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AGAINST THE NATIONAL INTEREST: A CRITIQUE OF THE FEDERAL GOVERNMENT'S PROPOSAL TO REPLACE THE NATIONAL CRIME AUTHORITY

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The abolition of the National Crime Authority (NCA) will create a serious gap in Australian crime fighting capacity. The Australian Crime Commission (ACC) as envisaged lacks two elements of the National Crime Authority that are essential to tackle and establish the facts about organised crime, namely:

- independence; and
- tight, efficient governance.

These are qualities required of a standing Royal Commission which is what the NCA is and the ACC will not be. The new commission will not be independent because it will be under the direct control of police commissioners and other law enforcement agencies which are themselves subject to substantial political direction.

It will not have effective governance because, unlike the NCA that basically is run by a chair and two other Board members, the new commission will be run by a large committee of all law enforcement agencies. It is as if the Government has completely forgotten the central messages of a string of Royal Commissions and other inquiries that have shown disturbing levels of corruption in law enforcement and other agencies of Government.

This paper explains how the changes would throw away characteristics that were seen as essential for the NCA. Effective crime fighting will be impeded by confused and fractured lines of responsibility between key office holders of the ACC. The lack of independence means that the new body will no longer have the credibility to back up its reporting functions of publicising information on the state of organised crime and recommending reform of the law and administrative practices.

The paper also examines in part D the reasons put forward by the Federal Government to justify its sudden about face in October 2001 from support of to opposition to the NCA. The reasons given are hollow.

The core one is that the change will improve co-ordination between law enforcement agencies and thus lead to more effective law enforcement. This is a case of blaming the NCA for a situation that has a existed apart from the NCA and which we can expect to continue under the new arrangements. There has been a long history of competition and jealousies between police services and other law enforcement

agencies around the country. They have not been able to establish priorities and co-ordinate resources as they should have. Placing a committee of them in the driver's seat of the ACC will extend those problems to the operation of the new body.

The Government also points to the cumbersome procedure to secure references for the NCA to exercise its coercive powers. This is another difficulty external to the NCA. Streamlined reference procedures could and should have been established without affecting the constitution of that body.

Gathering together on the Board of the ACC of the heads of ASIO, ASIC and Customs with other law enforcement agencies is the only element that can be said to justify another of the objectives put forward by the Government: the need to combat better the growth in the international dimension of organised crime and its links to terrorism. But again, putting a group of jostling agencies together in the Board room of the ACC is no more likely to produce a national approach to the problem than have other attempts in the past to improve co-operation between the same agencies.

The Government puts the ACC forward as a vehicle to get a group of law enforcement agencies that have never co-ordinated their efforts as well as they should to mend their ways. It is unlikely to achieve this. It will certainly mark the destruction of the Royal Commission-like independence and status of the NCA. Indeed, the hollowness of the reasons put forward by the Federal Government for the change feed a suspicion that elimination of that independence was intended.

The NCA with its grant of powers by state as well as federal legislation is one of the most important bodies to be established in the Commonwealth since federation. Its replacement will make for less effective law enforcement at a time when all admit that organised crime is even more challenging. Reasons advanced by the Federal Government for the change do not add up.

A. INDEPENDENCE

The ACC will not be independent because:

> (a) it will be subservient to existing law enforcement agencies by reason of its Board consisting of all police commissioners and the heads of several Commonwealth agencies and its chairman being the Commissioner of the Australian Federal Police (ACC Agreement August 2002 §4; sch 1, cl. 7B(2) ACC Bill 2002). In contrast, the Chair and other members of the NCA Board are specifically appointed by the Governor-General and, in the case of the other members, must be recommended by all relevant state and federal ministers (NCA Act s. 8);
>
> (b) the Chief Executive Officer or Director of the ACC will be "an individual with a strong law enforcement background" (ACC Agreement August 2002 §5 & ACC Bill second reading speech (2002)) rather than a judge or a legal practitioner of at least 5 years standing as s. 8(9) of the NCA Act requires the NCA Chairman (its CEO) to be. Most likely the CEO will be appointed from among the police forces and other agencies whose heads make up the Board and will look to employment from those same agencies at the end of his or

her tenure. Not only is the CEO required to follow instructions of the Board, he or she must please the Federal Minister who "may suspend the appointment of the CEO if the Minister is of the opinion that the performance of the CEO has been unsatisfactory" (sch 1, cl. 43(1) ACC Bill 2002). Indeed, the CEO's appointment may be terminated for the same reason (sch 1, cl. 44(3)). This is in contrast to the limited termination provisions of board members in the NCA Act (see e.g. s. 43) and a similar restricted provision applying to examiners in the ACC Bill (sch. 1, cl. 46H). The position of CEO is thus susceptible to influence unrelated to the performance of duties. This influence could come from both police and other law enforcement agencies and the Federal Minister.

(c) it will be subservient to the direction of governments through the political influence that Governments can exercise over various Board members. The means are various by which influence can be brought to bear by the political arm of government on different members of the ACC Board. For example, the Secretary of the Commonwealth Attorney-General's Department is a public servant subject to the directions of his federal political masters in most if not all aspects of his work. Mention has already been made of the power of the federal minister to suspend and (through the Governor-General) terminate the appointment of the CEO. By section 37 of the *Australian Federal Police Act 1979* the Minister may give binding directions to the Commissioner "with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police" and "in relation to the use of common services" with those of State police forces. The Federal Government has given a number of directions under this section. These are set out in the *2001 AFP Report* p. 12. They include, for example, directions on politically sensitive issues such as "providing an effective contribution to the whole-of-government approach to unauthorised arrivals" as well as "countering and otherwise investigating organised people smuggling" and "providing an effective contribution to the implementation of the Government's 'Tough on Drugs' strategy" as well as "countering and otherwise investigating illicit drug trafficking, [and] organised crime".

Apart from any formal power of direction, the high political profile that law and order issues assumes from time to time can bring police forces under sustained political pressure. For instance, Mr Ryan has identified 44 examples of political interference in the operation of the New South Wales Police that motivated his resignation as commissioner of that service (Williams (2002) pp. 318-19).

1. Why independence is essential

Independence is essential for any body expected to uncover facts about organised crime. This is because organised crime has huge resources at its disposal which enable it to use every manner of means – legitimate and illegitimate - to frustrate an investigation that threatens its lucrative activities.

(a) Financial muscle of organised crime

The size of the trade in illicit drugs, "currently the most lucrative commodities for organised crime in Australia" (NCA Commentary 2001, p. 20), gives an idea of the resources involved. In 1998 the Prime Minister described that trade as "an international, multi-billion dollar enterprise with its undisclosed and untaxed profits rivalled by few industries. Estimates of the size of the illicit drug trade range from US $300-$500 billion [in] the United States per annum" (Howard (1998)). Access Economics in 1997 estimated the annual turnover of the Australian illicit drug industry to be $7 billion (Access Economics (1997) pp. 14-18). The figure is probably much higher. A study by the University of Western Australia estimated that annual expenditure in 1995 on cannabis alone was $5.072 billion (Clements & Daryl, (1999)). The NCA makes the obvious point that profit is behind organised crime:

> "Profit drives organised criminals. The United Nations has assessed the global illicit drug trade as the third most profitable industry in the world, surpassed only by the oil and arms industries. Illegal immigration rackets worldwide are estimated to be worth $10 billion annually to organised people smuggling syndicates. In Australia, the total figure of crime related costs is estimated to be equivalent to about 4% of Gross Domestic Product (GDP), or $1,000 per capita, per annum" (NCA Commentary 2001, p. 15).

(b) Extent of corruption and other influence

The documentation associated with the ACC Bill does not acknowledge the extent that organised crime can influence existing official and other structures to produce outcomes favourable to it (ACC Bill second reading speech (2002) & ACC Bill explanatory memo (2002)). That organised crime has this capacity is already well known:

> (a) At one stage or another corruption has been recognised in almost every police force around Australia. The Royal Commission into whether there has been any corrupt or criminal conduct by Western Australian police officers and what is being revealed of corruption in the Drug Squad in Victoria are only the latest indications of this phenomenon. The Review conducted in 1993-94 of Commonwealth Law Enforcement Arrangements concluded that: "The continuation and growth of organised crime has been considerably assisted by corruption within law enforcement and other Government institutions" (CLER Report (1994) pp. 29-30 quoted in PJC (1998) §1.32). Recently a National Task Force code named Freshnet involved ". . . the investigation of organised criminal activities by established criminal networks in Australia. These networks are entrenched organised crime syndicates, which collectively exercise substantial criminal influence often facilitated by corrupt sources or access to confidential law enforcement information" (NCA Commentary 2001, p. 51, fn 44). The networks ". . . use this information and knowledge to impede investigations and prosecutions or to interfere with the legal process by intimidating witnesses. These features make it difficult for law enforcement to disrupt their activities. [Entrenched crime networks] therefore pose a threat to the integrity of, and public

confidence in, law enforcement agencies, prosecution authorities and the judiciary" (NCA *Annual report* (2000) p. 35).

(b) Instances of corruption at political levels have been documented or strongly suspected in Queensland (Fitzgerald (1989)) and New South Wales (Wood (1997) vol. 1, pp. 33-34) and there is a need for vigilance against its emergence in all jurisdictions.

(c) Independence is necessary to guard against influence and not just corruption. Politicians, courts and indeed a wide range of commercial, public and other legitimate avenues can be "used" by those with influence to prevent or side track an investigation. "Those who are the targets have much to lose and a great deal of money to employ in their defence" (Costigan (1984) vol. 1, p. 229). The Government itself acknowledged as much when it submitted a bill at the end of 2000 to enhance the powers of the NCA:

> "The Authority's task in investigating organised crime has been particularly difficult because of the way persons under investigation have manipulated existing legal rules and procedures to defeat the investigation. If a person refuses to answer a question in a hearing, it is possible for that refusal to be litigated through the courts, with delays of months or even years. In the interim, an investigation might be entirely frustrated, such that when proceedings are concluded and questioning can continue, the criminal trail has gone cold" (Campbell (2000) p. 21,028).

The Parliamentary Joint Committee that subsequently considered the bill noted particular cases where such delay had occurred (PJC (2001): §1.11, p. 3 & see PJC (1998) §§4.186-189).

As the AFP itself recognises, the investigation of corruption is "politically sensitive" AFP, *Annual report 2000-01*, p. 6).

The NCA itself has been vocal about the extent to which organised crime continues to corrupt and exert other influence to achieve favourable outcomes. Indeed, currently organised crime uses the sophisticated methods of risk assessment in its strategies to influence decisions:

> "We should never forget that institutions such as our Stock Exchange or superannuation funds do not escape the contemplation of organised crime as it considers its next foray. Organised crime does not stop short of offering large bribes to public officials. Usually such an offer will be many times the salary of the official. Whether or not it will try its hand in a particular case will often depend upon a sophisticated risk assessment, using methodology parallel to that developed by honest commercial best practice" (NCA Commentary 2001, p. 2).

The commentary that the NCA issued in August 2001 is replete with references to the extent of corruption:

> "In order to reduce the risk factors in their criminal ventures, some organised crime networks seek to corrupt public officials, including police. In some

> countries this has weakened the effectiveness of the State by eroding confidence in public officials, and by weakening the will of critical public institutions to be vigilant and effective against crime" (*ibid*., p. 16).
>
> "The NCA has long recognised that organised criminals in Australia will seek to corrupt Australian officials. Some ex-police and former civilian employees of law enforcement agencies have been linked to providing information about law enforcement methodologies to organised crime syndicates. The NCA has found during its operations repeated evidence that offenders use knowledge of law enforcement methodologies to evade detection and to frustrate investigators" (*ibid*., pp. 16-17)

The NCA was set up in 1984 as the equivalent of a standing Royal Commission. In the words of the Senate Standing Committee on Constitutional and Legal Affairs on the National Crime Authority Bill 1983:

> ". . . [I]ncreasingly over the last fifteen years, all Australian Governments have established various royal commissions to inquire into publicly notorious allegations of criminality and official corruption. The reports of these various commissions have resulted in a community perception that there are in Australia certain types of criminal activity that existing law enforcement structures are not equipped or able to prevent. There is also a perception that resort to transient royal commissions into publicly notorious allegations has not provided an adequate solution. These perceptions have led to calls for the establishment of a standing body capable of providing an effective national response to these types of criminal activity" (§§1.1-1.3, p. 1).

(c) Affirmations that NCA independence is vital

In this context, it was taken as a given that the new authority be independent. There has been debate on how to ensure this independence in the NCA's Act and how to achieve the best balance between independence and answerability and other values of our democratic and legal system but until now the core need for independence has been accepted by governments of all persuasions.

The Royal Commission of Mr Justice Stewart into drug trafficking noted in a chapter on the new body that: "It is accepted in Australia that a Royal Commission should be independent and non-political" (Stewart (1983) p. 783). "The commission should be," he wrote, "like a Royal Commission, an independent statutory body" (*ibid.*, p. 784). In marked contrast to the proposed ACC, he added that "The chairman should be a judge of a Supreme or the Federal Court. Permanent members of the commission, other than the chairman, need not be judges but it is thought that they should have legal qualifications and experience in court procedures. All permanent members should be appointed for a term of say five years . . ." (*ibid*.).

In the view of Mr Costigan QC who conducted the Royal Commission on the activities of the Federal Ship Painters and Dockers Union "any person holding the position of Chairman of a Crimes Commission must do so completely independent of any hope or promise which may be based on his performance in his job" (Costigan (1984) vol. 1, p. 218). He amplified the point in evidence he gave to the most recent evaluation by the Parliamentary Joint Committee of the NCA:

> "The position of Chairman was made non renewable for the quite simple reason that the holder of it should be seen to be in no way beholden to Government for possible advancement or preferment or other appointment by reason of the performance of his duties. Not only should the Chairman be squeaky clean, he *must be seen to be so*. It was always assumed that no appointment as Chairman would be made of a serving public servant for the very reason that on the termination of his term of office he would go back to the service. Likewise any offer or promise of any position, such as that of a judge, would offend the same principle" (PJC (1998) §7.14)

The potential influence that both the federal Minister and individual Board members would have over the continuing and future employment of the CEO of the ACC (see p. 2 above) is a gross infringement of the principle that Mr Costigan put forward.

In 1984 the then Liberal-National Party Opposition criticised the NCA Bill for not ensuring that the authority would be independent enough. It proposed amendments to:

- give the NCA authority to use its coercive power in the conduct of federal investigations without the need for a ministerial reference and to remove veto by a State of a reference that another state wished to make; and
- remove any power in Ministers to give directions, even if unanimous, on the ground that "any threat of political influence" should be removed (Sinclair (1984)).

The South Australian Commissioner of Police, Mr Malcolm Hyde, has declared that: "It is important to stress that appointment of the Chairperson can in no way be a political appointment as the Authority must be seen to be beyond political intervention" (PJC (1998) §7.17). "The South Australian Bar Association raised the need for NCA independence from police agencies and the belief that as a national body it should not be used by State police for their own ends" (*ibid.*, §1.76). The Parliamentary Joint Committee has recommended: "That the Chairperson of the National Crime Authority be a judge" (rec. 23, *ibid.*, §7.26).

(d) NCA as a Commonwealth anti-corruption watch dog

Compared to some Australian governments, the Commonwealth lacks a specific independent commission against corruption and with the abolition of the NCA will have no independent body capable of undertaking that role. The capacity of the new body to counter corruption is not even mentioned in the ACC Bill second reading speech (2002). For a number of reasons the Commonwealth Ombudsman and Auditor-General are poorly equipped to undertake that role. For one thing, inquiries of the Ombudsman are motivated by complaints from the public that are unlikely to surface when corruption is involved.

(e) To provide an national perspective to bear on organised crime

As a law enforcement body the NCA with its general functions (s. 11 NCA Act) and grant of inter-jurisdictional competence is in the unique position to take a national perspective on serious crime. Under those general functions it can, for example, seek references to use its coercive powers. Moreover the NCA under its

present charter can carry out investigations under references free from direction by external agencies. In contrast, because of its different management structure described below, the ACC will be sensitive to the competing priorities and trade-offs between the large array of law enforcement agencies that control it. It will be difficult for the ACC to take a truly national perspective.

B. TIGHT, EFFICIENT GOVERNANCE

The ACC will have a management structure unlike any organisation expected to investigate and expose serious crime. The NCA has a tight and efficient management structure under its Chair who, like a Royal Commissioner, has executive responsibility. Under the National Crime Authority Act 1984 the Board consists of the Chair and just two other members (s. 7). Additional members may be appointed only when because of work to do so "is necessary to enable the Authority to perform its functions" (s. 7(8AA)). The 2001 annual report of the NCA describes this tight management structure:

> "The Chairman, who is also the Chief Executive Officer, has responsibility for the day-to-day management and administration of the NCA. The Chairman and Members together determine NCA policy and the Members assist the Chairman in monitoring the implementation of these policies" (NCA *Annual report* (2001) p. 16).

In contrast, the ACC would have a complicated management structure with no clear lines of authority and some key positions being answerable to more than one superior:

> (a) The Board itself with 14 voting members plus the CEO as a non-voting member (ACC Agreement August 2002 §§4-5; sch. 1, cl. 7B ACC Bill 2002) is an unwieldy body that will be able to meet and give formal directions only occasionally;
>
> (c) Although "the CEO must manage the day to day administration of the ACC in accordance with the policy of, and any directions of the Board" (sch. 1, cl. 46A ACC Bill 2002) he or she is answerable to the Federal minister in that the CEO can be suspended or have his or her appointment terminated "if the Minister is of the opinion that the performance of the CEO has been unsatisfactory" (sch. 1, cls. 43(1) & 44(3));
>
> (d) For the same reason, the Minister's powers over the CEO cut across the Board's authority;
>
> (e) Although the CEO "must also co-ordinate ACC operations/investigations" (sch. 1, cl. 46A) the CEO does not have competence to conduct hearings involving the use of coercive powers. This must be carried out by examiners. As the explanatory memorandum explains:

> "While the CEO will be able to direct an examiner to participate in a special ACC operation or special investigation, the CEO will not have the power to direct the examiners as to whether or how those powers are to be exercised" (ACC Bill explanatory memo (2002) p. 2).

Of course, the reason for this managerial discontinuity lies in the placement of the ACC under police control rather than under independent appointees who are legally qualified and have senior status. The inability of the CEO to conduct hearings under the ACC Bill is as odd as the appointment of a someone to head an inquiry who is never allowed to attend a hearing.

(e) Each examiner "may regulate the conduct of proceedings at an examination as he or she thinks fit" (sch. 1, cl. 25A(1)) whereas under the NCA Act "The Authority may regulate the conduct of proceedings at a hearing as it thinks fit" (s. 25(3D)). This is a further indication of fragmentation of authority under the proposed ACC statute.

Under the ACC Bill the various lines of authority cross or are unclear and certainly do not devolve on any single person. In fair weather the ACC ship might well sail smoothly enough. The stress comes will come when the weather grows rough as it does do when getting close to powerful criminal groups. There is the real prospect that the ACC structure is unseaworthy and will founder in a storm.

In summary, the ACC would be neither a Royal Commission nor a police force: the ACC will be subject to governance by committee. This produces a body far less effective at exposing and fighting serious crime for the following reasons:

(a) there will be no single person with overall responsibility for fulfilling the statutory duties of the new commission;

(b) the board will consist of the heads of organisations that have not been able to achieve satisfactory levels of co-operation in the past; and

(c) the large number of agencies involved expands the possibilities for leakage of sensitive information about investigations.

Royal Commissions set up to investigate crime and police forces have united directive and managerial responsibility in one person. Tackling crime is much closer to conducting a military operation than running a commercial enterprise with its Board and separate CEO. This distinction is reflected in the structure of police forces around the country were authority resides in a commissioner, not a board. Police command structures may be flatter than they are in the military and there may be other bodies to guard against abuse (as indeed there are for the NCA) but, essentially, bodies involved in civil criminal investigation are organised on lines akin to those of the military.

1. Difficulties in achievement of co-operation between crime fighting agencies

Governments are right to be concerned to improve co-operation between law enforcement agencies across the Australian federation but this difficult task should not be achieved at the expense of destroying the NCA, the only inter-jurisdictional crime fighting body in the Commonwealth. Past attempts to get law enforcement

agencies to determine priorities and co-ordinate resources have often been frustrated by turf squabbles. This problem will now infect the operation of the new Commission.

The Stewart Royal Commission wrote that: "It appears clear . . . that total police effectiveness will never be obtained in Australia unless cooperation between the Australian Federal Police Force and the State forces is significantly improved" (Stewart (1983) p. 516). The Senate Standing Committee on Constitutional and Legal Affairs reported that:

> ". . . every royal commissioner who has reported on aspects of organised crime since Mr Justice Moffitt in 1974, has remarked upon various difficulties caused by the fragmentation of power and responsibility for law enforcement inherent in the Australian federal polity. . . . Regrettably, many royal commissioners have also been able to document disastrous consequences for law enforcement arising from the lack of co-operation between agencies. Indeed, Mr Justice Stewart in the latest report of his Royal Commission into Drug Trafficking observed that 'the higher one goes up the chain of command, the greater the tendency of what has been called the "territorial imperative" to operate. There is a compulsion to defend one's own turf against possible invaders'" (Senate Standing Committee on Constitutional and Legal Affairs (1984) p.3, §1.8-1.9).

In his final report on the activities of the Federated Ship Painters and Dockers Union Mr Costigan wrote that:

> ". . . policemen are very jealous of their sources, their informants and their intelligence. It is difficult to persuade them to operate as teams and to pool their information. The fear of losing control of such information is justified, from time to time, when through negligence or dishonesty the 'secret' information is shared with the criminal opposition" (Costigan (1984) §9.002, p. 159).

That inter-agency jealousies still exist is attested by the fact that the NCA itself has become caught up in them. It was hoped that the NCA with its inter-jurisdictional competence would improve co-ordination between agencies. It has probably done so but co-ordination between law enforcement agencies has continued to fall far short of what it should have. In 2001 Mr John Broome, former Chair of the NCA put it this way to the Federal Parliamentary Joint Committee:

> " . . . [T]he NCA has not reached the expectations of those who believed it would provide an effective vehicle to overcome the jurisdictional nightmare that is the result of our federal system in relation to the investigation and prosecution of serious criminal activity. There are many causes for this failure, some of which are constitutional (but not to the extent some suggest), some political and parochial, some attributable to the lack of resources, some due to inadequate legislation and policy paralysis at the National and State or Territory level and some to agency rivalries that governments have not been prepared to address" (Broome (2001a) §1.8).

To a Senate inquiry he affirmed that ". . . coordination and cooperation with both State and Federal agencies, which was expected to occur with the full cooperation of both sides, has never really been realised" (Broome (2001b) p. 2). There are ". . . those in other agencies who continue to oppose the existence of the NCA and any effective cooperation with it. There are staff in other agencies who would deliberately seek to prevent a successful operation. To some, *who* gets the result is more important than getting a result" (*ibid.*, p. 7).

The Standing Committee on Organised Crime and Criminal Intelligence (SCOCCI) was recommended in the Avery/Bingham Review of 1995 "as a replacement for the NCA Consultative Committee, a recommendation which was implemented when SCOCCI met for the first time in April 1996" (PJC (1998) §1.25). SCOCCI, which was made up of law enforcement agencies around the country, has been an attempt to co-ordinate "priorities and resources to be applied to national projects, particularly those of the NCA" and "to supervise the co-ordination of the criminal intelligence system in order to ensure the full exchange of intelligence in projects of potential interest to the [ministerial Inter-Governmental Committee] IGC" (PJC (1998) §5.30).

The 2000-01 annual report of the NCA describes the recent system of co-ordination in the following terms:

> "A Senior Officer Group (SOG) consisting of the Chief Executives of Commonwealth, State and Territory law enforcement agencies provides advice to the IGC on the broad priority areas for NCA investigations. After references have been agreed by the IGC and issued by Ministers, the NCA determines the relative priority of investigations in consultation with partner law enforcement agencies through a national coordination framework. Priorities are determined by considering factors such as the impact of the criminal activity, the cost-effective use of resources and the balancing of immediate results with long-term outcomes" (NCA *Annual report* (2001) p. 13).

The third evaluation of the NCA noted that in the case of SCOCCI the improve effectiveness and benefits that motivated its establishment "had not yet been fully realised" (PJC (1998) §1.27). It was disbanded because it was ineffective. Co-operation has been difficult between federal agencies as well as between State and federal ones.

In 2001 Mr Broome summed up attempts at co-ordination in the following terms:

> "Over the last decade there have been a number of attempts to put in place arrangements to identify law enforcement threats, identify available resources and enable the Government to determine priorities. There is a long history which includes the establishment of a committee consisting of the Heads of Commonwealth Law Enforcement Agencies (HOCOLEA), the establishment of the Commonwealth Law Enforcement Review (CLER), the establishment of the Commonwealth Law Enforcement Board (CLEB) and the Office of Strategic Crime Assessments (OSCA). None have provided the necessary

> framework. . . . Problems include agency rivalries, concerns about loss of influence, failure to consult agency heads and lack of government commitment to the process" (Broome (2001b) p. 20).

This history produces no confidence in the core assertion that the federal government has made to justify the structure of its proposed ACC:

> "The ACC will significantly enhance Australia's national law enforcement effort" the ACC Bill second reading speech (2002) asserts. "For the first time there will be a focus on national criminal intelligence and investigations and operations will be intelligence driven. It will be under the direction of a Board comprising the heads of the key Australian law enforcement agencies. Between them they are collegiately responsible for Australia's law enforcement and who better to set national law enforcement priorities. The ACC will significantly enhance law enforcement coordination and cooperation at the national level. It will complement rather than compete with existing law enforcement agencies."

The NCA was set up in 1984 as an important innovation in the Australian federation. As a standing royal commission separate from mainstream law enforcement agencies, governments around the country granted it inter-jurisdictional competences and coercive powers traditionally not given to police. Institutional rivalry was an obstacle to law enforcement up to 1984. It has continued since that time and, if only because of its existence with those competences and powers, the NCA has from time to time become caught up in that rivalry (Senate Legal and Constitutional Legislation Committee (18/2/02) p. L&C 30). The Federal Government's answer to the problem is to give all these jostling agencies a seat on the Board of the new crime commission and thus collective operational control of it. The NCA as a standing royal commission is sacrificed to the achievement of an objective that should be achieved by other means that governments should take and which will probably not be achieved by the method proposed.

Ultimate responsibility for law enforcement inadequacies rests not with the agencies concerned but with governments. The establishment of effective law enforcement arrangements to meet the challenges of economic integration, advances of technology and organised crime controlling unlimited resources is, of course, the responsibility of politicians, not the law enforcement agencies themselves. The principal obstacles to the achievement of the necessary co-operation and integration of law enforcement effort across a political and constitutional landscape drawn in the nineteenth century is a challenge that lies at the feet of politicians. However inadequate, the NCA, has been the boldest and most effective law enforcement measure that governments have so far taken to redesign that landscape. It should be consolidated, not eliminated.

Mr Broome wrote in 2001:

> "The role of the NCA as an investigative agency has been challenged but never changed since 1984. It continues to be challenged. Yet the critics propose no solution to the jurisdictional issues which would confront the AFP and State and Territory police services in dealing with sophisticated criminal

> activity that cross State, let alone national and international, boundaries" (Broome (2001b) p. 4).

2. Large number of agencies involved expands the possibilities for leakage of sensitive information about investigations

The large board of the ACC will make it more difficult to guard the security of operational information about investigations and this alone will reduce the operational efficiency of the new body. An ACC board consisting of 13 heads of external organisations will mean that 13 organisations will have potential access to highly sensitive information about criminal investigations. The potential for corrupt tip offs, public leakages and other impediments to effective investigation are magnified. The sort of thing that can happen is illustrated by the public leakage of sensitive summaries of investigations that the Royal Commission on the activities of the Federated Ship Painters and Dockers Union prepared as part of its hand over to the NCA. Mr Costigan, the Royal Commissioner, warned that that incident:

> ". . . raises in sharp contrast a major difficult in the operation of the Crime Authority. Such summaries are to be submitted to the Inter-Governmental Committee. This will mean their distribution to eight Governments, and their law enforcement agencies. Despite the precautions taken, my summaries found their way to the Press with only one Government involved. It seems inevitable that such a system will not be able to impose certain security on the transmission of such matters. This may well be a serious obstacle to the effective operation of the Crime Authority" (Costigan (1984) vol. 1, p. 58, §3.038).

Such a difficulty foreseen for the NCA is magnified by the proposed ACC management structure with the large Board's continuous access to operational information.

The net effect of the replacement of the NCA by the ACC will almost certainly be less effective law enforcement across the Commonwealth in relation to both domestic and transnational crime.

C. PUBLIC REPORTING AND RECOMMENDATORY FUNCTIONS

The compromised independence of the Australian Crime Commission and its governance by committee will make it far less likely that Parliaments and the public receive accurate information and recommendations that may be controversial.

Functions of a Royal Commission are to ascertain facts, expose them publicly and make recommendations to changes of law and procedures. Subject to safeguards for the protection of reputations in advance of actual prosecutions and the continuing conduct of investigations these functions are accorded to the NCA under its act. It is bound to make an annual report for public release. This should include "a description, which may include statistics, of any patterns or trends, and the nature and scope, of any criminal activity that have come to the attention of the Authority during that year in the course of its investigations" (s. 61(2)(b)) and "any recommendations for changes in the laws of the Commonwealth, of a participating

State or of a Territory, or for administrative action, that, as a result of the performance of its functions, the Authority considers should be made (s. 61(2)(c)). The Act gives the NCA specific authority to recommend to Federal and States ministers reform of laws and administrative practices (s. 12(3)).

These provisions are retained with little change in the ACC Bill 2002 but without an independent commission under tight governance they are emptied of their force and significance. The absence of any reference in the ACC Bill second reading speech (2002) to the public reporting functions reveals the lack of store that the Federal Government places on them.

1. NCA conceived as a standing Royal Commission with reporting functions

Throwing a light on corrupt and other criminal conduct was seen as a core role of a standing Royal Commission such as the NCA. Mr Justice Stewart urged that:

> "The object of the commission should be to make governments and the public aware of the existence and extent of activities of organised crime, to assemble material for the prosecution of conspirators and to make a public report at least annually" (Stewart (1983) p. 783).

He recommended "regular public reports on topics investigated" (*ibid.*) that would "educate the public" (*ibid.,* p. 785). He explained that:

> "An understanding in the community of what damage organised crime does and how organised crime can be attacked is of great importance to law enforcement in its efforts against organised crime. Furthermore it is unlikely that the public will support and assist the Crimes Commission unless it knows about the Crimes Commission's activities and understands how it can assist the Crimes Commission" (*ibid.,* p. 790).

In particular ". . . in its annual reports the commission should make known whatever statistical and factual material that is discovered about organised crime and it should also make recommendations for legislative improvements or improvements in administrative arrangements for the purpose of combating organised crime" (*ibid.,* p. 783 &, similarly, p. 786).

That Parliament did not accept the recommendations of both the Stewart and Costigan Royal Commissions (Stewart (1983) pp. 785 & 791& Costigan (1984) vol. 5, p. 156) to expose those involved in organised crime before their prosecution makes even more important the foregoing avenues of publicity.

The Senate Standing Committee on Constitutional and Legal Affairs that considered NCA Bill reaffirmed the importance of publicity about organised crime:

> "The Committee accepts the value of this requirement for comprehensive annual reporting with necessary safeguards to protect the fair trial, reputation or safety of individuals. Such reporting will be of considerable assistance in increasing parliamentary and public awareness of the extent and nature of relevant criminal activity, and of the manner in which the Authority is dealing

with it" (Senate Standing Committee on Constitutional and Legal Affairs (1984) p. 92, §8.14).

The committee drew particular attention to the value of what is now s. 61(2)(b) of the NCA Act 1984 to include in annual reports "a description, which may include statistics, of any patterns or trends, and the nature and scope, of any criminal activity that have come to the attention of the Authority during that year in the course of its investigations".

> "The effect of publicity by the Costigan Royal Commission and the McCabe LaFranchi Report was considerable in stopping the operation of particular schemes which were thriving in the absence of public exposure of their extent and illegality.
>
> "The Authority's annual report is one place where this type of scheme can be drawn to the notice of both the public and legislators and the Committee has already recommended that public sittings and bulletins may be used to alert the public. [Also] useful would be the opportunity for the Authority, at the conclusion of a particular reference, to be able to recommend tabling of its report on the reference in Parliament" (Senate Standing Committee on Constitutional and Legal Affairs (1984) p. 93, §§8.20-21).

The Senate Committee also endorsed the Royal Commission-like function of recommending reform of the law and administrative practices:

> ". . . [W]e are aware of the community expectation that the Authority should primarily concern itself with conducting investigations and gathering evidence which will result in the suppression of organised crime. If, as the result of performing that function, the Authority comes to the view that there is a need for some reforms in the law, administrative practices or the administration of the courts, it should so report" (*ibid*., p. 31, §3.36).

The most recent evaluation of the NCA by the Parliamentary Joint Committee described recommendation of law reform as one of the authority's "significant responsibilities" (PJC (1998) §1.6).

It goes without saying that the important powers of the NCA to publicise issues surrounding organised crime and to make recommendations for reform will be subverted if the organisation ceases to be independent or is structured in such a way that makes it unlikely that any controversial proposal is ever approved by its governing board. Thus, even if reproduced in the statute establishing the ACC, the effectiveness of the legislative provisions in the present NCA Act will be negated by the governing structure of the ACC. That will guarantee that issues that are controversial for political or other reasons will not command the necessary majority to see the light of day.

2. NCA Commentary of 2001 on the extent of organised crime as a case study

A commentary on organised crime issued by the National Crime Authority in August 2001 is a case study. It described in bleak terms the extent to which organised crime is penetrating Australia. It stated that "there is every indication that the reach of organised crime is growing. No field where large sums of money can potentially be

made escapes its gaze" (NCA Commentary 2001, p. 13). It referred to illicit drugs as "the most lucrative commodities for organised crime in Australia" The trade "centred on heroin, cocaine, cannabis and amphetamine-type substances, including MDMA (ecstasy)." The commentary outlined the suffering and other costs to the community associated with the trade and pointed to evidence, including the greater affordability of narcotics over the years that indicated that the problem was growing. It concluded "that the illicit drug trade continues to flourish in our country". Using heroin as an example, the authority estimated that law enforcement was seizing only about 12% that was being imported. There was, it added, "an observable trend towards increased involvement in drug trafficking and an ongoing preparedness of criminals to meet market demand for different illicit substances" (*ibid.*, pp. 19-22).

Against these pessimistic assessments, the NCA put forward the following proposals:

> "While unrelenting concentration should be directed towards apprehending those who traffic and profit from the misery and degradation of others, there is a need for strategies to be constantly reviewed. This is a field where the dynamics do not remain static. The risk and cost to the community may well mount to a point where different measures or a different concentration of measures should be considered. There are always balances to be struck. It does, however, seem safe to observe at this moment that there is hardly a household in Australia that does not have personal knowledge or experience of the evils of drug addiction and its associated effects.
>
> "This Commentary is not the appropriate place to rehearse different contentions in the long running public debate as to our drug problem. Suffice to say that experience should encourage us not to rule out consideration of new options or reconsideration of options previously deemed unpalatable. We must respond to the ongoing progression of this problem. Among the many measures worthy of consideration is to control the market for addicts by treating the supply of addictive drugs to them as a medical and treatment matter subject to supervision of a treating doctor and supplied from a repository that is government controlled.
>
> "Whatever steps are taken, the scale of the illicit drug problem and its onward progression is such as to demand the highest attention of government and the community - it simply is not a battle that can be won by law enforcement alone or in partnership with the health sector. A co-ordinated and holistic approach is required, building upon and updating the foundation already established" (*ibid.*, p. 23).
>
> In summary the NCA found that:
>
> - The supply of illicit drugs to the Australian community was growing in spite of all the efforts of law enforcement agencies;
> - The social problems associated with illicit drugs were huge and were growing;

- The point had been reached that the battle could not "be won by law enforcement alone or in partnership with the health sector" and that "a co-ordinated and holistic approach is required";
- "Among the many measures worthy of consideration is to control the market for addicts by treating the supply of addictive drugs to them as a medical and treatment matter subject to supervision of a treating doctor and supplied from a repository that is government controlled"; and
- The scale of the problem demanded the "highest attention of government and the community".

Politically, this was, of course a controversial set of assessments and recommendations in that they contradicted assumptions behind the Federal Government's "Tough on Drugs" policy and, in particular, appeared to endorse a trial of the medical prescription of heroin. Even so, the assessments and recommendations were clearly within the NCA's own charter.

Is it reasonable to expect that the new ACC will make such politically uncomfortable findings? The answer is "most unlikely". What is likely to happen is illustrated by the public response of the AFP to the NCA's commentary. The AFP, it will be recalled, is directed under its Act to "provid[e] an effective contribution to the implementation of the Government's 'Tough on Drugs' strategy" (AFP, *Annual report 2000-01*, p. 12).

Families and Friends for Drug Law Reform understands that the NCA commentary was cleared with all police hierarchies, including the AFP, before its issue. In spite of this, on Wednesday 8 August 2001, the day of issue of the NCA commentary, the Australian Federal Police itself issued a media release contradicting the commentary. In essence the AFP declared the NCA commentary did "not necessarily reflect the most recent statistics associated with the fight against illicit drugs" and affirmed that law enforcement was working. It pointed out that Australia was in the midst of a heroin drought particular to Australia and that "record seizures in recent weeks of cocaine and amphetamine type substances also point to the success of supply reduction strategies." The full text of the AFP media release is set out in Appendix B to this paper. On the basis of the AFP view, the Prime Minister told a radio audience the next day that "the Commissioner of the Australian Federal Police Mr Keelty should know what he's talking about . . . and he totally disagrees with the approach taken by the chairman of the National Crime Authority" (Howard (9/8/2001).

(a) The heroin drought

That the NCA commentary ignored the heroin drought is patently incorrect. The commentary included the following passage:

> "The economic principle of supply and demand governs how organised crime operates. The widely reported heroin shortage in Australia in the first months of 2001 illustrates the price fluctuations in the illicit commodity market directly related to supply fluctuations. Heroin is usually imported to Australia in 700g or 350g blocks. The price of 350g blocks during the financial year

> 1999/2000 was usually between $40,000 and $60,000. In March 2001, during the shortage, 350g units of heroin were reported in Sydney to be priced at between $90,000 and $100,000. History shows that the price of heroin in Australia is not steady and too much store cannot be placed upon what might prove to be a temporary fluctuation" (NCA Commentary 2001, p. 15).

Indeed, the Australian law enforcement community was aware that a heroin shortage was on the cards for reasons unconnected with law enforcement. In March 1999 the Director of the Office of Strategic Crime Assessments told a symposium that:

> "The analysis of the impact of trends in the Chinese heroin market on Australia indicates that the future of the heroin market in Australia may be influenced by changes in the Chinese heroin market. There is potential for the supply of heroin to Australia to be temporarily affected by significant increases in demand elsewhere, particularly in potentially large markets such as China. Such a temporary shortage could alter the dynamics of the local market by increasing the price of heroin, lowering its purity, leading to users substituting heroin with other types of drugs and increasing drug related crime. The likelihood of this occurring is limited by the surplus of heroin internationally and the fact that heroin use in China is not likely to exceed 6.5 million people in the next five years. If the number of regular heroin users in China does exceed 6.5 million, it could be a catalyst for a heroin shortage internationally and in Australia" (Wardlaw (1999) p. 5).

It was also known that adverse weather conditions in areas where some 80% of Australia's heroin is derived were severely curtailing opium production. "Three years of drought was followed by abnormal flooding and frost in Burma" (Gordon (Sept. 2001), p. 20). The US Department of State estimated that the potential yield for 2000 – effectively the same as that disclosed by the AFP[1] – was only 46% of the estimate for 1997.[2]

On top of this the AFP commissioner himself disclosed in June 2001 intelligence showing an intention by organised criminal groups to manipulate the Australian illicit drug market:

> "Mr Keelty said the national heroin shortage was the result of several factors. A major one was a business decision by Asian organised crime gangs to

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1. "The reality is that in Burma the production of opium increased considerably between 1999 and 2000, in fact up to 1,087 metric tonnes was produced in 2000" (Assistant Commissioner John Davies, 7:30 report, ABC, Wednesday 30 January 2002). A different figure of 1,837 metric tonnes appears in the transcript at ABC (Jan. 2002).

2. Estimates of potential yield in metric tonnes of opium in Burma: 2000 - 1,085; 1999 - 1,090; 1998 - 1,750; 1997 - 2,365; 1996 - 2,560; 1995 - 2,340; 1994 - 2,030; 1993 - 2,575; 1992 - 2,280 (Section on Southeast Asia and the Pacific in US, DOS, *Narcotics Control Reports*, *2000*).

> switch from heroin production as their major source of income to the making of methamphetamine, or speed, tablets" (Moor (19/06/2001)b).

He also revealed that Asian crime syndicates had carried out marketing research that showed a bigger market for amphetamine-like substances in the form of pills than an injected drug like heroin:

> "'They are making speed pills that look like ecstasy and in many cases they attempt to pass it off as ecstasy. Some people might think these tablets are sexier than heroin. And the syndicates have their market research which tells them that these days people are more prepared to pop a pill than inject themselves," he said" (Mr Keelty quoted in Moor (19/06/2001)a at p. 1)

An analysis by Families and Friends for Drug Law Reform of public statements and other evidence that bears on the drought is available in Bush (2002).

Intense public political controversy followed the NCA release of the NCA commentary in the course of which the AFP, the Prime Minister and the Minister for Justice and Customs made critical comments. It is telling that in all the furore the NCA did not resile from its assessments and proposals and, in fact, in its annual report transmitted on 9 November 2001 reaffirmed its commentary (NCA *Annual report* (2001) pp. 29-30).

It is thus clear that as of 8 August 2001 when the NCA released its commentary:

> (a) the NCA was fully aware of and had factored into its assessment the heroin drought and its effects (which were receiving much publicity); and
>
> (b) it assessed that law enforcement was not having an appreciable effect on either the shortage of heroin or the increased supply of amphetamine-like drugs and cocaine.

This assessment is supported by the then NSW Police Commissioner:

> "Mr Ryan said that despite large heroin seizures in the past 18 months there was a rise in cocaine use, and an 'enormous spread' of amphetamines. 'I think we are [losing the war], and so is every other country. We're not winning; that is the point'" (Doherty & Delaney (10/08/2001)).

(b) Conclusion from case study

The implications of the NCA assessment are of the foremost public interest. The prospect that the big changes that occurred in 2001 in illicit drug supply to the Australian market resulted from manipulation by organised crime rather than law enforcement is of central importance for policy. Disclosure of such an unpalatable assessment goes to the heart of why the NCA was created. It is imperative that Parliament and the public have access to such assessments however awkward they are for government policy.

3. Other warnings by the NCA on the need for a whole of Government approach to combat organised crime

It should also be recognised that passages quoted from the NCA's commentary were not an isolated warning. That Authority has been saying to anyone who would listen that penetration of organised crime in Australia is serious and getting worse and that "Arrangements are therefore needed to achieve a whole-of-government and multi-sector response to the threats posed by organised crime" (NCA Commentary 2001, p. 47 and similarly pp. 9, 10 & 48) or, in other words, a "co-ordinated and holistic approach" (*ibid.*, p. 23 and, similarly, pp. 3, 10 & 48). In its submission to a Senate inquiry it stated that:

> ". . . the appropriate response to organised crime is not only to continue to build the capability of the NCA and partner agencies with an organised crime function. The nature of organised crime is such that a more strategic approach is required, focusing law enforcement agencies collectively on the problem and including other stakeholders" (Senate Legal and Constitutional Committee (2001), pp. 14-15, §1.49).

In a speech on drug trafficking on 7 September 2001, its chairman referred to the commentary and stated that:

> "The NCA has urged a whole-of-government approach to this problem where resources from many departments of State and the private sector are called together to recognise the full implications of the threat and each to contribute towards the best possible counter to it" (Crooke (2001) p. 3).

The NCA annual report transmitted in November 2001 reaffirmed "the NCA's firm view . . . that a whole of government approach will strengthen the fight against organised crime" (NCA *Annual report* (2001) p. 4) and its recommendations in the commentary:

> ". . . [T]he Commentary advocates a 'whole of government' approach to organised crime because in its various manifestations, it presents a threat spanning well beyond the province of law enforcement agencies. It argues that such an approach involving law enforcement, health and other relevant areas is required to effectively combat organised crime and attack the profit motive underpinning it. Organised crime can no longer be recognised as merely a law enforcement issue" (*ibid.*, p. 30).

It developed the point:

> "Due to its transnational nature organised crime poses a real and present threat to Australia's national interest. Therefore its suppression should not be left to law enforcement alone. Countermeasures require the leadership of government and the mobilisation of our collective intellectual and other resources on a whole-of-government basis. The country also needs to engage the close interest of the private sector and academia in the effects of organised crime on the political, social and economic well-being of the nation" (*ibid.*, p. 23).

The implication is that governments have yet to adopt such an approach which, as the NCA points out, would undermine the enormous profits from illicit drugs that drive so much of organised crime and fund other anti-social activities such as terrorism.

D. ARGUMENTS PUT BY THE COMMONWEALTH

The opposition of the Federal Government to the NCA represents a sudden about face. Up to the Prime Minister's statement on 30 October 2001 the Government in its own words had "adopted a supportive approach to the performance of the National Crime Authority" (NCA Govt. Response (2000) p. 21,103). The *National Crime Authority Legislation Amendment Act* 2001, legislation to enhance the operation of the NCA, was moved by the Government and debated and enacted during 2001. It received royal assent on 1 October 2001. Since 30 October Commonwealth has put forward a number of arguments to justify the replacement of the NCA. None holds water.

1. The structure for the ACC will overcome the cumbersome reference system of the NCA

It is proposed that the ACC Board on which all Police Commissioners and other law enforcement agencies will sit will have the authority to determine matters to which the ACC coercive powers can be applied (ACC, State & Territory principles (2002) §12; ABC (23/6/02); ACC Bill explanatory memo (2002) p. 1). The current reference system requiring the approval of ministers at State and Federal level is indeed cumbersome but this is a problem external to the NCA and could be remedied without change to NCA governance.

The obstacles to getting quick references are protective attitudes of governments and different law enforcement agencies throughout the Commonwealth towards their separate jurisdictional and administrative prerogatives (see section B(1)). Similar difficulties can be expected in securing the consent among different jurisdictions through the representatives on the Board. The forum for the resolution of these difficulties will be moved from Ministers to the law enforcement agencies themselves.

Alternative approaches that would streamline the reference system without undermining NCA independence and governance include:

- Allowing the Commonwealth to refer federal matters to the NCA without the need for prior consultation with the Inter-Governmental Committee as presently required (s. 13, NCA Act);
- Removing from the Inter-Governmental Committee the right of veto of a reference by a State Minister into investigations proposed by another State Minister (s. 14, NCA Act). This was proposed by the then Opposition in 1984 (Sinclair (1984));
- Authorise police commissioners sitting in a body like the Standing Committee on Organised Crime and Criminal Intelligence (SCOCCI) to determine references;

- Introduce a system by which references can be given by police commissioners and Ministers independently so as, on the one hand, to minimise political influence and, on the other, to remove the opportunity to cut through at Ministerial level institutional jealousies.

In other words the objective of streamlining the reference system does not explain why it is necessary to compromise the independence and governance of the NCA. The reference system could be reformed in other ways and, in any case, granting police commissioners and other agencies the collective competence to determine matters for investigation by the ACC will not address the underlying reason why the reference system has been slow.

2. The ACC structure will make the new agency more efficient than the NCA in the fight against organised crime

The reverse is true: the organisation of the ACC will make for a less efficient crime fighting body than the NCA.

An efficient law enforcement agency must have the ability to deploy substantial resources quickly in a military-like manner. The new structure replaces a streamlined management structure under a Chairman and a small board with a large, unwieldy committee made up of agencies which in the past have been unable to achieve consistent levels of co-operation in the establishment of priorities and in carrying out operations (see section B(1)). It introduces crime fighting by committee – a recipe for inefficiency if not impotence.

3. The development of transnational organised crime since the NCA was established since 1984 requires changes

The Commonwealth has pointed to greater international integration of organised crime as justifying the changes (e.g. Senate Legal and Constitutional Legislation Committee (27/5/02) pp. L&C 91-92). Organised crime has indeed expanded and become more sophisticated since 1984 (PJC (1998) §§1.31-.35). This transnational trend is seen as "an inevitable consequence of the global transition to free market economies" (Morrison (2002) p. 4, col. 1) and greater global economic integration.

"[R]esearch on transnational organised crime indicates a number of trends:

- an expansion in the number of criminal organisations engaged in transnational crime;
- increased similarities between criminal organisations and legitimate transnational corporations, both of which are 'sovereignty-free actors'; and
- increased use of technology by organisations which operate in the legitimate and the illegitimate economies, and sometimes deal in both" (Morrison (2002) p. 4, col. 1).

That greater efforts and new approaches must be taken to counter organised crime in its national and transnational dimensions is indeed what the NCA has been saying. The NCA has assessed that organised crime is so pervasive that law

enforcement alone is unable to counter it and that whole of government approaches must be fashioned to do so (section C(3)):

> "The nature of organised crime is such that a more strategic approach is required, focusing law enforcement agencies collectively on the problem and including other stakeholders. Organised crime has an insidious effect across many Government portfolios including health, social security, finance, national security and law enforcement. Organised crime has been recognised in Australia and internationally as a serious threat to the very stability of nation states because of its extent, sophistication and pervasiveness throughout society. Arrangements are therefore needed to achieve a whole-of-government and multi-sector response to the threats posed by organised crime" (NCA Commentary 2001, p. 47).

The ACC would be useful in so far as it represents a step to improve co-operation between law enforcement agencies throughout the Commonwealth (though as argued above this is doubtful). At the same time, the growth in influence of organised crime since 1984 with attendant scope for corruption means that there is even more need now for an independent, standing Royal Commission like the NCA and politically impartial assessment of how best to counter that menace.

4. The Commonwealth is reported to have favoured the ACC concentrating on intelligence rather than conducting investigations

The Commonwealth proposed that the ACC "be a body which will be primarily intelligence focused" (Senate Legal and Constitutional Legislation Committee (27/5/02) p. L&C 80). "The ACC would provide the intelligence and then the footwork would be provided by the task forces" (*ibid.,* p. L&C 81).

It is important that any new body should investigate actual criminal conduct rather than just gather information because:

> (a) effective responses to crime require obtaining information in a form that can be used as evidence in prosecutions;
>
> (b) it has been the standard pattern for Royal Commissions which the NCA was modeled after to have powers of investigation.

5. The links between organised crime and terrorist groups require a different structure

Links between organised crime and terrorist groups are well known. For example, trade in illicit drugs is used to finance some terrorist activities (Morrison (2002) p. 5 & Senate Legal and Constitutional Legislation Committee (18/2/02) p. L&C 30).

The NCA itself has identified the importance of co-ordination within government of the overlap between crime and security. For example:

> "Structures have been created to bring a co-ordinated law enforcement and national security focus to bear on particular issues, including people-smuggling and threats to critical infrastructure. Security arrangements for the Olympic Games have shown that the work of law enforcement and security

> intelligence agencies can be successfully integrated. There may be further scope for the particular capability of Australia's intelligence community to support the national response to organised crime" (NCA Commentary 2001, p. 48).

Co-ordination can and should be achieved without disbanding an effective crime fighting body like the NCA. Provision already exists under the NCA Act and related legislation for the passing of information between the NCA and security agencies.

For all the menace of terrorism, organised crime is a more insidious threat to Australia because an organisation engaging in terrorism to pursue political goals is effective only if it makes its presence known. In contrast, the last thing that a criminal organisation wants is to reveal itself. It seeks to make money anonymously and, as a string of inquires has shown (see section A(1)(d)), has been prepared to buy influence in police forces and other high places to facilitate this. The NCA has also observed that:

> "Part of the present difficulty is that organised crime issues handled by law enforcement agencies currently do not consistently receive detailed attention at the highest levels of government on a par with the national security issues of defence, foreign intelligence and security intelligence" (NCA Commentary 2001, p. 48).

Because of the overlap between crime and security concerns there should be good co-operation and co-ordination between security and agencies like the NCA. A body with the capacity of the NCA has the power to complement the work of security agencies in combatting terrorism particularly in the capacity of the NCA to collect evidence that will be admissible in court rather than just gathering intelligence.

For all the appeal to the links between organised crime and terrorism to justify changes to the NCA, the only innovation in the ACC Bill that, can pretend to improve co-ordination in responding to terrorism is the inclusion of the Director-General of ASIO on the Board of the new commission (Sch. 1, cl. 7B(2)(e)). For reasons given above, the large Board and other structure of the ACC will probably impede rather than facilitate effective responses. The fact that the Government in the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002 chose to seek changes in the ASIO legislation to deal with terrorism undercuts the argument that the NCA Act needed substantial change.

APPENDICES

APPENDIX A - REFERENCES

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APPENDIX B - Media release of the Australian Federal Police issued on 8 August 2001

MEDIA RELEASE

08Aug2001

NCA Commentary Paper - Illicit Drugs

The AFP recognises that the NCA Commentary 2001, released today, is a discussion paper and as such does not necessarily reflect the most recent statistics associated with the fight against illicit drugs, Commissioner Mick Keelty said.

"For this reason it is important to place on the public record that it is now widely accepted by health authorities and others that there is a heroin drought in Australia.

"This is reflected in the following statistics:

- There has been a heroin 'drought' in Australia since last November. At the height of the drought this resulted in prices for a 'hit' in Cabramatta, Sydney, rising from about $20-30, to $70-80, and purity falling from around 60% to typically 15%.
- The situation in other capital cities broadly reflected the trend in Sydney, since we believe most heroin is supplied through Sydney.
- Significantly in determining the cause of the drought, no other country in East or South East Asia was affected like Australia. Since both Australia and this region are predominantly supplied by the Golden Triangle in South East Asia, this suggests that the causes of the drought were peculiar to Australia.

"In addition it is clear that deaths from heroin overdoses in the last 6 months are significantly lower than for the corresponding period last year, which is a further indication that supply reduction strategies are working.

"The AFP has always maintained the view that important harm minimisation and demand reduction strategies can not co-exist in an environment of unfettered supply.

"The effectiveness of demand reduction strategies is difficult to measure because of the complex nature of the illicit drugs market, however, what we do know is that last financial year the AFP, with the support of its partner agencies, was ranked second in an international benchmarking study of heroin seizures of some 18 developed nations.

"Record seizures in recent weeks of cocaine and amphetamine type substances also point to the success of supply reduction strategies.

"It is also timely to reflect upon the fact that these seizures are striking at the heart of organised and transnational crime. This is achieved through the efforts of some very courageous and dedicated women and men often working long hours in inhospitable

environments as was the case with the record seizure of cocaine in a remote area of coastline in Western Australia.

"As I stated to the Ministerial Council on Drug Strategy Meeting in Adelaide last week we are confident the results achieved through the Government's NIDS funding, as well as our own internal reforms, will place the AFP in even better international standing in the future", Commissioner Keelty said.

Media contact: Steve Jiggins (02) 6275 7647

SOURCE: http://www.afp.gov.au/page.asp?ref=/Media/2001/0808NCA.xml visited 17/12/01.

Families and Friends for Drug Law Reform (ACT) Inc.

committed to preventing tragedy that arises from illicit drug use

PO Box 36, HIGGINS ACT 2615
Telephone (02) 6254 2961
Email mcconnell@ffdlr.org.au
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APPENDIX C - CHRONOLOGY

6 April 1998 Tabling of the *Third evaluation of the National Crime Authority* by the Parliamentary Joint Committee on the National Crime Authority (PJC (1998)).
"The PJC notes that all three reviews conducted since 1991 have found that there was a continuing role for the NCA" (§1.27).

6 December 1999 Tabling of report of Parliamentary Joint Committee on the NCA concerning *Street Legal: the involvement of the National Crime Authority in controlled operations*

4 October 2000 Referral to the Senate Legal and Constitutional References Committee of inquiry into the *Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority.*

7 December 2000 Tabling of the Government's response to the PJC's 1998 *Third Evaluation of the National Crime Authority* (NCA Govt. Response (2000)).
"This Government has adopted a supportive approach to the performance of the National Crime Authority" (p. 21,103).
"While the National Crime Authority's role is to counter criminal activity that is systematic and may be multi-jurisdictional, there should be delineation between State or Territory police investigations and investigations carried out by the National Crime Authority. The National Crime Authority was established as a national agency and where it undertakes investigations within one State or Territory, it does so because that investigation has national significance" (p. 21,104).
The Government agreed to increase the power of the NCA e.g. to allow the National Crime Authority to use its coercive powers to investigate related activity occurring after the date of a reference (p. 21,104); permission to make derivative use of self-incriminating evidence (*ibid.)* and acceptance that no privilege against self-incrimination attach to summonsed documents (rec. 8, p. 21,105).

--- Introduction into and second reading speech in the Senate of the National Crime Authority Legislation Amendment Bill 2000. In the Government's second reading speech included the following:
"This Bill is an important measure to enhance the effectiveness of the National Crime Authority in combating organised crime. In particular it will create a significant deterrent to those who seek to obstruct and frustrate the Authority's hearing process" (Campbell (2000) p. 21,027).
"The continuing support for the activities of the Authority, from

Commonwealth, State and Territory Governments, reflects the important role played by the Authority. There is no doubt, however, that the problems caused by serious and organised crime operating across jurisdictional boundaries, continue to pervade all levels of society. This reinforces the need for a national law enforcement agency such as the National Crime Authority" (*ibid*., p. 21,028).

--- On the motion of the Government referral of the Bill "to the Parliamentary Joint Committee on the National Crime Authority for inquiry and report by 1 March 2001".

1 March 2001 Presentation by Senator George Campbell of report of the Parliamentary Joint Committee on the National Crime Authority on the National Crime Authority Legislation Amendment Bill (Senate, Hansard, 1 March 2001, p. 22,290).

29 March 2001 Government response to the Parliamentary Joint Committee on the National Crime Authority Report *Street Legal: the involvement of the National Crime Authority in controlled operations* (Senate, *Hansard,* pp. 23,361-365)

8 August 2001 Release of *NCA Commentary 2001*.

--- Media release of the Australian Federal Police asserting that the NCA's commentary did not "reflect the most recent statistics associated with the fight against illicit drugs" (AFP Media release (8/8/01)).

--- Answer to by the Prime Minister to a parliamentary question rejecting the assessments and proposals of the NCA:
"I take this opportunity of totally rejecting the suggestion raised by the Chairman of the National Crime Authority that consideration be given to a heroin trial. It remains the policy of this government to totally oppose heroin trials in this country. We will give no aid, comfort or any encouragement to any state or territory. I believe that those who advocate heroin trials are misguided. I do not accept the analysis that the measures that have been taken in recent years to increase the capacity of the law enforcement authorities to tackle the drug problem have failed to bear fruit" (House of Representatives, *Daily Hansard,* 8 August 2001, p. 29,428).

9 August 2001 Media release "Government Rejects Heroin Trial" no. E174/01 of the Minister for Justice and Customs, Senator Ellison.
"Senator Ellison said reports that the National Crime Authority supported a medically supervised heroin trial had been grossly overstated. "The Chairman of the NCA Mr Gary Crooke has indicated today that 'any drug dealers should be relentlessly pursued.'" Senator Ellison said that Mr Crooke had advised him that, "the NCA has never made any suggestion which favours the general legalisation of addictive drugs." . . .
Senator Ellison said passage of the National Crime Authority Legislation Amendment Bill 2001 through the Senate today would significantly enhance the effectiveness of the NCA to combat serious and organised crime which is

their main charter. "Among the important reforms, the first to the operational structure of the NCA in a decade, are increased penalties, removal of self-incrimination as a reasonable excuse as defence to answering questions and the ability to use information gathered through NCA investigations in other criminal proceedings."

--- Radio interview of the Prime Minister by John Miller on 4BC on 9 August 2001 at http://www.pm.gov.au/news/interviews/2001/interview1167.htm visited 19/12/01
The "recommendations [of the head of the NCA] will not be accepted by the Government. Whenever I'm Prime Minister we will not support a heroin trial and we will not give any aid or comfort to any state or territory that endeavours to conduct a heroin trial. Moreover the claim that we are losing the war against drugs, in other words, that we're falling further behind in the fight against drugs, is not borne out by the evidence."

10 August 2001 Sydney Morning Herald article reporting that "Mr Howard said a heroin trial would send a 'surrender signal', and the Treasurer, Mr Costello, told the NCA to 'leave policy matters to the elected representatives'" (Doherty & Delaney (10/08/2001)).

27 August 2001 Tabling in Senate of report of PJC of its *Inquiry into the implications of new technologies for law enforcement*.

28 August 2001 Tabling of Report of Senate Legal and Constitutional References Committee into the *Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority*

1 October 2001 Royal assent of *National Crime Authority Legislation Amendment Act* 2001

30 October 2001 Speech by the Prime Minister launching the Liberal Party's law and order policy, Brisbane**,** 30 October 2001 at http://www.pm.gov.au/news/speeches/2001/speech1313.htm visited 3/01/02
"We've had magnificent results because we've enhanced cooperation with overseas governments. There's been great cooperation between the Federal Police and the Customs Services and there's been great cooperation between the Federal Police and the State Polices of the various states of Australia.
"Now amongst the initiatives that I'm announcing today is a proposal that if I am re-elected as Prime Minister, and the Government is returned on the 10th of November, one of the very first things I will do is put in train the convening of a special conference of Premiers and Chief Ministers of the States to develop a new cooperative framework under which trans-national crime and terrorism can be dealt with by law enforcement at a national level. Whilst there is a high level of cooperation I am not satisfied it is working as effectively, as effectively, as it might and I'm not satisfied that all of the responsibilities of the Federal Government are sufficiently clearly defined and have sufficient amplitude to respond at a national level to crime and terrorism, which of course do not respect international borders, let alone State borders within Australia.

"I believe that the structure of the National Crime Authority is too cumbersome for these challenging times and I hold open the possibility of that body being either restructured or absorbed into other arrangements."

9 November 2001 Transmission of 2000-01 Annual Report of the NCA to the Minister for Justice and Customs, Mr Ellison, as chair of the Inter-governmental Committee in which the NCA reaffirmed its *Commentary*

10 November 2001 Federal election

18 December 2001 Prime Minister wrote to States and Territories about a summit of leaders to consider transnational crime and terrorism and also about an examination of the NCA.

21 December 2001 Joint Media release of the Attorney-General and Minister for Justice and Customs on "Review of National Crime Authority" at http://www.law.gov.au/aghome/agnews/2001newsag/joint12_01.htm visited 2/01/02

"The former Australian Federal Police Commissioner, Mr Mick Palmer, and the former Secretary of the Attorney-General's Department, Mr Tony Blunn, have been requested by Cabinet to review the performance and cost-effectiveness of the National Crime Authority and report in January.

"Mr Palmer and Mr Blunn will provide their opinion prior to the Commonwealth-State Summit on Transnational Crime and Terrorism in March, which will examine ways to improve Australia's national response to terrorism and transnational crime.

"Mr Palmer and Mr Blunn have been asked to explore options for achieving better and more cost effective outcomes in national crime law enforcement.

"The NCA was established in 1984. It is timely for the Commonwealth, in cooperation with the States and Territories, to review the performance and effectiveness of the NCA in view of the changing criminal environment and in the lead up to the Leader's Summit."

Late January Submission of the review by Messrs Blunn & Palmer.

18 February 2002 Evidence in estimates hearing of Senator Ellison, Minister for Justice and Customs, at Senate, Legal and Constitutional Legislation Committee, *Consideration of Additional Estimates*, *Hansard*, 18 February 2002.

27 February 2002 Circulation to the States of a paper entitled The transformation of the NCA that drew heavily on the Blunn-Palmer review

5 April 2002 Commonwealth and States and Territories Agreement on Terrorism and Transnational Crime that includes agreement to replace the NCA by an Australian Crime Commission at http://www.dpmc.gov.au/docs-/terrorism.cfm

27-28 May 2002 Further evidence in estimates hearing of Senator Ellison, Minister for Justice and Customs, at Senate, Legal and Constitutional

Legislation Committee, *Consideration of Additional Estimates*, *Hansard*, 27 & 28 May 2002.

17 July 2002 Meeting in Darwin of Commonwealth, State and Territory Police Ministers that failed to reach agreement on further arrangements about the new Australian Crime Commission

9 August 2002 Commonwealth, State and Territory Police Ministers' Meeting, 9 August 2002, Sydney NSW, *Agreement on Australian Crime Commission*

17 September 2002 Expiry of the term of Mr Crooke as Chairman of the NCA

26 September 2002 Australian Crime Commission Establishment Bill 2002 referred to the Parliamentary Joint committeeon the natinal Crime Authority

6 November 2002 PJC due to report on ACC Establishment Bill 2002

8, 9 and 14 October 2002 Scheduled public hearings of the PJC

31 December 2002 Target date for the establishment of the ACC