



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON ESTIMATES 2024-2025

Ms Nicole Lawder MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Miss Laura Nuttall MLA

**ANSWER TO QUESTION TAKEN ON NOTICE
DURING PUBLIC HEARINGS**

Asked by: Ms Elizabeth Lee MLA

Addressed to: ACT Integrity Commissioner

Redirected to: N/A

Reference: Uncorrected Hansard Transcript [Page 25]

In relation to: Which commission has a privative clause?

Hearing Date: Friday, 25 July 2024

QTON lodgement date: Monday, 29 July 2024

Answer Due Date: Thursday, 1 August 2024

Mr Adams: Litigation always has the potential for that to occur. None of the litigation so far has had that effect, but it can do so. The question of the extent of financing and what form it should take is a policy question about which I have some views, but I think they ought to be contributed in a context where the wider policy is looked at.

For example, I think only one Integrity Commission has what is called a privative clause, where you cannot go to the court except for jurisdictional errors. So an alleged incidental error of fact, for example, or non-jurisdictional error of law you cannot go to the court with, but if it is jurisdictional, that is, if there is a genuine failure to give procedural fairness; or the person is not, because of their status, for one reason or another, subject to the jurisdiction of the commission, of course, you should be able to litigate that. So it limits the ability to sue for matters.

MS LEE: Which commission was that? You said there is one.

Mr Adams: Can I take that on notice and let you know?

MS LEE: Yes, thank you.

ACT Integrity Commissioner: The answer to the Member's question is as follows:

The National Anti-Corruption Commission is the Commission referred to, regarding having a privative clause¹.

An extract from the [National Anti-Corruption Commission \(NACC\) Bill 2022 \(Explanatory Memorandum\)](#) (page 321 – sections 14.14 – 14.18) is provided at [Attachment A](#) detailing the amendments to the *Administrative Decisions (Judicial Review) Act 1977* amendments and how these interact with the NACC Bill.

Approved for circulation to the Select Committee on Estimates 2024-2025



Signature:

Date: 2nd August 2024

By the ACT Integrity Commissioner, Michael Adams KC

¹ A privative clause is a provision within an Act that restricts the scope of judicial review for decisions made pursuant to the Act.

Extract from [National Anti-Corruption Commission \(NACC\) Bill 2022 \(Explanatory Memorandum\)](#)

Administrative Decisions (Judicial Review) Act 1977 amendments

14.14 Item 2 would amend Schedule 1 of the ADJR Act. The amendments would exclude the following provisions of the NACC Bill from the operation of ADJR Act:

- provisions in Part 6 (dealing with corruption issues), including that Part as applied— with some modifications—to Part 10 (oversight of the NACC) by clause 211 of the NACC Bill. This would include a decision by the Commissioner to commence a corruption investigation, or a decision to refer a corruption issue to relevant Commonwealth agencies or State and Territory government entities.

- provisions in Part 7 (investigating corruption issues), including that Part as applied to Part 9 (public inquiries) by clause 163 and to Part 10 by clause 214 of the NACC Bill. This would include a decision relating to a notice to produce and a decision to issue a summons to attend a hearing.

- clauses 161 (the power to conduct public inquiries), 162 (the power to invite submissions to public inquiries), 209 (the Inspector may deal with NACC corruption issues), 210 (how the Inspector deals with NACC corruption issues) and 213 of the NACC Bill (how the Inspector may conduct investigations).

14.15 The provisions of the NACC Bill that would be excluded from the operation of the ADJR Act concern intermediate process steps necessary for the NACC to effectively undertake an investigation into a corruption issue. If a person were able to seek review of decisions made under these provisions, this could significantly impede the NACC's ability to fulfil its statutory functions. For example, in the same investigation, a person could seek review under the ADJR Act of each of the Commissioner's decisions to deal with a corruption issue, commence a preliminary investigation, issue a notice to produce seeking foundational information to inform the Commissioner as to whether and how to further deal with the corruption issue, commence an investigation of the corruption issue, and to hold a hearing. The person could also send the Commissioner correspondence requesting that the Commissioner discontinue the investigation, and then seek review under the ADJR Act of the Commissioner's decision to continue the investigation. Excluding decisions made under these provisions from the ADJR Act would ensure that well-resourced subjects of investigations cannot use the ADJR Act to fragment, delay and frustrate corruption investigations by seeking review of the Commissioner's foundational and intermediate decisions on the way to reaching findings.. It is therefore appropriate to exclude these provisions of the NACC Bill from the operation of the ADJR Act.

14.16 These amendments would not limit a person's ability to seek judicial review under the Judiciary Act 1903 or in the High Court's original jurisdiction. This would include the ability for a person to seek a writ of mandamus to compel the performance of a statutory duty by the Commissioner, such as the duty contained in clause 153 to provide a person with an opportunity to respond to certain matters before including them in an investigation report. It would also include the ability for a person to seek a writ of prohibition or an injunction to prevent an excess of power

or jurisdiction by the Commission, or to restrain unlawful behaviour. National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 322

14.17 Other decisions made under the NACC Bill would still be reviewable under the ADJR Act. Specifically, decisions made under Part 8, which concerns reporting on corruption investigations, including the Commissioner's recommendations in relation to an agency taking action against a person where the Commissioner has found that the person has engaged in corrupt conduct. It is appropriate that such decisions are reviewable under the ADJR Act given the potential for decisions made under Part 8 to adversely and permanently affect a person's reputation or privacy, in contrast to intermediate decisions made in the course of NACC Act processes under, for example, Part 7.

14.18 Item 3 would repeal paragraph (eaa) of Schedule 2 of the ADJR Act. Paragraph (eaa) of Schedule 2 operates to exclude certain decisions under the LEIC Act from section 13 of the ADJR Act, being decisions in connection with corruption investigations and public inquiries. With the amendments proposed under item 2, paragraph (eaa) would no longer be necessary and it is appropriate to repeal the paragraph.