

LATEST DEVELOPMENTS - CREATING A NATIONAL ANTI- CORRUPTION COMMISSION: WHAT DOES IT MEAN FOR BUSINESS?

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Legal Briefings - By **Jacqueline Wootton, Christine Wong, Owen Lunney and Amelia Burns**

On 28 September 2022, the Australian Labor Party introduced the National Anti-Corruption Commission Bill 2022 to federal parliament, fulfilling one of its key promises from the federal election earlier this year.

KEY NEW DEVELOPMENTS IN THE BILL

- Generally private hearings, unless there are 'exceptional circumstances' (departing from the Haines Model)
- 'Corrupt conduct' no longer tied to certain offences
- Stronger protections for commercially sensitive information

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In this briefing, we provide an update on our [June 2022 update](#) on the various proposed models for a National Anti-Corruption Commission (NACC), and what this Bill means for business.

Attorney-General Mark Dreyfus tabled the legislation stating it was evidence of Labor's commitment to improve trust in politics and ensure the "integrity, honesty and accountability" of government. He said "the Commission will be able to investigate serious or systemic corrupt conduct affecting any part of the federal public sector".

The Bill extends the definition of corrupt conduct to that of "any person (whether or not a public official) that adversely affects, or that could adversely affect" the honest or impartial exercise of a public official's powers or duties. The Commission will also have jurisdiction to investigate corrupt conduct "of any other kind" by "public officials", which include contracted service providers under contracts with Commonwealth government agencies.

This inclusion of third parties and contractors means that while the Commission's jurisdiction will focus on the federal political sphere and public sector, the introduction of a Commission also will have clear implications for business and corporate Australia.

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JOINT SELECT COMMITTEE REVIEW

The Bill follows the Labor Government's seven "design principles". It will now be examined by a Joint Select Committee. The Committee will conduct an inquiry (including receiving submissions and holding public hearings) with a 10 November 2022 deadline for reporting. The Federal Government hopes to pass the Bill this year and will aim for a House of Representatives vote in early November and a Senate vote in the final sitting fortnight of the year (21 November to 1 December 2022).

CREATING THE FEDERAL ANTI-CORRUPTION COMMISSION

While Labor has a majority of seats in the House of Representatives, it lacks a majority in the Senate. As such, it will need to rely on support outside of the party room to pass this Bill into law.

The Coalition has been largely supportive of the push for an integrity commission.

However, early statements from a number of crossbenchers suggest the public or private status of hearings will be a key sticking point. As currently drafted, hearings will be held in private unless there are 'exceptional circumstances' meaning there is a public interest to hold the matter publicly. The sentiment that "public hearings are the disinfectant to anti-corruption" has been expressed by a number of independents and the Greens.

PROPOSED POWERS FOR THE COMMISSION

The types of broad powers which the Bill proposes to give the Commission will have wide implications. These include

- **Retrospective investigations**, which can be commenced at the Commissioner's discretion, for serious and systemic corruption.
- **The ability to receive public referrals**, and for members of the public to provide information and make allegations regarding corrupt conduct.
- **Invasive investigation powers**, to:
 - compel the production of information and documents;
 - compel a person to give evidence, to answer questions and produce documents; and

- issue search warrants for premises (including non-government premises) and persons.

Failure to comply potentially carries criminal penalties, including imprisonment.

- **No ability to withhold evidence on the basis of legal professional privilege or public interest concerns**, although such evidence would be heard in private hearings and LPP may still be claimed over advice in relation to appearing before or producing material to the Commission.
- **Public hearings** in 'exceptional circumstances' and where it is in the public interest to do so.
- **Publication of reports and findings** of corrupt conduct, made available to the public.
- **Powers to refer** conduct to prosecutors or relevant regulators, increasing the likelihood of subsequent criminal or civil penalty enforcement proceedings.

PROPOSED SAFEGUARDS AND PROTECTIONS

Balanced against these types of powers, the Bill seeks to enshrine some safeguards and protections. These include:

- **Exclusion of sensitive information:** The Commissioner must exclude sensitive information, from a report or disclosure. This includes if the Commissioner is satisfied disclosure would involve unreasonably disclosing confidential commercial information. Private hearings for disclosure of materials subject to legal professional privilege or contrary to public interest.
- **Opportunity to be heard:** Critical findings or opinions will not be disclosed without the affected person having the opportunity to be heard and make submissions.
- **Exoneration:** Reports must include opinion that no corrupt conduct has occurred and explanation, if determined.
- **Self-incrimination:** A person will not be excused from giving information or documents if doing so would tend to incriminate the person, but information or documents are inadmissible in a criminal proceeding against that person, with some exceptions.
- **Legal representation:** A person giving evidence at a hearing may be represented by a legal practitioner.
- **Judicial review:** Commissioner operates with procedural fairness and findings may be subject to judicial review.

HOW A FEDERAL ANTI-CORRUPTION COMMISSION MAY AFFECT BUSINESS

While investigations and hearings will need to relate to the public sector (including companies contracting with the Commonwealth and its agencies), the Commission's inquiries will naturally extend to any private actors and businesses that are involved in alleged corrupt conduct.

Businesses and executives need to be alert to the potential powers of the Commission and the increasing spotlight that will be on government interactions and dealings.

Examples of State Anti-Corruption Commissions involving business

The work of state anti-corruption commissions has shown how companies of all sizes, large and small, can be involved.

From NSW ICAC:

- An investigation into corruption at an NGO that was in receipt of public money.
- The investigation into alleged dishonestly obtained financial benefits from falsely charged security services at a university.

Both of these involved extensive records being sought from private companies.

From IBAC in Victoria:

- An investigation into a local council for alleged favouritism towards developers, involving records being sought from the developers.

Examples of how a Commission may affect business include:

- **Staff can provide information and make allegations:** Where the Commonwealth engages or otherwise works or is involved in some way with a commercial entity, the staff of that company can make an allegation and provide information to the Commission

CONCLUDING THOUGHTS

Following the introduction of the Bill, we are likely to see debate in relation to breadth of the Commission's broad powers.

This briefing has highlighted some areas for business to watch as this debate unfolds, including the public or private nature of hearings.

Other key areas to consider include the broader implication that a Commission will have for the integrity landscape in Australia.

The Commission's existence, and power to directly receive referrals and complaints, including from whistleblowers and members of the public, is likely to have wider ramifications for the disclosure and reporting of misconduct generally. It will send an important signal encouraging disclosure of misconduct, reinforcing the trend that has been in place since the introduction of refreshed whistleblowing laws, and provide an additional contact point and pathway for information and allegations to be disclosed to external authorities.

One of the Commission's stated objectives is to educate and provide information about corruption the detrimental effects of corruption on public administration and the Australia community.

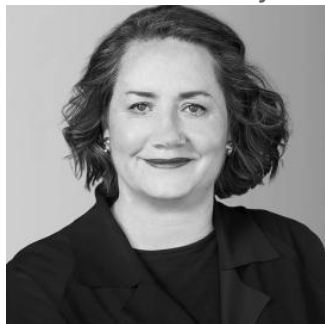
This is aligned with what has already been occurring at a state level. Indeed, one of the key contributions that state integrity bodies have made has been to identify lessons from their work, and to produce and promote materials that are widely available across the public and private sectors.

These types of resources have added to the toolkits available to companies as they consider what corruption risks may be relevant in their operating context, and steps that can be taken to assist in mitigating those risks and to promote a robust commitment to anti-corruption compliance.

This briefing note was prepared with assistance from Madeleine Ryan, Alessandra Hayward and Calida Tang.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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