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Australian Crime Commission Establishment Bill 2002

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Law and Bills Digest Group
21 October 2002

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Australian Crime Commission Establishment Bill 2002

Date Introduced: 26 September 2002

House: House of Representatives

Portfolio: Justice and Customs

Commencement: Amendments to the *National Crime Authority Act 1984* commence on 1 January 2003.

Purpose

To establish an Australian Crime Commission (ACC) to replace the National Crime Authority (NCA or the Authority), the Australian Bureau of Criminal Intelligence (ABCI) and the Office of Strategic Crime Assessments (OSCA) and to make consequential and transitional amendments associated with these changes.

Background

Introduction

On 5 April 2002, a proposal to establish an ACC to replace the NCA was considered by a Commonwealth, State and Territory Summit.

The Background section of this Digest describes the National Crime Authority, Australian Bureau of Criminal Intelligence (ABCI) and the Office of Strategic Crime Assessments (OSCA).¹ It then provides a short summary of the Leaders Summit on Terrorism and Transnational Crime, its antecedents and its aftermath.

Background to the establishment of the NCA

A *National Crimes Commission Act 1982* (National Crimes Commission Act) was passed by the Commonwealth Parliament following a number of Royal Commissions in the 1970s and 1980s which drew attention to the existence, nature and magnitude of organised crime in

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Australia.² In 1984, the Senate Standing Committee on Constitutional and Legal Affairs remarked:

... it is trite to observe that the perpetrators [of organised crime] pursue their schemes without regard to territorial (national or state) boundaries. Yet, every royal commissioner who has reported on aspects of organised crime since Mr Justice Moffit in 1974, has remarked upon various difficulties caused by the fragmentation of power and responsibility for law enforcement inherent in the Australian federal polity. Compounding these problems is the fact that responsibility for law enforcement is divided among the various agencies.³

Both the *National Crimes Commission Act 1982* and the *National Crime Authority Act 1984* (NCA Act) responded to a perceived need for ‘a new law enforcement agency at the national level, equipped with coercive powers, skills and resources to deal with the fight against organised crime.’⁴

The *National Crimes Commission Act 1982* never commenced operation.⁵ Instead, the incoming Hawke Labor Government decided to review it. The reasons for the review were various. The ALP had opposed the National Crimes Commission Bill while in Opposition. Further, the Stewart Royal Commission had raised doubts about the effectiveness of the legislation, the States were opposed to the establishment of the National Crimes Commission and it was considered unlikely that they would enact underpinning legislation.⁶

In 1983, a Green Paper entitled *A National Crimes Commission?* was issued by Special Minister of State, Mick Young MP, and Attorney-General Gareth Evans. A National Crimes Conference was held in Parliament House from 28-29 July 1983. Additionally, discussions were held with the States and the Northern Territory, culminating in a meeting in September 1983 between Attorney-General Evans and Police Ministers at which agreement was reached about a model for a National Crime Authority. A National Crime Authority Bill was introduced into the Parliament in November 1983.

The Second Reading Speech for the National Crime Authority Bill 1983 highlighted the Hawke Government’s objectives in establishing the NCA and acknowledged the public concerns held about it. The Second Reading Speech referred to:

- the need to avoid fragmentation of law enforcement efforts in the fight against organised crime
- the need to take account of fears that had been expressed about a permanent criminal investigation body with unlimited terms of reference and uncontrolled investigative powers, and
- the need to obtain State involvement in the NCA’s activities.⁷

It also made specific reference to the way in which the States and the Northern Territory would be involved in the legislative scheme, particularly via the establishment of an Inter-Governmental Committee (IGC):

... there is now satisfactory provision for participation by the States and the Northern Territory. The National Crime Authority will consist of a Chairman, and two other

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members selected respectively by the unanimous decision of the Attorneys-General and Police Ministers of the Commonwealth and participating States. ... There is further provision for an inter-governmental committee to generally monitor the work of the Authority. Each State and the Northern Territory as well as the Commonwealth will be able to be represented on this committee, which should give the States a clear window into its operations.

Secondly, the concern—widely expressed in relation to the proposed 1982 Crimes Commission—that the body would be able to roam at will over the whole field of its jurisdiction, without having to justify its investigations to those politically accountable, has been specifically addressed by the requirement in the present Bill that the Authority only exercise coercive investigative powers in the context of specific references initiated by the appropriate government and approved by the inter-governmental committee. There is further provision for the Committee to request the Authority to provide information as to specific matters relating to an investigation or as to the general conduct of operations of the Authority.⁸

The 1983 Bill was referred to the Senate Standing Committee on Constitutional and Legal Affairs. One of the issues examined by the Senate Committee was the role and powers of the IGC. The 1983 Bill enabled the IGC to determine not only whether references from State Ministers were given to the NCA but whether references from the Commonwealth Minister were approved. The Committee recommended that the Commonwealth Minister only be required to consult with the IGC rather than obtain its approval when a reference would involve the NCA investigating Commonwealth or Territory offences. However, it accepted the position taken by Attorney-General Evans that:

... the fact that the Bill provides for an Inter-Governmental Committee reflects both practical and constitutional constraints on the Commonwealth in the area of law enforcement. The practical constraint is that for the Authority to get co-operation from the States, who are the major repositories of law enforcement capacity in Australia, they have to be involved in the organisational machinery of the Authority.⁹

Another issue, raised by the Green Paper in 1983 and discussed periodically since is whether the NCA's functions and powers in relation to complex organised crime should be exercised by the police. Among the reasons that have been advanced for the current NCA scheme, which establishes a permanent commission with special powers to pursue organised crime, are that:

- police forces operate within jurisdictional boundaries, whereas organised crime crosses those boundaries
- the NCA is able to place offences and perpetrators in a context of organised crime, whereas police are directed more to identifying individual criminals and charging them
- the community would balk at the police exercising the special coercive powers available to the NCA.¹⁰

The NCA's website remarks:

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The NCA is not a police service. ... [it] exists because of recognition that State/Territory law enforcement agencies cannot effectively deal with multi-jurisdictional organised crime in isolation and that many investigations cannot be successfully undertaken by traditional policing methods. The NCA approaches organised crime in a strategic, holistic way and must be very selective in the investigations it undertakes by itself.

Within the NCA, multi-disciplinary teams of lawyers, seconded officers from partner law enforcement agencies, financial investigators, intelligence analysts and support staff bring together the wide range of skills and expertise needed to effectively combat today's increasingly sophisticated and entrepreneurial organised criminal activity. The most commonly investigated offences include drug importation, cultivation, manufacture and trafficking, money laundering, large scale organised fraud and revenue evasion, bribery, extortion and violence.¹¹

Legislative and constitutional underpinnings of the NCA

There is no specific head of power over crime in the Commonwealth Constitution. As a result, the Commonwealth has used a variety of constitutional powers to create Commonwealth offences and legislate for the establishment of bodies like the NCA. Nonetheless, practical considerations (most law enforcement is in the hands of the States and Territories, the NCA relies on cooperative relationships with other law enforcement agencies and State and Territory police services provide criminal investigators to work in the NCA) and gaps in constitutional power have necessitated a cooperative legislative approach involving the States and the Territories. In the case of the NCA the Commonwealth Act, the *National Crime Authority Act 1984* (the NCA Act), is mirrored by State and Territory legislation.

Apart from the powers conferred on the NCA by the NCA Act and complementary State and Territory laws, the NCA can also exercise powers under other Commonwealth statutes—most importantly, the *Crimes Act 1914*, the *Customs Act 1901*, the *Taxation Administration Act 1953* and the *Telecommunications (Interception) Act 1979*.

Brief summary of the functions and powers of the NCA

The following account of the NCA's functions and powers is taken from the NCA website. It mentions the organisation's special (coercive) powers which are available when the NCA is conducting a special investigation authorised at Ministerial level. Under its statute, the NCA is also empowered to conduct general investigations. General investigations can be undertaken at the NCA's own initiative, can involve the use of statutory powers, such as the power to request information from Commonwealth agencies but cannot involve the use of coercive powers.

Under its governing Acts, the charter of the NCA is to investigate complex organised crime on a national basis and to collect, analyse and disseminate relevant criminal

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information and intelligence. It also has important law, policy and administrative reform functions. The NCA does not conduct prosecutions. It collects admissible evidence and provides it to the appropriate prosecuting authority, which then decides whether or not to proceed.

To facilitate its task, the NCA has been entrusted with special powers beyond those given to any police service. These special powers, which are similar to those available to a number of other statutory bodies, include the power to obtain documents and other evidence, and to summons a person to appear at a hearing to give evidence under oath. The 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. The Authority regards the exercise of these powers as one of its most important responsibilities.¹²

The NCA's capacity to conduct hearings and its powers have been enhanced since its establishment. Recent amendments include the creation of the position of hearing officer, the restriction of immunities available to a person who is required to answer questions at an NCA hearing, and the ability of the NCA to authorise controlled operations and the use of assumed identities.

Further details of the NCA's powers and functions can be found in the Main Provisions section of this Digest.

Australian Bureau of Criminal Intelligence

The ABCI was established in 1981 as the result of an Intergovernmental Agreement entered into by Commonwealth, State and Northern Territory Police Ministers. Its purpose is to facilitate the exchange of criminal intelligence between Australia's law enforcement agencies. It provides law enforcement with services in four main areas: analysis, information technology, policy and training services.¹³

A Board of Control consisting of all Australian Police Commissioners oversees the activities of the ABCI. The Board also 'determines appropriate policies, procedures and methods for governing the ABCI's activities'.¹⁴

Amongst other things, ABCI maintains the Australian Criminal Intelligence Database (ACID). Six Australian police forces use ACID as their 'intelligence repository for local and national intelligence'.¹⁵ Subsection 12(2) of the NCA Act provides that in performing its functions, the Authority shall cooperate and consult with the ABCI. NCA task forces use the ABCI central database as a repository and for intelligence sharing. The ABCI also produces an annual *Australian Illicit Drug Report*. The NCA's most recent annual report remarks:

The NCA also provided information for the ABCI's annual Australian Illicit Drug Report.

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The NCA moved to develop closer working relationships with the Office of Strategic Crime Assessments ...

Office of Strategic Crime Assessments (OSCA)

OSCA is located in the Criminal Justice Division of the Attorney-General's Department. The NCA describes OSCA as follows:

OSCA was established in 1995 to provide the Commonwealth Government with strategic assessments of significant crime trends and criminal threats to Australia, likely to emerge within 5 years. The other main function of OSCA is to facilitate the coordination of intelligence assessment activities within Commonwealth law enforcement.

OSCA also manages a strategic 'indications and warnings' system for the law enforcement community. This system coordinates collection and warning on specified issues to assist policy decision makers. The systems depends on information provided by agencies, and the synthesis and analysis of this information.¹⁶

Commonwealth, State and Territory Agreement on Terrorism and Transnational Crime

In the press release accompanying the Government's 2001 election policy, *A Safer and More Secure Australia*, the Prime Minister said:

One difficulty the Commonwealth has in effectively fighting transnational crime and terrorism is that these crimes may not be strictly federal offences. The present scope for AFP officers to investigate State offences is limited and the only way that the Commonwealth can intervene is through referral of an investigation to the National Crime Authority. However, this referral process is a complex co-operative scheme which can be very time consuming in commencing investigations, making it difficult to deal with modern national and transnational crime syndicates effectively.

The *Safer and More Secure Australia* policy foreshadowed a Commonwealth-State Summit on Transnational Crime and Terrorism to be held in March 2002 and indicated that the Commonwealth would seek outcomes on:

Ways to improve Australia's ability to combat transnational crime and terrorism;

Options for reforming or replacing the National Crime Authority to ensure we have a national body fully equipped to deal with future transnational criminal activities;

A reference of constitutional power to the Commonwealth to support an effective national response to threats of transnational crime and terrorism.

On 21 December 2001, following the return of the Coalition Government in the 2001 General Election, the Attorney-General and the Minister for Justice and Customs announced that former Australian Federal Police Commissioner, Mick Palmer and former

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Attorney-General's Department Secretary, Tony Blunn would conduct a review of the NCA.

Various reasons have been advanced for the review and the Government's desire to reform or replace the NCA. These include NCA support of a controlled heroin trial for dependent users, Government concerns about some NCA activities (for example, in relation to the John Elliott case), concerns that the mechanism for referring matters to the NCA is unnecessarily complex and time consuming and fears that the current NCA structure is unsuited to tackle the links between organised crime and terrorism.¹⁷ Some commentators expressed puzzlement about reported Government plans to confine the NCA to an intelligence gathering and priority setting role given the fact that its powers have been enhanced in recent years.¹⁸ For instance, legislation has been passed creating a new office (of hearing officer) to conduct NCA hearings, adding to the offences that can be investigated by the NCA if they are carried out in the course of organised criminal activity, restricting the immunity available to witnesses at NCA hearings, enabling the NCA to authorise and participate in controlled operations and permitting the NCA to authorise the use of assumed identities.

The Palmer-Blunn report was submitted to Cabinet on 23 January 2002¹⁹ but was not made public. However, one newspaper described it as presenting three options for consideration:

... a reconstructed NCA that would have an expanded role in strategic intelligence, a cut-down NCA limited to the use of its coercive powers without responsibility for intelligence, and the preferred option—the abolition of the NCA and its replacement by an Australian Crime Commission with the AFP playing a leading role.²⁰

On 10 March 2002, the Minister for Justice and Customs denied reports that the Government was proposing to merge the NCA and the AFP.²¹

The Prime Minister, Premiers and Chief Ministers met to discuss transnational crime and terrorism on 5 April 2002. The communique they released contained the following agreement:

7. To strengthen the fight against organised crime it is agreed to replace the National Crime Authority (NCA) with an Australian Crime Commission (ACC) that builds on the important features of the NCA for effective national law enforcement operation in partnerships with State and Territory police forces whilst removing the current barriers to its effectiveness.
8. The ACC to be focussed on criminal intelligence collection and establishment of national intelligence priorities.
9. The ACC to have access to taskforce investigative capability to give effect to its intelligence functions and to support its overall operations. The ACC to include the Office of Strategic Crime Assessments and the Australian Bureau of Criminal Intelligence.

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10. The Board of the ACC to include representatives from all States and Territories. Ministerial oversight will be retained by having the Board report to an Intergovernmental Committee of State and Commonwealth Ministers.

11. To streamline the process for obtaining investigation references.

12. The ACC will retain the capacity to use coercive powers and to investigate criminal activity of national significance.

13. Other details to be settled by mutual agreement with the new body to come into operation by 31 December 2002.²²

In July 2002, the States are reported to have rejected the Commonwealth's model for an ACC. Disagreement appears to have centred on funding, staffing, whether the ACC would have an operational capability or be an intelligence gathering body, and the effectiveness of the new organisation.²³ It was also speculated that the Secretary of the Attorney-General's Department would chair the ACC Board and concerns were expressed that such an arrangement would make the ACC an arm of the bureaucracy rather than a body independent of the Executive Government.²⁴

However, on 9 August 2002, a further agreement was reached between the Commonwealth, States and Territories to give the ACC greater powers and about issues of funding and governance.²⁵ Minister for Justice and Customs, Senator Chris Ellison said:

The Commonwealth and the States and Territories have reached final agreement on all outstanding issues. Now that the principles have been agreed all efforts will be focused on implementation. ...

The ACC will be more streamlined than the NCA and will bring a national focus to criminal intelligence collection and coordination. The fact that the Board will comprise the heads of law enforcement agencies means that it provides a framework for cooperation and coordination of our national law enforcement effort not previously known in Australia.

Contrary to some press reports, these negotiations have been vital to ensure that Australia gets the best possible result.²⁶

Preparation for the transition

In other action taken by the Government, the position of the ACC's Chief Executive Officer has been advertised²⁷ and an implementation team has begun preparing for the transition of the NCA to the ACC:

Mr Simon Overland has been seconded to the [Attorney-General's Department] from his position as the Chief Operating Officer of the AFP, to work as the Implementation Project Manager responsible for overseeing the transition to the ACC. Mr Overland is leading an implementation team which includes representatives of the NCA, ABCI and OSCA.

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The Implementation Project Manager reports to a Steering Committee chaired by Mr Ian Carnell of [the Attorney-General's Department], and comprising four State Police Commissioners and the Chairman of the Australian Securities and Investments Commission (ASIC). The Steering Committee met for the first time on 11 June 2002.

Several working groups have also been established, under the auspices of the Implementation Team, to formulate administrative and operational structures of the new organisation.²⁸

The Government has also appointed an acting Chair and an acting member of the NCA whose appointments will expire on 31 December 2002, the day before the proposed Australian Crime Commission Establishment Act commences. Further details about these appointments can be found in the Main Provisions section of this Digest.

Reference to the Parliamentary Joint Committee on the National Crime Authority (PJC)

On 26 September 2002, the Australian Crime Commission Establishment Bill was referred to the PJC for consideration and an advisory report by 6 November 2002.²⁹ The PJC is established by the NCA Act. Among other things, its functions are to monitor and review the performance of the NCA and inquire into and report on NCA-related matters referred to it by the Parliament.³⁰

Main Provisions

The Main Provisions section of this Digest is structured so that the current statutory regime for the NCA can be compared with proposals for reform contained in the Australian Crime Commission Establishment Bill 2002. Current legislative provisions contained in the NCA Act are described first, followed by a description of the regime proposed by the ACC Bill.

Functions of the NCA and proposed functions of the ACC

National Crime Authority Act 1984

At present, the NCA's functions are to:

- collect, analyse and disseminate criminal intelligence and information
- conduct investigations into 'relevant criminal activity'. When conducting general investigations into 'relevant criminal activity' the NCA can exercise certain powers, like making requests to Commonwealth agencies for information. However, it cannot use its coercive powers, for example to summon witnesses and require them to answer

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questions and produce documents unless a matter has been referred to it at Ministerial level (see below).

- establish and coordinate task forces to investigate ‘relevant criminal activity’
- conduct special investigations³¹ into ‘federally relevant criminal activity’³² after a matter has been referred to it either by the Commonwealth Minister (after consulting with the Inter-Governmental Committee) or by a State Minister or Ministers (with the approval of the IGC).³³ Special investigations can involve the use of the NCA’s coercive powers.
- exercise powers and functions conferred by State law
- keep the Commonwealth Minister informed about the general conduct of its operations and provide information at the Minister’s request about references the Commonwealth Minister has made under section 13 of the Act³⁴
- provide information to State Ministers who are members of the IGC, in certain circumstances—for instance, when the State Minister requests information about NCA operations in the performance of its general functions ‘being operations conducted within the jurisdiction of that State’³⁵
- report to the IGC, including provision of the findings of any special investigations it conducts. If those findings include information which, if published, would prejudice personal safety or reputation or the operations of law enforcement agencies, then the information cannot be disclosed to the IGC but must be included in a separate report to the referring Minister (either the Commonwealth Minister or the relevant State Minister).³⁶
- provide information and reports to the Parliamentary Joint Committee on the NCA. This information includes information about investigations that have been conducted by the NCA and information about the general conduct of NCA operations.³⁷
- provide an annual report to the IGC. The IGC then provides the report, together with any comments it wants to make, to the Commonwealth Minister and State and Territory Ministers from participating jurisdictions.³⁸

‘Relevant criminal activity’, a concept referred to above, is activity involving a ‘relevant offence’ against Commonwealth, State or Territory law. The concept of ‘relevant offence’ encapsulates a statutory definition of complex organised crime. The investigation of complex organised crime is one of the NCA’s core functions.

A ‘relevant offence’ involves 2 or more offenders, substantial planning and organisation and the use of sophisticated techniques involving serious³⁹ criminal behaviour such as theft, fraud, tax evasion, illegal drug dealing, extortion or violence. As a result of subsection 4(2) of the NCA Act, the Authority can also investigate offences it suspects

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may be directly or indirectly connected with a ‘relevant offence’, despite the fact that such offences are not ‘relevant offences’ per se.

Australian Crime Commission Establishment Bill 2002

The proposed functions of the ACC are found in **new section 7A (Schedule 1)** of the Bill) and are to:

- collect, correlate, analyse and disseminate criminal information and intelligence and maintain a national database
- undertake intelligence operations when authorised by the ACC Board and report to the Board. An ‘intelligence operation’ is defined as ‘the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity’.⁴⁰ The ACC Board will authorise all intelligence operations—both those operations where the ACC can use powers like requesting information from Commonwealth agencies, and those operations that the Board has determined to be ‘special operations’, during which coercive powers can be used.⁴¹ The process for determining that an operation is a special operation is set out below.
- investigate federally relevant criminal activity when authorised by the ACC Board and report to the Board. As with intelligence operations, the Board must authorise all investigations—both those general investigations where the ACC can exercise powers like requesting information from Commonwealth agencies and those investigations that the Board has determined to be ‘special investigations’, during which coercive powers can be used.⁴² The process for determining that an operation or investigation will be a special operation or investigation is described below.
- provide strategic criminal intelligence assessments to the Board and advise on national criminal intelligence priorities
- undertake other statutory functions conferred on it.

Some of these functions flow from the proposed merger of the NCA with ABCI and OSCA. However, the ability of the ACC to conduct special intelligence operations involving the use of coercive powers is new.

The ACC will continue to investigate complex organised crime. However, the expression ‘relevant offence’ currently found in the NCA Act will be replaced with the concept of ‘serious and organised crime’. The definition of ‘serious and organised crime’ is substantially the same as the definition of ‘relevant offence’ (see previous section) but it adds ‘firearms’ and ‘cybercrime’ to the list of criminal behaviour that can fall within the ambit of organised crime.

There are also changes to subsection 4(2) of the Act (**item 29 of Schedule 1**). They enable the ‘head of an ACC operation/investigation’ (rather than, as at present, the Authority) to

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investigate an offence suspected of being directly or indirectly connected with the commission of a 'serious and organised crime', although the offence is not a serious and organised crime per se. The Explanatory Memorandum comments that, 'As with the NCA, this enables the ACC to pursue its functions without artificial boundaries being established surrounding the definition of offence'.⁴³

Establishment and governance

National Crime Authority Act

The Authority consists of a Chair and at least two other members.⁴⁴ The Chair must be a judge, former judge or lawyer of at least 5 years standing.⁴⁵ If the Chair is a judge then his or her appointment is part-time. Other members are full-time officeholders.⁴⁶

The Chair and members are appointed by the Governor-General. The appointment of one of the members must accord with a unanimous recommendation of the Commonwealth Attorney-General and the Attorneys of participating States and Territories.⁴⁷ One other member is appointed on the unanimous recommendation of the Commonwealth, State and Territory police ministers.⁴⁸

The Chair of the NCA has a number of statutory functions and powers. For instance, he or she is responsible for the management of the Authority in accordance with policies and directions issued by the Authority (section 46A).

The Chair can also call meetings of the Authority, presides at those meetings and has both a deliberative and a casting vote (section 46).

Additionally, as a member of the NCA⁴⁹, the Chair can exercise the statutory powers of a member—such as issuing summons and notices to produce documents and conducting special hearings involving the use of coercive powers, like requiring witnesses to answer questions.

The Chair is empowered to provide information to law enforcement agencies that comes into the possession of the NCA and which relates to the commission or possible commission of offences.⁵⁰ He or she can also pass on information relevant to security to ASIO and can pass on information in certain circumstances to foreign law enforcement agencies.⁵¹

Some of the Chair's powers are delegable—for instance, he or she can delegate, to a member or staff member, the power to provide information to law enforcement agencies about the commission or possible commission of an offence.⁵² The power to revoke a non-disclosure directive made by the Authority under subsection 25(9)⁵³ can be delegated to a member, as can the Chair's power to direct that a person who has been required to supply documents to the NCA can have their attendance expenses paid.⁵⁴

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Until recently, the Chair of the NCA was Gary Crooke QC. Mr Crooke was senior counsel assisting the Fitzgerald Inquiry in Queensland and the Wood Royal Commission into the NSW Police Service and has been a President of the Australian Bar Association and a Vice-President of the Law Council of Australia.⁵⁵ On 17 September 2002, the Government announced that Phillip Bradley had been appointed to act as Chair of the NCA. Mr Bradley is currently Commissioner of the NSW Crime Commission. His previous experience included working for the Stewart Royal Commission and the Commonwealth Director of Public Prosecutions.⁵⁶

A former member of the NCA, Marshall Irwin, whose term expired in 2002 had previously been Deputy Director of Public Prosecutions in Queensland and later a General Counsel to the Queensland Criminal Justice Commission. On 28 August 2002, the Government announced that Mr Irwin had been replaced by Rosemary Davey as an acting member of the NCA. Ms Davey is a barrister who has been 'regularly briefed by the South Australian and Commonwealth Directors of Public Prosecutions and has also acted for the National Crime Authority'.⁵⁷ The other member of the NCA is Jim Bennett, a former Deputy Senior Crown Prosecutor for NSW.⁵⁸

Australian Crime Commission Establishment Bill

Item 35 of Schedule 1 repeals section 7 of the NCA Act (which establishes the Authority) and substitutes a new section which replaces the NCA with an Australian Crime Commission made up of a Chief Executive Officer (CEO), examiners and staff members.

The CEO is appointed by the Governor-General after the Commonwealth Minister has invited the ACC Board to make nominations and has consulted members of the Inter-Governmental Committee (**new section 37**). The CEO is a full-time office holder.

Chief Executive Officer of the ACC

The CEO will be responsible for the day-to-day management of the ACC in accordance with policy and directions issued by the ACC Board [**new section 46A(1)**]. He or she will also sit on the ACC Board and can sit on its committees but is unable to exercise voting rights or be counted for the purpose of a quorum (see **item 9** and the provisions inserted by **item 35 of Schedule 1**).

The CEO will also be responsible for coordinating ACC operations/investigations and may decide which examiners conduct special operations and investigations [**new subsections 46A(2) & (3)**].

Additionally, some powers and functions presently exercisable by the Chair of NCA will be transferred to the CEO. These include the power to revoke a non-publication order made in a hearing/examination [**new subsections 25A(10) & (11)**], pass relevant information to law enforcement agencies and foreign law enforcement agencies (**item 274**), and to pass information relating to security to ASIO (**items 283-285**). The CEO will

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also be able to pass on information to Commonwealth, State and Territory agencies prescribed by regulation (**item 274**).

The appointment, terms and conditions of the CEO are discussed below under 'Administrative provisions' (below).

ACC Board

The ACC Board is established by **new subsection 7B(1)**. The Board will consist of the AFP Commissioner (who will also be the Chair), the Secretary of the Attorney-General's Department, the CEO of Customs, the Chair of the Australian Securities and Investments Commission, the Director-General of ASIO, the Police Commissioners of each State and the Northern Territory, the Chief Police Officer of the ACT and the CEO of the ACC. In other words there will be six Commonwealth members on the Board (one of whom, the CEO, is a non-voting member and one of whom, the AFP Commissioner, will be the Chair and able to exercise a casting vote) and eight State and Territory representatives (who will all be police commissioners).

Functions of the Board set out in **new section 7C** include:

- determining national criminal intelligence priorities
- giving strategic direction to the ACC and determining its priorities
- authorising the ACC to conduct intelligence operations or investigate federally relevant criminal activity
- determining which operations and investigations will be special operations/investigations and thus subject to the use of the ACC's coercive powers
- deciding who will head an ACC special operation or investigation
- establishing task forces
- distributing strategic criminal assessments
- reporting to the Inter-Governmental Committee on the ACC's performance, and
- performing any other functions conferred by the Act.

With the consent of the IGC, Board members can attend and participate in IGC meetings (**item 37 of Schedule 1**). (A similar provision is found in existing subsection 8(9) of the NCA Act whereby the Chair and other members of the Authority can attend IGC meetings if the IGC agrees.)

Other functions of the Board can be found elsewhere in the Bill. For instance, a State law can confer certain functions and powers on the ACC (**item 228**) and on the CEO, an examiner or ACC staffer. However, neither the ACC nor the officeholder can exercise

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functions or powers under State law involving an investigation or intelligence operation unless the ACC Board consents. Under existing subsection 55A(3) of the NCA Act a State law cannot confer an investigative function on the Authority unless the State Minister refers the matter, the IGC approves and the Commonwealth Minister consents.

Functions of the Chair of the Board

The powers and functions of the Chair of the ACC Board (the AFP Commissioner) include:

- convening meetings of the Board. There must be at least two meetings per calendar year and the Board must meet according to a schedule that it determines [**new subsections 7D(1)-(3)**].
- preside at Board meetings (if present). In the absence of the Chair another ‘eligible Commonwealth Board member’ must preside. Eligible Commonwealth Board members are the AFP Commissioner, the Secretary of the Attorney-General’s Department, the CEO of Customs, the Australian Securities and Investments Commission Chair and the Director-General of Security. [**new subsection 7E & item 9 of Schedule 1**]
- exercise both a deliberative and, if necessary, a casting vote at meetings [**new subsection 7G(2)**]
- keep the Commonwealth Minister informed about the general conduct of the ACC and provide him or her with information about specific matters if requested to do so. The Chair must not provide the information if he or she considers that its publication could prejudice safety, reputation or the operations of law enforcement agencies [**new subsections 59(1) and (2)**, inserted by **item 253**].
- provide information to a State Minister who is an IGC member about ACC conduct in the performance of its functions where ‘that conduct occurred within the jurisdiction of that State’. Once again, the information must not be supplied if the Chair of the Board considers that its publication could prejudice safety, reputation or the operations of law enforcement agencies [**new subsections 59(1A) and (2)**, inserted by **item 253**].
- provide information to the IGC including information about ACC operations and investigations. Where the information is a report on the findings of special operations or investigations then the Chair of the Board must not supply the information if its publication could prejudice safety, reputation or the operations of law enforcement agencies. In such a case, the Chair of the Board must prepare a separate report and present it to the Commonwealth Minister. (see, in general, **items 254-263**)
- provide information to the PJC about the general conduct of the ACC’s operations and information about an operation or investigation that has been conducted by the ACC

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[with the same caveats as above but with an appeal mechanism to the Minister similar to that in existing subsections 59(6C) & (6D)] (**items 265-273**), and

- provide an Annual Report to the IGC. The IGC then transmits that report, together with any comments that it wants to make, to the Commonwealth Minister and Ministers in participating jurisdictions. (**items 293-295**)

Item 253 in particular appears to make some significant changes to the provision of information to Commonwealth and State Ministers. For example, under the NCA Act, the Authority must provide the Commonwealth Minister with information about the NCA's operations relating to a special investigation reference made by the Commonwealth Minister when the Commonwealth Minister requests it to do so.⁵⁹ However, under the amendments proposed in the Bill if the Commonwealth Minister requests specific information about the ACC's activities, the Chair of the Board must comply unless he or she considers that the disclosure of information to the public could prejudice safety, reputation or the operations of law enforcement agencies.⁶⁰ The Explanatory Memorandum explains:

This is an important safeguard on the disclosure of information, places all Ministers on an equal footing and recognises the changed role that Ministers now have in relation to the conduct of the ACC.⁶¹

A question that might be asked here is whether some of the amendments sit comfortably together—for instance, the ability of the Chair of the Board to refuse to pass on certain information to the Commonwealth Minister under **new subsection 59(2)** because of its potentially prejudicial character and the provisions in **amended subsections 59(6C)-(6D)** which enable the PJC to refer to the Commonwealth Minister requests for information that the Chair has denied it because that information is potentially prejudicial.

Item 287 repeals existing section 59A of the NCA Act which enables the Chair to delegate certain of his or her powers to members, SES employees and, in some cases, staff members. **New section 59A** will enable the CEO to delegate 'to a member of the staff of the ACC who is an SES employee, or an acting SES employee, all or any of the CEO's powers or functions under this Act'. Normally, where an Act confers a power of delegation, the powers that can be delegated do not include the power to delegate.⁶²

Oversight

External scrutiny of the NCA occurs via the Commonwealth Minister, State and Territory Parliaments, the Inter-Governmental Committee, the Parliamentary Joint Committee on the National Crime Authority and the Ombudsman. Reporting requirements and provisions enabling NCA records to be inspected are found not only in the NCA Act but in other pieces of Commonwealth legislation, such as the *Crimes Act 1914* and the *Telecommunications (Interception) Act 1979*.

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Descriptions of the IGC, PJC and annual reporting requirements under the NCA Act appear below.

National Crime Authority Act

Inter-Governmental Committee

The most recent NCA Annual Report describes the IGC in the following terms and gives an idea of how it works in practice:

The NCA is accountable to Commonwealth, State and Territory Ministers responsible for administering its legislation through the Inter-Governmental Committee (IGC) which is chaired by the Commonwealth Minister for Justice and Customs. It provides the legal and political basis for the NCA's multi-jurisdictional investigations.

The IGC is responsible for generally overseeing the work of the NCA and establishing its overall investigative priorities. It determines the NCA's priorities by authorising relevant State and Territory Ministers to issue references which allow the NCA to undertake special investigations utilising its special powers. The Commonwealth Minister may also issue references after consulting with the IGC.

...

As well as the consideration of references, the IGC monitors the work of the NCA and receives reports from it. The Committee is also consulted regarding the NCA's Annual Report. During the year a number of reports on NCA activities, including those on national task forces, were provided to the Committee. In addition, at its meetings during the period, the IGC considered a number of issues of importance to organised crime investigations such as national consistency of legislation, a national approach to civil forfeiture of proceeds of crime, the development of uniform national legislation regarding outlaw motor cycle gangs, and other law reform matters.⁶³

The IGC is established under section 8 of the NCA Act. It consists of the Commonwealth Minister, and a Minister from each participating State and Territory nominated by the Premier or Chief Minister of that jurisdiction. Its functions and powers include:

- being consulted by the Commonwealth Minister when he or she proposes to make a section 13 reference to the NCA.⁶⁴ These are references enabling the Authority to investigate 'federally relevant criminal activity' using its special coercive powers.
- deciding whether approval should be given for a reference to be made to the NCA under section 14 when a State Minister or Ministers wants such a reference to be made.⁶⁵ These are references enabling the Authority to investigate 'federally relevant criminal activity' that involves offences against State law. Once again, coercive powers can be used in these investigations.

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- considering whether approval should be given for a reference to be made to the Authority under State law so that the Authority can investigate relevant criminal activity (other than federally relevant criminal activity)⁶⁶
- creating additional offices of NCA member when the NCA is conducting a special investigation. Once such a resolution is made advice to the Governor-General must be consistent with the recommendation.⁶⁷
- monitoring the work of the NCA⁶⁸
- requesting and receiving reports from the NCA⁶⁹
- approving (together with the Commonwealth Minister) NCA members exercising concurrent functions under State laws⁷⁰
- approving the issuing of Ministerial guidelines to the NCA in relation to ‘particular cases’,⁷¹
- recommending the appointment of persons as hearing officers. Hearing officers are appointed by the Governor-General but the appointments must be consistent with a unanimous recommendation by the Inter-Governmental Committee, and⁷²
- receiving an annual report from the NCA. The IGC can comment on that report.⁷³

Other IGC functions and powers are contained in the NCA Act. For instance, the IGC is empowered to consider and approve requests originating from the NCA for a matter to be referred to the NCA for investigation.⁷⁴ And, a State law which confers investigative functions on the NCA will not be effective without a referral from the State Minister, IGC approval and the consent of the Commonwealth Minister.⁷⁵

Parliamentary Joint Committee on the National Crime Authority

Section 53 of the NCA Act provides for the establishment of a Parliamentary Joint Committee on the National Crime Authority. Five of its members are appointed by the Senate and five by the House of Representatives.

The duties of the PJC are set out in section 55 of the NCA Act and include monitoring and reviewing the NCA's performance, reporting to Parliament about the NCA, commenting on its annual report, and recommending changes to the NCA's functions, structure, powers and procedures. The PJC must also be briefed by the Ombudsman at least once a year about the NCA's involvement in controlled operations (section 55AA). Additionally, under section 59 of the NCA Act, the PJC can obtain information relating to an NCA investigation or the general conduct of NCA operations, unless the information would endanger personal safety, reputation or the operations of law enforcement agencies. In such cases, the PJC can refer the request to the Commonwealth Minister [subsections

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59(6A)-(6D)]. The PJC can also report on information provided to it under section 59 [subsection 55(3)].

Annual Report

Section 61 of the NCA Act requires the Authority to provide an annual report to the IGC, for transmission to Commonwealth and State Ministers. Subsection 61(2) sets out what the report must contain—including, a description of matters referred to the NCA for investigation during the year, information about patterns of criminal activity, recommendations for legal and policy change, and any prosecutions resulting from NCA investigations. Subsection 61(6) requires the Minister to table a copy of the report in Parliament, together with any comments made by the IGC on the report.

Australian Crime Commission Establishment Bill

Inter-Governmental Committee

Under the Bill, the Inter-Governmental Committee is retained and its membership is unchanged, but its functions and powers are re-written. **New section 9** provides that its functions are to:

- generally monitor the work and oversee the strategic direction of the ACC and its Board
- receive reports from the Board and transmit them to Governments represented on the ICG, and
- carry out any other functions conferred by the Act.

At present, if the Commonwealth Minister wishes to give directions or issue guidelines to the Authority about ‘particular cases’, the IGC must approve [subsections 18(1) and (2)]. The amendments provide that if the Commonwealth Minister wishes to issue guidelines or give directions to the ACC Board about ‘particular ACC operations/investigations’, then the IGC must approve (**item 61**). It is not clear whether there is any substantive difference in the expressions, ‘particular cases’ and ‘particular ACC operations/investigations’.

Parliamentary Joint Committee

The amendments relating to the PJC made by the Bill are consequential on the replacement of the NCA with an ACC and with changes in statutory functions. Thus, the Parliamentary Joint Committee on the National Crime Authority will be renamed the Parliamentary Joint Committee on the Australian Crime Commission.

Existing subsection 55(2) of the NCA Act ensures that the oversight and information gathering powers of the PJC do not extend to the PJC itself conducting an investigation of a ‘relevant criminal activity’. The Bill extends the ACC’s functions to include conducting criminal intelligence operations. As a consequence, subsection 55(2) is amended to ensure

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that the powers of the PJC do not extend to the PJC itself undertaking an intelligence operation (**item 222**).

Annual Report

Consequential changes to the annual reporting requirements found in section 61 are made by **items 293-295 & 297-307**.

Item 296 repeals paragraph 61(2)(a) which presently provides that the annual report must contain a description of the matters referred to the Authority for investigation. The replacement subsection reproduces the requirement that the annual report describe special investigations conducted during the year but does not impose similar requirements in relation to special intelligence operations.

Making decisions about special investigations and special operations

Special investigations are those investigations relating to federally relevant criminal activity that can be carried out under the NCA Act using coercive powers akin to those exercised by a royal commission. These powers include the power to summon witnesses to NCA hearings and require them to give sworn answers and produce documents.

As stated earlier, in addition to special investigations, the Bill will enable the ACC to carry out special operations. A special operation is an intelligence operation during which the ACC can exercise special (coercive) powers. An 'intelligence operation' is defined as 'the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity' (**item 15**).

National Crime Authority Act

As stated earlier, the NCA Act enables special investigations to be undertaken by the NCA if either the Commonwealth Minister has referred the matter, following consultation with the IGC or, where a State Minister/s wants a special investigation to be undertaken, with the approval of the ICC. There is no reference to 'special operations' in the NCA Act.

The NCA Act provides that decisions of the Inter-Governmental Committee can be made either by holding a meeting or passing a resolution (without a meeting being held). In general questions are decided by a majority of votes.⁷⁶ However, where the Inter-Governmental Committee approves a reference for a special investigation by a State Minister or Ministers, the representative of the State/s concerned must also vote in favour of the resolution.⁷⁷

Before approving a reference to the NCA, the IGC must consider whether ordinary police methods of investigation are likely to be effective.⁷⁸

Notices referring matters to the NCA for special investigation must:

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- describe the general nature of the relevant circumstances or allegations, and
- state, at least in general terms, that the relevant offence/s are offences against Commonwealth, State or Territory law, and
- set out the purpose of the investigation [subsections 13(2) and 14(2)].

Australian Crime Commission Establishment Bill

The Bill empowers the ACC Board to issue a written determination that an operation or investigation will be a special operation or investigation (enabling coercive powers to be used). Before approving a special operation, the Board must consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers under the Act ‘have been effective’ [**new subsection 7C(2)**]. Similarly, before issuing a written determination authorising a special investigation the Board must consider whether ‘ordinary police methods of investigation are likely to be effective’ [**new subsection 7C(3)**].

In addition to being in writing a determination made under **new subsections 7C(2) or (3)** must:

- describe the general nature of the circumstances constituting the ‘federally relevant criminal activity’, and
- state at least in general terms that the serious and organised crime involved involve offences against Commonwealth, State or Territory law, and
- set out the purpose of the operation or investigation [**new subsection 7C(4)**].

Further, a decision must be taken to make such a determination and can be made in one of three ways. First, under **new subsections 7C(2) or (3)**, an ACC meeting can vote in favour of making the determination [**new subsection 7G(4)**]. At least 9 of the Board members, including at least 2 eligible Commonwealth Board members (excluding the CEO who cannot vote at Board meetings⁷⁹) must vote in favour.

Second, voting can occur without a Board meeting taking place if the question is referred to all Board members. In this case Board members can resolve by phone or some other means of communication that a special operation or investigation should be established (**new section 7J**). Once again, at least 9 Board members, including at least 2 eligible Commonwealth Board members (excluding the CEO⁸⁰) must support the resolution.

There is a third way in which approval can be given for a special investigation or operation—if the Board unanimously confers this function on a committee composed of at least 2 eligible Commonwealth Board members [**new subsections 7K(1) & (4)**]. In such a case, any decision by the committee that an investigation or operation is a special investigation/operation must be a unanimous one [**new subsection 7K(8)**].⁸¹

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Hearings/examinations—procedures

National Crime Authority Act

At present, section 24A of the NCA Act gives the NCA the power to hold a hearing when conducting a special investigation. Hearings can be either:

- conducted by a member (including the Chair) of the NCA (section 25), or
- conducted by a hearing officer, when directed to hold a hearing by the NCA Chair under paragraph 24A(b) (section 25A).

In general terms, the same procedures apply to hearings irrespective of whether they are conducted by members (under section 25) or by hearing officers (under section 25A).

Australian Crime Commission Establishment Bill

Under the new arrangements proposed for the ACC, sections 24A, 25 and 25A are repealed (**items 118-120**). Instead of ‘hearings’ conducted by NCA members or hearing officers there will be ‘examinations’ conducted by examiners. **New section 24A** empowers examiners to conduct examinations for the purposes of a special ACC operation or investigation. **New section 25A** sets out procedures for the conduct of examinations.

For the most part, **new section 25A** is modelled on existing section 25A. For instance, examinations are held in private, a person giving evidence at an examination may be legally represented, an examiner may direct that evidence or documents obtained are not disclosed and, if the interests of justice require it, evidence obtained from a person can be passed on to a court conducting a criminal trial of that person.

Hearings/examinations—powers and penalties

National Crime Authority Act

For the purposes of a hearing before the Authority or a hearing officer:

- a member can summon a person to give evidence and produce documents⁸²
- sworn evidence may be required⁸³
- a member can, by notice, require a person to produce a document.⁸⁴ Failure to comply renders the person liable to a maximum fine of \$2,000 or 5 years imprisonment.⁸⁵
- a member can prohibit disclosure of the summons or notice, with disclosure making the person liable to a maximum fine of \$2,000 or imprisonment for one year⁸⁶
- a witness required to answer questions or produce documents can make use of a limited privilege against self-incrimination. That apart, failure to attend a hearing when

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summoned or answer questions or produce documents makes the person liable to a maximum fine of \$20,000 or imprisonment for 5 years.⁸⁷

- an application can be made by or on behalf of the NCA to a superior court judge for an arrest warrant if it is believed, for instance, that a person issued with a summons has absconded or is likely to abscond⁸⁸
- it is an offence to give false or misleading evidence at a hearing—maximum penalty, imprisonment for 5 years or a fine of \$20,000⁸⁹
- it is an offence to hinder or obstruct a hearing—maximum penalty, imprisonment for 5 years or a fine of \$20,000.⁹⁰

Australian Crime Commission Establishment Bill

For the most part the amendments to Part II, Division 2 (Hearings) effect minor, consequential changes to the NCA statutory scheme. Additionally, some amendments replace dollar-amounts for fines with their equivalent in penalty units. These amendments will enable penalties to be increased in line with any changes to the penalty unit regime in the *Crimes Act 1914*.⁹¹

However, other amendments proposed by the Bill are more substantial. Thus, under the NCA Act power to summon a person to attend a hearing, give evidence or produce documents lies with a member of the NCA not with a hearing officer [see subsections 28(1) and 29(1)]. Under the amendments, these powers would be exercised by an examiner appointed under **new section 46B** (see **items 126 & 139**). Similarly, the power to place non-disclosure conditions on a summons currently lies with an NCA member (section 29A). The amendments give this power to an examiner (see **items 146, 147, 149 & 151**). Lastly, the NCA Act enables an application for an arrest warrant to be made ‘by or on behalf of the Authority’ to a superior court judge [subsection 31(1)]. The amendments provide that the application is made by an examiner (see **item 179**).

Other powers under the NCA Act/ACC Bill

National Crime Authority Act

Sections 19-24 of the NCA Act confer other powers on the Authority, its members and certain of its staff. For instance:

- a member may request, from a Commonwealth agency, information that is relevant to a general or special investigation being conducted by the Authority [subsection 19A(1)]
- a member may require a Commonwealth agency to provide information that is relevant to a general or special investigation being conducted by the Authority [subsection 20(1)]

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- a member or NCA staff member who is police officer can obtain a warrant in order to search for things relevant to a special investigation [subsection 22(1)], and
- a member can obtain an order from a Federal Court judge that a person's passport be delivered to the Authority if, for example, there are reasonable grounds for believing that a person who has been summoned to appear before the Authority and has relevant evidence intends to leave Australia (section 24).

Australian Crime Commission Establishment Bill

The powers listed above are retained under the amendments proposed by the Bill. Where presently exercisable by a member they are now exercisable by an examiner or by an ACC staffer who is also a police officer [in the case of powers under subsection 22(1)]. The provisions appear to apply to special and general operations in the same way as they now apply to special and general investigations. (see, for instance, **items 66-72, 74-75, 77-80, 82, 87, 89, 98, 99, 103-116 of Schedule 1**).

Administrative provisions

National Crime Authority Act

Administrative provisions found in Division 3 of Part II of the NCA Act cover the appointment, terms and conditions of the Chair of the Authority, members, staff and consultants.

The Chair, members and hearing officers can be re-appointed to their positions but the total period for which they can hold office is no more than 6 years (section 37).

'Direct or indirect' conflicts of interest must be disclosed 'as soon as possible' by members and hearing officers and mean that they cannot take part in relevant decision-making by the Authority (in the case of members) or in relevant hearings (in the case of hearing officers) (section 42).

The appointment of a member or hearing officer can be terminated by the Governor-General for misbehaviour, physical or mental incapacity. An appointment must be terminated if the member becomes bankrupt, if he or she engages in outside employment without Ministerial approval, is absent from duty for more than a specified amount of time or fails to disclose a conflict of interest [subsection 43(2)]. The appointment of a hearing officer must be terminated if he or she becomes bankrupt or fails to disclose a conflict of interest [subsection 43(2A)].

In addition to NCA staff who are engaged under the *Public Service Act 1999* and consultants, staff can be seconded to the NCA from the AFP, Commonwealth agencies and State and Territory police services, and counsel assisting can be appointed (sections 47, 48, 49, 50 & 58).

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Australian Crime Commission Establishment Bill

The ACC's CEO will be appointed by the Governor-General after the Commonwealth Minister has invited the ACC Board to make nominations and has consulted with the IGC. The CEO cannot hold office for more than 5 years. There is no provision for re-appointment. (**new section 37**).

The Bill's disclosure of interests provisions for the CEO and examiners are slightly different to those in the NCA Act. For instance, in relation to the CEO, **new section 41** provides that:

The CEO must give written notice to the Minister, and to the Chair of the Board, of all interests, pecuniary or otherwise, that the CEO has or acquires and that could conflict with the proper performance of the CEO's duties.

The grounds on which the Governor-General can terminate the CEO's appointment are found in **new section 44** and are similar to those in existing section 43 relating to NCA members, with the addition that unsatisfactory performance is also a ground of termination [**new subsection 44(3)**].

Examiners will be appointed by the Governor-General after the Commonwealth Minister has consulted with the IGC [**new subsections 46B(1) & (2)**]. A person cannot be appointed as an examiner unless they are a legal practitioner of at least 5 years standing. They cannot be appointed for any more than 5 years in total but can be appointed on a part-time or a full-time basis [**new subsections 46B(3)-(5)**].

Provisions relating to disclosure of interests and outside employment mirror those applying to the CEO (**new sections 46F and 46G**). Termination provisions are also similar except that there is no provision for the Governor-General to terminate an examiner's appointment on the grounds of unsatisfactory performance (**new section 46H**).

Consequential changes are made to staffing and related provisions by **items 199-210 & 212-215**.

Amendments relating to the conferral of functions, powers and duties under State law

Items 225-249 amend sections 55A-55C of the NCA Act. Sections 55A-55C were inserted into the NCA Act by the *National Crime Authority Amendment Act 2000* in response to the High Court's decision in *R v. Hughes*.⁹² That decision raised questions about whether a body like the NCA could perform functions or exercise powers under State law especially when those powers or functions are coupled with a duty or are coercive in nature.⁹³

The amendments provide that State laws can confer certain duties, powers and functions on the ACC, the CEO, examiners, ACC staff members, Federal Court Judges and Federal Magistrates. At present, these duties, powers and functions can be conferred on the Authority, members and Federal Court judges. The amendments extend the duties, powers and functions

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that can be conferred to undertaking intelligence operations relating to serious organised crime that involves offences against State law.

The NCA Act currently provides that a State law will not be able to effectively confer an investigative function on the Authority unless the State Minister refers a matter to the Authority, the IGC approves and the Commonwealth Minister consents [subsection 55A(3)]. Under **new subsection 55A(3)** the ACC cannot, under a State law, conduct an investigation or undertake an intelligence operation unless the ACC Board has consented. Further, the sorts of duties, functions and powers that are conferred by State law extend not only to the same kinds of duties, powers and functions that are conferred by the ACC Act but to duties, powers and functions ‘of a kind specified in regulations’ [**new subparagraphs 55A(2)(b)(ii) & 55A(4)(b)(ii) & 55A(5)(b)(ii)**].⁹⁴

Consequential amendments (Schedule 2)

The NCA is referred to in or given powers by a raft of other Commonwealth statutes. Schedule 2 of the Bill makes amendments to 21 Commonwealth statutes.⁹⁵ Some of these amendments are described below.

Crimes Act 1914

Under the *Crimes Act 1914* (the Crimes Act), a member of the NCA can authorise a controlled operation involving the investigation of a serious Commonwealth offence, where the investigation falls within the NCA’s purview [see, for example, paragraph 15J(2)(c) & subsection 15J(4) of the Crimes Act]. A controlled operation is an operation that may involve an otherwise unlawful activity, conducted by law enforcement officers, to obtain evidence of serious offences against Commonwealth law.⁹⁶

Items 5-23 of Schedule 2 of the Bill, amend the relevant controlled operations provisions of the Crimes Act. As a result, the CEO of the ACC and authorised SES employees of the ACC will become authorising officers for controlled operations purposes (**items 13 & 14 of Schedule 2**).

The Crimes Act requires the Chair of the NCA to give the Minister and the Ombudsman a quarterly report on decisions to grant or refuse controlled operations certificates [subsection 15R(2) & section 15UA]. This function will be performed by the CEO of the ACC (**items 20 & 24-25**).

An annual report must also be provided to Parliament by the Commonwealth Minister about controlled operations. However, if on the basis of information provided by the NCA Chair, the Minister considers that publication of particular information is likely to endanger a person’s safety or compromise an investigation or prosecution, then the Minister must exclude that information from the annual report (section 15T). The Bill replaces the reference to the NCA Chair with a reference to the CEO of the ACC (**item 22**).

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The Crimes Act enables the NCA to authorise and use assumed identities. The ACC will exercise this power (**item 28 of Schedule 2**).

Customs Act 1901

The *Customs Act 1901* (the Customs Act) enables an NCA member or staff member who is also a police officer to apply for a listening device warrant in order to pursue narcotics inquiries (section 219B).

The Bill amends the Customs Act so that the CEO of the ACC, an examiner or a staff member who is also a police officer can apply for a listening device warrant (**item 38 of Schedule 2**).

Financial Transactions Reports Act 1988

Section 16 of the *Financial Transactions Reports Act 1988* (FTR Act) enables a cash dealer⁹⁷ to report information to the Director of AUSTRAC⁹⁸ about transactions that might be relevant to the investigation or prosecution of a Commonwealth offence or to the enforcement of proceeds of crime legislation. Such information (FTR information) can also be communicated to a member or staff member of the NCA.

Section 27 of the FTR Act enables the NCA to have access to FTR information. Where the NCA obtains such information it can be communicated in an anonymised form to the IGC and the PJC and may be divulged in the course of a hearing or to a law enforcement agency.

Items 41-76 of Schedule 2 amend the FTR Act. The amendments enable the CEO, an examiner or an ACC staff member to obtain FTR information. The amendments also provide that the CEO can relay the information, in an anonymised form, to the Chair of the ACC Board. The Chair may then communicate it to the IGC and the PJC. The CEO can also divulge the information to an examiner who may divulge it in the course of an examination. An examiner or a staff member can pass the information to a law enforcement agency.

The amendments also delete paragraphs 27(15)(c) and (d) of the NCA Act which provide that information can be communicated to:

- (c) a barrister or solicitor appointed by the Attorney-General to assist the NCA;
- (d) a person assisting a barrister or solicitor so appointed. (**item 74**).

The Explanatory Memorandum does not appear to comment on these deletions.

National Crime Authority Legislation Amendment Act 2001

Items 78-83 preserve the review of the 2001 amendments to the NCA Act which is mandated by *National Crime Authority Legislation Amendment Act 2001*. The review is to be carried out by a person appointed by the Commonwealth Minister who will examine

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the operation of provisions that remove the defence of reasonable excuse, abolish derivative use immunity and increase penalties for non-compliance.⁹⁹

Taxation Administration Act 1953

The *Taxation Administration Act 1953* (TAA) enables the Commissioner of Taxation to give the NCA information for the purposes of a tax-related investigation. The Bill enables the information to be given to the CEO of the ACC (**items 129 & 130**).

Section 3D of the TAA provides that a member or acting member of the NCA can obtain a judicial order requiring the Taxation Commissioner to supply him or her with information that is relevant to a special investigation being conducted by the Authority. Amendments proposed by the Bill (**items 132-146**) will mean that the applicant for the order and the recipient of the information will be the CEO. The Bill provides that information may be required for special operations purposes as well as for special investigations.

Under existing subsections 3D(11)-(22) of the TAA information obtained from the Taxation Commissioner can be disclosed and used in certain ways. The Bill amends the relevant provisions so that, for instance, information obtained by the CEO can be disclosed to an examiner conducting an examination under Division 2 of Part II, the ACC and, by the Chair of the ACC Board, to the ICG.

Telecommunications (Interception) Act 1979

Under the *Telecommunications (Interception) Act 1979* (TI Act) a member of the NCA or a staff member who is also a police officer can apply for and obtain an interception warrant in order to investigate certain types of offences.

The Bill amends the TI Act so that the CEO, an examiner or an ACC staff member who is also a police officer will be able to apply for and obtain an interception warrant (**item 214**).

References to the ABCI

Schedule 2 also removes references to the ABCI in several statutes (for example, **items 39, 40, 43 & 55**).

Transitional amendments

Items 308-326 of Schedule 1 are transitional amendments. For instance, they provide that when the legislation commences, an NCA hearing officer will be taken to be appointed as an examiner. Transitional provisions will also apply to NCA consultants, NCA legal practitioners. The amendments will also continue references made to the NCA, duties, powers and functions conferred by State laws on the NCA, secrecy obligations and the PJC.

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Contingent amendments (Schedule 3)

A *Proceeds of Crime Act 2002* has recently been given Royal Assent. That Act proposes a number of amendments to the NCA Act. **Part 1 of Schedule 3** will amend the *Proceeds of Crime Act 2002* if section 3 of that Act commences before 1 January 2003. However, if section 3 of the *Proceeds of Crime Act 2002* commences on or after 1 January 2003, then the amendments in **Part 2 of Schedule 3** will apply.

Concluding Comments

The Bill proposes some significant changes to the governance, oversight and operations of the NCA. Among the debating points that might be raised about the amendments are:

- will the size of the proposed ACC Board (13 voting members¹⁰⁰) mean that its powers and functions, including the endorsement of special operations and investigations, are likely to be delegated to committees? In this regard, will the requirement that a committee consist of ‘at least two eligible Commonwealth Board members’ lead to more efficient decision-making or will it concentrate power, including the power to approve the use of special coercive powers, in the hands of too few people? Does the fact that a Board decision to delegate its powers to a committee must be a unanimous one ensure that a committee will be composed of a sufficient number of members with a range of experience and interests?
- what are the implications of making the Director-General of Security an ACC Board member?
- what are the implications of and need for provisions enabling the ACC to conduct special operations involving the collection of criminal intelligence using coercive powers?
- what are the implications of the ACC being directed and its special operations/investigations being authorised, not by an IGC composed of Commonwealth, State and Territory Ministers as is currently the case for the NCA, but by a Board chaired by the AFP Commissioner and including 8 other police commissioners? Will the ACC effectively become an arm of police services with coercive powers not generally available to police?
- is it appropriate to give examiners the powers currently exercised by members of the Authority—such as the power to issue summons and notices to produce documents?
- are accountability and reporting mechanisms adequate? For instance, under the NCA Act, the Authority must provide the Commonwealth Minister with information about the NCA’s operations relating to a special investigation reference made by the Commonwealth Minister.¹⁰¹ However, under the amendments proposed in the Bill if

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the Commonwealth Minister requests specific information about the ACC's activities, the Chair of the Board must comply unless he or she considers that the disclosure of information to the public could prejudice safety, reputation or the operations of law enforcement agencies.¹⁰²

Endnotes

- 1 The functions of the ABCI and OSCA will be subsumed by the ACC.
- 2 For example, the 1973 NSW Royal Commission into Organised Crime in Clubs (headed by Justice Moffit); the 1977 NSW Royal Commission into Drug Trafficking (headed by Justice Woodward); the 1977 Australian Royal Commission of Inquiry into Drugs (established by the Commonwealth, Victorian, Tasmanian, Western Australian & Queensland Governments and headed by Justice Williams); the 1980 Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (established by the Commonwealth and Victorian Governments and headed by Mr Frank Costigan QC); the 1981 Royal Commission of Inquiry into Drug Trafficking (established by the Commonwealth, NSW, Victorian & Queensland Governments and headed by Justice Stewart).
- 3 Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, p. 3.
- 4 *Report of the Review of Commonwealth Law Enforcement Arrangements*, AGPS, Canberra, February 1994, p. 329.
- 5 It was repealed by the *National Crime Authority Act 1984*.
- 6 National Crime Authority, *Annual Report 1984-85*, AGPS, Canberra, 1986.
- 7 See: *Report of the Review of Commonwealth Law Enforcement Arrangements*, op.cit.
- 8 Senator Gareth Evans, Second Reading Speech, National Crime Authority Bill 1983, *Senate Hansard*, 10 November 1983, p.2492 (check).
- 9 Senate Standing Committee on Constitutional and Legal Affairs, *Report. National Crime Authority Bill 1983*, AGPS, Canberra, 1984, p. 35.
- 10 See, for example, the Williams Royal Commission, the Costigan Royal Commission and the Stewart Royal Commission quoted in the Green Paper, *A National Crimes Commission?*, June 1983. The issue of whether there should be a separate body like the NCA was also considered by the Report of the Review of Commonwealth Law Enforcement Arrangements, February 1994. The issue of co-location was discussed briefly in Senate Legal and Constitutional References Committee, *Order in the Law. The Report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority*, August 2001.
- 11 <http://www.nca.gov.au> (accessed 15 October 2002).
- 12 <http://www.nca.gov.au> (accessed 15 October 2002).
- 13 <http://www.missingpersons.info.au/abci.htm> (accessed 15 October 2002).

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- 14 National Crime Authority, 'Transition to the Australian Crime Commission', <http://www.nca.gov.au> and click on 'What's New' (accessed 15 October 2002).
- 15 Australasian Police Ministers' Council, *National Common Police Services Annual Report 2000-2001*, p. 56.
- 16 National Crime Authority, 'Transition to the Australian Crime Commission'.
- 17 See: for example, 'Editorial', *Sydney Morning Herald*, 2 November 2001; 'Crime fighter's mystery death', *The Age [Melbourne]*, 27 April 2002; 'Crime reform doesn't pay', *The Courier-Mail*, 20 July 2002; 'Staff exodus puts crime body at risk', *Sunday Age*, 21 July 2002; 'States revive crime fighting plan', *The Australian*, 29 July 2002.
- 18 See: for example, "'Disaster recipe" for crime fighting body', *Canberra Times*, 19 July 2001.
- 19 National Crime Authority, 'Transition to the Australian Crime Commission', 2002.
- 20 'PM's bid to break law agency', *The Weekend Australian*, 9 March 2002.
- 21 Minister for Justice and Customs, 'NCA/AFP merger ruled out', *Media Release*, 10 March 2002.
- 22 Commonwealth and States and Territories Agreement on Terrorism and Transnational Crime, Summit Communique, 5 April 2002. See also Minister for Justice and Customs, 'Ground-breaking Leaders Summit takes fight to criminal elements', *Media Release*, 6 April 2002.
- 23 'Successor to NCA will fail, say police', *Sydney Morning Herald*, 14 June 2002; 'NCA in warning to police ministers', *Sunday Age*, 14 July 2002; 'States to fight Fed strategy on crime', *The Courier-Mail*, 16 July 2002; 'Police minister's block nation's new crime fighter', *Sydney Morning Herald*, 18 July 2002, 'Police ministers reject crime-fighting model', *Canberra Times*, 18 July 2002; 'Crime reform doesn't pay', *The Courier-Mail*, 20 July 2002. See also, Minister for Justice and Customs, 'ACC on track', *Media Release*, 9 July 2002.
- 24 'States shape new crime body', *The Australian*, 11 June 2002; 'Top lawyer hits crime body rush', *The Courier-Mail*, 7 June 2002; 'States to fight Fed strategy on crime', *The Courier-Mail*, 16 July 2002.
- 25 'States agree to revised crime fighting body', *The Canberra Times*, 10 August 2002.
- 26 Senator the Hon. Christopher Ellison, 'Agreement reached on ACC', *Media Release*, 9 August 2002.
- 27 'Chief ad "too soon"', *The Australian*, 30 September 2002.
- 28 National Crime Authority, 'Transition to the Australian Crime Commission'.
- 29 See House of Representatives, *Hansard*, 26 September 2002, p. 7330.
- 30 Section 55.
- 31 The expression, 'special investigation', is defined as 'an investigation that the Authority is conducting in the performance of its special functions' [subsection 4(1), NCA Act]. 'Special functions' are conducting investigations, that can involve the use of coercive powers, when matters are referred at Ministerial level [subsection 11(2)].

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- 32 The concept of ‘federally relevant criminal activity’ was introduced into the NCA Act by the *National Crime Authority Amendment Act 2000*, itself a product of the High Court’s decision in *R v. Hughes* (2000) 171 ALR 155. The decision in *Hughes* centred on the extent to which Commonwealth bodies or officers can exercise powers in relation to State matters. ‘Federally relevant criminal activity’ will occur where there is a Commonwealth or Territory offence or where a State offence has a ‘federal aspect’.
- 33 Section 11.
- 34 Subsection 59(1).
- 35 See, for instance, subsections 59(1A) & (2).
- 36 Subsections 59(3)-(5).
- 37 Subsections 59(6A)-(6D).
- 38 Section 61.
- 39 It does not include offences which are punishable by less than 3 years imprisonment [paragraph (g) of the definition of ‘relevant offence’].
- 40 **Item 15 of Schedule 1.**
- 41 ‘Special operation’ is defined by **item 26 of Schedule 1.**
- 42 ‘Special investigation’ is defined by **item 26 of Schedule 1.**
- 43 Explanatory Memorandum, p. 7.
- 44 Subsection 7(2).
- 45 Subsection 7(9).
- 46 Subsection 7(5).
- 47 Subsection 7(7). The definition of ‘State’ in section 4 of the NCA Act includes the Australian Capital Territory and the Northern Territory.
- 48 Subsection 7(8).
- 49 ‘Member’ is defined in subsection 4(1) as ‘member of the Authority and includes the Chair’.
- 50 Subsection 59(7).
- 51 Subsections 59(11) & (12).
- 52 Subsections 59(7) & (8) and subsection 59A(1).
- 53 Subsection 59A(2).
- 54 Subsection 26(2) and subsection 59A(3).
- 55 National Crime Authority, *Annual Report 2000-2001*.
- 56 Attorney-General & Minister for Justice and Customs, ‘Acting Chair of the National Crime Authority’, *Joint News Release*, 17 September 2002.

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- 57 Attorney-General & Minister for Justice and Customs, ‘Acting member of the National Crime Authority’, *Joint News Release*, 28 August 2002.
- 58 National Crime Authority, *Annual Report 2000-2001*.
- 59 Paragraph 59(1)(b).
- 60 See **new subsections 59(1) & (2)** inserted by **item 253 of Schedule 1**.
- 61 Explanatory Memorandum, p.30.
- 62 Paragraph 34AB(b), *Acts Interpretation Act 1901* (Cwlth).
- 63 National Crime Authority, *Annual Report 2000-2001*, pp. 13, 20.
- 64 Paragraph 9(1)(b).
- 65 Paragraph 9(1)(c).
- 66 Section 9(1)(ca).
- 67 Subsections 7(8AA) and (8AB).
- 68 Paragraph 9(1)(e).
- 69 Paragraph 9(1)(f); subsections 59(1A)-(5).
- 70 Section 15.
- 71 Subsection 18(2).
- 72 Subsection 25A(2).
- 73 Section 61(1). The Annual Report is also provided to the Commonwealth Minister and the relevant Minister from each participating State and Territory.
- 74 Section 10.
- 75 Subsection 55A(3).
- 76 Paragraph 8(6)(d).
- 77 Subsection 9(3).
- 78 Subsection 9(2).
- 79 New subsection 7G(3).
- 80 New subparagraph 7J(1)(b)(ii).
- 81 Once again the CEO cannot vote if he or she is a member of a committee established by the Board.
- 82 Section 28.
- 83 Subsection 28(5).
- 84 Subsection 29(1). A notice can also be issued relating to a special investigation irrespective of whether a hearing is being held [subsection 29(2)]
- 85 Subsections 29(3) & (3A).

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- 86 Subsections 29A(1) & 29B(1).
- 87 Section 30.
- 88 Section 31.
- 89 Section 33.
- 90 Section 35.
- 91 Section 4AA of the Crimes Act presently sets the value of a penalty unit at \$110.
- 92 (2000) 171 ALR 155.
- 93 Section 55C of the NCA Act states that no Commonwealth law imposes an obligation on the Authority or a member to perform duties, functions or exercise powers that does not relate to a federally relevant criminal activity or that would be constitutionally impermissible.
- 94 See also **new subparagraphs 55A(5B)(b)(ii) & 55A(5C)(b)(ii)** relating to Federal Judges and Magistrates.
- 95 This number includes the *National Crime Authority Legislation Amendment Act 2001*.
- 96 Section 15H, *Crimes Act 1914* (Cwlth).
- 97 Cash dealers include financial institutions, currency dealers and insurers. See subsection 3(1).
- 98 The Australian Transaction Reports and Analysis Centre.
- 99 Section 4.
- 100 An additional member, the CEO of the ACC, is a non-voting member.
- 101 Paragraph 59(1)(b).
- 102 See: **new subsections 59(1) & (2)** inserted by **item 253 of Schedule 1**.

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