



**A guide to the
National
Anti-Corruption
Commission**

July 2023

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Contents

3	Introduction
4	Commencement
4	Functions of the NACC and its Commissioners
4	What is 'corrupt conduct'?
8	What is 'serious' or 'systemic' corrupt conduct?
9	Who is a public official?
10	Powers of the NACC Commissioner
13	Matters to be referred to the NACC
13	The NACC's reporting obligations
14	Publication of reports
14	Witness and whistle-blower protections
17	Annexure
23	Endnotes



Introduction

Late last year, in a significant achievement for the oversight of public sector integrity in Australia, the Australian Federal Parliament passed laws to establish an independent National Anti-Corruption Commission (**NACC**) to investigate 'serious or systemic' corrupt conduct by federal public officials. The NACC commenced on 1 July 2023.

Independent and dedicated anti-corruption commissions investigating public sector corruption have been a feature of the public accountability landscape in Australian states for many decades¹. But the establishment of the NACC overcomes long-standing political reluctance to create a similar institution at the federal government level.

Modelled on the state bodies but seeking to learn from the perceived strengths and weaknesses of each, the NACC will operate independently of government under strict oversight arrangements. It will have wide-ranging coercive powers to conduct confidential corruption investigations and, in tightly controlled circumstances, the ability to conduct its inquiries through public hearings. The NACC is not itself a prosecuting agency, and so, where it identifies potential contraventions of the law, or makes findings of fact, it may refer these matters to the Commonwealth Director of Public Prosecutions or other appropriate Commonwealth, State or

Territory agency or entity for the consideration of criminal prosecution or further investigation. In certain circumstances, it may also decide to publish its report on the outcome of its investigations.

The introduction of the NACC will see the sharing of investigatory powers between the NACC and those bodies that have historically held responsibility for investigating corruption across the federal government sector, including the Australian Federal Police.

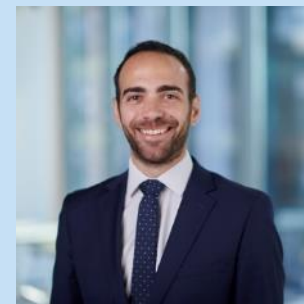
The new laws are focussed on the detection and investigation of serious or systemic corrupt conduct, rather than creating new criminal offences for corrupt conduct. However, of significance to business is that the NACC's jurisdiction to investigate corruption is not confined to the traditional concepts of bribery of public officials. Rather, the definition of 'corrupt conduct' on which the NACC's jurisdiction is founded is broad, and includes any conduct that adversely affects the honest or impartial exercise

or performance of a public official's powers, functions or duties, or conduct that constitutes or involves a breach of public trust or abuse of office or any misuse of Government information or documents. Mitigating the risk of becoming subject to a NACC investigation will require businesses to conduct enhanced risk assessments when dealing with any 'public official' under the regime including a proper understanding of who may be a current or former 'public official' when participating in any government contract or hiring new staff or contractors.

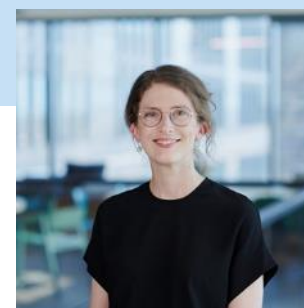
This guide seeks to outline the key features of the NACC, including the scope of its jurisdiction, functions and coercive powers. Observations about the expected operation of the NACC and how it may interpret its jurisdiction are drawn from the new laws as passed and the Revised Explanatory Memorandum (**EM**).



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Commencement

The substantive parts of the *National Anti-Corruption Commission Act 2022 (NACC Act)* and the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022 (NACC Transitional Provisions Act)* commenced on 1 July 2023.

The Honourable Paul Brereton AM RFD, recently retired as a Judge of the Supreme Court of New South Wales and a Judge of Appeal, has been appointed as the inaugural NACC Commissioner, for a term of five years.

Functions of the NACC and its Commissioners

The NACC Commissioner has multiple functions including²:

- the detection of corrupt conduct;
- the conduct of preliminary investigations into corruption issues or possible corruption issues;
- the conduct of corruption investigations into corruption issues that could involve corrupt conduct that is serious or systemic;
- reporting on corruption investigations and public inquiries;

- the referral of corruption issues to Commonwealth agencies and State or Territory government agencies, including the referral of criminal charges to the Commonwealth Director of Public Prosecutions;
- overseeing investigations into corruption issues conducted by other Commonwealth agencies;
- the conduct of public inquiries into the risks of corrupt conduct and measures for its prevention;
- the provision of education and information in relation to corrupt conduct and its prevention; and
- to collect, correlate, analyse and disseminate general information and intelligence about corrupt conduct; and
- to report and make recommendations to the relevant Minister concerning legislative or administrative reform in relation to any matters dealt with by the NACC Act.

The Deputy Commissioners' functions primarily include providing assistance to the Commissioner³, and the NACC's function is to assist the Commissioner and the Deputy Commissioners to perform their functions⁴.

The NACC Inspector is an independent officer of the Parliament

appointed by the Governor-General⁵, whose functions primarily include detecting corruption with the NACC and undertaking associated investigations and referring these issues to investigative agencies⁶. The Inspector will also be responsible for preparing an annual report to be tabled in Parliament, relating to the performance of the Inspector's functions during the financial year⁷.

What is 'corrupt conduct' within NACC's jurisdiction?

Corrupt conduct is defined broadly by the NACC Act⁸ to include each of the following:

- any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:
 - the honest or impartial exercise of any public official's powers as a public official; or
 - the honest or impartial performance of any public official's functions or duties as a public official;
- any conduct of a public official that constitutes or involves a breach of public trust;



- any conduct of a public official that constitutes, involves or is engaged in for the purpose of abuse of the person's office as a public official;
- any conduct of a public official, or former public official, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a public official.

Under the NACC Act, corrupt conduct does not need to be for a personal benefit⁹. Further, a person may engage in corrupt conduct alone or with others¹⁰ and a conspiracy or attempt to engage in the relevant conduct may itself be corrupt conduct¹¹. A public official's own conduct (e.g. soliciting a bribe) may constitute corrupt conduct if it could have an adverse effect on the honest or impartial exercise or performance of their powers, functions or duties as a public official¹².

Example from the EM:

...a third party could offer to give a benefit to a relative of a public official to induce the public official to make a decision that favours a friend of the third party. The fact that neither the public official nor the third party received a direct benefit from the conduct would not prevent the Commissioner from investigating this corruption issue, if they were of

the opinion it was serious or systemic.

Corrupt conduct will be taken to include conduct prior to the commencement of the NACC Act (including conduct of former public officials)¹³. This will give the NACC power to investigate corruption concerns arising from conduct that occurred prior to its creation.

The definition of corrupt conduct employed in the NACC Act is deliberately much broader than existing criminal offences directed at a public official receiving a bribe or corrupting benefit in connection with the performance of their official functions. However, the EM notes that the definition of corrupt conduct 'is not intended to establish a new standard of conduct by public officials ... [but] ... [r]ather, this clause is intended to reflect long-standing standards of conduct by public officials and their existing duty, including the duty to act in the public interest'¹⁴. Further, in terms of its application, 'the concepts in the definition are intended to be complementary and mutually reinforcing, rather than mutually exclusive, and a particular instance of corrupt conduct may be covered by more than one part of the definition'¹⁵.

Adverse effect on the honest or impartial exercise of a public official's functions or powers

The first limb of the definition focusses on conduct which may adversely affect the honest or impartial exercise of a public official's functions or powers, or collectively, the 'probity' of the public official's conduct as a public official. At the most basic level this would capture giving an undue benefit (a bribe or 'kickback') to a public official to influence the exercise of their powers, functions or duties, though the potential coverage of the definition is much broader than that (see the examples below). What is not intended though is that conduct (for example, deceit or fraud) that merely affects the *efficacy* (as opposed to probity) of the performance of a public official's functions – or conduct that adversely affects the honesty or impartiality of a public official's conduct in a *private* capacity – is regarded as corrupt conduct¹⁶.

Example of partial conduct from the EM:

Failing to undertake a merits recruitment process in circumstances where such a process is required or expected could be considered partial and fall within the definition of corrupt



conduct. In these circumstances ... there would be an expectation that no one would be advantaged in a particular way. This could apply where, for example, a recruitment panel for an ongoing position within a department rated a candidate as suitable for engagement at a particular level because the candidate was a close friend or relative of a member of the panel. In that case, there would be a duty to treat all candidates equally, but one candidate would be given preference over other candidates, and that preference would be given for an improper purpose – namely, to advantage a friend or relative.

Example of potentially partial conduct from the EM:

An allocation of grants for the purpose of gaining political advantage, or to provide a benefit to a political donor may also be considered partial and within the definition of corrupt conduct ... There would be an expectation that grants processes are generally conducted in the public interest and without regard to political considerations. A grants allocation that favours a political donor or confers another political advantage may also be extraneous to the power to give the grant. This

situation should be distinguished from the situation where a decision-maker makes a grant in the public interest, in the expectation that they will receive acknowledgement or recognition — including political recognition — [for] exercising their powers in an effective manner ... It should also be distinguished from a situation where a government has made an election commitment to provide a grant to a particular recipient — in such circumstances there would be no duty or expectation of impartiality and the grant guidelines could provide for that outcome.

A breach of public trust by a public official

The second limb of the definition addresses the concept of a breach of public trust by a public official:

'If a public official exercises their official powers for an improper purpose, or exercises their powers or performs their functions and duties contrary to the purpose for which those powers, functions or duties were conferred, their conduct would amount to a breach of public trust (see Greiner v Independent Commission Against Corruption (1992) 28 NSWLR 125, 165 (Mahoney JA)). The concept of a breach of public trust does not require that the abuse of entrusted power or an official position be for personal gain

or the benefit of a third party; the key feature of a breach of trust is the exercise of a power, or the performance of a function or duty, for an improper purpose.¹⁷

Examples from the EM:

Whether conduct can be characterised as a breach of the public trust will depend on the exact circumstances. Accordingly, breach of public trust could include the following conduct but it would not be limited to these examples:

- official misconduct or misconduct in public office;
- showing partiality in the exercise of official powers in order to advance a personal interest;
- using, applying, or awarding public resources to achieve a purpose for which those resources were not appropriated, designated or otherwise given.

An abuse of office as a public official

The third limb of the definition extends to conduct which would constitute an abuse of public office, such as where an official engages in improper acts or omissions in their official capacity with the intention of gaining a benefit for themselves or another person or causing a detriment to another



person¹⁸. An example of this is where a public official may manipulate government business to advantage their own private or family business interests.

Examples from the EM:

- A senior public servant may engage in an abuse of office if they use their seniority to influence a decision-making panel comprised of more junior public servants to make a decision that benefits a friend or family member-notwithstanding that there is no direct benefit to the senior public servant from that outcome.
- An individual (the first person) responsible for processing claims for financial assistance, and who has obtained information concerning another individual's (the second person) financial situation, may engage in an abuse of office if they use that information to the detriment of the second person - such as by using that information to pressure the second person to agree to sell a property or asset on unfavourable terms.

The misuse of information or documents

The final limb of the definition concerns the misuse of information or documents acquired in a person's capacity as a public official. The EM notes that this concept is intended to cover conduct ranging from, for example, simple unauthorised access to information through to the unlawful sale of classified information or documents to a third party¹⁹. This limb of the definition will be of significance to businesses hiring executives or contractors from the public sector, where the definition will capture any misuse of information or documents the executive or contractor acquired in their prior capacity as a public official.

Examples from the EM:

- a public servant in the ATO browsing through a celebrity's tax returns;
- a public servant or law enforcement officer who is a domestic violence perpetrator using an official database to access a former partner's personal information;
- a Border Force officer disclosing sensitive information about their work practices to enable an organised crime syndicate to

import illegal cargo into Australia; and

- a recently-resigned ministerial adviser disclosing market-sensitive and classified regulatory information gained in their capacity as a public official in exchange for a lucrative position with a participant in the regulated market.

Exclusions

The EM reinforces expectations that in Australia's representative democratic system of government private citizens and businesses, among others, will engage with parliamentarians and other public officials to advocate on behalf of their own and other persons' interests, and in the ordinary course that conduct is not corrupt conduct²⁰.

Example from the EM:

... a person who merely vigorously lobbies a public official to present the merits of the person's position or those of their client would not be covered by the concept of corrupt conduct, where nothing in the conduct or the relevant circumstances could be expected to induce or influence a public official to exercise a power dishonestly or partially.



The definition of corrupt conduct is not intended to capture external frauds on the Commonwealth because such third-party conduct does not or could not affect the honest or impartial discharge of a public official's duty. External criminal activity that does not involve any corruption of a public official will continue to be dealt with by other criminal investigation agencies.

To ensure an appropriate separation between the executive and judicial branches of Government, the definition of corrupt conduct does not include conduct engaged in by a staff member of the High Court or of a Court created by the Parliament to exercise a power, or perform a function or duty, of a judicial nature²¹. However, corrupt conduct that is unconnected to judicial functions or duties does fall within the NACC's jurisdiction.

Finally, the NACC Act is careful to ensure that bona fide political activity is not considered corrupt conduct. For political activity to be considered 'bona fide', it must not involve the exercise of power, or the performance of a function or duty, by a public official, or the use of public resources within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**)²².

The term 'political activity' is intended to refer to activity 'that is designed to

attain a purpose by the use of political power or by activity in political channels', including:

- the internal affairs of political parties' and individual candidates' campaigns; and
- activities involving political candidates, political parties and third parties such as political campaigning, political advertising, fundraising events and campaign meetings²³.

Therefore, only activities undertaken in a manner that involves or affects the exercise of power, or the performance of a function or duty by a public official or the use of public resources, will be deemed as involving corrupt conduct. All other circumstances are not considered to be corrupt conduct.²⁴

The NACC Act adopts the definition of 'public resources' used in the PGPA Act which includes:

- money held by the Commonwealth or a corporate Commonwealth entity;
- property owned or held by the Commonwealth or a corporate Commonwealth entity; or
- money appropriated from the Consolidated Revenue Fund to fund expenditure by the Government²⁵.

A political activity would not involve the use of public resources merely because it involves the use of funds that, in accordance with Part XX of the *Commonwealth Electoral Act 1918* (Cth), have been previously appropriated and provided to a political party or candidate, or the use of funds the political party expects to receive²⁶.

Example from the EM:

... a parliamentarian, political party or third party interest group that publicly campaigns on a particular policy issue could not be regarded as corruption in a democratic society ... it is not appropriate for the definition of corrupt conduct to extend to political activities that have no effect on the probity of public administration, or where no public resources have been used.

What is 'serious' or 'systemic' corrupt conduct within the NACC's jurisdiction?

The Commissioner is only able to conduct an investigation if he or she is of the opinion that the corrupt conduct is serious or systemic in nature²⁷. If the conduct does not meet the threshold of 'serious or systemic' then the Commissioner may refer the



matter to an appropriate Commonwealth agency, or a State or Territory government entity for further investigation or consideration²⁸.

'Serious' and 'systemic' corrupt conduct are undefined in the NACC Act, but the EM provides some guidance on the scope of these terms.

Ultimately, whether conduct is considered to be serious or systemic will depend on the subjective opinion of the Commissioner, and the Commissioner may choose to publish written guidelines to further clarify the scope of 'serious or systemic corrupt conduct'²⁹.

The meaning of 'serious'

The term 'serious' is intended to take its ordinary meaning, and the EM identifies the following as a non-exhaustive list of conduct that would be considered to be 'serious'³⁰:

- where the corrupt conduct could involve the commission of a criminal offence – the seriousness of that offence, including by reference to the maximum penalty set by the Parliament for the offence;
- where the corrupt conduct involves corruptly causing a financial loss or gain – the quantum of that financial loss or gain;

- where the corrupt conduct involves the misuse of information – the sensitivity of that information, and the harm that may result from its misuse;
- where the corrupt conduct involves an abuse of office – the nature of the office, the manner in which the person is alleged to have abused their office, and the nature and extent of the improper benefit or loss that has resulted or that may result;
- whether the conduct was done covertly or involved deception; or
- whether the conduct was done in a planned and deliberate fashion.

Whether or not conduct meets the threshold of 'serious' will depend on the conduct rather than the identity or characteristics of the office-holder³¹.

Example from the EM:

... a senior official who knowingly misuses a corporate credit card for a small personal expense, without more, may not be considered serious—notwithstanding their seniority. However, if the senior official also misused their seniority to pressure a departmental fraud control officer to ensure their credit card statement is not audited or reviewed, this additional abuse of office would be relevant to

determining whether the conduct is serious.

The meaning of 'systemic'

The term 'systemic' is also intended to take its ordinary meaning, and refers to corrupt conduct that occurs as *part of a pattern* of corrupt conduct³². The pattern does not need to be coordinated, and it could, for example, refer to conduct that is occurring independently in multiple Commonwealth agencies.

Who is a public official?

The definition of 'public official' is very broad and is defined to include a parliamentarian, a staff member of a Commonwealth agency, a staff member of the NACC, or any person who is acting for and on behalf of, or as a deputy or delegate of these³³.

The effect of the breadth of the definition of 'public official' is that any dealings, even a remote dealing, with any part of the Commonwealth government (including Commonwealth companies) are likely to lie within the NACC's powers of investigation. Most people who work for, exercise the powers of, or perform functions for the Australian Government or the Australian Parliament are likely to be considered public officials under the NACC Act.



It is particularly important to appreciate that under the scope of the definition of public official, employees of private sector commercial contractors to a Commonwealth entity or company may be deemed to be public officials. Therefore, sub-contractors or suppliers to private sector commercial contractors which deliver services or goods under a contract for a Commonwealth entity or company, should conduct themselves as if they are dealing with a public official – not a mere commercial counterparty.

The relevant definitions for each of the three categories of public official are set out in the annexure to this guide.

Powers of the NACC Commissioner

The NACC Commissioner will have broad powers, including powers to:

- investigate any corruption issue as determined by the Commissioner³⁴;
- direct or compel the production of documents by giving a direction (in the case where Commonwealth agency has information, or a document or thing relevant to an investigation) and otherwise by issuing notices to produce³⁵;
- hold public or private hearings (or a combination of the two)³⁶;

- enter premises occupied by a Commonwealth agency to inspect, seize or make copies of documents relating to its investigations without a warrant, and the power to issue search warrants in respect of non-government premises³⁷; and
- receive information obtained under the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**)³⁸.

Power to direct or compel the production of documents

If the Commissioner has reasonable grounds to suspect that a person has information, or a document or thing, relevant to an investigation, the Commissioner may issue a notice to produce to that person. The Commissioner can use this power either alone or in conjunction with a hearing.³⁹

The legislation envisages the possibility of notices being issued to an individual in cases where that individual has been charged with an offence, or in cases where a charge against that individual is imminent, or after a confiscation application notice has been issued (being a notice relating to proceedings under the *Proceeds of Crime Act 2002* (Cth) (**POCA**)). The privilege against self-incrimination is abrogated for notices to produce⁴⁰. However, in cases where an individual has (or will have)

proceedings commenced against them, the information provided by that individual to the NACC will not be admissible in evidence against that person in criminal proceedings, proceedings for the imposition or recovery of a penalty, or a confiscation proceeding. In most cases, the producing person would not be excused from providing the required information or documents on the grounds of public interest immunity or legal professional privilege⁴¹.

A number of rules in relation to disclosure of information about a notice to produce, the abrogation of privilege and the failure to comply with a notice to produce, are similar to those in relation to summonses and are set out below.

Power to hold public or private hearings

The power to hold public hearings was one of the most contested aspects of the legislation because of the different approaches taken to this in respective States' corruption and integrity bodies. Ultimately, the Commissioner was granted the power to hold hearings⁴² and, generally these hearings will be held in private, unless the Commissioner is satisfied that there are 'exceptional circumstances' which justify a public hearing. When considering whether a hearing should



be public, the Commissioner may take into account a range of factors, including⁴³:

- the extent to which the corruption being investigated is 'serious or systemic';
- whether certain evidence is of a confidential nature, or relates to an alleged or suspected commission of an offence;
- whether a public hearing would cause unfair prejudice to a person's reputation, privacy, safety or wellbeing;
- whether a person giving evidence is in a position of vulnerability, including due to their position or role; and
- the benefits of exposing corrupt conduct to the public.

In respect of those who may be required to give evidence at such hearings, if the Commissioner has reasonable grounds to suspect that a person has evidence (or particular information, document or thing) relevant to an investigation, the Commissioner may summons that individual to attend a hearing to give evidence, or give the Commissioner information, documents or things, at a hearing⁴⁴.

If a summons to a private hearing includes a non-disclosure notation, it is an offence to disclose information

about the summons⁴⁵. However, certain disclosure is permissible including to legal practitioners, for the purpose of obtaining legal advice, and medical practitioners or psychologists, for the purpose of obtaining medical or psychiatric care⁴⁶.

The Commissioner must make a non-disclosure notation in certain circumstances, including to protect a person's safety or reputation or if disclosure would impact upon a person's fair trial⁴⁷. The Commissioner may also make directions about the use or disclosure of material obtained by a summons, including directions as to confidentiality⁴⁸. Notwithstanding any confidentiality direction, the NACC Act provides for certain lawful disclosures of material subject to a confidentiality direction, including where a court makes orders for disclosure of the material to the court or to prosecutors of a witness if the court determines it is in the interests of justice to do so⁴⁹.

It is an offence to fail to comply with a summons, including a failure to attend a hearing, the failure to give the information, documents or things required by the summons, and to conceal or destroy documents or things required, or likely to be required, by the Commissioner⁵⁰. It is also an offence to give false or misleading evidence or information at a hearing⁵¹.

The above rules in relation to non-disclosure notations, disclosure, and the failure to comply with a summons, also apply to notices to produce.

As with the Commissioner's powers to issue notices to produce, the legislation also envisages the possibility of summonses being issued to an individual in cases where that individual has been charged with an offence, or in cases where a charge against that individual is imminent, or after a confiscation application notice has been issued (being a notice relating to proceedings under the POCA). The privilege against self-incrimination is abrogated for summonses⁵². However, protections apply to the use of the individual's evidence in subsequent proceedings against the summonsed individual, and his or her evidence will not be admissible in evidence against that person in criminal proceedings, proceedings for the imposition or recovery of a penalty, or a confiscation proceeding.

Powers of entry to premises

For the purpose of a corruption investigation, the Commissioner or authorised officers are able to enter and search a Commonwealth agency without a search warrant, except in relation to:

- the High Court or a court created by Parliament, to reflect the



separation of powers between the Executive Government and Judiciary;

- any place in the Parliamentary precincts and offices, to ensure that a warrant is issued where a claim of parliamentary privilege might arise;
- any premises occupied by the ABC or SBS, to protect press freedoms for public broadcasters;
- certain defence areas; and
- places declared by the Attorney General⁵³.

A search may occur at a place occupied by a Commonwealth agency being a place where the agency exercises a right of occupancy, or a place that the agency controls. This includes where the agency exercises rights, occupancy or control through its employees or contractors.⁵⁴

During any such search, the Commissioner or authorised officer may:

- enter the place;
- inspect, make copies of, or remove the documents; and/or
- seize documents where necessary to prevent its destruction and where it is relevant to an indictable offence.⁵⁵

Telephone intercepts and surveillance devices

On 1 July 2023, NACC Transitional Provisions Act amended other Commonwealth legislation to provide the Commissioner with covert investigative powers, including the power to use surveillance devices under the *Surveillance Devices Act 2004* (Cth) and the power to obtain data relating to communications under the TIA Act⁵⁶.

The NACC's covert powers are only able to be used to investigate criminal conduct⁵⁷.

The NACC Commissioner, Deputy Commissioner and authorised staff members of the NACC have the power to apply to an eligible judge for warrants for the interception of telecommunications⁵⁸ and to obtain stored communications including email, text messages or voice messages⁵⁹. The relevant thresholds for obtaining information under the TIA Act by the NACC are:

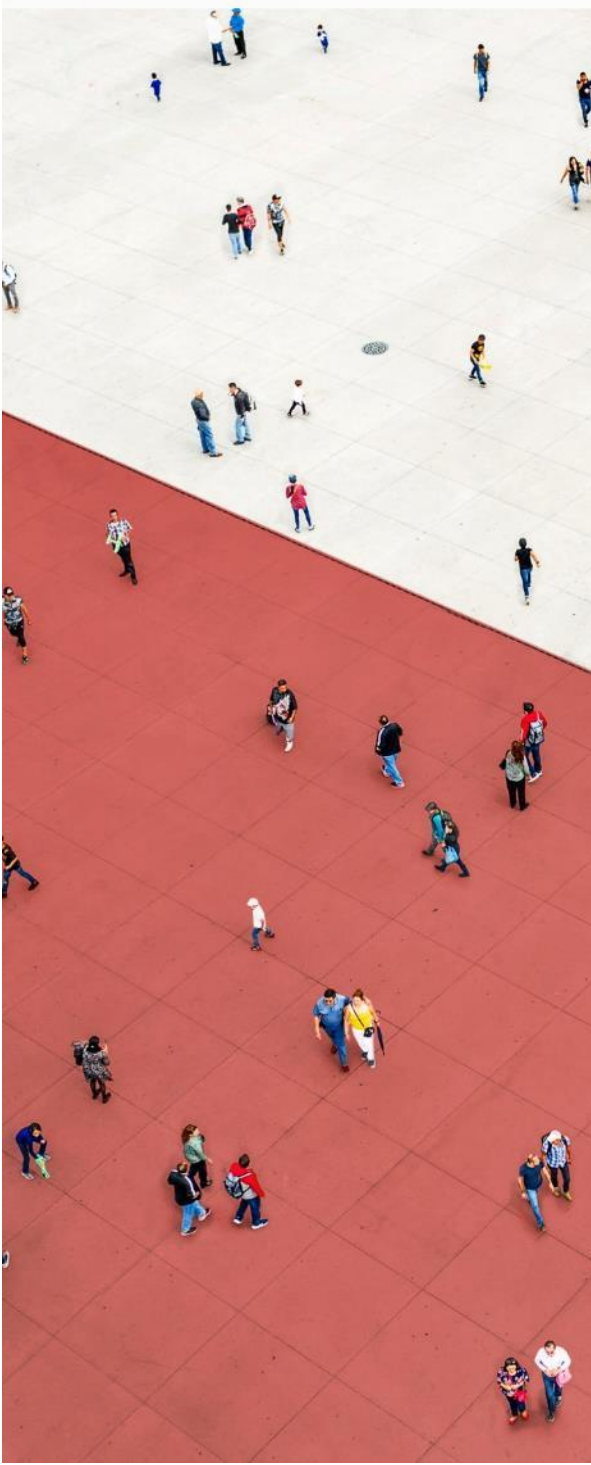
- With respect to interception of telecommunications, an eligible judge may grant an interception warrant if there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the telecommunications service, and the information obtained would

assist with the investigation of a 'serious offence'⁶⁰.

- With respect to stored communications, a warrant may be granted by an issuing authority (being a judge appointed by the Attorney-General in accordance with section 116 of the TIA Act) if there are reasonable grounds to suspect that the information would assist with the investigation of a 'serious contravention', being among other things, an offence punishable for a maximum period of at least three years' imprisonment⁶¹.

With respect to telecommunications data, being the metadata associated with communications including the source and destination of a communication and the time and duration of its connection, the Commissioner or a person authorised by the Commissioner can internally authorise access to this data if satisfied that it is reasonably necessary for enforcing the criminal law⁶².

The NACC's powers under the TIA Act will also be overseen by the Commonwealth Ombudsman⁶³.



Matters to be referred to the NACC

In addition to establishing the NACC and its powers, a key feature of the legislation is the establishment of a regime which obliges various responsible executives to report relevant matters to the NACC, in addition to its ability to be referred matters more generally.

Mandatory referrals – Commonwealth Agency Heads and Intelligence Agency Heads

Individuals who are staff members of Commonwealth agencies⁶⁴ who have responsibilities and carry out certain functions under the *Public Interest Disclosure Act 2013 (Cth)* (**PID Act**) also have obligations under the NACC Act. These individuals, referred to as **PID Officers**, must refer a matter to the NACC as soon as reasonably practicable if they receive an internal disclosure under the PID Act that raises a corruption issue under the NACC Act if all of the following apply:

- the PID Officer received the internal disclosure in the course of performing their functions under the PID Act;
- the internal disclosure raises a corruption issue under the NACC Act;

- the corruption issue concerns the conduct of a person who is, or was, a staff member of the agency while that person is, or was, a staff member of the agency; and
- the PID Officer suspects the issue could involve serious or systemic corrupt conduct.

The referral obligations of PID Officers differ between intelligence agencies⁶⁵. If an internal disclosure in an intelligence agency raises a corruption issue, and the PID Officer suspects it could involve serious or systemic corrupt conduct, they must refer it to the NACC or the Inspector General of Intelligence and Security (**IGIS**). If the issue is referred to the IGIS instead of the NACC, and the IGIS is satisfied the corruption issue is likely to involve serious or systemic corrupt conduct, they must refer the issue to the NACC.

In either case, the PID Officer must notify the person who made the internal disclosure as soon as practical after that PID Officer refers a corruption issue to the NACC.

The mandatory referral obligations apply regardless of when the relevant conduct occurred, including before the agency head joined the agency, they were appointed as agency head, or before the NACC commenced operations. However, if the agency head was already aware of a

corruption issue prior to 1 July 2023, the agency head is not obligated to refer it to the NACC but he or she can do so voluntarily.

Voluntary Referrals

Any person, including members of the public and public officials, can voluntarily refer a corruption issue, or provide information about a corruption issue, to the NACC, and can do so anonymously if they chose to do so. A person can refer a corruption issue to the NACC even if they are not certain that the conduct is 'serious' or 'systemic'.

The Commissioner is not required to consider or respond to every referral it receives, and can also decide not to take any action at all. If there is not enough information to decide whether the referral could involve serious or systemic corrupt conduct, the Commissioner may ask the person who referred the issue to provide more information (assuming they did not provide that information anonymously).

The NACC's obligations to report on its investigations

After completing an investigation, the Commissioner must prepare a report that sets out his or her findings or opinions, a summary of the evidence



and any recommendations and reasons for those recommendations⁶⁶. Such reports must include any findings about a person whose conduct has been investigated and whether or not that person is found to have engaged in corrupt conduct⁶⁷.

Any findings by the Commissioner do not constitute a finding or opinion that the person is guilty of or has committed, is committing or will commit a criminal offence⁶⁸. In such cases the Commissioner may refer the matter to the Commonwealth Director of Public Prosecutions or the Australian Federal Police, or other appropriate Commonwealth agency for consideration as to whether the agency should conduct a criminal investigation or pursue prosecution.

The Commissioner is also able to share evidence obtained in their investigation with State or Territory government entities for their consideration of whether to conduct a criminal investigation or pursue prosecution.

Generally, the Commissioner must give copies of the investigation report to the Prime Minister if the investigation relates to the conduct of a Minister, or otherwise to the relevant Minister and, depending on the nature of the investigation, the head of the relevant Commonwealth agency, the President of the Senate or the

Speaker of the House of Representatives⁶⁹.

The Commissioner must also advise a person of the outcome of an investigation if the Commissioner has investigated that person's conduct⁷⁰.

Publication of reports

The Commissioner may publish the whole or part of an investigation report if they have already provided a copy to the Prime Minister or the relevant Minister, and they are satisfied it is in the public interest to do so⁷¹. Additionally, if public hearings were held during the investigation, the Prime Minister or relevant Minister must table the investigation report in Parliament⁷².

Before finalising its investigation report, the Commissioner must give those who are to be the subject of a critical finding, opinion or recommendation a reasonable opportunity to respond to the investigation report before it is published⁷³. A further opportunity to respond to the investigation report will be given to those who are to be the subject of a critical finding, opinion or recommendation if it is to be published or tabled in Parliament⁷⁴.

An entity or person who is the subject of a finding or opinion that they engaged in corrupt conduct may request that the NACC include a

summary of their response in the final report, and the Commissioner must comply⁷⁵.

There is certain information that will be excluded from NACC investigation reports, because it is sensitive and publishing the information is not in the public interest. Examples of these types of information include:

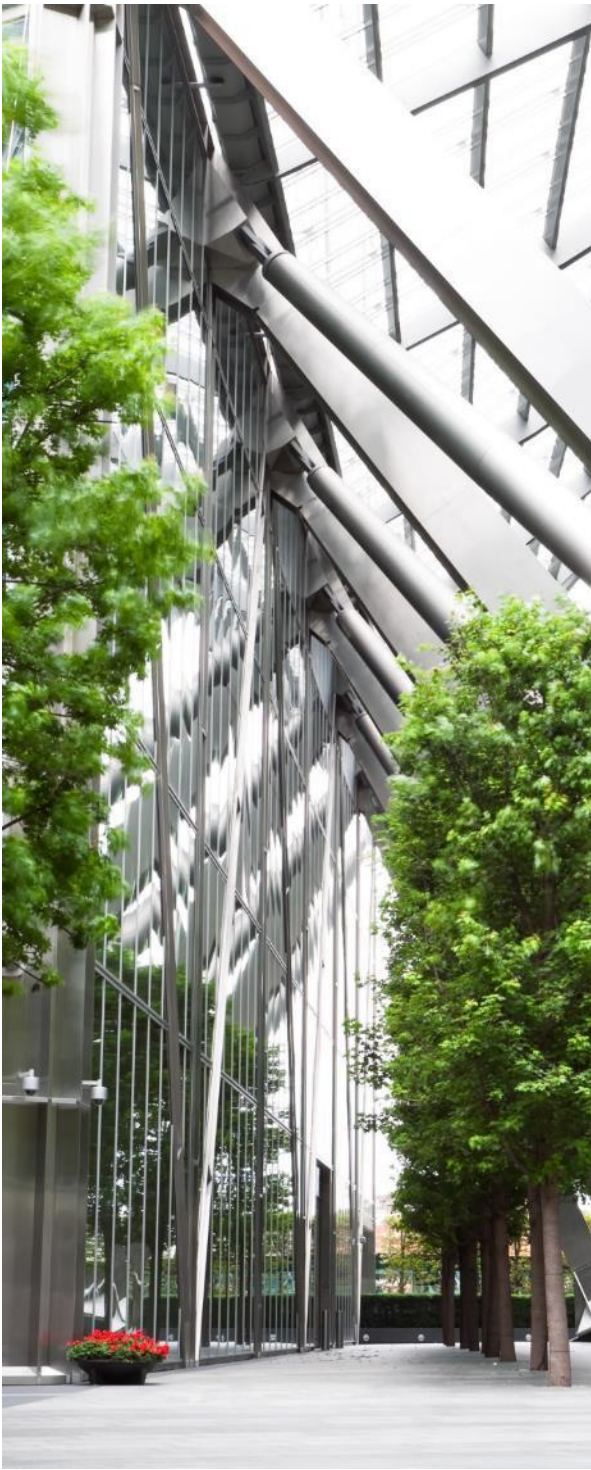
- information about Australia's national security;
- information that could endanger someone's life or physical safety; and/or
- information that would unreasonably reveal details of someone's private life.

These types of protected information will be included in a separate 'protected information report' which cannot be published.

Witness and whistleblower protections

There are a range of legal protections offered to witnesses who disclose information regarding corrupt conduct to the NACC, including:

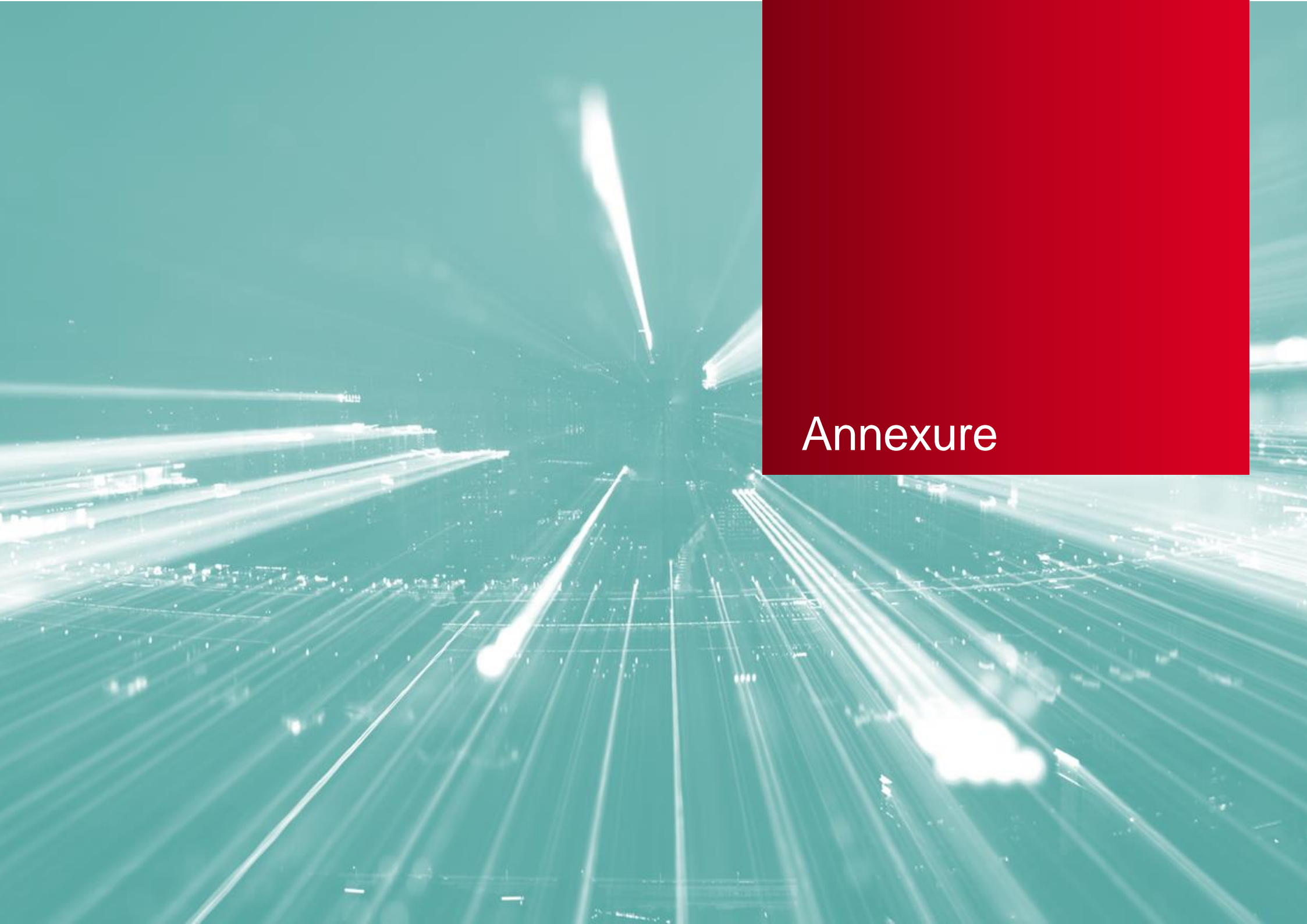
- witnesses may have legal representation, and may request to give particular evidence in private, and make submissions about this to a presiding Commissioner;



- while the NACC is able to compel the production of certain documents attracting legal professional privilege, any such documents do not cease to be the subject of legal professional privilege merely because they have been disclosed to the NACC. Additionally, any evidence involving the disclosure of privileged documents are required to be given in private hearings rather than public hearings;
- while a person is not excused from providing information or documents to the NACC on the grounds of self-incrimination or to avoid being exposed to a penalty, any information or documents produced will not be admissible evidence against the individual in any subsequent criminal proceedings or proceedings for the imposition or recovery of a penalty, or confiscation proceedings;
- where a notice to produce or private hearings summons is served, it may be accompanied with a 'non-disclosure notation' which prevents the person from disclosing information about the notice or summons. However, the legislation allows for disclosure of this information to legal representatives, medical practitioners or psychologists for the purpose of obtaining legal advice or medical or psychiatric care; and
- where a person who refers, or provides information about, a corruption issue to the NACC, that person will not be subject to any civil, criminal or administrative liability for the disclosure and no contractual remedy may be enforced or exercised on the basis of the disclosure.

Additionally, it is a criminal offence to take a reprisal, or threaten to take a reprisal, against anyone because that person has disclosed information to the NACC⁷⁶.

In cases of disclosure of a corruption issue to a journalist, the relevant journalist, their employer (including Commonwealth agencies) or any other person is not required to disclose information about the identity of an informant under the NACC Act⁷⁷. However, these protections do not limit the search powers of an authorised officer under Part IAA of the *Crimes Act 1914 (Cth)*⁷⁸.



Annexure

Annexure

Parliamentarian⁷⁹

Definition

- (a) a senator; or
- (b) a member of the House of Representatives; or
- (c) a Minister of State (whether or not a senator or member of the House of Representatives); or
- (d) a person who is taken to be the President of the Senate under the *Parliamentary Presiding Officers Act 1965* and who is not a senator or member of the House of Representatives; or
- (e) a person who is taken to be the Speaker of the House of Representatives under the *Parliamentary Presiding Officers Act 1965* and who is not a senator or member of the House of Representatives; or
- (f) a person to whom remuneration is payable under section 49 of the *Parliamentary Business Resources Act 2017*.

Commonwealth Agency Staff Members

Commonwealth Agency ⁸⁰	Head of the Commonwealth Agency ⁸¹	Commonwealth Agency Staff Members ⁸²
a parliamentary office	the parliamentarian	<p>Staff members of a parliamentary office include the staff of the office, who are primarily persons engaged under the <i>Members of Parliament (Staff) Act 1984</i> (Cth).</p> <p>A parliamentarian is the head of a parliamentary office but would not be considered a staff member of the office however a parliamentarian is still considered to be a public official subject to the NACC's jurisdiction.</p> <p>The extended definition of a parliamentarian means that a parliamentary office may continue to exist even when the relevant House of Parliament is dissolved and the parliamentarian is not a senator or member.</p>
a Commonwealth entity	if the accountability authority of the entity is a single person – that person – otherwise, the chief executive officer or a person prescribed as the head of the entity	<p>Commonwealth entities are defined as⁸³:</p> <ul style="list-style-type: none"> ■ a Department of State; ■ a parliamentary department, for example the Department of Parliamentary Services; ■ a listed entity, for example the ATO or the AFP;

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		<ul style="list-style-type: none"> ■ a body corporate that is established by a law of the Commonwealth, for example the Commonwealth Scientific and Industrial Research Organisation; or ■ a body corporate that is established under a law of the Commonwealth (other than a Commonwealth company) and is prescribed to be a Commonwealth entity, for example Land Councils. <p>Staff members of Commonwealth entities include⁸⁴:</p> <ul style="list-style-type: none"> ■ the head of the entity; ■ an entity official; ■ employees of the entity, and employees of a staff member of the entity, who are engaged on behalf of the Commonwealth; ■ a contracted service provider for any Commonwealth contract administered by the entity; and ■ secondees to the entity.
a Commonwealth company	the chief executive officer of the company or a person prescribed as the head of the company	<p>A Commonwealth company is a body corporate that is incorporated, or taken to be incorporated, under the <i>Corporations Act 2001</i> (Cth) that the Commonwealth controls directly, for example, NBN Co Limited.⁸⁵</p> <p>Staff members of Commonwealth companies include⁸⁶:</p> <ul style="list-style-type: none"> ■ the head of the Commonwealth company; ■ employees of the company, and employees of a staff member of the company, who are engaged on behalf of the Commonwealth; ■ a director or officer of the company; ■ a contracted service provider for any Commonwealth contract administered by the company; and ■ secondees to the company.

Commonwealth Agency Staff Members

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<p>A subsidiary of a Commonwealth company or a corporate Commonwealth entity</p>	<p>the chief executive officer of the subsidiary or a person prescribed as the head of the subsidiary</p>	<p>A subsidiary of a corporate Commonwealth entity or a Commonwealth company, meaning an entity that is controlled by the corporate Commonwealth entity or Commonwealth company⁸⁷.</p> <p>Staff members of subsidiaries of Commonwealth companies or corporate commonwealth entity include⁸⁸:</p> <ul style="list-style-type: none"> ■ the head of the company or entity; ■ employees of the company or entity, and employees of a staff member of the company or entity, who are engaged on behalf of the Commonwealth; ■ a director or officer of the company or entity; ■ a contracted service provider for any Commonwealth contract administered by the company or entity; and ■ secondees to the company or entity.
<p>the High Court</p>	<p>the Chief Executive and Principal Registrar of the High Court</p>	<p>Special rules would apply to the High Court, which is not a Commonwealth entity under the PGPA Act, given its constitutional status. The staff members of the High Court are⁸⁹:</p> <ul style="list-style-type: none"> ■ The Chief Executive and Principal Registrar of the High Court; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the High Court; and ■ individuals who are appointed or engaged as an officer or employee of the High Court under section 26 of the <i>High Court of Australia Act 1979</i>. <p>For the purposes of the NACC Bill, the High Court does not include the Justices of the High Court, who are beyond the NACC's jurisdiction.</p>

Commonwealth Agency Staff Members

Commonwealth Agency ⁸⁰	Head of the Commonwealth Agency ⁸¹	Commonwealth Agency Staff Members ⁸²
the Australian Geospatial-Intelligence Organisation	the Director of the Australian Geospatial-Intelligence Organisation	<p>Special rules would apply to the Australian Geospatial-Intelligence Organisation. The staff members of the agency are⁹⁰:</p> <ul style="list-style-type: none"> ■ the Director of the Australian Geospatial-Intelligence Organisation; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the Australian Geospatial-Intelligence Organisation; and ■ individuals who are employed in the Australian Geospatial-Intelligence Organisation.
the Defence Intelligence Organisation	the Director of the Defence Intelligence Organisation	<p>Special rules would apply to the Defence Intelligence Organisation. The staff members of the agency are⁹¹:</p> <ul style="list-style-type: none"> ■ the Director of the Defence Intelligence Organisation; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the Defence Intelligence Organisation agency; and ■ individuals who are employed in the Defence Intelligence Organisation agency.
the Inspector-General of the Australian Defence Force	the Inspector-General of the Australian Defence Force	<p>Special rules would apply to the Inspector-General of the Australian Defence Force. The staff members of the agency are⁹²:</p> <ul style="list-style-type: none"> ■ the Inspector-General of the Australian Defence Force; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the agency; and ■ members of the staff of the Inspector-General of the Australian Defence Force.

Commonwealth Agency Staff Members

Commonwealth Agency ⁸⁰	Head of the Commonwealth Agency ⁸¹	Commonwealth Agency Staff Members ⁸²
the Inspector-General of Biosecurity	the Inspector-General of Biosecurity	<p>Special rules would apply to the Inspector-General of Biosecurity. The staff members of the agency are⁹³:</p> <ul style="list-style-type: none"> ■ the Inspector-General of Biosecurity; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the agency; and ■ individuals engaged under the <i>Public Service Act 1999</i> who assist the Inspector-General of Biosecurity.
the Inspector-General of Live Animal Exports	the Inspector-General of Live Animal Exports	<p>Special rules would apply to the Inspector-General of Live Animal Exports. The staff members of the agency are⁹⁴:</p> <ul style="list-style-type: none"> ■ the Inspector-General of Live Animal Exports; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the agency; and ■ individuals acting under the authority of the Inspector-General of Live Animal Exports.
the Inspector-General of Water Compliance	the Inspector-General of Water Compliance	<p>Special rules would apply to the Inspector-General of Water Compliance. The staff members of the agency are⁹⁵:</p> <ul style="list-style-type: none"> ■ the Inspector-General of Water Compliance; ■ contracted service providers who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; ■ secondees to the agency; and

Commonwealth Agency Staff Members

Commonwealth Agency ⁸⁰	Head of the Commonwealth Agency ⁸¹	Commonwealth Agency Staff Members ⁸²
		<ul style="list-style-type: none"> ■ individuals engaged under the <i>Public Service Act 1999</i> who assist the Inspector-General of Water Compliance.
a body prescribed by the regulations for the purposes of this item that is established for a public purpose by, or under, a law of the Commonwealth	the person prescribed by the regulations for the purposes of this item	

NACC Staff Member⁹⁶

Definition

- (a) the Commissioner;
- (b) any Deputy Commissioners;
- (c) the CEO;
- (d) a member of the staff referred to in section 262 (i.e. a person engaged under the *Public Service Act 1999*);
- (e) a consultant of the staff referred to in section 263 (i.e. a consultant engaged by the CEO, on behalf of the Commonwealth, to assist in the performance of the NACC's functions on the terms and conditions that the CEO determines in writing);
- (f) a person referred to in section 264 whose services are made available to the NACC (i.e. officers and employees of Agencies – within the meaning of the *Public Service Act 1999* - and authorities of the Commonwealth, whose services are made available to the NACC in connection with the performance of any of the NACC's functions and whose services are made available under arrangements made by the CEO, on behalf of the Commonwealth, with the appropriate authority or officer under which the government or authority makes those officers or employees available to the NACC);
- (g) a legal practitioner appointed under section 265 (i.e. a legal practitioner appointed by the CEO to assist the NACC or NACC Commissioner as counsel generally, or in relation to a particular corruption investigation).

Endnotes

¹ Queensland (1989), New South Wales (1989), Western Australia (2004), Tasmania (2010), Victoria (fully operational from 2013) and South Australia (2013).

² Section 17 NACC Act.

³ Section 19 NACC Act.

⁴ Section 22 NACC Act.

⁵ Sections 182, 185 NACC Act.

⁶ Section 184 NACC Act.

⁷ Section 198 NACC Act.

⁸ Section 8(1) NACC Act.

⁹ Section 8(8) NACC Act, EM, [2.54]-[2.55].

¹⁰ Section 8(9) NACC Act, EM, [2.56]-[2.57].

¹¹ Section 8(10) NACC Act, EM, [2.58]-[2.59].

¹² Section 8(3) NACC Act, EM, [2.28].

¹³ Sections 8(4)-(5) NACC Act; EM, [2.47]-[2.49].

¹⁴ EM, [2.8].

¹⁵ EM, [2.9].

¹⁶ EM, [2.20]-[2.21].

¹⁷ EM, [2.33].

¹⁸ EM, [2.39].

¹⁹ EM, [2.44].

²⁰ EM, [2.23].

²¹ Section 8(6) NACC Act, EM, [2.51]-[2.52]. Nor are Judges 'public officials' within the NACC's jurisdiction.

²² Section 8(3) NACC Act.

²³ EM, [2.74].

²⁴ EM, [2.75].

²⁵ EM, [2.76].

²⁶ EM, [2.77], [2.79].

²⁷ Section 41(3) NACC Act; EM, [6.13].

²⁸ Section 41(1) NACC Act; EM, [6.11].

²⁹ Section 279 NACC Act.

³⁰ EM, [6.17].

³¹ EM, [6.18].

³² EM, [6.20].

³³ Section 10 NACC Act; EM [2.89]-[2.90].

³⁴ Sections 40-42 NACC Act; EM [7.10].

³⁵ Sections 57-58 NACC Act.

³⁶ Part 7 Division 3 NACC Act.

³⁷ Sections 117-120 NACC Act.

³⁸ EM [14.222].

³⁹ EM [7.19].

⁴⁰ Section 113 NACC Act.

⁴¹ EM [7.23].

⁴² Section 62 NACC Act.

⁴³ Section 73(3) NACC Act.

⁴⁴ Section 63 NACC Act.

⁴⁵ Section 98(1) NACC Act; EM [7.271]-[7.276].

⁴⁶ Section 98(3) NACC Act; EM [7.277]-[7.278].

⁴⁷ Section 96 NACC Act; EM [7.284].

⁴⁸ Section 100 NACC Act; EM [7.281]-[7.283].

⁴⁹ Sections 103 and 106 NACC Act.

⁵⁰ Sections 68-70 NACC Act; EM [7.76].

⁵¹ Section 71 NACC Act; EM [7.76].

⁵² Section 113 NACC Act; EM [7.75].

⁵³ Section 117(2), (3) and (5) NACC Act; EM [7.466].

⁵⁴ EM [7.465].

⁵⁵ Section 117(1) NACC Act; EM, [7.464].

⁵⁶ Section 2 NACC Transitional Provisions Act; EM, [14.10].

⁵⁷ EM, [14.13].

⁵⁸ EM, [14.240].

⁵⁹ EM, [14.244].

⁶⁰ Section 5D TIA Act; EM, [14.241].

⁶¹ Section 5E TIA Act; EM, [14.245]-[14.246].

⁶² Section 5D TIA Act; EM, [14.248]-[14.254].

⁶³ EM, [14.224].

⁶⁴ See definition of Commonwealth Agency Staff Member in the annexure to this guide.

⁶⁵ Which include the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation, the Australian

Signals Directorate, the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation and the Office of National Intelligence.

⁶⁶ Section 149(2) NACC Act.

⁶⁷ Sections 149(3)-(4) NACC Act.

⁶⁸ Section 150(2) NACC Act.

⁶⁹ Section 154 NACC Act.

⁷⁰ Section 159 NACC Act.

⁷¹ Section 156(1) NACC Act.

⁷² Section 155 NACC Act.

⁷³ Section 153 NACC Act; EM [8.32]-[8.41].

⁷⁴ Section 157 NACC Act; EM [8.62]-[8.67].

⁷⁵ Section 153(3) NACC Act.

⁷⁶ Sections 30 NACC Act.

⁷⁷ Sections 31(1)-(3) NACC Act.

⁷⁸ Sections 31(4) NACC Act.

⁷⁹ Section 7 'parliamentarian' NACC Act.

⁸⁰ Section 11 NACC Act.

⁸¹ Section 11 NACC Act.

⁸² Section 12 NACC Act; EM.

⁸³ Section 10 PGPA Act.

⁸⁴ Section 12 NACC Act; EM [2.119].

⁸⁵ EM, [2.99].

⁸⁶ Section 12 NACC Act; EM [2.119].

⁸⁷ EM, [2.100].

⁸⁸ Section 12 NACC Act; EM [2.119].

⁸⁹ EM [2.121]-[2.122].

⁹⁰ EM [2.123].

⁹¹ EM [2.123].

⁹² EM [2.127].

⁹³ EM [2.124].

⁹⁴ EM [2.125].

⁹⁵ EM [2.126].

⁹⁶ Sections 7 and 262-266 NACC Act.

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