

## **Memo: National Anti-Corruption Commission**

The new National Anti-Corruption Commission (NACC) creates a new mechanism for achieving public integrity and accountability federally.

The NACC will conduct royal-commission-type inquiries into potential corruption across the Commonwealth public sector.

### **Link to legislation**

<https://www.legislation.gov.au/Details/C2022A00088>

### **Commencement**

The Act received Royal Assent on 12 December 2022, and part of the Act dealing with oversight of the NACC commenced on 13 December 2022.

The remainder of the Act comes into effect on 1 July 2023.

### **Purpose**

The Commission will have broad powers to investigate corruption issues that the Commissioner believes could involve serious or systemic corrupt conduct. After investigation of a corruption issue, the Commissioner will be empowered to refer persons for criminal prosecution, civil proceedings or disciplinary action.

### **Commissioner and leadership**

Paul Brereton has been appointed as Commissioner. Justice Brereton led the inquiry into allegations of war crimes by Australian soldiers in Afghanistan, and was most recently serving on the NSW Court of Appeal.

Nicole Rose and Ben Gauntlett have been appointed as deputy commissioners, with Gail Furness SC to act as inspector.

### **Scope of 'corrupt conduct' covered by the Act**

Corrupt conduct is covered in s 8 of the legislation. It is a broad definition.

It covers, broadly, the conduct of two categories of people.

The first category involves the conduct of public officials, which includes parliamentarians, employees of Commonwealth agencies, staff members of the Commission, as well as individuals acting on behalf of those people (s10).

Corrupt conduct by public officials includes conduct that:

- (a) constitutes or involves a breach of public trust;
- (b) 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;
- (c) 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.
- (d) any conduct that adversely affects, or that could adversely affect, either directly or indirectly:
  - i. the honest or impartial exercise of any public official's powers as a public official; or

- ii. the honest or impartial performance of any public official's functions or duties as a public official;

The second category of people whose conduct could fall under scrutiny are third party actors (such as unions, lobbyists, businesses or private individuals). Corrupt conduct of third party actors is defined as:

- (a) any conduct that adversely affects, or that could adversely affect, either directly or indirectly:
  - i. the honest or impartial exercise of any public official's powers as a public official; or
  - ii. the honest or impartial performance of any public official's functions or duties as a public official;

The conduct of a public official can be corrupt even if it is not for the person's personal benefit.

The legislation empowers the commission to investigate both criminal and non-criminal corrupt conduct, including actions such as the abuse of office, breach of public trust, and misuse of information.

The broad jurisdiction conferred by this definition empowers the Commission to investigate a range of matters ranging from criminal corruption to cases involving what is sometimes referred to as 'grey corruption.' For example, it may cover scenarios where a person exerts undue influence over a politician, such as by leveraging power through making large donations or hiring lobbyists. The Commission may also investigate instances of 'pork-barrelling,' or the improper use of ministerial discretion in the allocation of federal government funds. The Attorney-General has [stated](#) that it is part of the intention underlying the legislation that for the Commission to investigate the worst cases of pork barrelling.

### **Retrospective powers**

Significantly, the Act empowers the Commission to conduct inquiries into historical conduct, even if it took place before the legislation came into effect or involved individuals who are no longer in public office.

However, it should be noted that the Commissioner can only initiate a criminal investigation if the alleged conduct could have been considered a corruption-related offense at the time it occurred.

### **What powers will the Commission have?**

The Commission will have broad powers to investigate 'corruption issues' (defined as 'whether corrupt conduct is taking place, has taken place or is about to take place') (s 17; s9).

However, the Commission will only have powers to investigate corruption issues that it considers to be 'serious or systemic'.

Assuming the Commissioner forms the view that a matter meets the threshold of being 'serious or systemic', the Commission has extensive powers to conduct investigations into that issue. The Commission has the power to:

- use search powers (Division 7)
  - Authorised officers may enter any place occupied by a Commonwealth agency without a search warrant and conduct investigations, inspect documents, make copies/seize documents (s 117)
  - Authorised officers are given the same powers as police to obtain and execute search warrants under the Crimes Act (s 119)

- compel provision of information and documents (s 58)
  - the Act creates an offence for failure to produce information or documents in accordance with a notice to produce (s 60)
- hold hearings (s 58)
- compel witnesses to give evidence at hearings (65)
  - the Act creates offences for failure to attend a hearing (s 68) and failure to answer a question (81)

### **Public hearings - s73**

The default position is that investigations are to be held in private.

There is a two-fold test that sets up when a Commission can hold a public hearing. The Commissioner may decide to hold a hearing, or part of a hearing, in public if the Commissioner is 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.

The “exceptional circumstances” test is similar to test used by the Victorian Independent Broad-based Anti-Corruption Commission, which is considered to be highly restrictive on IBAC’s power to hold public hearings.

The legislation sets out a range of factors that the Commissioner can take into account in deciding whether or not to hold a public hearing. These include whether or not a public hearing could unfairly prejudice a person’s reputation, privacy, safety or wellbeing, as well as whether certain evidence is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence.

This has been the most controversial aspect of the new legislation so far. Some cross-benchers and other critics have said that the test is too narrow, and that public hearings would be an important mechanism for transparency and accountability.

### **Privilege**

Legal professional privilege and the privilege against self-incrimination are abrogated by the legislation.

A person cannot be excused from answering questions at a hearing, providing information, or producing documents on the ground that doing so would tend to incriminate the person or expose the person to a penalty (s 113).

However, information or evidence produced to the Commission is not admissible in evidence against the person a criminal proceeding.

Further, a person is not excused from giving an answer or information, or producing a document or thing, on the ground that doing so would disclose legal advice given to a person or would disclose a communication that is protected against disclosure by legal professional privilege (s 114).

### **Outcomes of inquiries**

The Commissioner will be able to make recommendations and findings of fact, which may include identifying instances of corrupt conduct or suggesting disciplinary measures. Additionally, the Commissioner has the option to refer evidence briefs to the Commonwealth Director of Public Prosecutions for potential criminal prosecution.

Once investigations are concluded, the Commissioner is required to submit reports to the Attorney-General and present them in Parliament if a public hearing took place. Furthermore, reports can be made public if it is deemed to be in the best interest of the public.

### **Types of matters the Commission may investigate**

The Commissioner will exercise his own discretion as to what matters to investigate. However, there are already growing calls for certain issues to be put on the Commission's agenda. For example:

- [PWC tax leaks scandal](#)
- [Sports rorts](#)