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No. 69 2003–04

Australian Crime Commission Amendment Bill 2003

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Australian Crime Commission Amendment Bill 2003

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Australian Crime Commission Amendment Bill 2003

Date Introduced: 4 December 2003

House: Senate

Portfolio: Attorney-General

Commencement: All but one of the provisions commence on the day on which the Act receives Royal Assent. Item 17 of Schedule 1 operates retrospectively from 1 January 2003.

Purpose

To make some minor amendments to the *Australian Crime Commission Act 2002* ('the ACC Act') to enable the Australian Crime Commission ('the ACC') to deal better with organised crime across State/Territory boundaries, particularly with offences committed under State laws.¹ The Bill seeks to address transitional issues which have arisen since the ACC was established on 1 January 2003. It also seeks to make some minor amendments to the *Administrative Decisions (Judicial Review) Act 1977* ('the ADJR Act') and the *Australian Postal Corporation Act 1989* ('the APC Act').

Background

The establishment of the ACC was a key initiative arising from the Commonwealth Government–State Summit on Transnational Crime and Terrorism held in Canberra in April 2002 'which resulted in agreement on a series of federal arrangements to support a new national framework for dealing with terrorism and transnational crime'.² The ACC replaced the National Crime Authority ('the NCA'), the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments. It is empowered to conduct criminal intelligence operations and to investigate federally relevant criminal activity and serious offences under State laws. A comprehensive background outlining the reasons for the establishment of the ACC, and the former roles of the bodies which merged to comprise it, is set out in the [Bills Digest](#) for the *Australian Crime Commission Establishment Act 2002* (Bills Digest No. 54 of 2002-2003).

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According to its [website](#), the ACC was established ‘to better position Australia to meet the threats posed by nationally significant crime’. Recent examples reported in the national press of the ACC’s involvement in addressing serious and organised criminal activity include measures to combat identity fraud³ and the seizure of nearly 800 key-ring-sized pistols in Sydney.⁴ There have also been calls for the ACC to use its coercive powers to halt the underworld carnage in Melbourne.⁵

According to the Explanatory Memorandum for the Bill, the proposed amendments ‘are necessary to ensure the proper functioning of the ACC under the cooperative legislative scheme’ established by the ACC Act. That Act ‘provides for the conferral of functions, duties and powers on the ACC under State legislation’ to enable it ‘to investigate, and conduct intelligence operations in relation to, serious organised crimes that are offences under State legislation’. The Bill is designed to overcome shortcomings in the practical operation of the ACC (which shortcomings became obvious after the commencement of the ACC Act).⁶

The Bill also seeks to amend the ADJR Act to exempt a person who makes certain decisions under the ACC Act from providing a statement of reasons for the decision (as is ordinarily required by section 13 of the ADJR Act).

The Bill also seeks to amend the APC Act to permit a current or former employee of Australia Post to use or disclose information or a document (acquired or received in the course of his or her employment) to the ACC under State laws.

Basis of policy commitment

As noted in the Background section of this Digest, the Government seeks to overcome deficiencies in the legislative framework under which the ACC operates. The amendments (and the legislation affecting the ACC generally) are part of the Government’s stance on law and order, and its national security agenda.

Position of significant interest groups/press commentary

There has been no press commentary or reports on the Bill.

Pros and cons

The main objectives of the Bill seem largely uncontroversial. While it might be said that the powers of the ACC impinge on civil liberties, the amendments largely seem only to give the ACC powers which it already had, or was intended to have, either under State law or in its former guise as the NCA etc.

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ALP/Australian Democrats/Greens policy position/commitments

There is no reference in the media or on the websites of the ALP, Australian Democrats or the Greens to the policy position or commitments of these parties to the Bill. On 8 January 2003, Mr Daryl Melham MP (then Shadow Minister for Justice and Customs) issued a news statement about the role of the ACC in tackling firearms, saying: ‘The Government knows that illegal guns are a real problem ... But while guns continue to flood across our borders, [the ACC] has barely got off the starting blocks because the Howard Government refuses to fund it properly’.⁷

Main Provisions

Clause 2 provides that each provision of the Act, except **Item 17 of Schedule 1** to the Bill, commences on the day on which the Act receives Royal Assent. Item 17 of Schedule 1 (which empowers the ACC to do anything which the NCA was empowered to do under the NCA Act) operates retrospectively from 1 January 2003.

Amendments to the ACC Act

Schedule 1 contains proposed amendments to the ACC Act.

Item 1 of Schedule 1 repeals section 15 of the ACC Act. Section 15 currently provides that examiners may exercise functions and powers under State laws concurrently with their responsibilities under the ACC Act, provided the Inter-Governmental Committee consents and the Minister [for Justice and Customs] is ‘satisfied that those functions or powers may conveniently be performed or exercised in conjunction with the performance or exercise by the ACC of its functions or powers’ under the ACC Act. An ‘examiner’ is appointed by the Governor-General and, under subsection 46B(3), must be enrolled as a legal practitioner for at least 5 years.

Section 15 was probably overlooked when the ACC Act was drafted. It probably ought to have been repealed when section 55A (‘Operation of State laws—investigation of offences against State laws’) was amended by the *Australian Crime Commission Establishment Act 2002* and is now effectively redundant. Section 15 was part of the earlier NCA regime in which the Inter-Governmental Committee had extensive powers of the sort currently exercised by the Board of the ACC. The Inter-Governmental Committee now only has a general oversight role, rather than authorising specific operations as it had done in the past. The repeal of section 15 may avoid inconsistencies in the performance of State functions and powers under sections 15 and 55A.

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If section 15 is repealed, then **subsection 55A(11)** of the ACC Act also needs to be repealed. That provision states: ‘This section does not limit section 15’. It is therefore meaningless if section 15 is repealed.

Item 2 of Schedule 1 amends subsection 43(1) of the ACC Act to provide that in addition to the current power of the Minister to suspend the Chief Executive Officer (‘the CEO’) of the ACC for unsatisfactory performance, the Minister will also be empowered to suspend the CEO ‘while allegations of misbehaviour against the CEO are investigated’. The Minister must provide a written notice of the suspension. Prior to any proposed suspension, the Minister must seek and consider advice from the Board of the ACC: subsection 43(1A).

Items 3 to 5 of Schedule 1 amend section 51 of the ACC Act. Section 51 is the secrecy provision of the ACC Act. It prohibits the making of records and disclosure of information ‘except for the purposes of [the ACC Act] or otherwise in connection with the performance of [duties under the ACC Act]’. **Item 3** of the Bill seeks to extend this exception to include activities done by specified persons (eg the CEO of the ACC or an examiner) under a ‘relevant Act or otherwise in connection with the performance of his or her duties under a relevant Act’. Likewise, paragraph 51(3)(a) currently permits certain persons to produce documents to a court⁸ or to divulge information to a court where production or divulgence is necessary to give effect to provisions ‘of this Act’. **Item 4** of the Bill seeks to extend this permission to cover production or divulgence of information where it is necessary to give effect to ‘a relevant Act’. **Item 5** inserts into subsection 51(4) a definition of ‘relevant Act’. That term means the ACC Act, or a State law ‘under which the ACC performs a duty or function, or exercises a power, in accordance with section 55A’ of the ACC Act.

Items 6 to 12 of Schedule 1 amend section 55A of the ACC Act. As mentioned above, section 55A gives ‘legislative consent’ to the conferral on the ACC, its Board, examiners, Federal Court judges and Federal Magistrates etc ‘certain duties, function and powers under State laws’. **Items 6 to 12** seek to extend the conferral of those duties, functions and powers to include ‘the Inter-Governmental Committee’ and ‘a member of the Board’. The ‘Inter-Governmental Committee’ is established by section 8 of the ACC Act and consists of the Commonwealth Minister and, in the case of each participating State, a Minister of the Crown of each State nominated by the State Premier. The proposed amendments seem to be a logical enumeration of the persons and bodies comprising or representing the ACC not already mentioned in section 55A.

Likewise, **Items 13 to 15** of Schedule 1 amend section 55B of the ACC Act to add ‘the Inter-Governmental Committee’ and ‘a member of the Board’ to the persons and bodies comprising or representing the ACC already mentioned in that provision. Section 55B provides that where the ACC etc is ‘investigating a matter relating to federally relevant criminal activity, or is undertaking an intelligence operation’, and the ACC has a choice between exercising powers conferred by the ACC Act or any other Commonwealth Act

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and those conferred by State laws, the ACC is not required to favour exercising powers under Commonwealth law.

Further, **Item 16** amends paragraph 55C(1)(b) of the ACC Act to extend the operation of that provision to ‘the Inter-Governmental Committee’ and ‘a member of the Board’. Section 55C provides that the ACC etc is not obliged to perform duties where the criminal activity under investigation is not a ‘federally relevant criminal activity’ or the imposition of the obligation would contravene any constitutional doctrine.

At face value, **Item 17** of Schedule 1 would appear to be the most contentious of all the proposed amendments, because it is intended to operate retrospectively. However, its purpose is to insert a new section 55D into the ACC Act to provide further transitional arrangements for the transfer of power and operations from the NCA to the ACC. This provision is deemed to have commenced on 1 January 2003 (when the ACC was established). It invokes the operation of section 25B of the *Acts Interpretation Act 1901* (which deals with the alteration of names and constitutions) to provide that where the NCA Act empowered the NCA to do a thing or deal with a matter, and there is a corresponding provision in the ACC Act for the ACC to do such a thing etc, then the NCA may do the thing under the ACC Act. In other words, section 25B of the *Acts Interpretation Act* operates to provide that the NCA ‘continues in existence under the new name’ of the ACC ‘so that its identity is not affected’: paragraph 25B(1)(a). Subsection 25B(2) operates to provide that the alteration of the NCA’s constitution does not affect any legal or other proceedings brought by or against the NCA before its name change. Also, the alteration does not affect any investigation or inquiry brought, or proposed to be brought, by any tribunal, authority or person (eg the Ombudsman) into the NCA.

According to the Explanatory Memorandum, **Item 17** also ‘honours an undertaking made to the Senate Standing Committee on Regulations and Ordinances [(‘the Senate Committee’)] by the Minister for Justice and Customs, to address through amendment to the ACC Act, the transition to the ACC of telecommunications warrants issued to the NCA’.⁹ While this issue is the subject of the *Australian Crime Commission Establishment (Transitional Provisions) Regulations 2003*, the Senate Committee was ‘uncomfortable’ that such a provision, with retrospective operation, was contained in delegated legislation.¹⁰

Amendments to the ADJR Act

Schedule 2 to the Bill amends the ADJR Act and the APC Act.

Item 1 of Schedule 2 to the Bill amends Schedule 2 to the ADJR Act. That schedule sets out the classes of decisions that are not decisions to which section 13 of the ADJR Act applies. Section 13 provides that where a person is aggrieved by a decision made under an enactment, he or she may in certain circumstances request that the decision-maker provide

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a written statement of reasons for the decision. **Item 1** seeks to add to the schedule a new class (“(ea)”) comprising certain decisions made under the ACC Act not already covered by the exemption applying to decisions ‘relating to the administration of criminal justice’ (enumerated in paragraph (e) of Schedule 2 to the ADJR Act). The amendment is drafted in similar form to other section 13 exemptions.

Amendments to the APC Act

Item 2 of Schedule 2 amends section 90J of the APC Act. Section 90J currently sets out the circumstances when a *current* employee of Australia Post may use or disclose information or a document acquired or received by the person in the course of his or her employment. These circumstances include disclosure under a Commonwealth law (such as the ACC Act) and disclosure to authorised ASIO officers. **Item 2** seeks to add **proposed subsection 90J(6A)** to the APC Act to provide that the employee may disclose the information or document as required under State law if the ACC is exercising a function or power under that law in accordance with section 55A of the ACC Act (see above).

Likewise, **Item 3** of Schedule 2 amends section 90LC of the APC Act. Section 90LC currently sets out the circumstances when a *former* employee of Australia Post may use or disclose information or a document. **Item 3** seeks to add subsection 90LC(6) to the APC Act, which provision is in the same terms as **proposed subsection 90J(6A)**.

Concluding Comments

This Bill does not seem to be controversial or to raise issues of contention. Its purpose is to overcome practical deficiencies in the operation of the ACC highlighted since the passage of the ACC Act.

Endnotes

- 1 The term ‘State’ is defined in section 4 of the ACC Act to include the Australian Capital Territory and the Northern Territory.
- 2 See http://www.pmc.gov.au/ar/2001-02/pdf/pmc_annual_report2001-02.pdf (p. 48).
- 3 Senator the Hon. Christopher Ellison, ‘New report reveals identity fraud as a billion-dollar threat’ (Media release E162/03), 12 November 2003.
- 4 Alex Mitchell et al, ‘Small but very deadly: Thousands of key-ring-sized pistols seized in raids’, *The Sun-Herald*, 16 November 2003, p. 5.

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- 5 Steve Barrett and Padraic Murphy, 'Bid to crack open underworld war', *The Australian*, 28 November 2003, p. 4, Padraic Murphy, 'Six on hit list, with a bullet', *The Australian*, 15 December 2003, p. 3, and Editorial, 'Criminal bloodletting could easily spill over', *The Australian*, 16 December 2003, p. 12.
- 6 Explanatory Memorandum to the Australian Crime Commission Amendment Bill 2003, p. 1.
- 7 Daryl Melham MP, 'Imported Pistols Make a Mockery of Howard's Gun Control Laws', *ALP News Statements* at: <http://www.alp.org.au/media/0103/20003335.html>, 8 January 2003.
- 8 The term 'court' is defined in subsection 51(4) of the ACC Act to include 'any tribunal, authority or person having power to require the production of documents or the answering of questions'.
- 9 Explanatory Memorandum to the Australian Crime Commission Amendment Bill 2003, p. 5.
- 10 Explanatory Memorandum to the Australian Crime Commission Amendment Bill 2003, p. 5.

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