senator Stott Despoja	

The Parliamentary Joint Committee on the National Crime Authority has resolved that it will conduct a comprehensive evaluation of the operations of the National Crime Authority.

The committee will examine in particular:

- (1) the constitution, role, functions and powers of the authority, and the need for a body such as the authority, having regard to the activities of other Commonwealth and state law enforcement agencies;
- (2) the efficiency and effectiveness of the authority;
- (3) accountability and parliamentary supervision of the authority; and
- (4) the need for amendment of the National Crime Authority Act 1984.

WITNESSES

COSTIGAN, Mr Frank, QC, 205 William St, Melbourne, Victoria 3000 451

JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Evaluation of the National Crime Authority

CANBERRA

Wednesday, 4 June 1997

Present

Mr Bradford (Chair)

Senator Conroy

Mr Filing

Senator Ferris

Mr Sercombe

Senator Gibbs

Mr Truss

Senator McGauran

Mrs West

The committee met at 10.13 a.m.

Mr Bradford took the chair.

[10.13 a.m.]

COSTIGAN, Mr Frank, QC, 205 William St, Melbourne, Victoria 3000

CHAIR—I declare the public hearing open and welcome Mr Frank Costigan, QC. In what capacity are you appearing before the committee?

Mr Costigan—In a private capacity.

CHAIR—We very much appreciate your willingness to make time available, Mr Costigan. We realise how busy you are and that you have fitted us in with your busy schedule, which includes going overseas later this week. Thank you very much for that.

Before inviting you to make an opening statement if you would like to, I am required to state that if during the hearing you consider information you might wish to give or comment requested by committee members of a confidential or private nature, you can make application for that information or comment to be given in camera and the committee will consider your application. I probably do not need to, but I am required also to remind you that it is contempt for a witness to give any evidence which the witness knows to be false or misleading in a material particular, to quote some antique standing order.

We have received from you, and we appreciate, a copy of ‘Standing commissions on crime and corruption in Australia: a failed experiment?’, a paper you delivered at a conference in Brisbane in April. Committee members have this paper. I think it would be very useful if we actually incorporated it in the transcript. Is it the wish of the committee that the document be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The paper read as follows—

CHAIR—Mr Costigan, did you wish to make some opening remarks? I know the committee has some questions to ask you.

Mr Costigan—Yes, I suspect that is so. I will make only a very few, if I may. Firstly, I apologise to the committee for not putting in a submission. At the time the submission was invited, I was in the process of preparing a speech for Brisbane. I was concerned not to be insulting the committee by, in effect, giving to the Brisbane conference what would have been my submission to this committee. So I am happy to have this treated as my submission, although, because it is in the form of a speech, it does not really cover all the matters that you might normally have expected me to put in a submission.

Secondly, there are a few minor errors in my submission, which I would like to correct. On page 7, in the paragraph commencing ‘The conclusion to come to’, in the fourth line after the first comma the word ‘that’ should be ‘than’. On page 15 in paragraph 9.048, about the sixth last line of that paragraph starting with ‘the fact of the memoranda’ should be ‘the fate of the memoranda’. On page 16 in the second line, the word ‘law’ should have been ‘low’, so it should read ‘the degree of satisfaction is deliberately low’. On page 17—which is my most egregious error—at paragraph 9.053 I was quoting part of my final report, and I left out a whole line. It should read:

The memoranda of relevant criminal activities prepared and delivered by my Commission were the result of intensive and deliberate attention to the requirements of the Act . . .

I apologise for that because, in fact, it does not quite make sense without that line.

CHAIR—Thank you. I am sure, in our careful reading of your speech, we would have detected those deficiencies.

Mr Costigan—I have little doubt about that. So far as any opening remarks are concerned, really what I have said in this paper is what I wanted to say. If I were to make any opening remarks, it would be just to summarise the structure of that paper. I am not sure if that is really going to advance the knowledge of the committee, so I am happy just to await questions.

Senator McGAURAN—Mr Chairman, I have not read the submission, so a brief summary would be very useful for all of us.

Mr Costigan—Yes. It will not take long.

CHAIR—Yes, certainly. Why don’t you do that?

Mr Costigan—The first 14 pages in this submission really set the background to

the setting up of the National Crime Authority in 1984. Perhaps the most important part of it is an extract which I took from a book by Justice Athol Moffitt, who was the President of the Court of Appeal in New South Wales for some time and was also the royal commissioner in the early 1970s.

He wrote a book called *A Quarter to Midnight*, and he published it in 1985. He gave a summary of the findings of a series of royal commissions into the crime problems in Australia over a period of 20 years. He accommodated, as he has to, the fact that any law which is looking to the further investigation of criminal matters was likely to affect in some way or other the rights of individuals. You always had to have a balance between protecting the general community and being careful not to overly interfere with the ordinary rights of ordinary Australians. So he has got quite a good analysis of the events leading up to the royal commissions.

Then I went to the history of how the Fraser government set up, in a bit of a hurry, the National Crime Authority. The bill was passed but not proclaimed. Then the election came and the Hawke government came in. I had had some misgivings about the act that was passed by the Fraser government—not misgivings as to the intention behind it but as to the way in which it had been set up. Quite frankly, I have not revisited why I had those misgivings, but I said to the new government, ‘Look, you are now a new government. This is an opportunity to have a good look at what is needed.’ They accepted that advice, and the national crime summit was set up. A whole host of people came to Canberra for a couple of days and discussed what needed to be done.

As a result of that, the National Crime Authority Act was proclaimed. It was an act which had a fairly tortuous history through the parliament. I forget how many amendments were put up—some of which were passed and some of which were not. It finished up, as all these things do, as a compromise. I always had very grave reservations as to the likely effectiveness of the body, as it was set up under that act. I have expressed some of those reservations in this paper.

Perhaps I should say that there was absolutely no dispute at that national crime summit that evidence had been put forward of a compelling nature that there was a problem in Australia which required new methods. The major reason for that was that the major criminals—white collar and otherwise—the parliaments needed to look at very cleverly ensured that their activities spanned national and state boundaries. So you found that, as a matter of deliberate practice, someone in Victoria would set up a company in Queensland which operated in Western Australia, which had bank accounts in Hong Kong and which had operations in Bangkok. So there was a deliberate attempt to impede an investigation by a local state or even a local national.

It was for that sort of reason it was felt that there was needed in Australia a body that would combine the activities of all state police and law enforcement agencies and

have proper relationships with internationals to deal with this kind of thing. So there was a unanimous view that something needed to be done. The debate, which was quite fierce, was as to the form it should take.

The authority was set up. The major problem I saw with it was that it defined in advance the areas that the authority was to investigate. It did not have the power to enter into a special investigation, except by way of a reference from the joint government committee or from ministers in respect of a relevant criminal activity.

You had to start off by defining what it was that the authority was to look at before it had even started its investigation. I found that really very difficult to understand. If you are doing an investigation—and it is a wide ranging investigation and it is looking at a difficult area of life—you do not know in advance where you are going to finish up. In some ways, the best example of that was my own royal commission, where I was asked to look at a rather difficult group of people on the Melbourne waterfront where a very large number of murders had been committed over the previous 10 years. Indeed, even during my commission some additional murders and attempted murders took place—one of which was on a witness who was giving evidence before me.

That is what I was expecting to be looking at but, to my great surprise, I finished up looking at major tax evasion, because members of the union had been used as false directors of \$2 companies that were being used to save some taxpayers the obligation of paying tax. I finished up looking at things which no-one in their wildest dreams would have thought I would be looking at when I was first given my commission.

I only mention not to pat myself on the back but just as an indication of when you start off an investigation you cannot really know at the beginning where it is going to finish up. If you try to shackle the investigator by requiring that his investigation has to be tied to a relevant criminal activity which you have to define at the beginning of the investigation rather than at the end, then you are really causing yourself a lot of problems. So that was my major criticism. I think at that time I was prepared to articulate a lot of other criticisms of the act, but a lot of those were drafting. It is not for me to say that the draftsman could have done it in a better way, but that was the substantive criticism.

That was really about the first half of this paper. Then I went into some problems with the act, and I have slid into the major problem in what I have just said. Then I dealt with the problem of it becoming more and more of a police force. I have spoken about that on a number of occasions over the last 10 years.

Another thing that was quite clear at the National Crime Summit on both sides of the debate was that whatever the extent of the special powers that you were going to give to the crime authority, or to a new body, they should not be given to a police force. I was going to say because of the natural distrust of Australians of giving police forces too much

power, but I would not want that to be taken as my reflecting on the integrity of police forces. I say that coming from Victoria, not from New South Wales. I can say that more comfortably since I see there is no New South Wales representative on this committee.

I deal with the question of police forces. It was contemplated that the crime authority should not have the attributes of a police force and should not be seen to be a police force. I have indicated that there have been problems about that. We have seen many examples of it being said in the media, and I think being said accurately, that the National Crime Authority has arrested somebody. That just fills me with horror that the Crime Authority should be in the business of investigating, not arresting suspected criminals. That is the job of police forces.

We have a well-developed common law of this country which protects citizens in relation to police activity and enables police to do their job properly. That was my second major complaint.

Then I have a bit of a swipe at the Commonwealth Law Enforcement Board. I have an additional swipe at the Law Reform Commission's suggestion of setting up a new body which is going to be given powers greater than anyone would contemplate giving to the National Crime Authority in order to investigate complaints against the National Crime Authority. One thing I did learn during my royal commission, which was at a lower level, is that one of the well-developed tactics which people who are being investigated will use is to complain about the activities of the investigator. Not that people should not be entitled to complain but there must be a legitimate basis. I have seen examples where serial complaints are made in relation to an investigation. The complaints have no substance but effectively disrupt the investigations.

What is being suggested is a new body which is going to be given the most draconian powers to go in and take documents, interfere with an investigation to see whether a complaint is justified. When one looks at the annual reports of the National Crime Authority the average number of complaints is about 18 a year. They include matters like that the receptionist was rude to someone who had come to give evidence. Anyway a swipe may or may not be the appropriate description of what I said. I think it is an acute and logical analysis of the defects of this new body. I think that is all I want to say. That is roughly what appears in my paper.

CHAIR—Thank you, Mr Costigan. Perhaps I could start by honing in on your major criticism of the act as it was established—that is, to deal with the question of references. Obviously that is probably its most controversial element. Certainly the input that we are getting from the civil libertarian end is that that was a constraint that was imposed on the authority with some justification. Somebody else said the caravan has moved on a fair bit since then. The NCA was the first of organisations like that set up on a national level. Now we have ACCC, we have the Securities Commission and so on that

have similar powers. Bob Bottom even told us in Queensland that the Queensland Egg Board had wider, more intrusive powers. Do you think now there is an argument we could put for actually removing that particular constraint for the requirement of references?

Mr Costigan—I think there is. I continue to be troubled about not going overboard with investigative bodies. You can create bodies which have such wide powers, without challenge in the courts, that truly innocent people can be very badly damaged by somebody in that authority, well-motivated, getting on the wrong track. One always has to be careful. I must say that I am troubled by the proliferation of the bodies we are seeing around Australia. I think that one reason for that is because the crime authority, which was supposed to be the national body to do these things, was not set up properly and was not given those sorts of powers.

For example, in New South Wales, not long after the crime authority was set up, they set up their own drug commission, which really kept within New South Wales the investigation of matters which ought to have been the province of the national body. Then you get ICAC set up. The majority of the population applauds the setting up of a body which is designed for anti-corruption, but you can never be sure where it is going to go, but suddenly you have three bodies. There was a serious problem in Queensland, which Tony Fitzgerald reported on. Then we have a fourth one, the CJC. Western Australia now has its own body. You have a number of these bodies wandering around the community, each with great powers and each with the capacity to investigate in the same area but on a state basis and with a capacity to do great harm to innocent people.

I would like to retreat from that to the crime authority again as the national body which is looking at national problems. I would give it wider powers. I would remove the reference problem. I was a great advocate for having some parliamentary supervision of this kind over the crime authority. I did not get much support from the government at the time but it was finally passed through the Senate. You have got to have accountability. The more you give wide powers to a body like this the more there has to be a proper basis for accountability. I think it has to be on a parliamentary level, such as this committee. It may be that you have to widen the resources of a committee like this. I am not quite sure about that. My strict answer to your question is: yes, I think you ought to.

Mr SERCOMBE—On this question of the reference base for the NCA's operations, obviously there are matters following on from Justice Merkel's and Justice Vincent's decisions in relation to a number of matters. Consequently the appeals are going to be an ongoing matter for legislators to consider. I wonder what sort of model you would have in mind if the act were to move away from the reference based system of initiating matters. The trade practices model, for example, of the authority itself making a determination on reasonable grounds that a matter ought to be investigated? If so, how do you then achieve the other objective you stressed about the importance of carrying the states with you?

Mr Costigan—The self-initiating investigation has got a lot of attractions if you are comfortable with the personnel that you have appointed to the authority and if you feel comfortable with appropriate accountability that they will not abuse that self-reference exercise and go off on hares of their own, which may even turn out to be political hares. People are people and you cannot be certain where enthusiasm might take you.

Perhaps I am coming back a bit to what the Chairman just put to me. My real complaint about the references is that they require a specificity which does shackle the investigator. If it were possible, for example, for the authority to be given a reference like money laundering—just described in those terms; not described by reference to the definition of relevant criminal activity in the act but a broad reference—or another reference like drug trafficking, but wide enough to enable the investigator to really go down side paths to see if they are leading somewhere and then come back, I could more comfortably live with the concept that the authority should only work by reference to references. But the present act requires too great a specificity which inevitably shackles and inevitably brings up the kind of litigation we are now seeing in the courts that you mentioned—the appeals to see whether a particular activity came within the reference or did not. That is immensely disruptive of the work of the organisation. Is that really answering your question?

Mr SERCOMBE—Yes, that is okay.

Mr Costigan—It is along the way perhaps.

CHAIR—The other question, though, is that it has been suggested that if we did go down the track that you are advocating that would actually open the authority up to even more challenges in the court at a preliminary stage. As it has been put to us, the reference system has been challenged spectacularly on a couple of occasions, but this may even be worse.

Senator CONROY—That is when you would require a change to the legislation.

Mr Costigan—Absolutely. Yes, you have got to have a change to legislation to achieve what I am talking about. Of course you would not want to exclude the court's capacity to interpret the legislation to see that the authority was acting properly. Of course you would have to retain that.

I recently celebrated my 40th year at the Victorian Bar, so I know what can happen in the courts. I feel very comfortable with the protection that the courts can give us in terms of liberties, but I also know—one sees it particularly in white-collar crime—that well-funded defendants have an almost interminable capacity to frustrate investigations by serial appeals to the courts. I would have thought it would be possible to draft an amendment to the act which made technical appeals less likely and yet provided an

appropriate avenue of appeal if the authority was exceeding its proper jurisdiction.

CHAIR—Thank you. Mr Filing, would you like to ask a question?

Mr FILING—Back in 1987, I think it was, you made a speech to Labor lawyers in Brisbane.

Mr Costigan—Yes.

Mr FILING—One of the criticisms you made was that during the period of the 1980s when there was substantial evidence of criminal and corrupt behaviour in the various state governments—I think you mentioned New South Wales, Queensland and Western Australia—the NCA almost seemed to be an absentee and, given that all this was going on, the NCA seemed to have done nothing. Do you think, on reflection, that that possibly reflected more on the way in which the references were given by the intergovernmental committee which is composed of ministers from the various state governments who would, presumably, have had an interest in not having an investigation into their own affairs?

Mr Costigan—I am not sure whether the phrase ‘on reflection’ is an invitation to me to change my mind.

Mr FILING—You have changed a bit.

Mr Costigan—Yes, I have changed a bit. Yes, I think to some extent that is right. Coupled with the notion of getting a reference and the fact that the intergovernmental committee is the normal route for getting a reference there is an inhibition on a local state government which might feel the heat of an investigation not to consent to a reference. I think on reflection, looking back 10 years, that that might have been an unspoken kind of veto.

Mr FILING—Do you think, conversely, that there would have possibly been the opportunity, because of the intergovernmental committee, for a political axe to be ground in relation to references that might have been proposed or given to the NCA?

Mr Costigan—The answer to that question has to be yes in view of your use of the word ‘possibly’.

Mr FILING—I am considering, for instance, matter 10, or Operation Albert—the Elliott matter, which most people have conceded now should not have gone to the NCA for inquiry. It was at a time when there was some speculation about the way in which it had gone to the NCA instead of perhaps being properly investigated by the NCSC at the time.

Mr Costigan—That is a complicated matter. There are legitimate criticisms of the lack of resources provided to the NCSC. They were demonstrated in that whole BHP problem. I have some problems talking in any detail about the Elliott case because I appeared for the DPP in the proceedings of the Federal Court.

Mr FILING—You can speak in generalities. The reason I broach this is that amongst the criticisms we have had in recent times in this inquiry, particularly from those concerned with the civil libertarian aspect, has been the criticism that there are not sufficient safeguards or levels of accountability to protect private citizens against what has been described as overzealous behaviour on the part of the NCA. What I was trying to elicit, I suppose, is that given that there were around four or five separate layers of accountability in the process, is there sufficient protection, say, to protect somebody from being witch-hunted politically through the NCA?

Mr Costigan—I am not accepting for the purpose of my answer that that was a witch-hunt. The evidence I have seen in relation to the preparation of the references would tend to indicate incompetence but not malevolence. What I have seen would indicate that all the proper steps were taken in relation to getting the reference in and confidentiality was maintained. I do not think it is certain, for example, that the reference was not wide enough to encompass what was done and indeed the Court of Appeal in Victoria might have something to say about it.

Mr FILING—Sure, I appreciate that.

Mr Costigan—Ultimately, any attempt to use the NCA for political reasons has to be frustrated in the political arena, I think.

Mr FILING—Just on that particular point, which I think is an important one, amongst the criticisms of the process there has been, as you know, virtually from day one of the operation of this particular committee in its previous incarnations and up until now, strong criticisms that there are insufficient resources and, for that matter, some too heavy restrictions on the ability of the committee to properly scrutinise the NCA.

Given that we were criticised by Elliott and others during that process, do you think that there is a greater role for the committee to be able to have more thorough access to look into the NCA's matters, particularly in relation to where it might be in that area of operational matters?

Mr Costigan—I think so. I have always acted on the basis that, at the end of the day, there has to be trust in the people who are supervising. If I were the Chairman of the NCA, I would not only report to a committee like this on a regular basis but also ask the committee to nominate a couple of people, preferably from both sides of the political spectrum, whom I could brief in more detail so that they were well aware of what was happening.

Those people would then have an ability to come back to the committee and say, 'I cannot give you the operational details, but I think there is a problem there. It seems to me that what they are doing is overzealous in the particular area. The likely benefit that could come from this investigation does not balance out the costs to individual liberties and perhaps we ought to say to the NCA, "Stop it".'

Senator CONROY—Shouldn't that happen through the intergovernmental committee? Isn't that the more likely place, given that there is representation usually from all political parties on that?

Mr Costigan—There is a problem of leaking, isn't there? With the best will in the world, the kind of thing the NCA is investigating is pretty sexy stuff. It is the kind of thing that you like to drop, 'I know something that is going on in there,' and so on. The intergovernmental committee is representative of all states but again, with the best will in the world, you are expanding the numbers of people who know about what might be a very sensitive investigation.

One could imagine, although I am speaking highly speculatively, for example, a prominent citizen of this country—perhaps even a member of parliament—involved in a major drug importation and that was what the NCA was looking at. You would have to be terribly careful who you told that to. On the other hand, you might feel more comfortable if you are able to say to the chairman of this committee and his vice-chairman if they were from different parties, 'I have to tell you about this. It is likely to blow up. I think you should know about it.' But I would not want to go to the intergovernmental committee, not because I distrust anybody there but because there are too many people on it. For operational reasons there would be times when you just really could not tell it to any people at all.

Senator CONROY—In the evidence given to us so far there have been arguments about whether or not the NCA should get back to doing things like just drugs and stay away from the sexy and trendy—they are terms that have been used—white-collar investigations. I was wondering if I could get a comment from you on that, especially on how it relates to acting as an ordinary police force. If we go back to the drug question, then you are really just becoming a supplement to existing police forces. I am interested in your comments there.

Mr Costigan—So far as the drugs are concerned, I would say that is a police matter. But the very nature of major drug trafficking does involve more than one jurisdiction. You just do not get a drug importation in Victoria where the drugs stay in Victoria and the Victorian police can do the whole job. The concept behind the NCA is that, in matters like that, it would be able to coordinate various law enforcement bodies and offer to them the special powers that the parliament has given to the NCA.

So if you had an operation of the sort I have mentioned, the New South Wales police, the Victorian police and the Australian Federal Police would come to the NCA and say, 'We would like you to supervise a task force—not being part of the investigation, but knowing what is going on—so that we can come to you from time to time to ask you to use your special powers to get additional information and we will go back and do the police work.'

So the NCA itself is not doing the police work, but it is there as a very valuable resource. That is the kind of thing I had in mind, because you are quite right that, if the NCA goes in and does the investigation itself, then it is acting as a police force, but with those additional powers and that is not what was intended. I would be very troubled if the NCA walked away from white-collar crime because you cannot put these things into categories and say, 'What is happening there is white-collar crime and it has got nothing to do with the next box, which is dealing with drugs.'

I have always been, some people would say, obsessed with the idea of following the money trail because, at the end of the day, no matter what the criminal activity—white-collar crime, drugs or armed robbery—with a few exceptions where the real desire is to have some kind of status or power, the aim is to get money. Having got the money, you do not want to give it back to governments, either by way of tax or in any other form, so you have to launder it.

There would be no activity of a criminal nature which would justify the NCA getting involved which did not require the skills of following the money trail. Not only is that an effective method of finding the money but it is an immensely useful investigative tool, because the more you can follow the money trail and see where the money has gone, the more you get an insight into who really is getting the proceeds of the activity. In real white-collar crime, it is almost all about money laundering. It is about stealing money and then laundering it. It is taking it from the public—

Mr SERCOMBE—And fraud.

Mr Costigan—Yes, and fraud. For the NCA to opt out of white-collar crime would be to deprive itself of a graduate education in the skills of money laundering. Just this morning coming up on the plane I bought this paper—so I have not just destroyed Qantas's literature—and there is an extract of an article from the *Economist* on the terrible problems that not just the Australian Taxation Office but taxation offices throughout the world are going to have in imposing tax where transactions are taking place on the Internet and with electronic money transfers. That is an immense problem. The NCA should be right up to date with that kind of thing. It should be talking to bodies in other countries to see how best you monitor what is happening there. It is not going to be easy. But if you opt out of white-collar crime, you really are opting out of the best education in it.

Senator FERRIS—Bob Bottom, who, I think, describes himself as you have, as the father of the NCA—

Mr Costigan—Does he?

Senator FERRIS—Perhaps it has two fathers. He has expressed the view to this committee previously that, in his view, the NCA has all the resources necessary, even money wise, and that the real problem is getting people in these bodies to actually be committed to getting results.

There are more than 20 law enforcement agencies of one sort or another in Australia, and yet we had the commissioner of the AFP just a few days ago agreeing that Australia was awash with heroin and that the drug battle is very difficult to get on top of. Why is that? Why are there so many bodies and yet we still have, if you look at this year's annual report, relatively small charges and small fines and penalties listed in the NCA as being the people charged? Why is all this happening?

Mr Costigan—I think one of the problems with the drug battle is that a lot of people have regarded it as a law and order battle, and it is not a law and order battle. It is when you are talking about the major traffickers and major importers. Of course, the forces of law enforcement have to be going after those people, but, for the great bulk of users, it is a medical problem and a health problem.

In so far as we try to judge our success in the so-called drug war by the number of major traffickers who are arrested and convicted, we have set up a false standard. The real worry about the drug problem is the effect on our citizens. For most people involved in the drug industry, they are users, and it is a health problem. This is the kind of thing that Jeff Kennett was talking about 18 months ago when he set up the drug advisory panel. In some ways, it was a great surprise to a lot of people that he of all premiers chose to do it.

I am not of the same political persuasion as Mr Kennett, as you might know, but I have no doubt at all that in regard to the drug problem he was absolutely genuine and that his ideas were right along the right track—that if you want to treat the drug problem simply as a law and order problem you are never going to win.

Senator FERRIS—So it is not question of adding extra powers?

Mr Costigan—No, I do not think so. It is an easy solution to some of these problems to say, 'We can fix it up if you give us more money or give us more powers.' I am not disputing that the NCA could do with more money. I am not close enough to its operations to know whether that is right or not. But it can be an illusion to say, 'We can always fix things if you give us more power.'

Senator FERRIS—In the paper you provided to us you talked about the basis for the NCA being set up. You said it was envisaged that it would play a central role in attacking organised crime and corruption. Do you think it has fulfilled that role successfully?

Mr Costigan—I do not think it has, no. I said so in fairly firm terms in that speech I gave in Brisbane in about 1987. There was a real problem with the NCA at that time seeing itself as a police force. My view was that the NCA would be very much a central coordinating body with developing expertise which it could make available under proper rules to other law enforcement bodies, not for dealing with the mugging in St Kilda Road or the house burglary in North Adelaide but for the major crimes. The difficulty was when they tried to define major crimes in the structured way they did. I always saw the NCA as a body that was there with considerable resources, with developed expertise and with very great powers to go into banks and financial institutions and, I must say, into solicitors' accounts, trust accounts.

Senator FERRIS—Barristers?

Mr Costigan—Barristers do not have trust accounts. It is one of the great things about being at the bar: you do not have a trust account, so you are not tempted. In my royal commission, where I was not inhibited in going into solicitors' trust accounts, half an hour in the box with a solicitor who has been managing the funds of a dubious person for years will tell you more about what is going on than looking at bank accounts and so on. That is how I saw the NCA. It is there, it has got those great powers, it is coordinating task forces and it is available to assist individual law enforcement agencies or joint operations by using those special powers. It is there to kind of monitor and develop an information bank.

Senator FERRIS—Previous witnesses have suggested that issues related to what they have called turfdom have interfered with the efficiency of the operation of not only the NCA but a couple of other federal agencies. Do you have any experience of that?

Mr Costigan—One of the reasons the NCA was set up was to try and get over that problem of turfdom. I do not have any personal experience since I finished the commission as to whether the vibes at meetings of various law enforcement agencies are good or bad, although I understand, talking to John Broome and also talking to Tom Sherman, that the atmosphere has improved enormously. After all, that is why it was set up, so that you could say to the New South Wales police, 'Look, it is not a question of your turf. It is a question of a joint operation. You've got some Victorians coming in, you have got a few Queenslanders and the AFP are there. Let's work together.' That was one of the most important roles for the NCA—to develop an atmosphere where individual law enforcement agencies did not feel that others were trying to take credit for things. You are never going to escape that. It is a human quality to claim credit.

Senator FERRIS—Mr Costigan, have you ever been invited to join, or would you consider joining, the NCA?

Mr Costigan—Have I ever been invited? I was invited by the Prime Minister to chair the original National Crime Authority, and I said I was looking forward to going back to the bar. I had had enough.

Senator FERRIS—As you have said yourself, caravans move on.

Mr Costigan—They do. But the answer strictly to your question is no, I have not been invited, and I would rather not indulge in speculative questions.

CHAIR—I am not reticent to use the word ‘war against drugs’ because I think it creates the right sense of urgency and is quite an apt description of it. You described it as a health problem but, whichever way you look at it, there seems to be evidence that we are not winning the war, as I put it. Does that mean that we are not doing enough on the law enforcement side, or on the health side? What is wrong? The strategy is currently being reviewed—the national drug strategy.

Mr Costigan—I think ‘war’ is an appropriate noun to use as long as it not seen as just a law enforcement war. There is a real problem with the importation and trafficking of drugs, which can be dealt with on a peace level. I was saying it was a medical problem but, of course, the war is not entirely a medical problem—a very significant part of the drug problem is a health problem.

Actually Australia is regarded pretty highly in its attitude towards the health side of drugs. I was chairman for eight years of the Drug Rehabilitation Fund in Victoria, which disbursed the assets of drug traffickers. It was not a lot of money; it was \$1 million a year, but I saw a fair bit of it. I spent some time overseas talking to people—at my own expense, let me hasten to add—in Amsterdam, Switzerland, Sweden and Denmark, and the general feeling then was that we were doing pretty well in that we were concentrating on harm reduction as the major aim of our strategy, coupled with increased collaboration with overseas agencies to try to capture the traffickers.

We are never going to win that war. Just in simplistic terms, we have an enormous coastline, we have a small population and the profits to be made in trafficking are so enormous that ingenious people will either find ways that get through the net or take risks and get caught. It is common to say we only catch 10 per cent of the heroin that comes in. God knows how you work out the percentage if you do not know the totals!

CHAIR—We will go to Senator Gibbs in a moment, but I wish to finish off on that so that I am quite clear. We mentioned Sweden. I do not know if you are familiar with the latest situation there, but my understanding is that they have retreated from that

sort of harm minimisation strategy and have taken a much stronger stand on the supply side. They are now having more success than they were having. Is that your understanding of it?

Mr Costigan—I cannot answer that. I do not know. I have heard some suggestion that that was so in the Netherlands. I chaired a conference in 1990 in Melbourne—an international conference on drugs and strategies—and there was a lot of discussion about decriminalisation, which is a word that I hate because it does not really tell you what you are trying to do. At that stage, I was talking to senior police in Amsterdam who had been very much opposed to the policy in Amsterdam of, in a sense, being kind to drug users. They had come around to the view that the Netherlands government had got it right, and that it was far better to be setting up treatment clinics for users and providing heroin to users, under very strict conditions, than to be putting them all in jail at enormous cost. I gather, but I do not know for certain, that there has been a bit of backing away from that policy.

I must say that when I was in Sweden, which was about nine years ago, I thought their policy was a very tough policy as opposed to that in the Netherlands. I remember talking to someone who was very senior in the Swedish government who said that his view was that, of course, you give drug users rehabilitation—you arrest them and put them in gaol and then you rehabilitate them. I said to him, ‘What happens if the rehabilitation does not work?’ He said, ‘They stay in gaol until it does.’

CHAIR—That sounds like Bob Bottom.

Mr Costigan—I do not know whether they have moved further in being harsh, but I do not think it could be harsher than that.

Senator GIBBS—You have said before that the NCA has become more of a police force and I notice in your annual speech here you were saying that we have all seen the NCA arrest people at six in the morning with the media present. We have had some witnesses say that they did not believe in the seconded system where they take police from different states, because of the inherent corruption in the police force—I come from Queensland. If you do not think it should be a police force, do you think they should have any police at all or should they simply be an investigative body? Who should actually comprise the NCA?

Mr Costigan—Starting with the police, if I was running the NCA I would have about eight policemen on board—one from each state and one from the AFP—at a high level as liaison officers who knew what was doing. They could be taking back to their own force knowledge of what the NCA was doing and would act as a conduit when there was a cross-jurisdictional matter to be investigated. They would be working with the NCA when the NCA says, ‘We have to look at this problem in Queensland, the Northern

Territory and South Australia.’ They are there to make available the resources of their own force to investigate, but are comfortable in the knowledge that they are in that central national body which has a great deal of information on its computers and in its files which can be accessed for the purpose of that investigation and where the special powers of the NCA could be used.

I would see the NCA as a body with a lot of trained accountants; a number of lawyers, but not dominating by any means; the liaison police people; and a large number of computer keyboard operators and analysts. It is a very difficult skill analysing an enormous volume of information and you need training for that. That is the sort of organisation I would be looking at.

Mr SERCOMBE—Where do the boundaries in that scenario exist with an organisation like AUSTRAC, for example?

Mr Costigan—I would say very close relationships with AUSTRAC.

Mr SERCOMBE—Because a lot of what you have described, in fact, would be an AUSTRAC function.

Mr Costigan—Yes, but AUSTRAC is really concerned with the money, isn’t it?

Mr SERCOMBE—Yes.

Mr Costigan—And it does it very well, as I understand. It has been a very powerful—

Senator GIBBS—If you want analysis into where they are going investigative-wise and down this track or down that track.

Mr Costigan—Yes, that is right. The NCA would have access to the kind of information that AUSTRAC can have, but would also have the ability, if information from AUSTRAC indicated that a branch in a northern suburb in Melbourne was the recipient of a lot of suspicious money, to call in the bank manager, put him in the box and cross-examine him in a way that AUSTRAC could not. The NCA would also have access to reports of investigative policemen in task forces who are going beyond the money but colouring the scenario.

So we know this money is going through; we have AUSTRAC material which evidences that. But we also have this other evidence. We have had some evidence from Mr X who tells us that he knows Mr Y and Mr Y has been doing some funny things, so you go to Mr Y’s bank account. It is a collection of individual pieces of information and that is where you need the analysis: where you have got people trained in analysis, putting

it all together and conceptualising what is going on.

CHAIR—I assume you are aware of the Australian Bureau of Criminal Intelligence activities. There is another authority set up to collect information.

Mr Costigan—Yes, I know.

CHAIR—It is hard to keep on top of them all, isn't it?

Mr Costigan—It is. I have not had anything to do with them for 13 years. I had a bit to do with them during the commission. I am not quite sure how you merge in the kind of thing I am talking about with the NCA and the Bureau of Criminal Intelligence. I think there were a lot of turf problems.

Senator FERRIS—They were the ones who raised the issue—

Mr Costigan—Yes.

CHAIR—I think there is a challenge for us to look at some of those issues to see if we can—

Mr Costigan—There has always been a turf problem at another level. I have always thought that the AFP wanted to subsume the Bureau of Criminal Intelligence into the AFP, which of course did not please the other states who were providing input. That is another turf problem. Then you get the problem between the AFP and the NCA if they have both got a similar kind of intelligence. The AFP needs different kinds of intelligence. It has got a role which is not the same as the NCA—it has ordinary piecework to do. So I cannot really answer that question as to what is happening at the moment.

CHAIR—It is just that it seems that what you are describing could be a function for the NCA might already be being done by the ABCI, but I am not entirely sure either.

Mr Costigan—I was going to make a suggestion that you could subsume the ABCI into the NCA.

CHAIR—Right.

Mr Costigan—I know that would not happen.

Mr TRUSS—Earlier you spoke about a desire to have, perhaps, a broader reference when introducing an inquiry so that you are able to follow it wherever it leads.

Mr Costigan—Yes.

Mr TRUSS—You also indicated the necessity to have some degree of parliamentary or public scrutiny.

Mr Costigan—Yes.

Mr TRUSS—But how in practice could you rely on, say, a parliamentary committee to scrutinise the trails that your broader reference might take you along?

Mr Costigan—I would not want them to scrutinise in detail. I think the parliamentary committee—perhaps not the whole committee, but at least a representative executive of the committee—ought to be given a bit more information about the day-to-day operations of the NCA so that they can form a view as to whether it is really doing the job it was set up to do. At the end of the day, as I said earlier, you have got to trust

the people that the parliament has appointed. You have to trust that the leaders of the major parties will appoint to the committee people who are prepared to sit on the committee in the spirit in which it was set up. You would not want to have on the committee people who were themselves of dubious ethics.

Mr TRUSS—No member of parliament would fall into that category, I am sure.

Mr Costigan—I went up to Port Moresby about 10 days ago and gave a speech about corruption in government. I think Australian governments—certainly the federal government—have been remarkably free of corruption, but one must always be alert to the possibility of it. I think the pressure is very important in that.

Mr TRUSS—But presumably the authority would be a long way down the trail of drifting away from their original reference before they could really be in a position to even consult with such an inner committee about where they were going?

Mr Costigan—Sure, although sometimes you can find something out very quickly. But, yes, that is right of course. I am not suggesting for a moment that there should be detailed daily, or even weekly information to the executive of this committee as to what we did last week and what we are going to do next week and so on. But I think it is appropriate, for the purpose of accountability, that this committee ought not to be in a position where the chairman of the NCA comes up—I am not saying he does it—and says, ‘I can’t answer that question. You’ve got no right to know what we’re doing. You’ve got to trust us.’ I think there has got to be an accountability.

If it goes bad and, as a result of that accountability, something leaks to someone who is a target, that in itself is useful information to an investigative body. It is not all bad.

Mr TRUSS—The Fitzgerald inquiry in Queensland started off investigating links between prostitution and the police and ended up charging ministers for travel expenses—in fact, they probably had more charges in that area than they ever did in relation to police. That is an example of a reference getting extraordinarily broad.

Mr Costigan—I do not know whether you want me to comment about travel expenses, do you, Mr Truss? But it is a good example of how you do not know where you are going to finish up when you do an investigation. It was not just travel expenses; the police commissioner went to gaol and a number of other people were identified at a moderately high level.

Mr SERCOMBE—There is a National Party branch at the gaol, is there not?

Mrs WEST—You must forgive me. I was absent. So if you have already answered this question, you do not have to answer it again. How valuable is the NCA today in your estimation?

Mr Costigan—I think it is terribly important that we should have a body like that. As life becomes more sophisticated—I was speaking some little time ago about the problems that are going to flow with the Internet and electronic financial transactions and so on—in order to keep pace with that and to monitor the abuse of those systems in the interests of crime we have got to have a body like this.

The other side of the coin is that you have got to have an appropriate accountability. You just cannot launch a body onto the Australian scene and then step back and say, ‘We trust it to behave properly’, because sometimes these bodies do not behave properly, not necessarily with malice, but they just make mistakes and there has got to be accountability.

Mrs WEST—At its inception, the Attorney-General said in 1983, ‘Do we need to do anything different from what we are doing now?’ We have gone through all the ensuing growing pains and problems with the escalation of crime and particularly drug related crime, and I would say it is timely to ask that question now. We have had the NCA. We have up to 22 law-enforcement agencies grow like topsy. We have an inordinate number of public servants and police people involved in the prevention and looking after crime. Do we need to do anything different from what we are doing now? Crime has escalated. We have had this law-enforcement industry grow, and yet the crime industry has also grown at the same time.

Mr Costigan—I think we have actually been quite inefficient in the way in which we have set up organisations. Again, I mentioned that before you came. We finished up with not just the crime authority but the drug commission in New South Wales, ICAC, the CJC in Queensland and there is an anti-corruption body in Western Australia. I think

myself that that is partly a reflection of the fact that the NCA was not perceived to be doing its job properly. But it was also partly a reflection of the fact that individual states would prefer to control their own anti-corruption body than let a national body come in.

In that sense, I think we have been inefficient and I think the inefficiency does really flow, to a large extent, from the fact that we did not quite get it right when we passed the National Crime Authority act. It is 13 years since it was passed and it is a very appropriate time to be standing back and asking the question: 'Look, do we need to do something about it?'

Mrs WEST—Could we withdraw from some of those 22 law enforcement agencies? Do you think they are vital? Is there duplication?

Mr Costigan—I am sure there is duplication, but we are talking about turf there.

Senator CONROY—I was wanting to ask Mr Costigan a number of questions about matters that are currently before the courts, and I was wondering whether the committee would be willing, without wanting to put Mr Costigan on the spot, to go in camera so that we could have a frank discussion with Mr Costigan about those issues.

CHAIR—We can certainly do that. If you do not want to ask the questions and Mr Costigan does not want to answer them we can proceed in that way.

Senator CONROY—I did not want to put Mr Costigan on the spot and on the record with what I am asking him about.

Mr Costigan—For the reasons I have already given, I would not want to talk about the Elliott case more than I have in this paper because I was professionally involved in it and there are all sorts of problems about my talking about it.

Senator CONROY—I understand you were involved in the Vincent case. Were you professionally involved in the Northrop case?

Mr Costigan—No, I was not involved in the Vincent one. I acted for the DPP when Mr Elliott attempted to get an injunction to stop himself being charged. As a result of that I had access to a good deal of information.

Senator CONROY—And would that come to the Northrop issue? I am more interested in discussing how it applies to the references and how judges have interpreted the references and that sort of thing. Are you going to be constrained?

Mr Costigan—No. The court of appeal in Victoria is going, in the next couple of months, to be hearing arguments and determining that matter. I am reluctant to get

involved in that discussion.

Senator CONROY—That is why I am trying to stay away from the court of appeal. I am more interested in Northrop. I understand the parallel, but—

CHAIR—Can we come back to that after we think about that? Paul Filing has indicated that he has to leave shortly and he has a couple of other questions.

Mr FILING—I am grateful to have your expert help today. I was interested in perhaps getting a few of your feelings about some of the current trends present in the community, particularly in the areas of crime. One has already been raised by one of my colleagues—that is, as you are aware, Mr Comrie and Mr Falconer in Western Australia. Others have raised this problem that the country appears to be awash in heroin. There seems to be a very serious problem. There has been strong criticism put to this committee that federal government cut backs in particular have seriously debilitated the effort against particularly drug importation. Do you agree with that scenario? Are you able to offer a comment in that case? Do you see that there may be some opportunities of fixing it up?

Mr Costigan—I do not think I can comment about any suggested government cut backs in those areas. First of all, I am not sure whether there have been cutbacks. I believe there probably have been although—

Mr SERCOMBE—In Customs and the AFP.

Mr Costigan—I am really not able to say whether those cutbacks have impacted on the area of law enforcement which deals with that issue. They may have impacted upon traffic control in the ACT for all I know, but I just do not know so I cannot really comment on that.

Mr FILING—Given your experience, though, and looking perhaps with the benefit of hindsight following your own royal commission, looking at other royal commissions and looking at some of the revelations that have occurred in the period since, do you see that there is a problem with Australia's traditional law enforcement agencies dealing with serious problems such as drug trafficking, given that there are some unusual facets to that, particularly a concentration of heroin importation amongst, for instance, Chinese triad gangs and their use of Vietnamese personnel to distribute it on the street? Do you see that these are areas that traditional law enforcement may have serious problems overcoming.

Mr Costigan—I think the answer is probably yes, but I would withdraw the adjective 'Australian'. It is a problem that is world wide.

Mr FILING—Yes, I agree with that—law enforcement agencies generally—but I meant Australia with its British model policing structure.

Mr Costigan—Even countries with a different legal structure have had the same kinds of problems—countries like Spain, France, a number of the European countries, the Netherlands. I do not think there is any first world country that has not had this problem of massive drug importation and use. I do not think there is any country which has solved it. The American philosophy was to build more prisons and they have succeeded in building more prisons and putting more people in jail. They have used their formidable military resources to try to interdict planes coming in and so on. But the problem is still there.

It does not seem to be a problem the solution of which is to be found simply in traditional law enforcement or any kind of law enforcement. You cannot walk away from law enforcement. You have to have it and you have to be attacking the traffickers and so on. But there is a growing realisation that the drug problem steps over boundaries and is not just a law enforcement problem. It is a health problem and it is a social problem and it is an education problem. We have been very successful—I can say this as a heavy ex-smoker—in attacking the use of smokes over a long period. It takes 10, 20 years. We have also made drink driving unacceptable socially. Thirty years ago some people used to boast about how full they got and then drove home.

Mr FILING—But you would agree that it seems somewhat of a contradiction for it to be unlawful for a newsagent to sell a child cigarettes but for there to be a suggestion that children be able to access shooting galleries publicly funded by state government.

Mr Costigan—It is a terrible dilemma that at the time when we are mounting massive resources to encourage people to give up one form of drug, like smoking, that we should be contemplating leashing the distribution of another sort of drug. I know there is a real logical dilemma in that.

Mr FILING—Bob Bottom gave evidence to this committee in Brisbane a couple of weeks ago. One of the things he mentioned was that he could not understand why, given that much information about where drugs are trafficked, where they are available, who is often available to get them for you or to provide them seems to be reasonably freely accessible to the citizens, police forces are not able to detect and prosecute those responsible. His view was that, given we know what the problem is or who is doing it, it should be relatively easy to fix it up. Would you agree with that?

Mr Costigan—I do not think it is reasonably easy to fix up. There is no doubt that if, say, the Victorian police force decided as a matter of policy that it was going to put its men and women out in the street and arrest every user, they could have five—

Senator CONROY—I think you are suggesting supplier. I think you were saying ‘arrest every supplier’.

Mr Costigan—A lot of the suppliers are users, you know.

Senator CONROY—I understand.

Mr Costigan—There are different levels. But there is no doubt you could have massive numbers of arrests. You would have to do something about the police budget and you would have to worry then about who is going to look after the home burglaries and the muggings and the armed robberies and so on. But you could do it.

Mr FILING—You could argue that many of them might stop because the people responsible are actually out there trying to get money for drugs.

Mr Costigan—They would just find different ways. As happened in America in the 1920s, with a nod and a wink you knew where you could get a bottle. They would just get more careful.

Mr FILING—But in the 1920s, for instance, much of that sort of nodding and winking was as a result of pay-offs and political and other social corruption.

Mr Costigan—Yes. That is one of the consequences of it; you can get that corruption.

CHAIR—I take it you have made it clear that neither in public nor in camera would you wish to deal with the sort of questioning along the lines that Senator Conroy was foreshadowing. That is perfectly reasonable and clear.

Senator CONROY—Can I put to you a conundrum? You have suggested that a parliamentary committee needs to oversight, yet we can get neither the authority involved nor you to give us an explanation of what happened in relation to the references. We have not had any significant, satisfactory briefing. The internal investigation is being withheld from the committee.

CHAIR—No, that is not quite true, Stephen. It has not yet been made available to the committee.

Senator CONROY—Do you think we should see it before or after we finish our investigation?

CHAIR—No, I am hoping that we will see it, or at least a version of it, in the course of our inquiry.

Senator CONROY—I am not as hopeful. There is an internal investigation being done by the department of the NCA. Neither of these are available to us at this point. We

are trying to get some sort of discussion going, and this is the parliamentary committee to oversight it. I apologise that I was not aware that you actually participated in some of the legal debates, but we are trying to find someone to give us a discussion about the legal complexities such as where, when, where it might or might not go. No-one will do it.

Certainly I can understand if legal people do not want to get involved in possibly commenting in public on legal decisions but, even in camera, I just find it very difficult to actually get to the nub of what this investigation is about; that is, the conduct of the NCA, whether it was inside or outside its brief. What were the legal implications on how the reference was drafted? It is those sorts of things. Yet we are the parliamentary committee conducting the investigation.

Mr Costigan—I think you ought to know that.

Mr SERCOMBE—And whether incompetent or malevolent or neither.

CHAIR—I think some light might be shed on that next week.

Senator CONROY—Light from the individual involved. On the one side, if you like, the one group involved are constrained to silence. Yet next week we are going to have one side of the case. I am not asking you to answer this necessarily. I am just putting back to you that as a parliamentary committee we are currently incapable of actually dealing with this issue.

CHAIR—Yes.

Mr Costigan—I think you ought to know that sort of material. I am not the person to give it to you, because I was not involved in the references. I could not tell you those things, but all this evidence was given before Justice Vincent. It is all in the transcript. I do not know whether that is available to the committee. I would be surprised if you could not get it.

Senator CONROY—I have the majority of the transcripts.

Mr Costigan—I do not think there is anything secret about that.

CHAIR—We can discuss that at a private meeting in the morning. It just seems that we could pursue the Attorney-General further on that issue. We have asked to have access to that information. I agree that we need to pursue it.

Mr Costigan—I think it is very important that you should have that.

Mr SERCOMBE—I want to take Mr Costigan back to the special powers, and I

think that we would all agree with the broad rationale of the special powers. One of the issues that we need to grapple with, of course, is the question of getting the balances right. One of the fundamental balances in our legal system relates to the matter of self-incrimination. As you would no doubt be aware, witnesses appearing at special hearings can plead privilege, but I would be interested in any comment that you may have in that respect. There is a suggestion that possibly even that right be removed, but that any evidence obtained in those hearings in those circumstances would not be admissible. It would be helpful to get a view.

Other issues fundamental to questions of natural justice include having some material presented about having a case to answer. I understand the distinction between the investigation process and the judicial process. Nonetheless, there are some principles of natural justice that we need to have a think about in this whole context.

Mr Costigan—As far as self-incrimination is concerned, my view back in 1983 and 1984 is the same as the view I have now; namely, the privilege against self-incrimination should not be available in a hearing before the National Crime Authority, which is in camera, but any answers given which do incriminate could not be used in any prosecution of the person. In other words, information would be obtained as a result of that plea not being available which would assist the investigation. But, because you are taking away a basic common law right of not incriminating yourself, your answers ought not to be available by way of an admission if you are prosecuted. So that is the balance I would have struck. The parliament struck a different balance.

I said a lot about natural justice in my final report and how it should operate, but I think you hinted at what I would regard as the distinction between an investigation and a prosecution. Even the police would recognise that if you are doing a police investigation, you do not go and tell the target everything you find out as you go along because the investigation just becomes hopeless.

Mr SERCOMBE—Except that you have been at pains this morning to draw a distinction between a policing role and a non-policing role for the NCA. To the extent to which you move further up that continuum, from police at one end to judicial at the other, that the NCA has moved up further along the judicial line, then principles of natural justice presumably ought to become more significant.

Mr Costigan—Principles of natural justice the High Court now calls—

Mr SERCOMBE—Implied rights.

Mr Costigan—Procedural fairness—that sort of runaway from the medieval concept of natural justice. Procedural fairness does the same thing. You really do have to be careful in an investigation not to show your hand too early. On the other hand it is

often very useful—in the investigation of the sort that the NCA would be doing—to prevent yourself going along the wrong track, when you have reached a point where you think there is a pretty substantial matter to be answered, to put that to the person and say, ‘We have been doing this investigation for the last three months. It seems we have the following material and it seems to us that you have some pretty difficult questions to answer, but do you have an answer?’ Sometimes they do have an answer. The old hoary answer, ‘I won it on a horse’ raises all kinds of cynical feelings. It is sometimes true.

Mr SERCOMBE—Or the casino perhaps.

Mr Costigan—Or the casino. So sometimes it is useful for a real investigation to find out if there is an answer and not waste your time.

CHAIR—Just explain this to me, Mr Costigan, because I am not a lawyer, which I think is probably some advantage in a way for me in this role, but during this self-incrimination thing, if in fact people have not got that right then it is with the authority to determine, as you say, how far they go. Obviously, if they go too far then they destroy or preclude the evidence that that person is giving that may actually enable them to be convicted. Is that right? Is that what might happen or could happen?

Mr Costigan—Sometimes, I suppose, the only evidence that you might have against somebody is their admission. You might have a chain of evidence that gets to there, then there is a break, and then there is a next chain and you cannot link them up unless the person you are asking questions of says, ‘Yes, the man is an animal. I did it.’ That used to be the old oral admission that the police used to tender and which they were often criticised for.

If you are really trying to get a broader picture in an investigation—you are trying to get a sense of how things are done in money laundering or in drug importation or whatever. You have got someone in the witness box where that gap is there and you need to fill that gap in order to continue down the road. You say to them, ‘Alright, I want you to answer this question: what did you do with that money on such and such a day? Any answer you give me cannot be used in any prosecution of you.’ He then tells you what he did and you know then that he is guilty of something but you cannot prosecute him.

CHAIR—That is the answer. But it still furthers the cause—

Mr Costigan—It adds to the information pool. It furthers your investigation and gives you an insight into what is happening.

Senator FERRIS—Mr Costigan, very early on in your evidence you talked about people whose lives have been destroyed by organisations with the power of the NCA or seriously affected in their outcome. We have had evidence in closed session of a person

who has made that assertion and who has quite effectively demonstrated it. Have you ever given any thought to whether there should be access to any sort of ex gratia payment or any victims of crime payment for people who are in that way subsequently charged and found not guilty of something but because of the particular charges that they faced, notwithstanding that they were found not guilty, have been unable to return to the profession for which they were previously highly regarded? Have you ever turned your mind to how we should as a society think about those sorts of situations?

Mr Costigan—I have. I have not come to any absolute conclusion about it. I do think that if someone is being investigated by a body like the NCA, where in one sense you have got the full power of the state targeting an individual, there should be some assistance provided to that person, in terms of legal assistance. It is not very many citizens who can afford to have legal representation for something that might run on over months and months. That can be a great hardship. It is not true in every case. Sometimes the target has available to him or her far greater funds than the NCA has.

CHAIR—On rare occasions.

Senator CONROY—Not all that rare. I think there was around 14 of them.

Mr Costigan—I remember when I was looking at the ‘bottom of the harbour’ there was an accountant in Queensland, whose name I will not mention, who had on his staff a number of accountants, the services of about three silks, and immediate access to advice. The officer in the Taxation Office who was looking at his affairs was a single officer in Perth who had 300 other files to look at. The comparison of the resources available went all one way.

But as a general rule what you say is right. You have an organisation and it has its own momentum and resources and the ordinary citizen has not got the financial or psychological capacity to cope with that unaided. I think a society that sets up a body like the NCA ought to be ready to make available assistance to people who are being investigated.

You have to be careful because sometimes the person who is being investigated is an absolute crook, who in fact has hidden resources in the Cayman Islands, Swiss banks and wherever. When it is all over he might finish up getting acquitted by a jury on a technicality because some key witness has been knocked off. There is no sensible way in which a decent society would say, ‘We’re terribly sorry about all that. You did in fact murder three people and you’ve sent \$25 million out of the country. We’ll pay your costs.’

CHAIR—Or worse, give you a substantial ex gratia payment to say that we’re sorry.

Senator FERRIS—Nonetheless, there are cases. Because this was in closed evidence I am not able to be specific about it, but an individual has made some very powerful assertions about the way in which his life and his career have been destroyed because an element of trust that was so necessary within the profession he worked in has been destroyed, despite the fact that he has been found not guilty of any charges. He and his wife who appeared before us built a case which seemed to me to be quite compelling. Some years later he is not able to return to the profession for which he was previously highly regarded.

Mr Costigan—I was not intending by my remarks to in any way suggest that there is not, on occasions, a proper basis for compensation. I think when a government sets up a body like the NCA it has to wear, as part of the costs of setting it up, that there will on occasions be a need to compensate or recompense people who have been badly done by. It is very hard to put that in a section of an act which accommodates every situation because they are all different. But there ought to be some flexibility where the crime authority or the Ombudsman or some other person would have the right to identify an appropriate need and for government to accept it.

CHAIR—There are legal remedies but I guess that, if somebody has been tried and found not guilty, that is different to, say, one or two other cases where a person might threaten to take action and might threaten to sue the NCA. That course of action is available to somebody, isn't it?

Mr Costigan—To sue the NCA?

CHAIR—Yes.

Mr Costigan—I would want to think about that. I am not sure it would be easy.

Senator CONROY—No, but someone announced in the *Bulletin* in the last two weeks that he was going to do it.

Mr Costigan—Yes, I know it is easy to say you are going to do it.

CHAIR—We will draw this to a close. Mr Costigan, your presence here this morning has been extremely valuable to the committee. The evidence you have given has been very interesting, informative and will prove to be very helpful. I realise you are going overseas for six weeks. I will not ask you exactly where you are going, but bon voyage. When you are back, and perhaps if we have not completed our inquiries and there are follow-up questions, I am sure that you would be happy for us to get back in touch.

Mr Costigan—Thank you for the courtesy. I came here in terror—I am not used to being cross-examined.

CHAIR—I am sure you could have given as good as you received. I declare the hearing closed. Thank you.

Committee adjourned at 11.46 a.m.