



Submission by the
Commonwealth Ombudsman

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

Submission by the Commonwealth Ombudsman, Iain Anderson

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Introduction and summary

1. The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to make a submission to the Joint Committee on Intelligence and Security's (the Committee) review of item 250 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential Bill).
2. Item 250 of the Consequential Bill would amend s 110A(1)(c) of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to replace references to the Australian Commission for Law Enforcement Integrity (ACLEI) with references to the National Anti-Corruption Commission (NACC).
3. In practice this would amend the definition of 'criminal law-enforcement agency' in the TIA Act to substitute ACLEI with the NACC and thus empower the NACC with TIA Act powers. The Office currently oversees the use of TIA Act powers by ACLEI. The proposed amendment to transfer TIA Act powers to the NACC would also transfer the Office's oversight responsibilities from ACLEI to the NACC.
4. This submission outlines the proposed responsibilities of the Office to oversee:
 - use of the TIA Act powers by the NACC as a result item 250
 - use of covert and intrusive powers provided by legislative regimes other than the TIA Act
 - complaints about NACC administrative actions more generally.
5. I am satisfied that the mechanisms for my Office to oversee the NACC's use of covert and intrusive powers are sufficient. My Office continues to actively engage with the government's work on Electronic Surveillance Reform to inform opportunities for improvement in this area of our work.

Our role

6. The purpose of the Office is to:
 - provide assurance that the organisations we oversee act with integrity and treat people fairly
 - influence systemic improvement in public administration.
7. We seek to achieve our purpose by:
 - identifying administrative deficiencies through independent review of complaints about Australian Government administrative action
 - fostering public administration that is accountable, lawful, fair, transparent and responsive
 - providing a level of assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to covert, intrusive and coercive powers within our jurisdiction.

Oversight of the NACC's use of covert and intrusive powers under the TIA Act

8. The Consequential Bill would empower the Office to oversee the NACC's use of a range of covert and intrusive powers under TIA Act. Specifically:
 - **Telecommunications interception powers under Chapter 2:** would enable the NACC to listen or record information passing over telecommunications systems, in real time without the knowledge of the person making the communication.
 - **Stored communications powers under Chapter 3:** would enable the NACC to access the content of communications that have already occurred and are stored in the systems of a carrier or carriage service provider. Examples of stored communications include Short Message Service (SMS), Multimedia Messaging Service (MMS), emails and voicemails.
 - **Telecommunications data (commonly referred to as 'metadata') powers under Chapter 4:** would enable the NACC to access information about an electronic communication other than the contents or substance of that communication – for example, the date, time and duration of a communication.
 - **International production orders under Schedule 1:** would enable the NACC to access telecommunication interceptions, telecommunications data and stored communications from prescribed communications providers in foreign countries with which Australia has a designated international agreement.
9. Consistent with the Office's oversight of other agencies' use of these powers, we would carry out our oversight of the NACC through:
 - inspecting the NACC's records, systems, training and governance material
 - interviewing staff
 - observing and assessing processes and practices
 - making recommendations and suggestions for improvement
 - preparing statutory reports on our inspection findings which are tabled in Parliament and made public.

Oversight of covert and intrusive powers provided by other relevant legislation

10. For context, the National Anti-Corruption Commission Bill 2022 (the Bill) and Consequential Bill would also empower the Office to oversee the NACC's use of covert and intrusive powers under the following non-TIA Act legislative regimes:
 - Controlled operations powers under Part IAB of the *Crimes Act 1914*, which would provide legal protection to the NACC and civilian participants for conduct that is otherwise unlawful or subject to civil liability during covert investigations.
 - The use surveillance devices, tracking devices and computer access warrants, which would enable the NACC to covertly access and search devices such as laptops, tablets, mobile phones and USBs under the *Surveillance Devices Act 2004*.
 - Industry assistance powers under Part 15 *Telecommunications Act 1997*, which would enable the NACC to request and, in limited circumstances, compel designated communications providers to provide technical assistance. This could include requesting or requiring a carrier to increase the data allowance on a device to enable a surveillance device to be remotely monitored without consuming the target's data; or requesting or requiring a social media platform to assist with

testing or developing a tool to automate the creation of online personas and historical content to facilitate online engagement.

11. The Office's oversight of the NACC's use of these powers would be undertaken in the same way as outlined above in relation to TIA Act powers (see paragraph 9 above).
12. Concurrently with the NACC reform, the Consequential Bill amends the *Telecommunications Act 1997* to permit the following state-based anti-corruption commissions to use the covert and intrusive industry assistance powers under Part 15 of the *Telecommunications Act 1997*:¹
 - the Independent Commission Against Corruption of New South Wales
 - the New South Wales Crime Commission
 - the Law Enforcement Conduct Commission of New South Wales
 - the Independent Broad-based Anti-corruption Commission of Victoria
 - the Crime and Corruption Commission of Queensland
 - the Independent Commission Against Corruption of South Australia
 - the Corruption and Crime Commission of Western Australia.
13. Robust oversight is critical to maintaining public confidence and trust in integrity agencies. It is important that when it affords agencies additional powers – particularly where those powers are covert – the Government ensures the responsible oversight body is appropriately funded to provide effective assurance.
14. Subject to being appropriately resourced, I am satisfied with the mechanisms for my Office to oversee state integrity agencies' use of the covert and intrusive industry assistance powers under Part 15 of the *Telecommunications Act 1997*.
15. We are engaging with Government about proposed funding options to ensure my Office can provide effective oversight of these agencies' use of the industry assistance powers.

Oversight of complaints about NACC

16. The Bill and Consequential Bill provide regimes for both the Inspector of the NACC and my Office to handle complaints about the NACC.
17. Clause 184 of the Bill empowers the Inspector of the NACC to take complaints about the NACC. Such complaints could concern the NACC's investigations, and allegations of corruption against the NACC or NACC staff.
18. Paragraph 7.292 of the Explanatory Memorandum for Bill and Consequential Bill states the Commonwealth Ombudsman would have jurisdiction to investigate complaints about the NACC. This reflects the jurisdiction of my Office to investigate the administrative actions of the NACC. This is because the NACC fits the definition of a 'prescribed authority' within the meaning of the *Ombudsman Act 1976* (Ombudsman Act), being a body established by an enactment for a public purpose, and there being no

¹ National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill (Cth) 2022, cl 263-270.

exemptions to the definition of ‘prescribed authority’ that expressly apply to it.² Examples of what might fall within the definition of ‘administrative action’ and therefore the Office’s jurisdiction include complaints about delays in the NACC taking action or communicating with complainants, and administrative practices in relation to a hearing.

19. We recognise that while this potentially concurrent jurisdiction with the Inspector in terms of complaints ensures comprehensive oversight, it will require our Office to develop and maintain working relationships with the NACC (potentially with a MOU) to prevent duplication of effort. The Office may also conduct an own motion investigation into the NACC and would seek to consult with the Inspector as part of this process.
20. Finally, no additional funding has been sought by my office to manage NACC related complaints at this stage. We will assess if existing funding is sufficient to deliver effective oversight and reassess once we have further information on the scope, complexity and volume of complaints received and had time to establish and develop our relationship with the NACC and Inspector.

Submission to Joint Select Committee on NACC Legislation

21. Finally, I note my Office has provided a submission to the Joint Select Committee on National Anti-Corruption Commission Legislation and its consideration of the Bill and the Consequential Bill. That submission provides further detail on the points of interaction between my Office and the NACC in relation to the referral of corruption issues and information gathering powers.

² See National Anti-Corruption Commission Bill (Cth) 2022, cl 94 which expressly provides that the protections and immunities afforded to the Commissioner and legal practitioners assisting in a NACC hearing would **not** limit the powers of the Ombudsman under the *Ombudsman Act 1976*, to investigate issues of administrative practice in relation to a hearing held under the Act.