



Australian Government
Australian Commission for
Law Enforcement Integrity

Review of Item 250 of the National Anti- Corruption Commission (Consequential and Transitional Provisions) Bill 2022

Submission by the Australian Commission for Law Enforcement
Integrity to the Parliamentary Joint Committee on Intelligence
and Security

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Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security's review of Item 250 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the NACC Transitional Bill).

Item 250 of the NACC Transitional Bill repeals section 110A(1)(c) of the *Telecommunications (Interception and Access) Act 1979 (Cth)* (the TIA Act) which currently provides:

110 Meaning of *criminal law-enforcement agency*

(1) Each of the following is a ***criminal law-enforcement agency***;

(c) The Australian Commission for Law Enforcement Integrity

This section would be substituted with:

(c) the National Anti-Corruption Commission

As Item 250 of the NACC Transitional Bill removes ACLEI from the definition of criminal law-enforcement agency and replaces the reference to ACLEI with the National Anti-Corruption Commission (the NACC), the purpose of this submission is to give the Committee with an overview of:

- ACLEI, including its composition, purpose and functions
- the proposed transition of ACLEI to the NACC, including some key legislative differences between ACLEI and the NACC, and
- the powers granted to ACLEI under the TIA Act as a *criminal law-enforcement agency* and circumstances in which ACLEI currently utilises those powers.

Overview of ACLEI

Purpose

The Integrity Commissioner and ACLEI are established under the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act), which commenced operation on 30 December 2006. ACLEI is a narrow jurisdiction anti-corruption commission, with jurisdiction limited to designated law enforcement agencies.

ACLEI's purpose is to make it more difficult for corruption to occur or remain undetected in designated Australian Government law enforcement agencies. Its purpose supports ACLEI's single outcome under the Attorney-General's Portfolio Budget Statements 2022–23, which is to provide independent assurance to the Australian Government that Commonwealth law enforcement agencies and their staff act with integrity by detecting, investigating and preventing corruption.

Role and Function

ACLEI achieves its purpose by performing the functions set out in the LEIC Act. It undertakes this role through 5 key activities:

- detecting corruption and enhancing our partner agencies' capability to detect corruption

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- receiving and assessing notifications and referrals of alleged corrupt conduct
- conducting investigations into corrupt conduct, giving priority to corrupt conduct that is serious and systemic
- supporting LEIC Act agencies to conduct their own investigations into corruption and misconduct, and
- preventing corruption through engagement, support and identification of vulnerabilities within LEIC Act agencies.

Currently, the following agencies are wholly subject to the Integrity Commissioner's jurisdiction:

- Australian Criminal Intelligence Commission (ACIC)
- Australian Federal Police (AFP) (including ACT Policing)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Department of Home Affairs (Home Affairs), including the Australian Border Force (ABF).

In addition, prescribed aspects of the following agencies are also part of the Integrity Commissioners jurisdiction:

- Department of Agriculture, Fisheries and Forestry (DAFF)
- Australian Competition and Consumer Commission (ACCC)
- Australian Prudential Regulation Authority (APRA)
- Australian Securities and Investments Commission (ASIC)
- Australian Taxation Office (ATO), and
- Office of the Special Investigator (OSI).

The agency heads within ACLEI's jurisdiction must notify the Integrity Commissioner of corruption issues in their agencies as soon as practicable once they become aware of them. Information about corruption may also come from members of the public, the Attorney-General, law enforcement and other government agencies.

Transition of ACLEI to the NACC

The NACC Transitional Bill provides for the repeal of the LEIC Act and for the transition of certain powers and functions from the Integrity Commissioner to the National Anti-Corruption Commissioner.

The NACC will be a broader jurisdiction anti-corruption commission as compared to ACLEI's narrow jurisdiction and the NACC Bill contains some key differences from the LEIC Act to enable that broader jurisdiction.

Expanded jurisdiction

The LEIC Act applies to the conduct of staff members of a limited number of law enforcement agencies as well as a subset of staff of prescribed agencies that perform law enforcement functions.¹

¹ LEIC Act, s 5 (definition of "law enforcement agency") and s 10.

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The NACC Bill applies to “public officials”, a cohort that is made up of:²

- parliamentarians
- staff members of Commonwealth agencies
- staff members of the NACC, and
- any person who is acting for or on behalf of, or as a deputy or delegate of, any person or body listed above.

A staff member of a Commonwealth agency is defined expansively to include officials of Commonwealth entities, individuals employed by or engaged in assisting agencies and their staff members, and contracted service providers.³

Types of conduct

The LEIC Act empowers the Integrity Commissioner to investigate “corruption issues”, which are allegations concerning corrupt conduct engaged in by staff members of law enforcement agencies.

A staff member of a law enforcement agency engages in corrupt conduct if they engage in conduct that:

- involves, or that is engaged in for the purpose of the staff member abusing his or her office as a staff member of the agency
- perverts, or that is engaged in for the purpose of, perverting the course of justice, or
- having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.⁴

The NACC Bill provides for the investigation of “corruption issues”, which are allegations concerning engagement in corrupt conduct.⁵ The Bill proposes a five limbed definition of “corrupt conduct”, which consists of:⁶

1. any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:
 - a. the honest or impartial exercise of any public official’s powers as a public official, or
 - b. the honest or impartial performance of any public official’s functions or duties as a public official.
2. any conduct of a public official that constitutes or involves a breach of public trust
3. any conduct of a public official that constitutes, involves or is engaged in for the purpose of abuse of the person’s office as a public official
4. any conduct of a public official, or former public official, that constitutes or involves the misuse of information or documents acquired in the person’s capacity as a public official, and
5. any conduct of a public official in that capacity that constitutes, involves or is engaged in for the purpose of corruption of any other kind.

² NACC Bill, cl 10.

³ NACC Bill, cl 12.

⁴ EIC Act, ss 6 and 7.

⁵ NACC Bill, cl 9.

⁶ NACC Bill, cl 10.

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While the NACC Bill definition of corrupt conduct is broader than the current LEIC Act definition, in particular in relation to limbs 1, 2 and 4, these aspects of the definition are utilised in the definition of corruption used by other Australian anti-corruption commissions.

Of particular note is that limb 4 would enable the NACC to investigate a former public official for a subsequent misuse of documents or information that were obtained while that person was a public official. Under the LEIC Act, the jurisdiction of ACLEI is limited to conduct undertaken by staff members while they are staff members of a law enforcement agency.

Threshold for investigation and referral

The LEIC Act directs the Integrity Commissioner to give priority to corruption issues that relate to serious corruption or systemic corruption.⁷

In contrast, the NACC Bill explicitly provides that the National Anti-Corruption Commissioner may only conduct, or continue to conduct, a corruption investigation if the National Anti-Corruption Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.⁸

The phrase "serious or systemic" is not defined in the NACC Bill. The explanatory memorandum to the Bill clarifies that the words "serious" and "systemic" should be treated as alternatives and be given their plain ordinary meaning.

Powers available to ACLEI under the TIA Act as a *criminal law-enforcement agency*

Under s 110A (1) of the TIA Act, ACLEI is a *criminal law-enforcement agency*, along with a series of other state and Commonwealth based agencies. As a *criminal law-enforcement agency*, ACLEI may apply for and execute stored communications warrants and may deal with information obtained under a stored communications warrant for the purposes of our investigations.

As a *criminal law-enforcement agency*, ACLEI is also an *enforcement agency* for the purposes of Chapter 4 of the TIA Act. This enables ACLEI to access telecommunications data in accordance with Chapter 4 of the TIA Act for the purposes of our investigations.

ACLEI also has access to a number of other law enforcement powers, which will be provided to the NACC through the NACC Transitional Bill, including:

- telecommunication intercepts under the TIA Act
- controlled operations under the *Crimes Act 1914 (Cth)*
- integrity testing under the *Crimes Act 1914 (Cth)*, and
- surveillance devices warrants under the *Surveillance Devices Act 2004 (Cth)*

⁷ LEIC Act, s 16.

⁸ NACC Bill, sub-cl 41(3).

OFFICIAL**ACLEI's use of powers under the TIA Act as a *criminal law-enforcement agency***

ACLEI routinely exercise our powers as a *criminal law-enforcement agency* to access both existing and prospective telecommunication data in support of investigations into corruption issues. In contrast, our use of stored communications warrants or preservation notices is less common and we note that the material able to be captured by stored communications warrants, like with the wider electronic communications environment, is being impacted by the encryption of data, which at times reduces the investigative utility of those warrants.

The table below provides a breakdown of the use of stored communication and telecommunication data powers by ACLEI from 1 July 2020 until 17 October 2022, by financial year.

	2020/21	Number of related corruption issues	2021/22	Number of related corruption issues	1 July 2022-17 October 2022	Number of related corruption issues
Stored Communications Powers						
Number of Preservation Notices (s 107H)	1	1	1	1	0	0
Number of Stored Communication Warrants (s 110)	0	0	1	1	0	0
Telecommunication Data Powers						
Number of historic data authorisations (s 178)	175	23	265	31	154	19
Number of prospective authorisations (s 180)	40	6	75	3	24	6

The exercise of telecommunication data powers is more commonly used in the early stages of an investigation or as new persons of interest are identified throughout an investigation. The results of these inquiries assist in linking individuals to devices, establishing

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connections between individuals, identifying communications between devices, establishing patterns of life and identifying the movement of individuals throughout the community.

These powers are critical in ACLEI being able to progress corruption investigations from early stages to fully resourced investigations and on to criminal prosecutions. It has been our experience that telecommunication data powers have become a vital law enforcement power in undertaking corruption investigations.

While stored communication powers are used less often by ACLEI than telecommunication data powers, they are still an important law enforcement power for ACLEI to have to ensure it can appropriately investigate corruption.

ACLEI maintains appropriate record keeping and legislative compliance measures to ensure the transparent and appropriate use of both stored communication and telecommunication data powers. ACLEI is regularly subject to inspection by the Office of the Commonwealth Ombudsman (OCO) and is committed to the continual improvement and strengthening of our compliance framework in line with any recommendations and better practice suggestions received from the OCO. This approach and compliance framework will be applied to the NACC.

Conclusion

The most logical and straightforward way to ensure that the stored communication and telecommunication data powers afforded to ACLEI are also available to the NACC is through the proposed amendment of section 110A(1) of the TIA Act to include the NACC in the definition of a '*criminal law enforcement agency*'. ACLEI is supportive of that amendment.

ACLEI is a powerful, capable and independent agency with a jurisdiction specifically focused on law enforcement agencies, and a remit to prioritise serious or systemic corrupt conduct. The NACC is intended to be a powerful, capable and independent agency, charged with continuing the important work of ACLEI, however with a far broader jurisdiction and a remit to investigate serious or systemic corrupt conduct.

With the dramatic increase in jurisdictional agencies, coupled with the requirement to only focus on serious or systemic corruption, it is entirely appropriate for the current powers conferred on ACLEI through the provisions of the TIA Act to also be conferred on the NACC.