

Australian Crime Commission (Western Australia) Bill 2003

EXPLANATORY MEMORANDUM

This Bill provides for the operation of the Australian Crime Commission (the ACC) in Western Australia, repeals the *National Crime Authority (State Provisions) Act 1985* and makes consequential amendments to various Acts to effect the transition of the National Crime Authority to the newly created ACC.

The ACC is established under the Commonwealth Act, and came into operation on 1 January 2003. The ACC combines the investigative functions of the former NCA with the criminal intelligence functions of the former Australian Bureau of Criminal Intelligence and the former Office of Strategic Crime Assessments.

The Commonwealth Act replicates the powers that were available to the NCA and enables these powers to be used for both the ACC's investigatory role and its new criminal intelligence role.

The Commonwealth Act establishes the governance regime for the ACC, including a Board and an office of Chief Executive Officer (CEO) of the ACC.

The Board, which comprises Commonwealth, State and Territory law enforcement representatives, and is responsible for determining national criminal intelligence priorities and overseeing the strategic direction of the ACC, as well as authorising intelligence operations and investigations and the use of special powers.

The Commonwealth Act also establishes the Inter-Governmental Committee (IGC), which is comprised the Commonwealth Minister and in the case of each participating State, a member to represent that State, being a Minister of the Crown. The IGC-ACC is responsible for maintaining an appropriate monitoring and oversight role in relation to the ACC.

The Commonwealth Act also continues the coercive examination powers that were available to the NCA.

The Bill and comparable legislation in other States and Territories complement the Commonwealth Act by enabling the ACC to undertake like functions to those under the Commonwealth Act in relation to relevant criminal activity that relates to State or Territory offences. This ensures that the ACC can operate as effectively and seamlessly as possible on a national basis.

The Bill provides for the functions and powers of the ACC, the Board, and the CEO under State law. Akin to the Commonwealth Act, the Bill maintains the powers that were available to the former NCA and enables these powers to be used for both the ACC's investigatory and criminal intelligence roles.

The Bill creates offences for contraventions of the provisions of the Act to facilitate the effective performance of the ACC's functions. These offences reflect equivalent offences that are contained in the Commonwealth Act. The penalties for the offences

in the Bill are the same as the penalties for the equivalent offences in the Commonwealth Act.

The Bill will repeal the existing State legislation for the NCA, the *National Crime Authority (State Provisions) Act 1985* and consequentially amend numerous other pieces of legislation.

The Bill also contains transitional provisions to facilitate the seamless transition from the NCA to the ACC under State law.

Clause Notes

PART 1—PRELIMINARY

Clause 1: Short title and citation.

Clause 2: This clause sets out the commencement provisions.

Subclause (1): provides that the proposed Act would come into operation on a day fixed by proclamation.

Subclause (2): provides that different provisions may come into operation on different days. The phased proclamation of the Act will allow subsidiary legislation to be drafted to allow the Australian Crime Commission (Western Australia) Regulations to be drafted.

Clause 3: defines words and expressions for the purposes of the Bill

Notable definitions include:

* "ACC operation/investigation" being a ACC State intelligence operation or an ACC State investigation. This covers both the ACC's function in relation to intelligence operations and its function in relation to investigating relevant criminal activity.

* "intelligence operation" means the collection, correlation, analysis or dissemination of criminal information and intelligence relating to a relevant criminal activity. Intelligence operation has a broad meaning to ensure that the ACC is able to undertake fully its criminal intelligence role under State law.

* "serious and organised crime" is defined to cover a wide range of serious offences that are the same as those contained in the equivalent definition in the Commonwealth Act, except for certain offences under the Commonwealth Proceeds of Crime Act 2002 that are not relevant in a State context. The offences listed in the definition of "serious and organised crime" in the Bill mirror the offences that the former NCA could investigate, with the addition of offences that involve firearms and cyber crime.

The definition of serious and organised crime covers a listed offence that is punishable by 3 years' imprisonment or more and that is not committed in the course of a genuine industrial dispute of a specified kind.

In particular, the offence must also--

* involve 2 or more offenders and substantial planning and organisation; and

* involve, or be an offence of a kind that ordinarily involves, the use of sophisticated methods and techniques; and

* be an offence that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind.

* "special ACC operation/investigation" means an ACC State intelligence operation or an ACC State investigation that the Board has determined to be a special operation or investigation. This is an important definition as the ACC can only access its special powers, such as search warrants and examinations, as part of a special ACC operation/investigation. It cannot access these powers for other ACC investigations or operations authorised by the Board.

Clause 3(2): applies definitions of terms contained in the Commonwealth Act to the Bill unless the Bill indicates a contrary intention. This clause allows for any future amendments to be made whereby definitions may provide a contrary intention to the Commonwealth Act.

Clause 3 (2a) extends the definition of "a member of the staff of the ACC" in Section 4 (1) of the Commonwealth Act is taken to extend to a legal practitioner appointed under Section 7. This ensures that a legal practitioner appointed under s. 7 is clearly within the ambit of the secrecy provisions of the Act.

Clause 3(3): extends the meaning of the term "serious and organised crime" under the Bill to include incidental offences that are connected with a course of activity involving the commission of a serious and organised crime.

Clause 3(4): makes it clear that references in the Act to a function include a reference to a power or duty, other than in Part 2 (which deals with the functions and governance of the ACC).

Clause 3(5): provides for penalty units applicable upon conviction for an offence against this Bill. The following formula applies: A = number of penalty units provided within a clause for an offence: B = the amount in dollars that each penalty unit is worth. Thus, A x B = the total amount payable upon conviction.

The Bill provides that the value of the penalty unit is as prescribed under section 4AA of *The Crimes Act 1914* of the Commonwealth.

Clause 3(6): provides for a 'summary conviction penalty' that appears in this Bill in respect to an offence. Summary conviction penalty has the same meaning and effect as is provided for in section 5 of *The Criminal Code*.

Clause 4: provides that the Bill binds the Crown in right of the State and, to the extent of State legislative power, the Crown in its other capacities.

**PART 2--THE AUSTRALIAN CRIME COMMISSION, THE BOARD AND
THE INTER-GOVERNMENTAL COMMITTEE
Division 1--The Australian Crime Commission**

Clause 5: sets out the functions of the ACC. This clause complements section 7A of the Commonwealth Act, which provides for the functions of the ACC under that Act.

Clause 5(a): provides for the investigatory function of the ACC, which is similar to the investigatory function previously undertaken by the NCA. This provision will enable the ACC to investigate relevant criminal activity where the Board has consented to the ACC doing so under the Commonwealth Act. The ACC will only be empowered to investigate relevant criminal activity to the extent that it is, or includes, a State offence or offences.

Clause 5(b): provides for the ACC to undertake intelligence operations. This function reflects the new role that the ACC has in relation to criminal intelligence, in addition to the investigatory function previously undertaken by the NCA. This provision will enable the ACC to undertake intelligence operations where the Board has consented to the ACC doing so under the Commonwealth Act. As with its investigatory function, the ACC will only be empowered to undertake intelligence operations in connection with State offences.

Clause 5(c): provides that the ACC must provide reports to the Board on the outcomes of its investigations and intelligence operations.

Clause 5(d): provides that the ACC has such other functions as are conferred on it by other provisions of the Bill or any other Act. For example, functions could be conferred on the ACC by other State laws creating investigative powers, subject to the necessary legislative consent under the Commonwealth Act.

Clause 6: provides that the CEO's functions are to coordinate ACC operations and investigations, determine the head of an ACC operation or investigation and arrange for an examiner who is to be able to exercise his or her powers under the Bill in relation to a special ACC operation/investigation. This provision complements a similar provision contained in section 46A of the Commonwealth Act. It should be noted that under section 46A of the Commonwealth Act, the CEO is also responsible for the day to day administration of the ACC.

Clause 7: enables the CEO to appoint a legal practitioner to assist the ACC. This complements an equivalent provision in section 50 of the Commonwealth Act.

Division 2--The Board of the ACC

Clause 8: sets out the functions of the Board. This clause should be read together with section 55A(3) of the Commonwealth Act, which requires Board consent under that Act for the ACC to undertake an ACC State intelligence operation or ACC State investigation.

Clause 8(1)(a): provides that the Board has the function of determining whether an ACC operation or investigation is a special operation or investigation, which then allows for the exercise of coercive powers under the Bill.

Clause 8(1)(b): provides that it is a Board function to determine the classes of persons to participate in an ACC State intelligence operation/investigation. For example, the Board may determine that members of a Police Force of a State that are seconded to the ACC are to participate in a particular ACC State intelligence operation/investigation.

Clause 8(1)(c): provides that it is a function of the Board to establish task forces. A task force is one means by which the ACC could conduct an ACC State intelligence operation/investigation.

Clauses 8(2) and 8(3): set out threshold tests for the authorisation by the Board of the use of special powers under the Bill.

Before determining that an operation is a special operation, the Board must consider whether methods of collecting the criminal information and intelligence that do not involve the use of those powers have been effective.

Before determining that an investigation is a special investigation, the Board must consider whether ordinary police methods of investigation into the matters are likely to be effective.

These provisions provide an important safeguard on the authorisation by the Board of the use of special powers under the Bill.

Clause 8(4): sets out the details that must be contained in a written determination of the Board authorising the use of special powers.

These details set the parameters for the operation or investigation and represent another safeguard on the exercise of special powers under the Bill.

Clause 8(5): requires the Chair of the Board to provide to the IGC a copy of a determination authorising the use of special powers within 3 days of the determination being made. This is necessary to facilitate the IGC's oversight function under clause 16 in relation to the authorisation of special powers.

Clause 9: provides for the manner in which Board meetings are to be held.

Clause 10: provides that the Chair of the Board or another eligible Commonwealth Board member nominated by the Chair must preside at a Board meeting. An eligible Commonwealth Board member is defined in the Commonwealth Act to mean, in effect, another Commonwealth member of the Board, other than the CEO.

Clause 11: provides that a quorum of the Board is 7 members, excluding the CEO.

Clause 12: sets out the voting procedures that apply at Board meetings.

Clause 13: provides that the Board may regulate proceedings at its meetings as it considers appropriate and requires minutes of Board meetings to be kept.

Clause 14: allows decisions of the Board to be taken by resolution out of session to enable the Board to make decisions without a formal meeting being held.

Clause 15: enables the Board to establish committees to assist in carrying out its functions. However, there are a number of limitations imposed on the establishment and functions of committees to ensure sufficient accountability in relation to the exercise of Board functions by committees.

Importantly, the Board's function of determining whether an ACC operation or investigation is a special operation or investigation cannot be exercised by a committee. This function can only be exercised by the full Board.

Division 3--The Inter-Governmental Committee

Clause 16: provides for the functions of the IGC in relation to the revocation of special determinations made by the Board, and complementary powers for the IGC to obtain further information about a special determination from the Chair of the Board. These provisions complement equivalent provisions in section 9 of the Commonwealth Act. Section 9 of the Commonwealth Act also provides more generally for the oversight and monitoring role of the IGC in relation to the ACC and the Board.

Clauses 16(1) to 16(5): set out procedures for the IGC to obtain further information from the Chair of the Board in relation to a Board determination authorising the use of special powers. The Chair of the Board must not provide information requested by the IGC if the public disclosure of the information could prejudice a person's safety or reputation or the operations of law enforcement agencies. If the Chair of the Board decides, on this ground, not to provide the information sought, the IGC can refer the request to the State Minister, who must determine whether disclosure of the information could prejudice a person's safety or reputation or the operations of law enforcement agencies. This mechanism for referral of the matter to the State Minister provides an additional check on the provision to the IGC of information that it may require in determining whether to revoke a special determination under clause 16(6).

Clause 16(6): provides for the IGC by resolution to revoke a special determination made by the Board. The IGC's power to revoke a special determination is a further safeguard on the exercise of the special powers under the Bill.

Clause 16(7): requires the IGC to notify the Chair of the Board and the CEO if it revokes a special determination.

Clause 16(8): provides that the revocation of the determination will not affect the validity of any act done in connection with the ACC operation/investigation carried out.

Clause 16(9): provides that where a request may be made by any person, or in any circumstances, the Committee does not have a duty to consider whether to exercise the power under subclause (1) and (6) in respect of any special determination.

PART 3--EXAMINATIONS

Clause 17: provides that an examiner may conduct an examination for the purposes of a special ACC operation/investigation. This clause complements an equivalent provision in section 24A of the Commonwealth Act.

The power to conduct examinations, which includes coercive powers to produce documents and answer questions, is a powerful investigative tool that is central to the role and functions of the ACC.

Examiners are independent statutory officers appointed by the Governor-General under the Commonwealth Act. Under the Commonwealth Act, an examiner must have been enrolled as a legal practitioner for at least 5 years.

The independence of examiners is an important safeguard on the exercise of the special powers under the Bill.

Clause 18: regulates the conduct of examinations. This clause complements an equivalent provision in section 25A of the Commonwealth Act.

Clause 18(2): provides for legal representation of witnesses and, in some circumstances, non-witnesses.

Clause 18(3): requires that an examination must be held in private and empowers the examiner to give directions regarding the presence of persons during an examination.

Clause 18(5): precludes the presence of a person (other than approved ACC staff members) at an examination unless the examiner has given a direction under clause 18(3) permitting the person to be present or clause 18(4) applies.

Clause 18(7): requires an examiner to inform a witness of the presence of a non-witness at an examination and allow the witness to comment on that person's presence. Clause 18(8) makes it clear that a non-witness does not cease to be entitled to be present at an examination if the examiner fails to comply with clause 18(7) or a witness comments adversely on the presence of a non-witness. For example, if the ACC is coordinating its activities, in accordance with clause 37(2), with the functions of an overseas authority that performs similar functions to the ACC and a representative of that authority is present at an examination, the examiner must inform a witness of that person's presence.

Clause 18(12): sets out a procedure under which a court can require evidence given before an examiner that is subject to a non-publication direction under clause 18(9) to be made available to the court. A court can require evidence to be made available if a person has been charged with an offence and the court considers that it may be desirable in the interests of justice that evidence given before an examiner be made available to that person or his or her legal practitioner. Once the evidence has been made available to the court, clause 18(13) enables the court to make that evidence available to the charged person or his or her legal practitioner.

Clause 18(14): makes it an offence to be present at an examination contrary to clause 18(5) or to contravene a non-publication direction given by an examiner under clause 18(9). The maximum penalty is a fine of 20 penalty units, which is equal to \$2200, or imprisonment for one year.

Clause 19: provides for an examiner's powers to summon witnesses and take evidence. This clause complements an equivalent provision in section 28 of the Commonwealth Act.

Clause 19(1): enables an examiner to summon a person to appear before him or her to give evidence and to produce documents or things. The examiner must be satisfied it is reasonable to do so and must record his or her reasons for issuing the summons.

Clause 19(4): requires a summons to set out the general nature of the matters in relation to which the examiner intends to question the person, unless this would prejudice the effectiveness of the special ACC operation/investigation.

Clauses 19(5) and 19(6): empower an examiner to require a person appearing at an examination to produce a document or thing and take evidence on oath or affirmation.

Clause 19(8): makes it clear that the powers to summon witnesses and take evidence under clause 19 can only be exercised in relation to a special ACC operation or investigation. This means that these powers will be subject to the safeguards that apply under the Bill to the authorisation of the use of special powers.

Clause 20: provides for an examiner's power to obtain documents. This clause complements an equivalent provision in section 29 of the Commonwealth Act.

Clause 20(1): enables an examiner, by written notice, to require a person to attend before the examiner or a member of staff of the ACC to produce specified documents or things relevant to a special ACC operation/investigation.

Clause 20(2): The examiner must be satisfied it is reasonable to do so and must record his or her reasons for issuing the notice.

Clause 20(4): provides that a person must not fail or refuse to comply with a notice to produce documents or things and clause 20(5) makes a contravention of that provision a crime. The maximum penalty is a fine of 200 penalty units, (\$22,000), or imprisonment for 5 years. There is also provision for a summary conviction penalty, which is 20 penalty units (\$2,200) or imprisonment for one year.

Clause 20(6): to provide information to an examiner on the ground of legal professional privilege subject to a requirement that the legal practitioner identifies the person to whom the privilege applies), clauses 23(4) and (5) (which deal with self-incrimination) and clause 23(7) (which makes it clear that clause 23(3) does not affect the law relating to legal professional privilege) that apply to a person who is required to produce a document or thing at an examination to the production of documents or things pursuant to a notice under clause 20.

Clause 20(7): applies the offence provision in clause 23(6) if a legal practitioner contravenes the requirement in clause 23(3), as applied by clause 20(6), to identify the person to whom privilege applies where the legal practitioner refuses to produce a document or thing pursuant to a clause 20 notice on the ground of legal professional privilege. This makes such a contravention a crime with a penalty of 200 penalty units (\$22,000) or imprisonment for 5 years. This clause also allows for a summary conviction penalty which is 20 penalty units (\$2,200) or imprisonment for 1 year.

Clause 21: provides for the inclusion of a non-disclosure notation in a summons or notice issued under clause 19 or 20 to prohibit the disclosure of information about the summons or notice or any official matter connected with it. This clause complements an equivalent provision in section 29A of the Commonwealth Act.

Clause 21(2): sets out the circumstances in which an examiner may, or must, include a non-disclosure notation in a summons or notice issued under clause 19 or 20. A notation--

* must be included if the examiner is satisfied that failing to do so would reasonably be expected to prejudice a person's safety or reputation, the fair trial of a person or the effectiveness of an ACC operation or investigation;

* may be included if the examiner is satisfied that failing to do so might prejudice a person's safety or reputation, the fair trial of a person or the effectiveness of an ACC operation or investigation. An examiner may also include a notation if he or she is satisfied that the failure to do so might otherwise be contrary to the public interest.

Clause 21(3): requires that a written statement setting out a person's rights and obligations under clause 22, which creates offences for the contravention of a notation, must accompany the notation.

Clause 21(4): provides for the automatic cancellation of a notation in certain circumstances where it is no longer necessary to prevent disclosure of information about a summons or notice.

Clause 22: creates offences for disclosing certain information about a summons or notice that contains a non-disclosure notation under clause 21. These offences reflect equivalent offences in section 29B of the Commonwealth Act.

Clause 22(1): makes it an offence for a person who receives a summons or notice containing such a non-disclosure notation to disclose information about the summons or notice or official matters connected with the summons or notice. It provides for a penalty of 20 penalty units (\$2,200), or one year's imprisonment.

Clause 22(2): sets out exceptions to clause 22(1) in which disclosure is permitted. This recognises that there will be circumstances in which it is necessary and appropriate to disclose information about a summons or notice. A person who receives a summons or notice containing a non-disclosure notation can disclose information about the summons or notice or an official matter connected with it--

- * in accordance with any circumstances specified in the notation; or
- * to a legal practitioner for the purposes of obtaining legal advice or representation; or
- * if the person is a body corporate, to an officer or agent of the body corporate to ensure compliance with the summons or notice; or
- * if the person is a legal practitioner, for the purposes of obtaining the consent of another person under clause 23(3) to the legal practitioner answering a question or producing a document before an examiner. Clause 23(3) will apply where a legal practitioner is required to answer a question or produce a document that would disclose communications protected by legal professional privilege, and he or she seeks the agreement of the person to whom the privilege applies to answer the question or produce the document.

Where a person receives information about a summons or notice in accordance with clause 22(2) or (4), clause 22(4) sets out the circumstances in which that person can disclose the information. These are--

- * if the person is an officer or agent of the body corporate that received the summons or notice, he or she may disclose the information to another officer or agent to ensure compliance with the summons or notice or to a legal practitioner for the purposes of obtaining legal advice or representation; or

* if the person is a legal practitioner, he or she may disclose the information for the purposes of providing advice or representation.

Clause 22(3): makes it an offence for a person who receives information about a summons or notice in the circumstances set out in clause 22(2) or (4) to disclose information about the summons or notice or official matters connected with the summons or notice in certain circumstances. These are--

The penalty for contravention of clause 22(3) is 20 penalty units (\$2,200) or one year's imprisonment.

Clause 22(5): provides that the disclosure offences in clause 22 will cease to apply when the notation contained in the summons or notice is automatically cancelled under clause 21(4), or 5 years after the summons or notice has been issued, whichever is sooner. This recognises that once 5 years have elapsed after the issue of a summons or notice, the interests affected by the contravention of a non-disclosure notation in the summons or notice will no longer be such as to warrant criminal punishment for the contravention.

Clause 22(6): refers to the disclosing of something's existence and includes disclosing information from which a person could reasonably be expected to infer its existence.

Clause 23: provides for offences for failure to attend and answer questions at an examination and deals with self-incrimination and use immunity. This clause complements an equivalent provision in section 30 of the Commonwealth Act.

Clause 23(1): provides that a person must not fail to attend an examination in answer to a summons.

Clause 23(2): provides that a witness at an examination must not refuse or fail to take an oath or affirmation, refuse or fail to answer a question or refuse or fail to produce a document or thing in answer to a summons.

Clause 23(3): enables a legal practitioner to refuse to answer questions or produce documents at an examination on the ground of legal professional privilege, subject to a requirement that the legal practitioner provides the name and address of the person to whom the privilege applies if required to do so by the examiner.

Clauses 23(4) and 23(5): set out provisions dealing with self-incrimination and use immunity in relation to evidence given at an examination.

Clause 23(4): sets out the circumstances in which a person may claim the privilege against self-incrimination. A person can claim the privilege if--

* before answering a question that the person is required to answer at an examination;
or

* before producing, in answer to a summons, a business document that sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; or

* before producing a thing in answer to a summons--

the person claims that the answer, document or thing might tend to incriminate the person or make the person liable to a penalty.

Clause 23(5): limits the use that can be made of certain evidence if one the situations in clause 23(4) exists. If one of these situations exists, the answer, document or thing cannot be used as evidence against the person, except in confiscation proceedings or proceedings in relation to the falsity of evidence given by the person. However, any evidence that is derived from the answer, document or thing may be used against the person.

Clause 23(6): makes it a crime to contravene clause 23(1), (2) or (3). The penalty is 200 penalty units (\$22,000) or 5 years' imprisonment. The Clause also provides for summary conviction penalty of 20 penalty units (\$2,200) or imprisonment for one year.

Clause 23(7): clarifies that clause 23(3) does not affect the law relating to legal professional privilege.

Clause 24: empowers a Judge of the Federal Court or the Supreme Court, when sitting in chambers, to issue a warrant for the arrest of a person in specified circumstances upon an application made by an examiner. This is an important power to ensure that the investigatory process of the ACC is not thwarted. This clause complements an equivalent provision in section 31 of the Commonwealth Act.

Clause 24(1): sets out the grounds for issue of such a warrant. The Judge must be satisfied by evidence on oath that there are reasonable grounds to believe that--

- * a person who has been ordered to surrender his or her passport under clause 28 is nevertheless likely to leave Australia to avoid giving evidence before an examiner; or
- * a person is attempting or is likely to attempt to evade service of a summons to appear at an examination that has been issued under clause 19(1); or
- * a person has committed an offence under clause 23(1) by failing to attend an examination in answer to a summons.

Clause 24(3): precludes a member of the Australian Federal Police from executing a warrant unless he or she is also a member of staff of the ACC. This limitation is intended to ensure that the warrant provisions in clause 24 are within the legislative powers of the State.

Clause 24(5): makes it clear that reasonable force can be used in the execution of a warrant.

Clause 24(6): sets out the procedure for dealing with a person who is apprehended under a warrant. He or she must be brought as soon as practicable before a Judge of the Federal Court or the Supreme Court and the Judge may admit the person to bail, order the continued detention of the person to ensure his or her appearance as a witness before an examiner or order the release of the person.

Clause 24(7): requires a person who is detained under clause 24 to be brought back before a Judge of the Federal Court or the Supreme Court within 14 days, or any other

period fixed by the Judge. The Judge is then empowered to exercise any of the powers under clause 24(6) in relation to the person.

As the coercive examination powers under the Bill are only available in connection with a special ACC operation/investigation, the power to arrest and detain a person to ensure his or her appearance before an examiner will be subject to the safeguards that apply under the Bill in relation to the authorisation of the use of special powers.

Clause 25: makes it a crime to give false or misleading evidence at an examination before an examiner. The penalty is 200 penalty units (\$22,000) or 5 years' imprisonment, and provides for a summary conviction penalty of 20 penalty units or imprisonment for 1 year. This offence reflects an equivalent offence contained in section 33 of the Commonwealth Act.

Clause 26: allows an examiner to make arrangements to protect a person who is appearing or has appeared at an examination before an examiner or proposes to give, or has given, information or other documents other than at an examination. An examiner can make arrangements to ensure that the safety of a person is not prejudiced or a person is not subject to intimidation or harassment. This clause complements an equivalent provision in section 34 of the Commonwealth Act.

Clause 27: provides, in relation to an examination before an examiner, the same legal protection and immunity for examiners, witnesses and legal practitioners assisting the ACC or an examiner or representing a witness as would apply in proceedings in the High Court. This ensures that the conduct of an examination is not constrained by a risk of tortious liability that may otherwise arise from things said or done in the conduct of an examination. This clause complements an equivalent provision in section 36 of the Commonwealth Act.

Clause 28: enables an examiner to apply to a Judge of the Federal Court, when sitting in chambers, for an order that a person who has been summonsed in connection with a special ACC operation/investigation to appear before the examiner, or who has appeared before the examiner, must surrender his or her passport to the examiner. This clause complements an equivalent provision in section 24 of the Commonwealth Act.

PART 4--SEARCH WARRANTS

Clause 29: enables an eligible person to apply to an issuing officer for a search warrant. This clause complements an equivalent provision in section 22 of the Commonwealth Act.

An eligible person is defined under section 4(1) of the Commonwealth Act to mean an examiner or a member of staff of the ACC who is also a member of the Australian Federal Police or a State police force. An issuing officer is defined under clause 3(1) of the Bill to mean a Federal Court Judge, a Federal Magistrate or a Judge of a State court.

Clause 29(1): provides that an eligible person can apply for a search warrant if he or she has reasonable grounds to suspect that there may be in any premises or other specified place a thing of a particular kind connected with a special ACC operation/investigation which he or she believes on reasonable grounds might be

concealed, lost, mutilated or destroyed if a summons for the production of the thing were issued.

This means that a search warrant application can only be made in circumstances where the power to issue a summons for the production of a thing would be effective to secure the production of the thing in question.

Clause 29(2): sets out the things that a search warrant may allow an authorised person to do. An authorised person can enter and search the premises or other specified place and seize any things of the relevant kind, and deliver them to any person participating in the special ACC operation/investigation. An authorised person can use force, if necessary, to execute the warrant.

Clause 29(3): precludes a member of the Australian Federal Police from being an authorised person to execute a warrant unless he or she is also a member of staff of the ACC. This limitation is intended to ensure that the search warrant provisions in the Bill are within the legislative powers of the State.

Clause 29(4): sets out conditions for the issue of a warrant. An affidavit must have been provided setting out the grounds on which the warrant is sought, the applicant must have provided any further information required by the issuing officer as to why the warrant is sought, and the issuing officer must be satisfied that there are reasonable grounds for issuing the warrant.

Clause 29(5): requires the issuing officer to state the grounds on which a warrant has been issued.

Clause 29(6): specifies the details that must be included in a warrant. The warrant must--

- * state the purpose of the warrant, including a reference to the relevant special ACC operation/investigation with which the things the subject of the warrant are connected; and

- * state when entry can be made pursuant to the warrant; and

- * describe the kind of things that can be seized; and

- * specify when the warrant ceases to have effect. The maximum period for which a warrant can be valid is one month.

Clause 29(7): specifies when the warrant may be executed.

Clause 29(8): makes it clear that reasonable force can be used in the execution of a warrant.

Clause 29(9): provides for the seizure of evidence of an offence that is found in the course of searching for things of the relevant kind under a warrant. Such evidence can only be seized if the person executing the warrant reasonably believes that the seizure is necessary to prevent its concealment, loss, mutilation or destruction or to prevent the evidence being used to commit an offence.

Clauses 29(10) and 29(11): provide for the retention and delivery of things seized under warrant. Clause 29(10) enables the head of a special ACC

operation/investigation to retain a thing seized under warrant for as long as is reasonably necessary for the purposes of the relevant special ACC operation/investigation. If it is not, or ceases to be, reasonably necessary to retain a thing for such a purpose, the thing must be delivered--

* if it may be admissible evidence in proceedings by the Commonwealth, a State or a Territory for a civil remedy, to the relevant person or authority responsible for taking the proceedings; or

* otherwise, to the person who appears to be entitled to the possession of the thing.

These obligations do not apply if the CEO has already given the thing to the relevant Commonwealth or State Attorney-General or to a law enforcement agency or prosecuting authority in accordance with clause 34(1)(a), (b) or (c). That clause requires the CEO to assemble evidence that would be admissible in the prosecution of an offence and give it to the relevant Commonwealth or State Attorney-General, law enforcement agency or prosecuting authority.

Rather than delivering a thing seized under warrant to the person who appears to be entitled to it in accordance with clause 29(10), clause 29(11) enables a participant in a special ACC operation/investigation to deliver the thing to the Attorney-General of the Commonwealth or a State or to a law enforcement agency if it is likely to assist in the investigation of a criminal offence.

Clause 29(12): makes it clear that clause 29 does not affect other rights to apply for a warrant or other powers to issue a warrant. For example, clause 29 would not prevent a member of staff of the ACC who is also a member of the police force of the State from applying under other WA laws for a warrant in connection with an offence that is the subject of ACC State investigation.

Clause 30: allows an application to be made by telephone where a warrant is required urgently. This clause complements an equivalent provision in section 23 of the Commonwealth Act.

PART 5--PERFORMANCE OF FUNCTIONS AND EXERCISE OF POWERS

Clause 31 provides that the conferral of functions on a Commonwealth body or person is subject to the consent of the Board under the Commonwealth Act. This provision complements section 55A(5A) of the Commonwealth Act, which provides that the CEO or an examiner cannot perform a duty or function or exercise a power under State law relating to the investigation of a relevant criminal activity or the undertaking of an intelligence operation unless the Board has consented to the ACC doing so.

Clause 32(1): makes it clear, for the avoidance of doubt, that a Commonwealth body or person is not precluded by any State law from performing functions under the Act.

Clause 32(2): An exception is contained to clause 32 (1) whereby the performance of a function under this Act is subject to the *Parliamentary Privileges Act 1891*. This provision prevents the issue of a summons or notice to a Member of Parliament whilst Parliament is sitting thus avoiding contempt of Parliament. Additionally it provides a defence of reasonable excuse to the coercive powers of the Act for Members of Parliament, founded on a claim of parliamentary privilege.

Clause 33: provides that the Act does not purport to impose any duty on a Commonwealth body or person to perform a function if the imposition would be beyond State legislative power. This provision is intended to ensure that the Act does not contravene any constitutional doctrine that restricts the duties that may be imposed on Commonwealth bodies or persons.

Clause 33 does not limit clause 35, which makes it clear that a function conferred on a federal judicial officer under the Act is conferred on him or her in a personal capacity. In addition, clause 33 does not limit section 7 of the *Interpretation Act 1984*. That section is a general interpretative provision, which will apply such that the Bill will be read so as not to exceed State legislative power.

Clause 34: imposes obligations on the CEO in relation to what he or she must do with information obtained by the ACC and provides for the CEO to make law reform recommendations to Ministers. This clause complements an equivalent provision in section 12 of the Commonwealth Act.

Where admissible evidence is obtained during the course of an ACC operation/investigation, the CEO must assemble the evidence and give it to the relevant Commonwealth or State Attorney-General, law enforcement agency or prosecuting authority. This obligation applies under clause 34(1) in relation to evidence that would be admissible in the prosecution of an offence and under clause 34(2) in relation to evidence that would be admissible in confiscation proceedings.

Clause 34(4): provides that where the ACC obtains information or intelligence in the course of performing one of its functions, that information or intelligence may be used for the purposes of other ACC functions. For example, information obtained during an intelligence operation may be used during an investigation into relevant criminal activity. This provision recognises the integrated nature of the ACC's intelligence and investigatory functions and ensures that the use of information by the ACC is not artificially restricted.

Clause 35: makes it clear that a function conferred by the Act on a federal judicial officer (which is defined to mean a Judge of the Federal Court or a Federal Magistrate) is conferred on that person in a personal capacity and not as a court or member of a court, and the federal judicial officer need not accept the function conferred. This provision is intended to ensure that the Act does not breach any constitutional doctrine that restricts the duties that may be conferred on federal judicial officers.

Clause 35(4): affords a federal judicial officer performing a function under the Act the same protection as a member of the court of which he or she is a member. This ensures that the performance by federal judicial officers of functions under the Act is not constrained by a risk of tortious liability that may otherwise arise from the performance of those functions.

Clause 36: limits, in certain circumstances, the challenges that may be made in relation to activities of the ACC. This clause complements an equivalent provision in section 16 of the Commonwealth Act.

Where the Board has determined that an ACC State intelligence operation/investigation is a special operation/investigation, then an act or thing done

by the ACC because of that determination cannot be challenged in any court on the ground that the determination was not lawfully made.

This provision does not prevent challenges in relation to the activities of the ACC once a determination is in place. Also, this limitation does not apply to proceedings initiated by the Attorney-General of the Commonwealth or a State.

Clause 37: makes it clear that the ACC must cooperate with other law enforcement agencies, so far as practicable, in performing its functions under the Act. The ACC may also coordinate its activities with the functions of overseas authorities that perform similar functions to those of the ACC. This clause complements an equivalent provision in section 17 of the Commonwealth Act.

Clause 38: empowers the ACC to do all things necessary in connection with, or reasonably incidental to, the performance of its functions under the Act. This clause complements an equivalent provision in section 19 of the Commonwealth Act.

PART 6--GENERAL

Clause 39: makes it clear that a person is not liable to be punished for an offence under the Act if he or she has already been punished for the offence under the Commonwealth Act. This clause complements an equivalent provision in section 35A of the Commonwealth Act.

Clause 40: provides that the State Minister may make an arrangement with the Commonwealth Minister for the Board to receive information or intelligence from the State or a State authority relating to relevant criminal activities. This provision complements section 21 of the Commonwealth Act.

Clause 41: enables the State Minister to make an arrangement with the Commonwealth for the provision of human resources by the State to perform services for the ACC. This provision complements section 58 of the Commonwealth Act.

Clause 42: makes it clear that a judge of a State court may perform functions conferred on him or her by section 22, 23 or 31 of the Commonwealth Act. Section 22 of the Commonwealth Act empowers an issuing officer, which includes a Judge of a State court, to issue a search warrant and section 23 of the Commonwealth Act enables such a warrant to be issued upon a telephone application. The powers contained in sections 22 and 23 of the Commonwealth Act are equivalent to those contained in clauses 29 and 30, respectively, of the Bill. Section 31 of the Commonwealth Act empowers a Judge of a State Supreme Court to issue a warrant for the arrest of a witness, similarly to the power contained in clause 24.

Clause 43: deals with the dissemination of reports and information about the performance of the ACC's functions to relevant persons. This clause complements equivalent provisions in section 59 of the Commonwealth Act.

The Chair of the Board must keep the Commonwealth Minister informed of the general conduct of the ACC in the performance of its functions under the Act. This recognises the role of the Commonwealth Minister in monitoring the general conduct of the ACC, as a Commonwealth body established by Commonwealth legislation.

The Commonwealth Minister may also request from the Chair of the Board information concerning a specific matter relating to the performance by the ACC of its functions under the Act.

A State Minister who is a member of the IGC may also request from the Chair of the Board information concerning a specific matter relating to the performance by the ACC of its functions under the Act. This enables the State Minister to obtain information independently about the conduct of the ACC functions as the Minister responsible for the administration of the Act.

The Chair of the Board must comply with the request.

These provisions are intended to facilitate the role of the IGC in monitoring generally the work of the ACC.

Clause 43(8): enables the CEO to disseminate any relevant information that is in the ACC's possession to another law enforcement agency, foreign law enforcement agency or prescribed government authority. The CEO can only disseminate such information if it appears to him or her to be appropriate to do so, and the dissemination would not be contrary to a Commonwealth, State or Territory law that would otherwise apply.

The CEO is also empowered to provide, in specified circumstances, any information that is in the ACC's possession to--

- * authorities responsible for taking civil remedies on behalf of the Commonwealth, a State or a Territory, where the information may be relevant for the purposes of taking such remedies in connection with Commonwealth, State or Territory offences; and
- * a Commonwealth or State authority or a Territory Administration, where the information relates to the performance of the authority or Administration; and
- * the Australian Security Intelligence Organisation, where the information is relevant to security as defined in section 4 of the Commonwealth Australian Security Intelligence Organisation Act 1979.

Clause 43(11): sets out a general prohibition on a report under the Act being made available to the public if it--

- * contains a finding that an offence has been committed; or
- * makes a recommendation for the prosecution of an offence--

unless the finding or recommendation indicates that it is based on evidence that would be admissible in the prosecution of a person for that offence. This provision is intended to ensure that the publication of a report containing these matters does not compromise the fair trial or reputation of a person.

Clause 44: imposes secrecy obligations on specified ACC officers. These officers are the CEO, a member of the Board, a member of staff of the ACC (including a person appointed as counsel assisting the ACC or a person who performs services for such a person) and an examiner. These obligations are intended to ensure that information that could jeopardise the effective conduct of the ACC's functions is

not improperly disclosed, and complement similar obligations contained in section 51 of the Commonwealth Act.

Clause 44(2): makes it an offence for a specified ACC officer to record, divulge or communicate information acquired by him or her in the course of performing his or her functions under the Act, except for the purposes of, or in connection with the performance of his or her functions under, a relevant Act. This offence applies to conduct either while a person is a specified ACC officer or after he or she ceases to be such an officer. The penalty for the offence is 50 penalty units (\$5500) or one year's imprisonment.

Clause 44(3): ensures that a specified ACC officer cannot be required to--

- * produce to a court documents that have come into the officer's possession in the course of performing his or her functions under the Bill; or
- * divulge or communicate to a court matters that have come to the officer's notice in the performance of his or her functions under the Bill.

This is intended to preserve the secrecy of information relating to the ACC's functions in circumstances where a court would otherwise have power to require the production of documents or the answering of questions that would disclose that information.

Further, it provides for exceptions under which a specified officer can be required to produce the above documents or divulge or communicate the above matters. These are--

- * where the ACC, the CEO, the acting CEO, a member of the Board or an examiner in his or her official capacity is a party to the relevant proceeding; or
- * if it is necessary to do so to carry into effect the provisions of a relevant Act; or
- * if it is necessary to do so for the purposes of a prosecution resulting from an ACC operation or investigation.

Clause 44(4): defines a relevant Act for the purposes of clause 44 to mean the Commonwealth Act, this Act or a corresponding Act of another State or Territory. This definition is necessary to ensure that the secrecy obligations in this clause do not prevent the disclosure of information where this is necessary for the purposes of another Act that forms part of the ACC co-operative scheme.

Clause 45: allows the CEO to delegate in writing any of his or her powers, except the power of delegation, under the ACC Act to a member of staff of the ACC who is an SES employee. Clause 3(2) applies the definition of SES employee contained in the Commonwealth Act, which in turn applies the definition of this term under the Commonwealth Public Service Act 1999. Under that Act, SES employees consist of those Australian Public Service officers who are classified as Senior Executive Employees under the relevant classification rules under that Act.

Clause 46: provides for the protection of a member of the Board whereby that member will not be liable to an action or proceedings for damages relating to an act done or omitted in good faith, in performing their duties conferred or expressed to be conferred by or under this Act.

Clause 47: makes it an indictable offence to obstruct or hinder the ACC or examiner in the performance of the ACC's or examiner's functions or to disrupt an examination. This clause provides a penalty of 200 penalty units (22,000) or 5 years' imprisonment, or on summary conviction a penalty of 20 penalty units or imprisonment for one year. This offence mirrors an equivalent offence contained in section 35 of the Commonwealth Act.

Clause 48: provides for public meetings of the Board to inform the public about, or receive submissions in relation to, the performance of the ACC's functions. The Board can also publish bulletins to inform the public about the performance of its functions.

Clause 49: provides for certain matters to be included in an annual report prepared by the Chair of the Board under section 61 of the Commonwealth Act. This provision, together with comparable provisions in other States' and Territories' ACC legislation, will ensure that information included in the annual report under section 61 of the Commonwealth Act relating to the performance of the ACC's functions under that Act is supplemented with comparable information about the performance of the ACC's functions under State and Territory law.

Clause 49A: this clause provides for the State Parliament to address changes to this Act concurrently with the Commonwealth Parliament. This is achieved by being provided, at the earliest opportunity, those reports made under section 61A of the Commonwealth Act that are tabled in the Commonwealth Parliament.

Clause 49B: provides that an independent review of the operation of this Act must occur within three years of commencement, such a review must be subject of a written report to the Minister and such a report must be tabled before Parliament by the State Minister within 4 years of operation. This provision was recommendation of the Standing Committee on Uniform legislation. It is not mirrored in other State jurisdictions

Clause 50: provides that the validity of anything done for the purposes of this Act is not affected only because it was done also for the purposes of the ACC Act thus preventing any invalidating of things done, if they are done under both the Commonwealth and State Acts.

Clause 51: provides for a general regulation-making power under the Bill.

PART 7--TRANSITIONAL

Part 7 contains transitional provisions to ensure that the transition from the NCA to the ACC is as seamless as possible. These transitional provisions are necessary as a consequence of the commencement of the Commonwealth Act, which commenced operation on 1 January 2003, and the repeal of the *National Crime Authority (State Provisions) Act 1985* by clause 65 of the Bill.

Clause 53: deems an ACC State investigation that relates to a matter that was the subject of an NCA investigation that had been commenced but not completed before 1 January 2003 to be a special ACC investigation. This means that if the Board consents to the ACC conducting an ACC State investigation into a matter that previously had been the subject of an incomplete investigation under the *National*

Crime Authority (State Provisions) Act 1985, it will be unnecessary for the Board to make a new determination authorising the use of special powers under the Bill.

Clause 54 imposes on the ACC the obligation under section 34(1) of the Bill to assemble and give to the relevant prosecuting authority evidence that the NCA had obtained before 1 January 2003 but had not assembled and given to the relevant prosecuting authority under section 6(1) of the *National Crime Authority (State Provisions) Act 1985* as if that evidence had been obtained by the ACC in carrying out an ACC operation/investigation.

Clause 55: ensures that where the State referred a matter to the NCA for investigation before 1 January 2003, the reference continues to be protected from challenges under section 8 of the *National Crime Authority (State Provisions) Act 1985* after the repeal of that Act by the Bill. Section 8 protects a reference from challenge on the grounds that any necessary approval had not been obtained or was not lawfully given.

Clause 56: provides that an arrangement in force immediately before 1 January 2003 under section 11 of the *National Crime Authority (State Provisions) Act 1985* between the State Minister and the Commonwealth Minister for the NCA to receive information or intelligence by the State or a State authority has effect as if it had been made under the Bill.

Clause 57: ensures that where things seized pursuant to a warrant under section 12 of the *National Crime Authority (State Provisions) Act 1985* are in the ACC's possession, the obligations under clauses 29(10) and 29(11) of the Bill regarding the retention and return of things seized under warrant apply to those things.

Clause 58: provides that where a non-publication direction was in force under section 16(9) of the *National Crime Authority (State Provisions) Act 1985* immediately before 1 January 2003--

* the provisions in clauses 18(10) and (11) regarding the revocation of directions and the offence of contravening a non-publication direction contained in clause 18(14)(b) apply to that direction; and

* clauses 18(12) and (13), so far as they relate to the CEO of the ACC, apply to evidence that is the subject of such a direction. These provisions enable a court to obtain evidence that is the subject of a non-publication direction in certain circumstances.

Clause 59: ensures that if a non-disclosure notation included in a summons or notice to produce documents was in force under section 18A of the *National Crime Authority (State Provisions) Act 1985* immediately before 1 January 2003, the notation is effective and it is an offence under clause 22 of the Bill to make a disclosure in contravention of the notation. If there is an ACC operation/investigation relating to the same matter to which the NCA investigation related, the provisions in clause 21(4) and (5) relating to the automatic cancellation of a notation apply.

Clause 60: ensures that arrangements in force immediately before 1 January 2003 under section 24 of the *National Crime Authority (State Provisions) Act 1985* made by a member or hearing officer of the NCA to protect witnesses from harm or intimidation have effect as if they had been made under the Act.

Clause 61: enables arrangements between the State and the Commonwealth that were in force immediately before 1 January 2003 under section 28(b) of the *National Crime Authority (State Provisions) Act 1985* under which the State makes persons available to hold office as members of the NCA or to perform services for the NCA to have effect as if those arrangements had been made under the Bill.

Clause 62: ensures that former officials, being persons who were at any time subject to the secrecy obligations under section 31 of the *National Crime Authority (State Provisions) Act 1985*, are subject to the secrecy obligations in clause 44(2) and (3) of the Bill.

Clause 63: ensures that the *Co-operatives Schemes (Administrative Actions) Act 2001* continues to apply to administrative actions taken, or purportedly taken, under the *National Crime Authority (State Provisions) Act 1985* as if that Act had not been repealed and were still a relevant State Act for the purposes of the *Co-operatives Schemes (Administrative Actions) Act 2001*. The *Co-operatives Schemes (Administrative Actions) Act 2001* validates certain invalid administrative actions undertaken by Commonwealth officers and authorities, including actions undertaken pursuant to the *National Crime Authority (State Provisions) Act 1985*, by giving them the effect they would have had if they had been taken by State authorities or officers. This transitional provision ensures that such administrative actions are validated up to the time when the *National Crime Authority (State Provisions) Act 1985* is repealed by the enactment and commencement of clause 65 of the Bill.

Clause 64: enables the making of regulations prescribing matters of a transitional nature if there is no sufficient provision in Part 7 dealing with the matter.

PART 8--REPEAL OF THE NATIONAL CRIME AUTHORITY (STATE PROVISIONS) ACT 1985 AND AMENDMENTS TO OTHER ACTS

Clause 65: repeals the *National Crime Authority (State Provisions) Act 1985*, which is the existing State legislation for the NCA.

Clause 66: repeals the two references to the NCA in the *Co-operative Schemes (Administrative Actions) Act 2001*.

Clause 67: amends the *Federal Courts (State Jurisdiction) Act 1999* to include a reference to the ACC.

Clause 68: replaces a reference to the NCA in the *First Home Owner Grant Regulations 2000* with a reference to the ACC.

Clause 69: replaces a reference to the NCA in the *Royal Commission (Custody of Records) Act 1992* with a reference to the ACC.

Clause 70: replaces references to the NCA in the *Surveillance Devices Act 1998* with references to the ACC.

Clause 71: replaces references to the NCA in the *Surveillance Devices Regulations 1999* with references to the ACC.

Clause 72: replaces references to the NCA in the *Telecommunications (Interception) Western Australia Act 1996* with references to the ACC.

Clause 73: replaces the definition of ‘approved authority’ in the Witness Protection (Western Australia) Act 1996 with a reference to the ACC.