

INVESTIGATIVE POWERS OF THE NATIONAL CRIME AUTHORITY

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In this paper, I propose to describe the investigative powers of the National Crime Authority (the Authority) and explain how and why those powers have been used by the Authority. However, before I do so, let me give you a little background information as to the circumstances in which the Authority was created and the statutory framework on which it operates.

Establishment

Calls for the establishment of a national body to combat criminal activity of an organised nature in Australia began in the mid-1970s and gained currency through the findings of several Royal Commissions, including the Moffitt, Woodward, Williams, Costigan and Stewart Royal Commissions.

The debate over organised crime and what to do about it crystallised in Parliament in the latter part of 1982, at the end of which the *National Crimes Commission Act* was passed. However the *Act* was not proclaimed and the change in the Commonwealth Government in March 1983 cast a doubt over the future of the Commission, since the new Labour Government, when in opposition, had not supported the legislation. The new Government decided to review the future of the Crimes Commission. The process of review included a two-day national conference attended by more than 100 representatives of Commonwealth, State and Territory governments, police, the legal profession, civil liberty organisations, royal commissioners and other highly qualified and interested individuals. The conference was remarkable for the informed, lively and constructive debate which occurred. While many diverse views were expressed and while complete unanimity was not reached, there was evident by the end of the conference, broadly based support for the establishment of some kind of national crime authority provided that it remedied the deficiencies perceived in both the traditional royal commission model, and the 1982 *National Crimes Commission Act*. As a result of that conference and of further discussions with the States and the Northern Territory, the Government introduced the *National Crime Authority Act* 1983, which formed the basis of the *Act* which was passed in June the following year. All the States and the Northern Territory had agreed to participate in the work of the new Authority and passed mirror legislation through each Parliament to underpin the Commonwealth legislation, making the Authority the first body constituted on a national basis to combat organised crime in Australia.

Accordingly the Authority is given powers not only by the *National Crime Authority Act* 1984 (Commonwealth) but also by similar legislation passed by the States and the Northern Territory.

I will not refer to any sections of the State or Territory legislation in this paper and accordingly all references to 'the *Act*' are to be read as references to the Commonwealth Act.

Relevant criminal activity

In order to appreciate what investigative powers the Authority has, it is necessary to explain briefly the type of criminal activity investigated by the Authority and the functions of the Authority.

The Authority's functions are concerned with what is described in the *Act* as "relevant criminal activity". That expression is defined by s. 4 to mean any circumstances implying, or any allegations, that a "relevant offence" may have been, or may be being, committed against the law of the Commonwealth, of a State or of a Territory

"Relevant Offence" is defined to mean an offence -

- (a) that involves two or more offenders and substantial planning and organization;
- (b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques;
- (c) that is committed, or is a kind that is ordinarily committed, in conjunction with other offences of a like kind; and
- (d) that involves theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forging of passports, armament dealings or illegal importation or exportation of fauna into or out of Australia, or that involves matters of the same general nature as one or more of the foregoing, to that is of any other prescribed kind,

but -

- (e) does not include an offence committed in the course of genuine dispute as to matters pertaining to the relations of employees and employers by a party to the dispute, unless the offence is committed in connection with, or as part of, a course of activity involving the commission of a relevant offence other than offence so committed;
- (f) does not include an offence the time for the commencement of a prosecution for which has expired; and
- (g) does not include an offence that is not punishable by imprisonment or is punishable by imprisonment for a period of less than three years.

This definition is the Legislature's way of expressing what the laymen might describe as organised crime.

The functions of the Authority

The *Act* makes a distinction between general and special functions of the Authority and gives the Authority additional powers when it exercises its special functions.

Section 11 of the *Act* sets out the general functions which may be briefly described as:

- the collection, analysis and dissemination of criminal information and intelligence relating to relevant criminal activities
- the investigation of matters relating to relevant criminal activities either pursuant to a reference granted to it by a Commonwealth, State or Northern Territory Minister;
- the arrangement and establishment of Commonwealth, State and joint Commonwealth and State Task Forces, for the purpose of investigating relevant criminal activity; and
- the co-ordination of investigations by Commonwealth and State Task Forces into matters relating to relevant criminal activity.

Special functions

When the Authority exercises its special functions it is given powers not available to most law enforcement agencies. Before I describe those special powers I should refer you to the legislation which enables the Authority to receive a reference from the Commonwealth, the States and the Northern Territory, because it is only when the Authority has been given such a reference that it is able to exercise its special functions.

The Commonwealth Minister administering the *Act*, after consulting the Inter-Governmental Committee (which is a Committee established by the *Act* consisting of a Commonwealth Minister to represent the Commonwealth and a Minister of the Crown of each of the States and the Northern Territory), may refer a matter relating to a relevant criminal activity to the Authority for investigation (s. 13).

The Authority may itself request the Inter-Governmental Committee to give approval for a matter relating to relevant criminal activity to be referred by a Minister or Ministers to the Authority for investigation (s. 10).

Provided that they have the approval of the Inter-Governmental Committee, the States and the Northern Territory may under their own Acts, refer matters relating to relevant criminal activity to the Authority for investigation.

Up to this time, the Commonwealth and/or the States have referred nine matters to the Authority for investigation. Some of the matters have included illegal

importation and distribution of narcotics, the financing of those importations, fraud, tax evasion, currency violations, bribery and corruption, illegal dealings in armaments, arson and conspiracy to murder.

Section 4 of the *Act* defines "special investigation" to mean an investigation that the Authority is conducting in the performance of its special functions.

I now return again to s. 11 of the *Act* which also sets out the special functions of the Authority and these are described as:

- (a) Where a reference to the Authority made under s. 13 is in force in respect of a matter relating to relevant criminal activity - to investigate the matter insofar as the relevant offence is, or the relevant offences are or include, an offence of offences against a law of the Commonwealth or of a Territory; and
- (b) Where a reference to the Authority made in accordance with s. 14 by a Minister of the Crown of a State is in force in respect of a matter relating to a relevant criminal activity - to investigate the matter insofar as the relevant is, or the relevant offences are or include, an offence or offences against a law of the State.

Section 12 of the *Act* also requires that the Authority shall, in performing its investigatory functions, assemble evidence that it obtains in the course of its investigations and furnish that evidence to the Attorney-General of the Commonwealth or of a State or to the relevant law enforcement agency.

SPECIAL POWERS

Hearings; Production of documents

Where the Authority carries out a special investigation pursuant to a reference, it may use additional power for the purposes of that investigation.

One of the powers which the Authority may exercise when it is carrying out a special investigation is the power to hold hearings. At those hearings the Authority is constituted by one or more of its Members; evidence may be taken on oath or affirmation; the person giving evidence has a right to be represented by a legal practitioner and the hearing must be held in private.

The *Act* also enables the Authority to direct that -

- any evidence given before it,
- the contents of any document produced to the Authority
- any information that might enable a person who has given evidence before the Authority to be identified or
- the fact that any person has given or may be about to give evidence at a hearing,

shall not be published.

The *Act* requires that the Authority shall give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.

Section 28 enables a Member to summon a person to appear at a hearing and to produce documents. Failure to appear and/or to produce documents without reasonable excuse leaves the person open to prosecution for a penalty of \$1000 or imprisonment for 6 months.

The Authority regularly holds hearing and has found them to be of considerable assistance in furthering its investigations. Many advantages are to be obtained in having a Member of the Authority preside over an examination conducted by counsel assisting the Authority. Furthermore many witnesses who otherwise would not have done so, are prepared to provide information to the Authority when they know that the hearing is presided over by a Member and that the hearing will be held in private.

At these hearings a person is not required to answer any questions put to him or to produce any document if the answer to the question or the production of the document might tend to prove his guilt. There is one exception to that, namely if the relevant law enforcement agency has given to the person an undertaking in writing that any answer given or document produced will be used in evidence in any proceedings against him.

This privilege against self-incrimination can hinder the Authority's investigations. When one has regard to the scale of the criminal activity engaged in by persons investigated by the Authority and the huge illegal profits made by those persons, a strong case can be made that the *Act* should be amended to remove this privilege. I note that this privilege is not available to persons who appear at a hearing before the National Companies & Securities Commission conducted pursuant to s. 36 of the *National Companies and Securities Commission Act*.

Section 29 of the *Act* enables a Member, by notice in writing served upon a person, to require that person to attend before a Member or a member of the staff of the Authority and produce documents. This power is also regularly used by the Authority. It is very important power and it has provided the Authority with valuable information and evidence. Failure to comply with a notice without reasonable excuse leaves a person open to prosecution for a \$1000 or imprisonment for 6 months.

Control over the exercise by the Authority of its powers to hold hearing and to require the production of documents, is set out in ss 32 and 32A of the *Act*. By those sections a person who is dissatisfied with the decision of the Authority may apply to the Federal Court or to the Supreme Court of a State for an Order of Review in respect of the decision.

The *Commonwealth Administrative Decisions (Judicial Review) Act* of course applies to decisions of an administrative character made under the *Act*.

In the five years that the Authority has been in existence no applications have been made under s. 30 or 32A of the *Act* for an Order of Review. In fact over those five years there have been only four occasions where proceedings have been taken against the Authority and where the courts have delivered judgments. In all of those cases the proceeding have been resolved in the Authority's favour. Two further proceedings were commenced against the Authority but were subsequently discontinued.

Delivery of passports

As an adjunct to the power to hold hearings, s. 24 enables a Judge of the Federal Court, upon application by a Member of the Authority, to make an order requiring a person who has appeared or is to appear before the Authority at a hearing, to show cause why he should not be ordered to deliver his passport to the Authority. Before such an order can be made it is necessary to show that there are reasonable grounds for believing that the person may be able to give the Authority evidence to produce documents that are relevant to the matter in respect of which the Authority is conducting an investigation and could be of particular significance to the investigation, and that there are reasonable grounds for suspecting that the person intends to leave Australia,

Where the person appears before the Federal Court in pursuance of such an order the Court may, if it thinks fit, make an order requiring the person to deliver to the Authority any passport issued to him.

Warrant for arrest of a witness

If a person has been ordered under s. 24 to deliver his passport to the Authority and there are reasonable grounds to believe that the person is nevertheless likely to leave Australia for the purposes of avoiding giving evidence before the Authority and also where there are reasonable grounds to believe that a person in relation to whom a summons has been issued is attempting or likely to attempt to evade service of the summons, a Judge of the Federal Court may issue a warrant for the apprehension of that person (s. 31).

Search Warrants

Where the Authority has reasonable grounds for suspecting that there may be upon any land or upon or in any premises, vessel, aircraft or vehicle, a thing or things of a particular kind connected with a matter relating to a relevant criminal activity, being a matter into which the Authority is conducting a special investigation, and the Authority believes on reasonable grounds that if a summons were issued for the production of the thing or things, the thing or things might be concealed, lost, mutilated or destroyed, a Member of the Authority may apply to a Judge of the

Federal Court for the issue of a search warrant. The warrant is not to be issued unless the judge is satisfied that there are reasonable grounds for issuing it (s. 22).

This is an important power which the Authority has used to gain possession of documents which have assisted it to make decisions as to how to further conduct the particular investigation.

OTHER POWERS GIVEN TO THE AUTHORITY BY THE ACT

Obtaining information

Under s. 19A of the *Act* a Member of the Authority may, by writing served on an officer of a Commonwealth agency, request that officer to furnish to the Authority certain information referred to in that section and which is relevant to an investigation which is being carried out by the Authority.

Section 20 of the *Act* enables a Member to serve notice on an officer of a Commonwealth agency requiring that the officer to supply certain information referred to in that section and which is relevant to an investigation being carried out by the Authority.

Section 21 enables arrangements to be made whereby the Authority is able to receive from various authorities and persons information or intelligence relating to relevant criminal activities.

Some of these powers are exercised by the Authority more than others but they all result in the Authority acquiring considerable information which enables it to further its investigations.

Task forces

The Authority has been given power under s. 11 as a result of which it is able to arrange for the establishment of task forces and co-ordinate investigations by those task forces. The Authority uses this power and it is one of the means by which it is able to co-ordinate the effort in Australia against organised crime, despite its relatively small size. In this way it is able to draw together people with expertise and experience in particular fields or in particular investigations. It is one of the major strengths of the Authority but the management of the task forces present significant management challenges.

OTHER POWERS FROM OTHER SOURCES

Telephone interceptions

Since the commencement of the 1987 amendments to the *Telecommunications (Interception) Act 1979*, it is now possible for the Authority,

along with other agencies, to apply to an eligible Judge within the meaning of that *Act* for the issue of a warrant in respect of a telecommunications service. The warrant is executed by the Australian Federal Police. The intercept takes place at the control exchange closest to the telecommunications service intended to be intercepted. The signal is passed to Canberra where it passes through the Australian Federal Police Telecommunications Interception Division, set up pursuant to s. 32 of the *Act*. The signal then passes to a telephone exchange in Sydney and from there to the Authority's Telephone Interception Unit where a record of the interception is made.

The Authority makes extensive use of this power. The interceptions which are recorded provide important intelligence for the Authority's investigations and enable the Authority's investigators to keep abreast of the day to day activities of the criminals they are investigating and to make strategic decisions as to how the future of the investigation should be planned. The interceptions also proved admissible evidence against the criminal.

Listening devices

Under the *Commonwealth Customs Act 1901*, a Member of the Authority or a member of the staff of the Authority may apply to a Judge of the Federal Court or of the Supreme Court of the Australian Capital Territory for the issue of a warrant authorising the use of a listening device where the judge is satisfied that the person has committed, or is suspected on reasonable grounds of having committed, or of being likely to commit an offence punishable as provided by s. 235 of the *Act* (being a narcotics offence). These warrants not only authorise the use of a listening device for the purpose of listening to or recording words spoken by, to or in the presence of a person but they may also authorise members of the staff of the Authority to enter any premises in which a person is or is likely to be, for the purpose of installing a device.

To obtain the maximum benefit from these warrants, highly skilled technical people are required to install the devices. The Authority has found that the use of these devices is one of its most valuable means of obtaining up to date evidence and information on criminal activity.

Provision is also made in the *Listening Devices Act 1972* (S.A.) enabling a Member of the Authority or a member of the staff of the Authority who is a member of a police force to make application to a Supreme Court Judge for a warrant to use a listening device.

Other State legislation is used by members of the staff of the Authority to obtain warrants for the use of listening devices.

Monitoring orders

Section 73 of the *Proceeds of Crime Act 1987* (Commonwealth) enables a police officer to apply to a Judge of the Supreme Court of a State or Territory for a monitoring order directing a financial institution to give information to a law

enforcement authority. The section sets out the conditions which must be satisfied before the order can be made and provides for a fine not exceeding \$100,000 if the institution contravenes the order or provides false or misleading information in purported compliance with the order.

The Authority makes use of this power and has found that by using it it has obtained information from financial institutions which has enabled it to further its investigations and to provide evidence of criminal activities.

Tax related investigations

Section 16 of the *Income Tax Assessment Act* is a secrecy provision and is the section which prevents officers of the Australian Taxation Office from divulging information on taxation matters.

Where the Authority is carrying out an investigation into relevant criminal activities and that investigation relates to a taxation offence, then pursuant to s. 3D(1) of the *Taxation Administration Act*, the Commissioner of Taxation may communicate information to the Authority.

Where the Authority is conducting a special investigation and it considers that the Commissioner of Taxation may have acquired particular information that is relevant to the investigation, a Member may apply to a Judge of the Federal Court seeking an order that the Commissioner disclose to the Authority all information. There are conditions precedent which must be fulfilled before a Judge will make such an order and these are set out in s. 3D(8) of the *Taxation Administration Act*. The Authority has not so far had recourse to this section, largely because most of the targets of Authority investigations are suspected of committing inter alia taxation offences. To date, few of those involved in organised crime have regularly declared their illegal earnings.

Police powers

The Authority's investigators are made available by the Australian Federal Police and the police forces of the States and the Northern Territory. They become members of the staff of the Authority and usually remain with the Authority for a two to three year period. They retain their powers as police officers and exercise them when the occasion arises but only within their own territorial jurisdictions.

COMMENT

On the face of it, the Authority is a body invested with significant powers designed to equip it to combat organised crime in Australia. However it should be noted that the use of special powers to hold hearings and to require the production of documents are normally only used at an overt stage of an investigation. The summoning of witnesses can have the effect of announcing to the target of the investigation that he or she is indeed the subject of Authority investigations. For this

reason, it is usually impossible to commence detailed financial investigation until related covert inquiries have been completed or are at least well advanced. I mention these practical difficulties to illustrate that the mere possession of special powers does not automatically render complex investigations easier to conduct.

In conclusion I wish to say something about witness protection. Because of the very nature of the criminal activity which is investigated by the Authority, it is inevitable that the Authority will from time to time become involved with witnesses who must be provided with witness protection. No doubt with that in mind the Legislature saw fit to include s. 34 in the *Act* which enables a Member of the Authority to make such arrangements as are necessary to avoid prejudice to the safety of persons who provide information to the Authority. Many such arrangements have been made and the Authority has found that the protection of witnesses raises many extremely difficult problems which are not capable of easy resolution. The Authority's concern at the existing situation was in part responsible for an inquiry into the subject by the Parliamentary Joint Committee on the Authority. The Committee's recommendations are now the subject to Commonwealth-State negotiations on, among other things, drafting complementary legislation which will enable a former witness to adopt new identity, but with appropriate safeguards. In my view it is imperative that those negotiations be brought to fruition as soon as possible.