This paper considers some different approaches to organised crime within an Australian context. These different approaches involve a consideration of possible new investigative measures, different means as to the gathering of evidence, the protection of individual liberties in criminal cases, the physical arrangements of the court room and problems related to illegal immigration and the so-called “new terrorism”. The context under consideration however is not a jurisdictionally homogeneous one. To this extent, it is impossible to explore in the brief ambit of this paper all law enforcement and legislative measures that may now be being undertaken differently in relation to investigating organised crime and dealing with issues of national security. Similarly, it is impossible to consider such different approaches with respect to all the different areas of organised crime, particularly in view of the range of offences that may be committed. To this extent, this paper is necessarily selective in its approach to the issues concerned with the jurisdictional focus being a national one rather than State or Territorially based.

Historical Background


2 There are nine Australian jurisdictions in total, all with different legislation relating to criminal law.

3 In 1994, the Commonwealth Law Enforcement Board (CLEB) was set up to improve the management and enforcement of criminal justice at the Federal level and the coordination of national and international enforcement issues, with the Federal Government expanding into the criminal justice area with legislation such as the Criminal Code Act 1995 (Commonwealth). See Fox, Richard (2001) Future Directions in Criminal Law, Paper presented at the Australian Institute of Criminology’s 4th National Outlook Symposium on Crime in Australia – New Crimes or New Responses, Canberra, 21-22 June. Also see in Fox, arguments concerning the need for the adoption of a national uniform criminal code so that all criminal legislation dealing with serious offences in Australia can be constructed with the same underlying principles of criminal responsibility.

4 Organised crime may involve such things as burglary, motor vehicle theft, gambling, money laundering, criminal exploitation of health care, pensions, social security and superannuation funds, human organ trading, prostitution and the proliferation of pornography, illegal trade in native fauna and flora, abalone poaching, illegal firearms trading and people smuggling/trafficking.
To understand the current context in which organised crime is now investigated in Australia, it is important to have some regard to the historical development of the investigation of it. Following a report commissioned by the Victorian Government in 1964 into a series of murders at Melbourne’s Victoria Markets, there have been a succession of reports from Royal Commissions and Task Forces into organised crime in Australia. Dickie and Fox argue that, with respect to the findings of the Moffitt Royal Commission in 1974, organised crime was “discovered” as being a problem in the official sense. Those particular findings, combined with the findings of other reports dealing with various aspects of organised crime and corruption initiated governmental responses to organised crime commencing in 1979 with the establishment of the Australian Federal Police (hereafter the AFP) and in the early 1980’s with the formation of the National Crime Authority (hereafter the NCA). Clearly at that time, Federal legislative power was expanded to deal with the perceived problem of organised crime.

From time to time since their establishment, both the NCA and the AFP have been subject to governmental review. On 28 October 2001, the Prime Minister John Howard announced a Summit of Commonwealth, State and Territory leaders to consider a new national framework to deal with transnational crime and terrorism. This review included consideration of the reformation, abolition or replacement of the NCA. On 5 April 2002, a Summit Communique was released stating that the

---

5 See the 1964 Report by J.T. Cusack (U.S. Police Officer) to the Victorian Government.
7 Fox, Richard, ibid.
9 Other reports included the 1979 Report of the Woodward Royal Commission into Drug Trafficking (New South Wales), the 1979 Report of the Williams Royal Commission into Drugs (Commonwealth, Victoria, Queensland, Western Australian and Tasmania), the 1981-1982 Reports of the Costigan Royal Commission on the Federated Ship Painters and Dockers Union (Commonwealth and Victoria), the 1981-1983 Reports of the Stewart Royal Commission into Drug Trafficking (Commonwealth, New South Wales, Victoria and Queensland), the 1983 Report of the Connor Board of Inquiry into Casinos (Victoria), Companies Act investigation reports and the 1982-1983 Commonwealth and New South Wales Police Task Force Reports. There also followed later significant commissions of inquiry into police and political corruption in Queensland (Fitzgerald) and New South Wales, out of which eventually arose the establishment of State independent crime commissions.
10 In relation to needing Whistleblower Protection legislation to prevent fraud and corruption, see Goode, Matthew (2000), ‘The Future of Fraud’, Paper presented at the Australian Institute of Criminology’s Fraud Prevention and Control Conference, 24-25 August. The issue of corruption and its relationship to organised crime is not explored in this paper.
11 The Commonwealth Police Force came into being in 1957 and in 1979 federal policing was revamped with the establishment of the Australian Federal Police. AFP priorities are set by Ministerial direction include combating money laundering, e-crime, illicit drug trafficking and major fraud.
NCA would be re-structured to become the Australian Crime Commission (hereafter the ACC). The Communique referred to this re-organisation as being timely in terms of meeting the challenges of combating multi-jurisdictional crime and terrorism.

The ACC is to become operational after 31 December 2002. Its focus will be on criminal intelligence collection and the establishment of national intelligence priorities. At the same time, it will retain the coercive powers of its predecessor. Although the Australian Security Intelligence Organisation (ASIO)\(^\text{13}\) remains the main agency responsible for warning the government about situations that may endanger Australia’s national security, the new parameters described for the operation of the ACC could be considered to be a “different approach” not only to organised crime, but to the “new terrorism”. This different governmental approach can be seen in the operational nexus that has been created for the ACC involving organised crime, terrorism and issues relating to national security. Just how different an approach this will be to these issues however remains to be tested.

**The Almost “Former” National Crime Authority (NCA)**

The *National Crime Authority Act 1984* (hereafter the NCA Act) established the NCA as an independent statutory authority with the specific charter to investigate crime on a national basis and with powers similar to those of a Royal Commission. In establishing an agency with the requisite powers and authority to investigate “organised crime” (and bolstered by a raft of other Federal legislation),\(^\text{14}\) the enabling

\(^{12}\) The National Crimes Act (NCA Act) was enacted in 1982 but was not brought into operation due to concerns about the functions, composition and powers of a permanent National Crimes Commission. After further consultation and review the NCA Act came into operation in 1984.

\(^{13}\) ASIO was established by legislation in 1979 with security defined as the protection of Australia and its people from espionage, sabotage, politically motivated violence, attacks on Australia’s defence system and acts of foreign interference.

legislation did not however refer directly to organised crime.¹⁵ In relation to investigating criminal activity, the *NCA Act* defines “relevant offences” as involving two or more offenders, substantial planning and organisation and utilising sophisticated methods and techniques,¹⁶ but this activity is not described as being “organised crime”. The *NCA Act* is also underpinned by legislation in each State and Territory¹⁷ giving the NCA jurisdiction to investigate relevant criminal activity against Commonwealth, State and Territory law as well as the power to collect, analyse and disseminate relevant criminal information and intelligence.

Because the NCA has a multi-jurisdictional focus, it is accountable to those Commonwealth, State and Territory Ministers responsible for administering its legislation through the Inter-Governmental Committee (IGC) that is chaired by the Commonwealth Minister for Justice and Customs. The IGC is responsible for generally overseeing the work of the NCA on its multi-jurisdictional basis and is also responsible for establishing this agency’s overall investigatory priorities. It determines the NCA’s priorities by authorising relevant State and Territory Ministers to issue references that allow the NCA to undertake “special” investigations, thereby allowing the NCA to utilise its mandated “special powers” in the course of conducting such special investigations.¹⁸

The special powers with which the NCA is invested are powers beyond those given to police. They include the power to require the production of documents and other evidence and the power to summons a person to appear at a hearing to give evidence under oath. These powers are utilised in a confidential way to protect not only the integrity of the investigation but also to protect the privacy and safety of the persons called to give evidence or in relation to whom documents have been requested.¹⁹

¹⁶ See s.4 *NCA Act 1984*.
¹⁷ Each State or Territory has a National Crime Authority (State or Territory Provisions) Act.
¹⁸ Commonwealth Ministers may also refers matters to the NCA.
The mandated special powers are not used in the course of general investigations conducted by the NCA, these investigations not being matters of referral by State or Territory Ministers.\(^{20}\)

The type of offences investigated by the NCA are many and varied but include drug importation, manufacture and trafficking and associated money laundering, theft, fraud, tax evasion, bribery, extortion and violence. The NCA does not conduct prosecutions, but rather collects and provides evidence to the appropriate Commonwealth, State or Territory prosecuting authorities (the State and Territory various Directors of Public Prosecutions) who then decide whether or not to proceed with a prosecution based on all the available and admissible evidence.\(^{21}\)

The NCA as well as the AFP\(^ {22}\) conduct their investigations through the national coordination of various law enforcement groups and regulatory bodies. In the past decade, there have been several priorities set for the NCA. These priorities have brought together various Australian law enforcement agencies together with various Commonwealth and State government departments in the form of National Task Forces coordinated by the NCA. Briefly, the Task Forces have been organised as follows:

- **BLADE** focus on South East Asian organised crime;\(^ {23}\)
- **SWORDFISH** focus on money laundering;\(^ {24}\)
- **FRESHNET** focus on established crime networks;\(^ {25}\)
- **PANZER** focus on outlaw motorcycle gangs;\(^ {26}\)

\(^{20}\) The issue of the jurisdiction and powers of the NCA have frequently been at issue. Most recently see *Re: Wakim; ex parte McNally* (1999) 163 ALR 270 and *R v Hughes* (2000) 171 ALR 155 both of which have lead to legislative amendments – *Jurisdiction of Courts Legislation Amendment Act 2000* (Commonwealth) and *National Crime Authority Amendment Act 2000* (Commonwealth).

\(^{21}\) In relation to evidence and its admissibility, the challenge is to balance the civil liberties of individuals with the rights and responsibilities of a civil society in this process. See *Director of Public Prosecutions (Victoria) Reference No. 2* (1998) 3 VR 241 concerning lawfulness of investigation by the NCA, special powers of investigation by NCA and privileges against self-incrimination and voluntariness.

\(^{22}\) See *Frugniet* [1999] 2 VR 297 in relation to jurisdictional differences relating to whether an AFP member is a police officer.

\(^{23}\) Task Force Blade was established in 1995 with a primary focus on heroin trafficking and a secondary focus on people smuggling and immigration malpractice and amphetamine trafficking.

\(^{24}\) Task Force Swordfish undertook investigations into organised fraud against the Commonwealth through tax and duty evasion. Also as part of this taskforce is the NCA initiative against cyber crime.

\(^{25}\) Task Force Freshnet was established in 1997 to investigate the established crime networks that have successfully avoided prosecution via means of intimidating witnesses, corrupting police and government officials and access to law enforcement or regulatory information.

\(^{26}\) Task Force Panzer was established in 1995 to investigate criminal activities of motor cycle gangs such as the cultivation and supply of cannabis, manufacture and supply of amphetamines, organised violence and illegal firearms and weapons trade.
Finally, the AGIO Task Force was established to examine the patterns of suspect financial activity using the Australian Transactions Reports and Analysis Centre (AUSTRAC), an agency required to routinely receive from all financial institutions reports of defined financial transactions, that being a requirement of the *Financial Transactions Reports Act 1988* (FTR Act).

As part of the *Future Directions* strategy developed in May 2000, the NCA undertook to regularly prepare a commentary as to the current and anticipated position with respect to organised crime in Australia. The specific agenda of this commentary was to inform law enforcement, other concerned bodies and the community as to the impact of organised crime on Australia’s national interests. Although by no means comprehensive, the following are four telling comments arising from the most recent 2001 commentary:

- Organised crime has changed its scope;
- Money laundering has become an integral part of organised crime in that profits generated from illegal activity need to enter at some stage as legitimate funds;
- Convergence of threats increasingly exist as evidenced by the *modus operandi* of organised crime now being seen in politically motivated terrorist activity with the impact of organised crime seen on a par with threats to national security;
- Organised crime can no longer be recognised as merely a law enforcement issue.

It is clear from the comments above that there is a recognition of the changing environment of organised crime. The issue then becomes what can be done differently to counteract this changing environment in terms of investigating organised crime, particularly when the ability of governments, law enforcement and regulatory agencies to formulate and implement policies aimed at counteracting such activity is being outstripped by shifting market opportunities for those persons involved in organised criminal activity. It this issue that the ACC must confront.

---

28 The *FTR Act* and the *Taxation Administration Act 1953* were amended in 1999 to enable ASIO to access information held by AUSTRAC and for the Taxation Commissioner to disclose tax information to ASIO.
Gathering Evidence through New Investigative Measures?
Market Specialisation, Regulation and Control

One of the roles played by the NCA is in recommending to government, certain legal and administrative reforms arising out of the performance of its investigatory role and capacity. In April 2001, the NCA contributed to the development of the Measures to Combat Serious and Organised Crime Bill 2001 (Commonwealth) that aimed to reform Commonwealth legislation dealing with controlled operations, assumed identity and listening devices. Similarly, the NCA also recommended reforms to legislation dealing with the use of new technologies related to e-commerce and the use of electronic surveillance. The NCA also contributed to such legislative amendments as the *Police Powers and Responsibilities Act 2000* (Queensland), the Crimes Amendment (Forensic Procedures) Bill 2000 (Commonwealth) and possible amendments to the *Customs Act 1901* (Commonwealth).\(^{29}\) This list is by no means exhaustive, but it serves to indicate examples of different investigatory needs being translated into legislative measures.

Despite organising new legislation to enhance the means of investigation however, the means of participation in organised crime remains. The crux of understanding organised crime and its ability to burgeon across national borders centres on investigators being able to understand and analyse markets. As Beare argues, between the totally legitimate and the totally criminal there lies “a fascinating central zone occupied by “business persons” knowledgeable enough to exploit the gaps in legislation, regulatory and enforcement mechanisms.” \(^{30}\) To exemplify this contention, Beare suggests that issues such as the illegal smuggling of people involves different issues to drug smuggling and in fact, people smuggling itself is not

---

\(^{29}\) These possible amendments may arise out of a High Court challenge to provisions relating to illegal drug importation. See the NCA Annual Report 2000-2001, p.35.

a uniform activity, with different groups who are involved using different methods, different degrees of exploitation and violence and having different motivations and objectives.\textsuperscript{31} In this respect, the notion of understanding specialisation of markets arises.

An extension and application of this notion to law enforcement agencies suggests that rather than investigators being “generalist” investigators, there is a need for them to become “specialist” investigators. As Beare contends the AFP has made the most headway in terms of making such changes with some key organisational changes such as the implementation of teams versus ranks and the rewarding of individual specialist capabilities.\textsuperscript{32} Although data collection, covert surveillance and intelligence, and partnerships between agencies remain part of the armoury of investigatory and evidence collection methods, increasingly law enforcement agencies are looking to other institutions and organisations with specialist skills to participate in counteracting the activities of organised crime. It is the nature and extent of this participation that becomes an important issue in considering different approaches to organised crime.

Graycar suggests particular approaches that may counteract new crimes emerging out of shifting market environments.\textsuperscript{33} Specifically relating to methods of investigation, Graycar contends that inter-agency cooperation with the formation of new partnerships emphasising national planning, information gathering and undercover operations have partly replaced traditional methods of targeting organised crime so as to move beyond a street level focus to a focus on those who are the main organisers of such illegal activities. Especially, Graycar highlights the role played in Australia by regulatory bodies. He argues that these bodies carry the burden of monitoring legitimate industries and business transactions that may be vulnerable to criminal

\textsuperscript{31} Ibid, p.4.
\textsuperscript{32} Ibid, p.8.
activity. Regulatory bodies now have incorporated into their mandates, the powers and resources to address organised crime.

Just as market regulators are carrying an increased burden in these matters, there are a number of “new” institutions and agencies that have emerged and that are now playing partnership roles with governments in an attempt to counteract organised criminal activity. Similarly, private sector institutions such as the banks are now being mandated to detect money laundering. As Graycar contends much organised criminality lies beyond the capacity of law enforcement and regulatory agencies alone to control with these agencies together with government now being dependent on the efforts of a wide range of diverse institutions that have not always been involved with regulation of such illegal activity. The issue becomes one of whether in the face of increased investigative and regulatory activity, law enforcement and regulatory agencies have sufficient capacity to impose appropriate sanctions on those who have been engaged in illegal behaviours.

Recent events in Australia relating to two corporate collapses in particular have highlighted this dilemma. Two Australian regulatory bodies, the Australian Securities and Investment Commission (hereafter ASIC) and the Australian Competition and Consumer Commission (hereafter the ACCC) are both seeking to increase their punitive powers by having further criminal sanctions being made available to them as a means of penalising those who commit regulatory breaches regulators should raise public awareness as to the types of prevention strategies that might be required to counteract organised fraud. Also he argues that innovative products can deal with aspects of electronic, telecommunications and other crime.

Graycar, Adam, ibid.

Regulatory bodies oversee the operation of various market sectors. For example the gambling industry has numerous bodies that regulate various areas of gambling and types of gambling such as the numerous State Casino Authorities and Licensing Boards.


One such body being End Child Prostitution and Trafficking (hereafter ECPAT).

Graycar, Adam, ibid.

Collapse of HIH Insurance and One Tel reinforces the ambiguous position of enforcers relative to the main criminal prosecuting agency in Australia, namely the various Directors of Public Prosecutions. See Fox, Richard, ibid, p.12.

ASIC is regulatory agency that enforces company and financial services laws to protect consumers, investors and creditors. It was established in 1989, began operating in 1991 and operates pursuant to the Australian Securities and Investments Commission Act 2001.

The ACCC was formed in November 1995 by the merger of the Trade Practices Commission and the Prices Surveillance Authority. The ACCC administers the Trade Practices Act 1974 and the Prices Surveillance Act 1983 and in broad terms these Acts cover anti-competitive and unfair market practices, mergers or acquisitions of companies, product safety/liability and third party access to facilities of national significance.
contrary to relevant legislation. The seeking of this extension of criminal sanctions to bolster means of punishment already available to regulatory agencies contradicts the view that the criminal law as the principal system for the allocation of punishment is being eroded. 42

Although the system of regulation of markets suggests a more pro-active approach43 to monitoring legitimate businesses that may be susceptible to illegal behaviours, the seeking of an ability to impose further criminal sanctions may indicate one of two things. It may indicate an inability on the part of regulatory bodies to regulate and then penalise particular outcomes appropriately; or alternatively it may indicate that even in setting business standards or in seeking to alert the community to certain dangers, regulatory bodies seek to punish those who breach regulations more effectively by possibly relying on the criminal law and the system of punitive options available to it.

At the same time as regulatory agencies seek to extend their criminal sanction options, criminal law has juxtaposed criminal sanctions with civil penalties in order to gain control of monies illegally earned. Graycar44 and Lusty45 both argue that one means via which organised crime has been controlled has been through the continuation of civil sanctions against individuals involved in organised crime. In Australia, the initial impetus for confiscation laws arose out of the Royal Commissions conducted in the 1970’s and early 1980’s. In fact, the first step towards a civil forfeiture regime came in 1977 in the form of an amendment to the Customs Act 1901 whereby, on the balance of probabilities, cash, cheques or goods that had been derived from dealings related to prohibited narcotic imports could be forfeited without the need for a conviction.46 In most cases, this amendment failed due to the inability to trace the suspected proceeds to specific narcotic dealings.

42 See Fox, Richard, ibid, p.17.
43 Pro-active regulation is valued because it sets business standards, prevents harm or alerts the community to the dangers.
44 See Graycar, Adam, ibid, p.10.
46 Lusty, David, ibid, p. 346.
Between 1985 and 1993, all nine Australian jurisdictions, including the Federal jurisdiction enacted conviction-based confiscation legislation which Lusty contends proved “grossly inadequate to deprive criminals”\(^\text{47}\) of their ill-gotten gains. In 1990, the New South Wales Government enacted the *Drug Trafficking (Civil Proceedings) Act* which introduced civil forfeiture, but only initially in relation to serious drug crime. This legislation was amended in 1997 to encompass other forms of serious criminal activity that involved punishment by five years imprisonment or more. The Act was also re-named the *Criminal Assets Recovery Act 1990* (hereafter CARA) and was to be enforced by the New South Wales Crime Commission. Similarly in 1997, the Victorian Government enacted the Confiscation Act. This legislation contained a narrow range of civil forfeiture measures but they differed from CARA in two respects. The Victorian provisions only applied if the Defendant had been criminally charged with a forfeiture offence, whereas CARA operated independently of the criminal prosecution process. Second, civil forfeiture in Victoria was only available in respect of serious drug offences, whereas CARA extended to virtually all serious offences.\(^\text{48}\)

In November 2000, Western Australia enacted the *Criminal Property Confiscation Act* which contains wide-ranging civil forfeiture measures enabling confiscation to occur without specifically linking Defendants or their property to criminal activity. In June 1999, the Australian Law Reform Commission recommended the enactment of civil forfeiture laws based on CARA and on 20 September 2001, the Proceeds of Crime Bill 2001 was introduced into Federal Parliament containing enhanced conviction based laws together with “*in personam*” civil forfeiture provisions and a range of “*in rem*” civil forfeiture procedures. This bill is currently under review by the Senate Legal and Constitutional Legislation Committee. As Lusty argues, civil

\(^{47}\) Lusty, David, ibid, p. 348.

\(^{48}\) Lusty, David, ibid, p.355.
forfeiture with reverse onus\footnote{See Lusty, David, ibid, p. 357 in relation to reverse onus provisions whereby persons are required to demonstrate that their property was lawfully acquired in order to avoid confiscation.} is the way of the future in Australia and elsewhere. Any such legislation however needs to strike a balance between the rights of the individual and the greater good of the community and to contain the necessary checks and balances to achieve this effect.

**Protecting Individual Liberties in Criminal Cases**

**Privacy, Human Rights and the Right to a Fair Trial**

One specific initiative that has been aimed at transforming law enforcement in Australia has been the establishment of the Crim Trac Agency. This agency has been set up specifically to provide detailed and accurate police information. Pursuant to the *Public Service Act 1999* (Commonwealth), Crim Trac was established on 1 July 2000 being initially responsible for:

- A new National Automated Fingerprint Identification System (NAFIS);
- A new National Criminal Investigation DNA Database (NCIDD);
- A new Police Reference System (CPRS) to include a paedophile database

In relation to the DNA Database, the Federal Government consulted widely with the State and Territory Governments in order to produce consistent legislation across jurisdictions. In February 2000, a re-drafted Model Forensic Procedures Bill was released and currently the Commonwealth, States and Territories are at various stages of the implementation of DNA Database legislation.

As Crompton argues, DNA profiling is well recognised in terms of providing evidence that may link suspects to a crime scene or alternatively rule out suspects.\footnote{See Crompton, Malcolm (2001) ‘Preserving Privacy in a Rapidly Changing Environment’, Paper presented at the Australian Institute of Criminology’s 4\textsuperscript{th} National Outlook Symposium on Crime in Australia – New Crimes or New Responses, Canberra, 21-22 June pp. 10-11.} Establishing an identification database does however carry privacy implications. The overall operation and administration of the Crim Trac Agency has been considered in the passing of the *Crimes Amendment (Forensic Procedures) Act 2001*
(Commonwealth). The Senate Legal and Constitutional Legislation Committee report on this legislation prior to its being passed recommended that the role of the Privacy Commissioner be expanded in respect of the processes related to DNA profiling. The relevant Federal Minister, being the Minister for Justice and Customs, has now made a commitment to pursuing the overseeing operations of the Crim Trac Agency together with monitoring and auditing, on a periodic basis, the operation of the DNA profiling system in each jurisdiction.

In Australia, the right to privacy is enshrined by principles in the *Privacy Act 1988*, but in this legislation exemptions are made allowing for reasonably justified law enforcement requirements in terms of the use and disclosure of personal information and the right to access to that personal information. As Fox argues

> “the extent to which the application of convention rights of privacy, will be regarded as incompatible with current investigatory practices, especially the gathering and use of evidence obtained by means of covert surveillance can be expected to become a very live issue.”

Fox suggests that legislation such as the *Human Rights Act 1998* (United Kingdom) sets out the necessary articles and protocols that “impose obligations on the national government” which, in turn, will impact upon “substantive criminal law and procedure.” He identifies some other areas in Australian law where such human rights legislation may impact including certainty in criminal law, the restrictions on retrospectivity, and as previously mentioned consideration of methods of investigation such as DNA profiling.

Although Section 80 of the Constitution states that “the trial on indictment of any offence against any law of the Commonwealth shall be by jury”, it does not directly state that such a procedure is necessary to safeguard the individual liberty of a

---

51 See Fox, Richard, ibid, p.5.
52 See Fox, Richard, ibid, p.6.
54 In Australia across the various State and Territories, there is a mix of Common Law provisions, Criminal Codes and Statutory provisions.
55 There is no prohibition in the Commonwealth Constitution against retrospective criminal legislation.
subject. The right of an individual to have, for instance, a fair trial by jury is not enshrined in the Constitution, but in common law. The notion of a fair trial as a distinct right protected by common law arose in *Jago v District Court of New South Wales*. In the New South Wales Court of Criminal Appeal’s judgment concerning this case, Australia’s obligation under Article 14 of the International Covenant on Civil and Political Rights (hereafter the ICCPR) to guarantee trial “without undue delay” is referred to.

Similarly in *Dietrich v The Queen*, the High Court reconsidered the right to a fair trial. As Bronitt and Ayers argue this judgment is “peppered with references to the fair trial guarantees in the ICCPR and equivalent guarantees contained in the European Convention on Human Rights and the Canadian Charter of Fundamental Rights and Freedoms.” Similarly Bronitt and Ayers contend that in the judgments relating to both *Jago* and *Dietrich*, “the High Court significantly expanded the notion of the fair trial under common law.” Particularly in *Dietrich*, the judgment forged new alliances between international human rights law and the development of the common law with procedural fairness being described as “a legally enforceable right.” As Fox suggests, it remains to be seen how the “concept of fairness” changes in the coming years as international legislative principles and judge made law relating to rights of privacy and human rights impinge upon local criminal law and trial procedure.

There are a number of other cases in the last two decades that have been considered by the High Court of Australia that relate to aspects of the right to a fair trial. These include *Longman* (fair warnings about the reliability of evidence), *Veen (No.1)*

---

59 (1992) 177 CLR 292.
60 See Bronitt and Ayers (ibid), p.121.
61 Ibid, p. 121.
63 Ibid, p.122.
64 (1989) 168 CLR 79.
65 (1979) 143 CLR 458.
and *Veen (No.2)*\(^{66}\) (proportionality of punishment) and *Kable*\(^{67}\) (maintenance of the impartial administration of judicial functions). What these cases highlight is that any individual so convicted has rights of appeal and that there is a commitment by appellate courts to protect those rights. Issues of fairness concerning such things as the right to silence, the non-use of hearsay evidence from witnesses, the obligation on the prosecution to adequately disclose material which is favourable to the accused, the exclusionary rules relating to evidence against an accused that has not been properly obtained, the misuse of coercive investigatory powers and abuses of statutory powers are all issues that are protected not only by the appellate process, but also by procedures governing how individuals are to be dealt with and how evidence is to be collected being put in place by legislation.\(^{68}\) Although not guaranteed by the Constitution, such rules of procedural fairness and evidence are in place for the protection of an individual’s rights relating to the receiving of a fair trial.\(^{69}\)

**The Physical Arrangement of the Court**

Generally speaking in Australia, in the course of the running of criminal trials, special arrangements can be put in place in order to diminish perceived threats to the security of the court. Special arrangements may include searches of the perimeters of the building outside the court, searches inside the court and extra security personnel. From time to time, there may also be a need for special arrangements to be made in regard to the transportation to the court and transfer within the court complex of prisoners. Most often, there is no need for any special arrangements to be made in the course of running a criminal trial, although there are protocols and procedures in place whereby if an emergency situation arises in or outside of the court, the court may be appropriately secured. Procedures will vary from jurisdiction to jurisdiction,

---

68 See for example *Crimes Act 1958* (Victoria) s.464 (inclusive) including rights to communicate with friend, relative or legal adviser, rights to an interpreter, tape recording of confessions and admissions and the taking of fingerprints and blood samples etc.
and from court to court, and may often be dependent upon the location (metropolitan or regional), architecture or geography of the court.

Some of the procedures that court security staff may undertake can be exemplified by considering parts of the Court Security Act 1980 (Victoria). Section 3(1) of that Act states that subject to any limitations or restrictions provided by the rules an authorised officer may demand from a person who is on court premises that person's name and address, his/her reason for being on the premises and evidence of his/her identity. Failure to do so will incur a penalty of $1,000.

Further Section 3(3)(a) of the same Act states that if it is reasonably necessary in the interest of security, a person who is on court premises can be requested to submit to a frisk search and a search of such of his or her personal effects as may be reasonable for the purpose of detecting:-

(i) any firearm, explosive substance or offensive weapon; or
(ii) any item capable of being used to cause injury to, or to incapacitate, a person.

A person who without lawful excuse carries or has in his/her possession on court premises a firearm or an explosive substance or an offensive weapon is guilty of an indictable offence and may be liable to be imprisoned for seven years.

Problems Relating to Illegal Immigration and the So-Called “New Terrorism”

Under Australia’s Migration Act 1958, all foreign nationals wishing to travel to Australia must obtain authorisation to enter Australia in the form of a valid visa. Persons who enter Australia illegally have chosen not to apply for a visa, thereby seeking to circumvent immigration laws. Such persons who arrive without authorisation are “illegal entrants” and Australia’s law requires that they be detained. Persons who arrive illegally may make application as “asylum seekers” for ‘refugee” status. Such asylum seekers are not ‘refugees” until their claims for protection are
assessed against the United Nations Convention and Protocol relating to the status of Refugees.

Not all those who arrive in Australia as unauthorised arrivals seeking protection have genuine claims to protection for a variety of reasons. One of these reasons may be that some of these unauthorised arrivals have criminal backgrounds. As a consequence there is a need for careful assessment of all such applicants for migration and refugee status so as to establish their identity, where they are from and their reasons for being in Australia.

Australia has been involved in the international effort\textsuperscript{70} to resolve illegal immigration, people smuggling and related issues via a process of exchange of ideas. The following are some of the initiatives that have been put in place in dealing with unauthorised arrivals (this list is not comprehensive):

- Using fingerprinting and other biometric tests including language analysis to assist in ascertaining the true identity of asylum seekers to ensure that they do not already have protection elsewhere or have been refused refugee status overseas;
- Changes to the \textit{Migration Act} to increase the maximum period of imprisonment for people trafficking to 20 years with a mandatory minimum sentence of five years imprisonment for those found organising people smuggling;
- Introduction of the \textit{Border Protection (Validation and Enforcement Powers) Act 2001} (hereafter \textit{Border Protection Act}) providing for vessels in international waters to be boarded and searched if suspected in being involved in people smuggling, with those on board warned that passengers will be detained and crews prosecuted;
- Provisions in the \textit{Border Protection Act} for the seizure and disposal of vessels used to smuggle people into Australia;

\textsuperscript{70} People smuggling and transnational crime generally are high on the international agenda evidenced by the increasing number of bi/multi-lateral arrangements and the new Convention Against Transnational Organised Crime. See Tailby, Rebecca (2001), People Smuggling: Recent Trends and Changing Responses, Paper presented at the Australian Institute of Criminology’s 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra, 21-22 June.
• Maintaining multi-function task forces both in Australia and overseas that co-ordinate investigations, collect intelligence and maintain close liaison with law enforcement agencies investigating immigration fraud;

• Placement of departmental officers in key overseas airports where they train airline check-in staff to identify bogus documentation and to advise airlines on Australia’s entry requirements, so preventing the illegal travel of persons to Australia; and

• Frequently updating Australia’s Movement Alert List, a key tool governing the entry of non-citizens who are of security or character concern.

There have also been changes to Australia’s migration zones. New laws have been put in place so that anyone arriving without a visa at certain Australian territories and places\(^71\) will not be able to apply for any type of Australian visa without the permission of the relevant departmental Minister.

From 4 July 2002, immigration law has been amended by the *Migration Legislation Amendment (Procedural Fairness) Act 2002*. These amendments apply to codes of procedure in the *Migration Act* and relate to visa applications, cancellations and revocations as well as the review of decisions made by the Migration Review Tribunal\(^72\), the Refugee Review Tribunal\(^73\) and the Administrative Appeals Tribunal.\(^74\) Decisions made by these bodies can be reviewed by applying to either the Federal Magistrates’ Court, the Federal Court of Australia or the High Court of Australia. The existing judicial review scheme (Part 8 of the *Migration Act 1958*) was repealed and replaced with a new judicial review scheme, again in Part 8 of that Act. Briefly, the result of this change is to give decision makers wider lawful operation for their decisions, with the basis for challenge of those decisions being

---

\(^71\) These places include Christmas Island in the Indian Ocean, the Ashmore and Cartier Islands in the Timor Sea, the Cocos (Keeling) Islands in the Indian Ocean and any Australian sea installation or offshore resource (such as an oil rig).

\(^72\) This Tribunal is an independent merits review body established under the *Migration Act 1958* and its jurisdiction, powers and statutory procedures are set out in that Act and the Migration Regulations 1994.

\(^73\) This body was established by the Commonwealth Government under the *Migration Act 1958* and it operates pursuant to the Migration Regulations 1994 as an independent body to review individual decisions made by DIHA concerning refugees in Australia. It commenced operation on 1 July 1993.

\(^74\) This is another independent body that reviews a range of administrative decision made by Commonwealth minister (and, in limited circumstances, State), officials, authorities and other tribunals. It was established by the *Administrative Appeals Tribunal Act 1975* and operates under the Administrative Appeals Tribunal Regulations 1976 and with its jurisdiction covering 395 separate enactments.
now narrower than before. In essence, the Federal Magistrates’ Court, the Federal Court or the High Court cannot overturn a visa-related decision unless:

- The decision-maker was not acting in good faith in making the decision; or
- The decision is not reasonably capable of reference to decision-making power given to the decision-maker; or
- The decision does not relate to the subject matter of the legislation; or
- The decision exceeded the limits set out in the Commonwealth Constitution.

Further changes to the legislation have now also prevented class, representative or otherwise grouped court actions in migration proceedings.

Similarly, from 1 July 2002 amendments to the *Australian Citizenship Act 1948* and the Australian Citizenship Regulations 1960 have resulted in the *Australian Citizenship Legislation Amendment Act 2002*. Some amendments made include the following:

- The introductions of a power to revoke the approval of the grant of citizenship prior to conferral;
- The introduction of a power to defer the conferral of Australian citizenship after the grant of Australian citizenship;
- The insertion of a note that highlights that a person who has committed a “people smuggling” offence before the grant of a certificate of Australian citizenship may, in certain circumstances, be subject to the deprivation of Australian citizenship.

Although the Department of Immigration and Multicultural Affairs (hereafter DIMA) has overall responsibility for illegal immigration, the Australian Customs Service (hereafter Customs) is a key agency in responding to transnational crime through the role that it plays in controlling the illegal movement of goods and people across national borders. Customs also undertake a number of activities for DIMA such as

---

75 The Federal Magistrates’ Court has been given concurrent jurisdiction with the Federal Court.

76 One of the principal roles of the ACS (Customs) is to facilitate trade and the movement of people across the Australian border whilst protecting the community and maintaining appropriate compliance. Customs has to balance this legitimate movement with the detection and deterrence of unlawful activity at the border.
coastal surveillance. Similarly Customs has turned to new technologies and procedures such as the Advance Passenger Processing System whereby a partnership system between Customs, Immigration and Police allows for the identification of “persons of interest” from the moment they check into a foreign airport to commence their journey to Australia.

Following an incident in 1999 when two steel-hulled vessels reached the east coast of Australia undetected, the partnership arrangements between the ACS, Coastwatch (coastal surveillance coordinator), the AFP, DIMA, Australian Quarantine and Inspection Services, Agriculture, Fisheries and Forestry Australia, Department of Environment and Heritage, Department of Transport and Regional Services and Foreign Affairs and Trade have been strengthened. Further, the establishment of the National Surveillance Centre in Canberra has increased the information gathering capacities of this partnership. As Tailby argues, the national response to illegal immigration, including people smuggling has been an enhanced level of co-operation between local and international agencies. Included in this enhanced cooperation is the new joint People Smuggling Strike Team alliance between the AFP and DIMA. As previously discussed, there has also been a strengthening of existing legislation against people smugglers and the creation of new offences relating to people trafficking, specifically slavery and sexual servitude offences.

Specifically, in relation to national security, on 21 March 2002 the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002 was introduced to the House of Representatives. This legislation provides for the detention and questioning of people for up to 48 hours in order to gather information in relation to terrorists attacks. It has already been subject to change following

---
77 The Coastal Surveillance was set up in response to those undetected landings and following the taskforce 16 recommendations, the government allocated $124 million for a coastal surveillance upgrade.
78 Following the Hudson Report, Customs was given the task of providing a civil maritime surveillance and response service to a range of government agencies. Coastwatch, a division of Customs provides this service.
79 As one of the recommendations of the Coastal Surveillance Taskforce, a National Surveillance Centre was established at Coastwatch’s Canberra headquarters with electronic links to state governments and Defence agencies. This Centre began operation in the first quarter of 2000.
80 See Tailby, Rebecca, ibid.
review by the Senate Legal and Constitutional Legislation Committee and Joint Parliamentary Committee on ASIO. This legislation is still the subject of debate in relation to the issue of what is seen by many as the curtailing of the civil liberties of individuals with respect to the use of ASIO’s coercive powers in being able to detain and question individuals.


Under the Banking (Foreign Exchange) Regulations prohibitions were placed upon foreign currency transactions with various terrorist organisations and in December 2001, the *Commonwealth Government Gazette* listed the names of terrorists and terrorist organisation whose assets must be frozen by the holder of those assets under the *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001*.

There continues to be an accent on national security and anti-terrorism measures following the Summit on 5 April 2002 whereby it was agreed by the Commonwealth, States and Territories to organise significant changes to the management of terrorism and transnational crime. This is reflected in the legislation proposed for the 2002 Spring sittings of Federal Parliament in the form of the Australian Crime Commission Bill and the Counter-Terrorism (State References) Bill that will implement the agreement of 5 April 2002 for the States and Territories to refer power to the Commonwealth to support comprehensive terrorism offences of national application.

---

Conclusion

Although this paper refers mainly to the Australian context, the global context relating to organised crime and the “new terrorism” cannot be ignored. To date there has been substantial co-operation between various governments concerning organised crime and changing issues of national security. This co-operation includes the adoption of the United Nations *Convention Against Transnational Organised Crime* in Palermo in December 2000 which was particularly concerned with trafficking in illicit firearms, drugs and persons. Information sharing in these matters is crucial. More importantly however there is a need for greater uniformity and harmonisation of laws for facilitating prosecution and punishment of offenders and for making business practices more uniform on both the local and the global level. Currently, this is but an ideal.

In the Australian context what constitutes a different approach to organised crime and terrorism cannot not be described singularly, but can be described more specifically as being a series of different responses to both issues. Obviously legislation and regulation remain key factors in laying down an appropriate bases for the control and management of certain criminal and illegal behaviours.\(^{82}\) However, the setting up of new partnerships or alliances for information gathering, the harnessing of new technologies to enhance data collection and storage, the use of both criminal and civil sanctions, and the “different thinking” about the connections between organised crime and terrorism may all contribute to different approaches to both issues.

---

82 As well as legislation and regulation, the concept of Crime Commissions remains current with the Victorian Government announcing that consideration is being given to the establishment of a Victorian Crime Commission similar to the New South Wales and Queensland models. The usual issues have arisen in the debate about its establishment, namely issues of funding jurisdictions and the use of coercive powers of investigation.