



AUSTRALIA

# Submission by Free TV Australia

## *National Anti-Corruption Commission Bill 2022*

October 2022

## 1. Summary

- Free TV members are vital to providing valued and trusted news and current affairs to Australian audiences.
- Division 4 of Part 4 of the *National Anti-Corruption Commission Bill 2022* (the **Bill**) provides for the protection of journalists' informants in the work of the National Anti-Corruption Commission (the **NACC**). This protection is welcomed, as it is crucial to Australian journalists who rely on the maintenance of trust with informants to produce quality, public interest journalism.
- The protections in section 114 for legal professional privilege when it applies to the work of professional journalists are also an important protection measure. However, it is also recommended that clause 114 of the Bill (or another provision) stipulate that a journalist working in a professional capacity is not subject to any disclosure requirement under the legislation where compliance with that requirement would result in disclosure of information communicated in confidence to that journalist.
- The provisions in section 73, allowing for a default position of private hearings, and section 95, preventing reporting on the NACC's investigations, risk stifling Australian journalism. To ensure the vitality of public interest journalism in Australia, and a commitment to transparency, it is recommended that the Bill should ensure, at least, that journalists who report on matters relating to NACC investigations, without themselves breaching NACC orders directed at them, are not thereby exposed to criminal liability. In addition, it is recommended that the NACC be prohibited from making non-publication orders directed at journalists save in exceptional circumstances where a NACC investigation could not continue without the making of such an order.
- This imposition of the public interest test prior to issuing search warrants relating to journalists in section 124 is important to protecting journalists' sources, and retaining trust and engagement with public interest journalism in Australia. This protection should be bolstered, by raising the threshold for the issue of such a search warrant. The issuing of a search warrant in respect of journalist premises is an extreme step that should be taken only in exceptional circumstances.
- While journalists are excluded from some of the powers of the NACC through the Bill, the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022* (the **Consequential Bill**) amends gives the NACC certain powers under the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*. The protection in relation to journalists' informants should also extend to the exercise of powers arising from amendments made by the Consequential Bill.
- The extension of the definition of 'public official' to include private sector employees involved in the delivery of goods and services to the Commonwealth goes beyond the scope of the NACC. It would be inappropriate for the definition of 'public official' to be used to extend the powers of the NACC to private companies, and their employees. Accordingly, we recommend that the definition of "public official" be narrowed.

## 2. Introduction

Free TV Australia is the peak industry body for Australia's commercial television broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial FTA television makes to Australia's culture and economy.



Australia's commercial broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

A report released in September 2022 by Deloitte Access Economics, *Everybody Gets It: Revaluing the economic and social benefits of commercial television in Australia*, highlighted that in 2021, the commercial TV industry supported over 16,000 full-time equivalent jobs and contributed a total of \$2.5 billion into the local economy. Further, advertising on commercial TV contributed \$161 billion in brand value. Commercial television reaches 16 million in an average week, with viewers watching around 3 hours per day.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. Free to air television broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television, and Australians prefer local stories. Commercial television networks spend more than \$1.5 billion on Australian content ever year, dedicating over 85% of their content expenditure to local programming.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama. At no cost to the public, our members provide a wide array of channels across a range of genres, as well as rich online and mobile offerings.

The 2022 Deloitte Access Economics report found that while the internet is widely used in Australia, it is not universal, the quality and access varies significantly, and it is not free. At least 5.6 million (22%) Australians cannot access live streaming and video on demand (VOD).

A strong commercial broadcasting industry delivers important public policy outcomes for all Australians and is key to a healthy local production ecosystem. This in turn sustains Australian storytelling and local voices and is critical to maintaining and developing our national identity.

### 3. Protection of journalists' sources

Commercial television is vital to the functioning of Australian society and democracy. A recent survey found that commercial broadcasters were the most useful source of news and information during the 2022 Federal Election campaign<sup>1</sup>, and are also the most trusted, with a CT Group 2021 survey showing that '65% of respondents agreed that commercial television is a 'trusted source of local news, current affairs and information which is essential to Australian society and our democracy'<sup>2</sup>.

Division 4 of Part 4 (specifically, cl 31) of the Bill provides for the protection of journalists' sources. This protection is welcomed, as it is vital to Australian journalists who rely on the maintenance of trust with sources to produce quality, public interest journalism, for Australian audiences.

This protection can be further supported by the consideration of the issues outlined below.

### 4. Compulsory disclosure of information

Clause 114(1) of the Bill specifies certain matters that do *not* excuse a person from a requirement to provide information under the Bill. In particular, the clause confirms that a person must disclose information even if to do so would disclose legal advice given to the person, and even if disclosure would otherwise be protected by legal professional privilege.

However, clauses 114(3) and clauses 114(4) provide that these overrides of legal professional privilege do not apply '...in relation to legal advice given for the purposes of, or in the course of, a person's work as a journalist in a professional capacity' and 'in relation to a communication made for the purposes of, or in the course of, a person's work as a journalist in a professional capacity'. These provisions are important to protect the trusted and valued work of journalists, and further support the protection of journalists' informants as outlined above in relation to cl 31.

While the protection of legal professional privilege is vital for the work of journalists, journalists do otherwise remain subject to the proposed Commission's compulsory investigative powers. For example, journalists may be called as witnesses, where they have been investigating the same or a similar issue to the NACC. However, that a journalist may be in possession of information about a corruption issue, without otherwise being a suspected participant in it, should not be sufficient to require that journalist to be subjected to compulsory investigative powers.

It is **recommended** that clause 114 of the Bill (or another provision) stipulate that a journalist working in a professional capacity is not subject to any disclosure requirement under the legislation where compliance with that requirement would result in disclosure of information communicated in confidence to that journalist.

### 5. Restrictions on reporting on Commission investigations

Clause 73(1) of the Bill notes that '[a] hearing must be held in private, unless the Commissioner decides to hold the hearing, or part of the hearing, in public'. While the establishment of the NACC aims to promote transparency and accountability, as noted throughout the Explanatory Memorandum, the

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<sup>1</sup> JWS Research, *2022 Post Federal Election Survey Report*, page 22

<sup>2</sup> CT Group, *Federal Election Campaign Research* (report commissioned by Free TV (October 2021))

default position of holding hearings in private does not support this objective. Clause 73(2) outlines when a hearing, or part of a hearing, may be held in public – the Commissioner must be satisfied that ‘(a) exceptional circumstances justify holding the hearing, or the part of the hearing, in public; and (b) it is in the public interest to do so’ (73(2)). In making this decision, the Commissioner may have regard to the five considerations in clause 73(3).

Additionally, the NACC, as per clauses 95 and 96(2), will have a broad discretion to make a ‘non-disclosure notation’ on any summons or ‘notice to produce’ that it issues, the effect of which may be to ban the recipient from disclosing anything related to the investigation. The Commission will also have a broad discretion to make non-publication orders, as per clause 100(1), which may well become the default position.

These provisions risk stifling journalists’ work investigating the very kinds of conduct that the NACC legislation aims to expose and eradicate. This is because the provisions are likely to jeopardise reporting of investigations and of the underlying incidents or practices to which those investigations relate. These provisions may also prevent media organisations from reporting on their own activities, to the extent they are themselves caught up in investigations (if only because the NACC seeks information from them).

This effect is reinforced when one appreciates that journalists who seek to uncover information about investigations will be exposed to criminal liability for complicity,<sup>3</sup> incitement,<sup>4</sup> or conspiracy<sup>5</sup> in relation to underlying disclosure offences in the NACC Bill.

To ensure the vitality of public interest journalism in Australia, and a commitment to transparency, it is **recommended** that the Bill should ensure, at least, that journalists who report on matters relating to NACC investigations, without themselves breaching NACC orders directed at them, are not thereby exposed to criminal liability. In addition, it is **recommended** that the NACC be prohibited from making non-publication orders directed at journalists save in exceptional circumstances where a NACC investigation could not continue without the making of such an order.

## 6. Execution of search warrants

Clause 124(1) of the Bill provides that ‘[a]n issuing officer may issue a warrant to search premises...’. A protection has been put in place, however, in clause 124(2A) for journalists ‘who work in a professional capacity as a journalist’; ‘the employer of the journalist (working in that capacity)’ or ‘premises occupied or controlled by the journalist or the employer; or ‘the evidential material relates to an alleged offence against a secrecy provision by a person other than the journalist’. In these circumstances, as outlined in clause 124(2B) ‘the issuing officer must have regard to whether the public interest in issuing the warrant outweighs (a) the public interest in protecting the confidentiality of the identity of the journalist’s source; and (b) the public interest in facilitating the exchange of information between journalists and members of the public so as to facilitate reporting of matters in the public interest’.

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<sup>3</sup> *Commonwealth Criminal Code* s 11.2.

<sup>4</sup> *Commonwealth Criminal Code* s 11.4.

<sup>5</sup> *Commonwealth Criminal Code* s 11.5.

This imposition of the public interest test prior to issuing search warrants relating to journalists, is a welcome acknowledgment of the importance of protecting journalists' sources, and retaining trust and engagement with public interest journalism in Australia. We **recommend**, however, that the protection be bolstered, by raising the threshold for the issue of such a search warrant. Currently, it is no more than a public interest weighing exercise. We are of the view that the issuing of a search warrant in respect of journalist premises is an extreme step that should be taken only in exceptional circumstances (e.g. where there is a likelihood that a journalist is themselves engaged in conduct of the kind that the NACC is to investigate). This would prevent the execution of search warrants at the premises of a media organisation, or the home of a journalist, such as was seen in 2019 with the ABC, and News Corp journalist Annika Smethurst. At the time, Free TV made the following statement, which remains true over three years later,

*The role of the media in holding our Governments to account is the cornerstone of our democracy. It is essential that journalists are able to continue to do their jobs, reporting on stories in the public interest, without fear of persecution.<sup>6</sup>*

The bolstering of the protection from search warrants would help to minimise the risk of journalists and media companies facing raids by police for doing their jobs.

Additionally, section 124 of the NACC Bill allows for warrants to be issued by magistrates, justices of the peace or other persons employed in a court of a State or Territory authorised to issue search warrants or warrants for arrest.

This is not appropriate for an action against a journalist, or media company, which should be considered exceptional in their nature. Applications should be required to be made of judges of superior courts, being the Supreme Courts, the Federal Court and the High Court.

## 7. Impact of the Consequential Bill

As noted above, journalists are exempted or otherwise protected from the exercise of some of the powers of the NACC through by the NACC Bill itself. However, the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022* (the **Consequential Bill**) amends certain other legislation — notably, the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIAA**) and *Surveillance Devices Act 2004* (Cth) (**SDA**) —so as to give the Commission powers under those existing Acts.

The Commission will therefore have the power under the TIAA to apply for a 'journalist information warrant', or for orders under the SDA. The provision of powers under these Acts would appear to be at odds with the intention of the clause 31(2) of the NACC Bill which states that '[n]either the journalist nor the journalist's employer is required to do anything under this Act that would disclose the identity of the informant or enable that identity to be ascertained'. As such, we **recommend** that the protection in relation to journalists' informants should also extend to the exercise of powers arising from amendments made by the Consequential Bill.

## 8. Definition of public official

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<sup>6</sup> <https://www.freetv.com.au/afp-raids-on-journalists-deeply-disturbing/>

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The NACC Bill contains an unusually broad definition of “public official” that encompasses private sector employees involved in the delivery of goods or services under an arrangement of some kind with the Commonwealth (be it contractual or otherwise).<sup>7</sup>

The stated intention of the NACC is to ‘...investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption.’<sup>8</sup> The extension of the definition of ‘public official’ to include private sector employees involved in the delivery of goods and services to the Commonwealth goes beyond the scope of this intention, and opens the powers of the NACC to a large number of private sector companies. For Free TV members, for example, they may be captured through advertising contracts held with Government agencies or Departments. It would be inappropriate for the definition of ‘public official’ to be used to extend the powers of the NACC to private companies, and their employees. Accordingly, we **recommend** that the definition of “public official” be narrowed.

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<sup>7</sup> See cl 10(1)(b), when read with cl 12(1)(f)(ii) and cl 13(1) and (2) (especially in light of definition of “contract” in s7).

<sup>8</sup> Explanatory Memorandum, page 3