

National Anti-Corruption Bill 2022

Some Problems with the Role of The Inspector of the NACC under Part 10

Executive Summary

1. Part 10 of the Bill creates the office of Inspector of the NACC specifies the functions of the Inspector. The Inspector is, or should be, the most significant accountability and oversight mechanism for the new agency.
2. Unfortunately, Part 10, as presently drafted, is defective and not fit for purpose. It addresses a false issue, corrupt conduct within the NACC, and fails to give the Inspector the essential power to ensure that the NACC both complies with the law and behaves fairly. Part 10, as now drafted, confines the powers of the Inspector in ways that will have a significant adverse impact on the accountability of the NACC.
3. I provide in the next paragraph a suggested rewording of clause 184 of the Bill to deal with these issues. I have not set out the consequential changes to other provisions of Part 10 of the Bill which will be necessary if something approaching my formulation is adopted.
4. I suggest clause 184 be amended to read as follows:

184 Functions of the Inspector

- (1) The Inspector has the following functions:*
 - (a) to audit the operations of the NACC for the purpose of:*
 - (i) monitoring compliance with the laws of the Commonwealth;*
 - (ii) detecting agency maladministration and officer misconduct.*
 - (b) to investigate complaints of agency maladministration or officer misconduct made in relation to the conduct or activities of:*
 - (i) the NACC; or*
 - (ii) an officer or staff member of the NACC;*
 - (c) to provide relevant information and documents to the Committee;*
 - (d) to receive public interest disclosures (within the meaning of the Public Interest Disclosure Act 2013) and to deal with those disclosures;*

(e) to report, and make recommendations, to both Houses of the Parliament on the results of performing the functions mentioned in paragraphs (a) to (e).

(2) The Inspector also has such other functions conferred on the Inspector by this Act or by any other Act.

(3) In this Part “agency maladministration” has the following meaning: any conduct (by way of action or inaction) of the NACC--

(a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or

(b) that, although it is not unlawful--

(i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(ii) arises, wholly or in part, from improper motives, or

(iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(iv) arises, wholly or in part, from a mistake of law or fact, or

(v) is conduct of a kind for which reasons should have (but have not) been given, or

(c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

(4) In this Part “officer misconduct” means any conduct on the part of an officer or staff member of the NACC, which, if engaged in by the NACC, would amount to agency maladministration.

Accountability and Oversight

5. The NACC is intended to have extraordinary powers to deal with public sector corruption, including, for example, the power to compel answers to questions and production of information regardless of the protections Australians usually have, such as the privilege against self-incrimination.
6. It is critical that such an agency be made accountable for its actions and subject to adequate oversight. There are three available oversight mechanisms, the Courts, the

Parliamentary Joint Committee on the NACC created by Division 1 of Part 10 of the Bill and the office of the Inspector created by Division 2 of Part 10. Of these three, the most important, and the most effective, is or should be the Inspector. This is because that office will have the day-to-day oversight of the NACC. In contrast, the courts can only intervene on a case-by-case basis and in relation to matters such as an error of law (not of fact), denial of procedural fairness etc. The powers of the Parliamentary Committee are appropriately more general and high-level than those of the Inspector.

7. The difficulty I see with the provisions relating to the Inspector is that the functions allocated to the office are too narrow, deal with a non-existent issue and fail to grant the Inspector adequate power to examine the operations of the agency to ensure that it is operating lawfully, ethically and fairly.

The Major Problem

8. Clause 184 imposes a function of detecting corrupt conduct within the NACC on the Inspector (cl184(1)(a)) and associated functions (cl 184(1)(b)-(d)). The remaining functions set out in clause 184(1)(e)-(h), including the (important) power to deal with complaints are intended (as I understand it) to be distinct from the function of dealing with NACC corrupt conduct. That is appropriate, in my view.
9. I appreciate that clause 8 of the Bill contains an extended definition of “corrupt conduct” which is picked up by clause 184, that is, conduct that affects honest or impartial exercise, breach of public trust, abuse of office etc.
10. The problem is that that kind of conduct is not something likely to occur in an integrity agency like the NACC. Indeed, I would be surprised if it ever occurred within the NACC. I have never encountered any such conduct in the course of my duties as Inspector of the three integrity agencies in respect of which I have held that office. NACC corrupt conduct is a false issue, which distracts from the real probity issues which will inevitably occur within such an agency.
11. Critically, clause 184 takes no account of the issues which, in my experience, are likely to arise and thus precludes the Inspector from dealing with the real problems that this agency is likely to confront. In my experience as Inspector of the NSW ICAC (2017-2022), the Northern Territory ICAC (2018-present) and the NSW LECC (2022), the probable performance issues are:

- a. Failure to give adequate reasons for conclusions of misconduct (to use a general term) made at the conclusion of an investigation;
 - b. Failure to accord procedural fairness;
 - c. Failure to consider the rights of persons not under investigation and so cause reputational or other harm to them. An example is the failure to respect the rights of innocent counterparties to communications intercepted by the agency;
 - d. Investigation failures resulting from incompetence or lack of training on the part of agency staff.
12. Each of these failures can have serious adverse consequences for persons upon whom they are inflicted. Yet there does not appear to be anything in the draft legislation which enables the Inspector, or indeed anyone else, to deal with them. These are the real issues which will confront the agency and those with oversight and charged with making it properly accountable. They are not the (almost certainly) hypothetical issues now set out in clause 184(1)(a)-(d). There is a serious gap in the draft legislation.

Proposed Solution

13. Clause 184 should be amended to confer an audit function on the Inspector so that he can carry out regular monitoring to ensure that the NACC is conducting its operations lawfully and fairly. A useful precedent is found in the New South Wales legislation establishing the Independent Commission against Corruption and the Law Enforcement Conduct Commission. Both Acts specify as a function of the Inspector:
- to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State.*
- The Northern Territory ICAC Act requires the Inspector to evaluate the performance of the ICAC for a financial year and report on that evaluation to the responsible Minister (sections 136 & 137), a similar power.
14. These are significant and beneficial functions, and the Inspector of the NACC should have them or something equivalent. Even if Parliament were to retain the NACC corrupt conduct function, there is no good reason why this audit function should not be adopted. If it were to be framed in the terms I suggest in [4] above, it would

permit investigation of conduct that falls within the definition of NACC corrupt conduct, because my formulation involves a broader concept. The draft clause set out in [4] above deals with this.

Another Issue—Complaints Function

15. There is also a practical difficulty arising from the wording of the Inspector's function of dealing with complaints in clause 184(1)(e) which I have encountered in my role as Inspector of the Northern Territory Independent Commissioner against Corruption—the Territory legislation uses similar wording. The clause now grants to the Inspector the function:

to investigate complaints made in relation to the conduct or activities of:

- (i) the NACC; or*
- (ii) a staff member of the NACC.*

Complaints about what? The section offers no definition of the nature of the complaints the Inspector can deal with. The problem I encountered in the Territory was that employees in the Office of the ICAC brought a series of complaint about matters such as workplace bullying and harassment, which are not the intended role of the Inspector and with which the Office is not equipped to deal.

16. I suggest it would be better to adopt a provision along the lines of the NSW LECC Act definition of "agency maladministration" and confine the power to deal with such complaints to conduct which could amount to "agency maladministration" and a correlative concept of "officer misconduct". That definition as follows:

(1) For the purposes of this Act,

"agency maladministration" means any conduct (by way of action or inaction) of the NSW Police Force or the Crime Commission other than excluded conduct--

(a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or

(b) that, although it is not unlawful--

(i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(ii) arises, wholly or in part, from improper motives, or

(iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(iv) arises, wholly or in part, from a mistake of law or fact, or

(v) is conduct of a kind for which reasons should have (but have not) been given, or

(c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

The draft clause set out in [4] above is intended to take account of these matters.

Less Significant Matters

17. There are several other less significant issues with the drafting of legislation which my experience tells me it would be wise to deal with now. In no particular order, they are these:

- a. While I note clause 183 of the Bill, there should be a provision that provides specifically that the Inspector is not subject to the NACC itself. See for example section 57B(3) of the NSW ICAC Act.
- b. Clause 210(3) should be deleted.
- c. I note clause 214 of the Bill but consider there should be a provision such as section 57C of the NSW Act which is not tied or limited to the power to investigate. That section provides:

The Inspector--

(a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and

(b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and

(c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and

(d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and

(e) may investigate and assess complaints about the Commission or officers of the Commission, and
(f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and
(g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

Conclusion

18. One final point--although not often pointed out, a significant benefit of having an office such as an Inspector, is that he or she provides a quick, cheap and effective remedy for agency misconduct or incompetence, which means that citizens do not need to have recourse to the Federal Courts which are very much slower and extremely expensive for an ordinary person. This makes it even more important that the powers vested in the Inspector are fit for purpose. I regret to say that I do not think those set out in the current Bill are.

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