



**PUBLIC
INTEREST
DISCLOSURE
SCHEME**

CHAPTER 10: Interaction between the National Anti-Corruption Commission and the PID framework

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AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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10 Interaction between the National Anti-Corruption Commission and the PID framework

- 10.1 Overview of the National Anti-Corruption Commission**
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10.1 OVERVIEW OF THE NATIONAL ANTI-CORRUPTION COMMISSION

The National Anti-Corruption Commission (NACC) is an independent Commonwealth agency responsible for detecting, preventing, investigating and reporting on serious or systemic corrupt conduct in the Commonwealth public sector. It is also responsible for educating the public sector, and the public, about corruption risks, corruption vulnerabilities and measures to prevent corruption.

The National Anti-Corruption Commissioner (Commissioner) has broad jurisdiction to investigate allegations of serious or systemic corrupt conduct concerning:

- » Commonwealth Ministers and parliamentarians
- » persons employed or engaged under the Members of Parliament (Staff) Act 1984
- » Commonwealth agency heads, employees and secondees of Commonwealth agencies
- » contractors providing goods or services under a Commonwealth contract or providing services, exercising powers or performing functions on behalf of the Commonwealth
- » officers and directors of Commonwealth companies
- » Commonwealth statutory office holders and appointees
- » persons or bodies providing services, exercising powers or performing functions on behalf of the Commonwealth, and
- » any person whose conduct adversely affects, or could adversely affect, the honest or impartial exercise or performance of a public official's powers, functions or duties.

The Commissioner will be able to investigate serious or systemic corrupt conduct, including criminal and non-criminal conduct, and conduct that occurred before the NACC was established.

10.2 KEY CONCEPTS USED IN THIS CHAPTER

10.2.1 Who can make a referral to the NACC?

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. A public official under the PID Act who makes a referral to the NACC that also constitutes a public interest disclosure may be entitled to the whistleblower protections under the PID Act and the NACC Act (see 10.6.3 of this guide).

Some people must refer certain matters to the NACC – these are called 'mandatory referrals'. Sections 33 to 35 of the NACC Act requires the following people to disclose conduct that they suspect involves serious or systemic corrupt conduct to the NACC:

- » the head of a Commonwealth agency (or their delegate);
- » the head of an intelligence agency (or their delegate); and

- » authorised officers or principal officers (PID officers performing or exercising powers under Part 3 of the PID Act (see 10.3 of this guide).

10.2.2 Who is a PID officer under the NACC Act?

For the purposes of the NACC Act, a PID officer is a staff member of a Commonwealth agency who performs or exercises functions or powers under the Division 1 or 2 of Part 3 of PID Act. This means that a PID officer includes:

- » **authorised officers** performing or exercising functions and powers in relation to the allocation of internal disclosures under Division 1 of Part 3 of the PID Act, and
- » **principal officers** (or their **delegate**) performing or exercising functions and powers in relation to investigating internal disclosures under Division 2 of Part 3 of the PID Act.

10.2.2.1 Delegations

Section 277 of the NACC Act permits the head of an agency to delegate their duties and functions under the NACC Act to appropriate officers within their agency. This includes an agency head's mandatory referral obligation contained in ss 33 and 34 of the NACC Act. In addition, an agency head, who is also a principal officer (and therefore an authorised officer) of the agency under the PID Act, would be able to delegate their mandatory referral obligation under s 35 of the NACC Act. These mandatory referral obligations may be delegated to:

- » an SES or acting SES employee of the agency, or
- » if the agency does not have SES employees—an individual involved in the management of the agency that is comparable to an SES officer.

For example, the head of an agency may decide to delegate their mandatory referral obligation under the NACC Act to an SES employee with responsibility for conducting internal investigations. The delegate would be responsible for discharging the agency head's mandatory referral obligation in relation to suspected serious or systemic corruption issues that they become aware of. The delegate must also comply with any directions given to the delegate by the agency head when the agency head makes the delegation.

In practice, such a delegation may also be supported by a delegation under s 77 of the PID Act, which permits a principal officer of an agency to delegate their functions or powers under the PID Act to a public official that belongs to the agency.

10.2.3 What is a corruption issue?

Section 9 of the NACC Act defines a corruption issue as an issue of whether a person:

- » has already, at some time in the past, engaged in corrupt conduct
- » is currently engaging in corrupt conduct, or
- » will engage in corrupt conduct in the future.

Any person can refer a corruption issue to the NACC.

10.2.4 What is corrupt conduct?

The Commissioner may decide to investigate any person who has potentially done something that involves serious or systemic corrupt conduct under the NACC Act.

There are four types of corrupt conduct under s 8 of the NACC Act. A person engages in corrupt conduct if they:

1. are a public official and they breach public trust
2. are a public official and they abuse their office as a public official
3. are a public official or former public official and they misuse information they have gained in their capacity as a public official, or
4. do something that could cause a public official to behave dishonestly or in a biased way when they carry out their official duties—any person can engage in this type of corrupt conduct, even if they are not a public official.

A person also engages in corrupt conduct if they attempt or conspire to engage in any of the conduct outlined above, even if they do not go through with the attempt or are unsuccessful in doing so.

A disclosure can be made under the PID Act about conduct that is engaged in for the purpose of perverting the course of justice, abuse of position as a public official, or involves corruption of any other kind. It is important to remember that there may be internal disclosures made under the PID Act that involve corruption, but do not meet the threshold of serious or systemic corrupt conduct that would require a referral to the NACC. You will need to continue to handle such disclosures in accordance with the PID Act.

10.2.5 What is 'serious' or 'systemic' corrupt conduct?

The Commissioner is only able to investigate an allegation of corrupt conduct if the Commissioner is of the opinion that the conduct is *serious* or *systemic*.

The mandatory referral obligations on PID officers and agency heads under the NACC Act requires referral of matters that the person suspects could involve serious or systemic corrupt conduct.

The terms 'serious' and 'systemic' are not defined in the NACC Act and will take their ordinary meaning. "Serious" requires something that is significant; it involves something more than "negligible" or "trivial", but it does not have to be "severe" or "grave". "Systemic" means something that is more than an isolated case; it involves a pattern of behaviour, or something that affects or is embedded in a system. Whether something is 'serious' or 'systemic' is a subjective test.

The Commissioner may issue written guidelines to assist PID officers to determine what conduct should be referred to the NACC. The Commissioner may also make a determination in writing that certain corruption issues do not need to be referred to the NACC.

The NACC has published its [Assessment of Corruption Issues Policy](#) which provides information about how staff members of the NACC assess referrals that the NACC receives, including further guidance on the meaning of serious or systemic.

Agencies may wish to develop their own guidelines about what must be referred to the NACC to ensure clear and consistent referral practices that take into consideration the context and operating environment of their individual agency.

10.2.6 Who is an agency head under the NACC Act?

The NACC Act sets out the Commonwealth entities covered by the NACC's jurisdiction. It also defines the 'heads' of those agencies for the purpose of mandatory referrals (s 11 of the NACC Act).

For example, the following people are agency heads under the NACC Act:

- » Members and Senators of the Australian Parliament – including ministers
- » accountable authorities of departments of state and parliamentary departments – such as the Secretary of the Attorney-General's Department or the Secretary of the Department of Parliamentary Services
- » accountable authorities of other Commonwealth entities prescribed under the *Public Governance, Performance and Accountability Act 2013* – such as the Commissioner of Taxation (for the Australian Taxation Office) or the Commissioner of the Australian Federal Police
- » the chief executive officer (or other head as prescribed by regulation) of bodies corporate established under Commonwealth legislation (such as the Commonwealth Science and Industrial Research Organisation or land councils) and of Commonwealth companies (such as NBN Co) and their subsidiaries, and
- » the Chief Executive and Principal Registrar of the federal courts and High Court (judges of the federal courts and High Court are not within jurisdiction).

The definition of agency head under the NACC Act is different to the definition of principal officer under the PID Act. You should be aware that your agency's principal officer under the PID Act may be different to the agency head under the NACC Act¹ – the exercise or performance of any powers or functions, as well as any delegations relating to those powers and functions, must accord with the definition that applies in the relevant Act.

10.2.7 Who is a public official under the NACC Act?

The NACC has jurisdiction to investigate serious or systemic corrupt conduct that involves a Commonwealth public official in some way. Most people who work for, exercise the powers of, or perform functions for the Australian Government or the Australian Parliament are likely to be public officials under the NACC Act.

For the purposes of the NACC, section 10 of the NACC Act defines a public official as:

- » Commonwealth Ministers and parliamentarians
- » staff members of Commonwealth agencies, including employees of:
 - Commonwealth government departments
 - other Commonwealth entities prescribed under the PGPA Act
 - Commonwealth companies and their subsidiaries
 - statutory bodies
 - the High Court (excluding judges)
 - Commonwealth Ministers and parliamentarians (as parliamentary offices are considered to be a Commonwealth agency under the NACC Act)
 - contracted service providers providing goods or services under a Commonwealth contract, or providing services, exercising powers or performing functions on behalf of the Commonwealth (including consultants, independent contractors, labour-hire contractors, subcontractors),
- » staff members of the NACC.

10.2.7.1 Staff members of Commonwealth agencies

Most people who do work for a Commonwealth agency will be staff members of the agency for the purposes of the NACC's jurisdiction. Staff members of Commonwealth agencies include:

- » Commonwealth agency heads, employees and secondees of Commonwealth departments, Commonwealth companies and other statutory bodies
- » people who are responsible for delivering goods or services to a Commonwealth agency under a Commonwealth contract (known as contracted service providers)
- » persons employed or engaged under the *Members of Parliament (Staff) Act 1984* (MoP(S) Act staff) (as the parliamentary office is considered a Commonwealth agency under the NACC Act)
- » officers and employees of federal courts and the High Court, excluding judges
- » people who exercise powers or perform functions under certain Commonwealth laws.

10.2.7.2 Who is not a public official under the NACC Act?

The following are not public officials subject to the NACC's jurisdiction:

- » a judge of a State, Territory or federal court, including a Justice of the High Court
- » the Governor-General and Deputy Governor-General
- » a member of a Royal Commission
- » the Inspector of the NACC, or a person assisting the Inspector
- » foreign governments, including where a foreign government would otherwise be considered a contracted service provider.

It is important to remember that the definition of public official for the purposes of the NACC's jurisdiction is not the same as that definition under the PID Act. A NACC disclosure will only also be a public interest disclosure if it is about a person who is a public official for the purposes of both the NACC Act and the PID Act. For example, a

¹ In a small number of agencies, the chief executive officer is not the accountable authority under the PGPA Act (and therefore the agency head under the NACC Act), however the chief executive officer is the principal officer under the PID Act (s 73 PID Act).

referral to the NACC that alleges corrupt conduct by a MoP(S) Act staff member will not constitute a public interest disclosure, as MoP(S) Act staff are expressly excluded from the scope of the PID Act.

It is important to be aware of the differences between the two schemes, as the whistleblower protections that apply to a disclosure of information will be different depending on whether it is only a NACC disclosure, a public interest disclosure or both a NACC disclosure *and* a public interest disclosure (see 10.6 of the guide).

10.2.8 What is a NACC disclosure?

A person makes a NACC disclosure if they refer, or provide information about, a corruption issue to the Commissioner, the IGIS or the Inspector of the NACC. A person also makes a NACC disclosure if they give evidence or information, or produce a document or thing to the Commissioner, the IGIS or the Inspector in relation to:

- » a corruption issue (as defined in s 9 of the NACC Act)
- » a NACC Act process (as defined in s 7 of the NACC Act)
- » a NACC corruption issue (as defined in s 201 of the NACC Act), and
- » a complaint made in relation to the conduct or activities of a NACC staff member.

The above definition of NACC disclosure is defined at s 23 of the NACC Act. Section 8 of the PID Act defines a NACC disclosure as having the same meaning as in the NACC Act.

In practice, the definition of a NACC disclosure would apply to a broad range of disclosures to the Commissioner or the IGIS, including:

- » a voluntary referral of a corruption issue under s 32 of the NACC Act
- » a mandatory referral by the head of a Commonwealth agency or the head of an intelligence agency under ss 33 and 34 of the NACC Act
- » a mandatory referral by a staff member of a Commonwealth agency with responsibilities under Part 3 of the PID Act under s 35 of the NACC Act, and
- » a person who provides evidence during a corruption investigation or public inquiry.

A person who makes a NACC disclosure will receive protections under the NACC Act. These protections are similar to the protections contained in the PID Act, and include immunity from criminal, civil and administrative liability and protection from reprisal action.

10.3 MANDATORY REFERRALS TO THE NACC: PUBLIC INTEREST DISCLOSURE OFFICERS

Part 5 of the NACC Act creates voluntary and mandatory pathways for the referral of corruption issues to the Commissioner and, in the case of an intelligence agency, to the IGIS.

Importantly, s 35 of the NACC Act creates a mandatory referral obligation for staff members of Commonwealth agencies with certain responsibilities under the PID Act, known as PID officers.

10.3.1 How to make a referral to the NACC

A PID officer is able to make a referral to the NACC via the National Anti-Corruption Commission website (www.nacc.gov.au). Further information about how to refer a corruption issue to the NACC can be found on the NACC website at: www.nacc.gov.au/reporting-and-investigating-corruption/how-to-make-report.

A PID officer from an intelligence agency is also able to make a referral to the IGIS. PID officers in the intelligence agencies can email PID@igis.gov.au to request further information about how to make a mandatory referral under the NACC Act.

10.3.2 What is the mandatory referral obligation for PID officers?

Section 35 of the NACC Act creates a mandatory referral obligation for PID officers exercising powers or functions under Divisions 1 or 2 of Part 3 of the PID Act.

If a PID officer receives an internal disclosure under the PID Act that raises a corruption issue under the NACC Act, the PID officer **must** refer the corruption issue to the NACC if **all of the following apply**:

- » the PID officer became aware of the corruption issue in the course of exercising their powers or functions under Division 1 (allocating disclosures) or Division 2 (investigating disclosures) of Part 3 of the PID Act
- » the corruption issue concerns the conduct of a person who is, or was, a staff member of the Commonwealth agency at the time the conduct occurred, and
- » the PID officer suspects the issue could involve **serious** or **systemic** corrupt conduct.

A PID officer must refer a corruption issue to the NACC or the IGIS (as appropriate) **as soon as reasonably practicable** after becoming aware of the issue, or within such later time as is allowed by the Commissioner.

In practice, the mandatory referral obligation means that authorised officers will need to consider whether an internal disclosure received under the PID Act contains allegations of serious or systemic corrupt conduct. Similarly, principal officers will need to consider, in the course of deciding whether to investigate, or investigating, an internal disclosure under the PID Act, whether there is evidence of serious or systemic corrupt conduct.

The threshold that a PID officer suspects that an issue could involve serious or systemic corrupt conduct is intended to operate as a low threshold. A PID officer does not need to be satisfied that the conduct has actually occurred as this is a matter for the Commissioner to consider, and possibly investigate. It will be enough if the PID officer holds a genuine suspicion that the corrupt conduct could be serious or systemic.

Guidance on what may constitute 'serious' or 'systemic' corrupt conduct is outlined above at section 10.2.5 of this guide.

For corruption issues that do not meet that threshold to trigger a mandatory referral obligation, a PID officer may choose to voluntarily refer the issue to the NACC.

10.3.3 Additional steps for PID officers in intelligence agencies

If an internal disclosure raises a corruption issue that relates to an intelligence agency, and the PID officer suspects the disclosure could involve serious or systemic corrupt conduct, they **must** refer it to either the Commissioner or the IGIS.

If the PID officer refers the issue to the Commissioner, the PID officer must notify the IGIS of the referral as soon as practicable. This will provide the IGIS with visibility of allegations of corruption in relation to the intelligence agencies, or staff members of intelligence agencies, that it oversees, allowing the IGIS to effectively perform their oversight role.

If the PID officer refers the issue to the IGIS, and the IGIS is **satisfied** that the issue **likely** involves corrupt conduct that is serious or systemic, the IGIS **must** refer the issue to the Commissioner. This will ensure that all issues involving serious or systemic corruption make their way to the Commissioner, who may then decide how to deal with the issue.

10.3.3.1 Definition of an intelligence agency under the NACC Act

The following agencies are intelligence agencies for the purposes of the NACC Act:

- » the Australian Geospatial-Intelligence Organisation (AGO)
- » the Australian Secret Intelligence Service (ASIS)
- » the Australian Security Intelligence Organisation (ASIO)
- » the Australian Signals Directorate (ASD)

- » the Defence Intelligence Organisation (DIO), and
- » the Office of National Intelligence (ONI).

These agencies are also intelligence agencies, and overseen by the IGIS, for the purposes of the PID Act. Under the PID Act, disclosures relating to the intelligence functions of certain agencies (that is, ACIC and AFP) are also overseen by the IGIS. However, NACC referrals relating to the intelligence functions of these agencies can only be made to the NACC Commissioner, and not to the IGIS. The PID Act requirements to notify the IGIS continue to apply to an internal disclosure that concerns the intelligence functions of these agencies where the disclosure, or part of the disclosure, has been referred to the NACC. For example, the ACIC and the AFP must notify the IGIS where a NACC stop action direction (see 10.5 of this guide) prevents allocation or investigation of a disclosure that relates to those agencies' intelligence functions.

10.3.4 Does the mandatory referral obligation apply to historical conduct?

A PID officer's mandatory referral obligation applies regardless of when the conduct occurred, including if the conduct occurred before the NACC commenced or before the PID officer joined the agency. A PID officer is required to refer serious or systemic corrupt conduct, including historical conduct, if they become aware of the conduct on or after the commencement of the NACC on 1 July 2023.

The same requirements for a mandatory referral would apply to corrupt conduct that occurred before the NACC commenced. The PID officer must:

- » become aware of the conduct in the course of performing their functions under the PID Act after the NACC commences
- » the corruption issue must concern a person who is or was a staff member of the PID officer's agency at the time the conduct occurred, and
- » the PID officer must suspect the conduct is serious or systemic corrupt conduct.

A PID officer will not be required to refer conduct that they were already aware of before the NACC commenced. This is intended to ensure that PID officers are not required to refer issues to the Commissioner that may have already been dealt with. Although there is no obligation to refer corruption issues that a PID officer was aware of before the NACC commenced, a PID officer may still voluntarily refer the corruption issue to the NACC under s 32 of the NACC Act.

10.3.5 Exceptions to making a mandatory referral

There are two exceptions to a PID officer's mandatory referral obligation under the NACC Act:

1. The PID officer believes on reasonable grounds that Commissioner or the IGIS (as appropriate) is already aware of the issue.
2. The Commissioner has made a written determination that a referral is not required.

10.3.5.1 Where the Commissioner or IGIS is already aware of an issue

A PID officer is **not required** to refer a corruption issue to the NACC or the IGIS if they believe on reasonable grounds that the Commissioner or the IGIS is already aware of the issue. This exception ensures that mandatory referral obligations do not result in duplication by requiring multiple people to refer the same corruption issue to the Commissioner or the IGIS. For example, the obligation to refer a single corruption issue may apply to both the head of a Commonwealth agency (or intelligence agency) and a PID officer of that agency.

Once one person has made a referral, any person who believes on reasonable grounds that the Commissioner or the IGIS is already aware of the issue is relieved of their mandatory referral obligation. For example, an authorised officer under the PID Act would not be required to refer a corruption issue to the NACC or the IGIS if they believe on reasonable grounds that their agency head, or another PID officer, had already referred the corruption issue to the Commissioner or the IGIS.

10.3.5.2 Commissioner's determination

A PID officer is also **not required** to refer a corruption issue to the NACC or the IGIS if the Commissioner makes a determination that a referral is not required.

The Commissioner may make a written determination under s 37(1)(b) of the NACC Act that a referral is not required because of the kind of corruption issue involved, or the circumstances in which the corruption issue arose. A determination may provide that a specific corruption issue or class of corruption issues does not need to be referred to the NACC. The determination would relieve the PID officer of their mandatory referral obligation in relation to conduct covered by the determination.

10.3.6 What information must be included when making a referral to the NACC

A PID officer is required to provide all information relevant to the corruption issue that is in their possession or control at the time they make a mandatory referral to the NACC or the IGIS. This may include, but is not limited to:

- » the names of any public officials who the PID officer suspects has engaged in serious or systemic corrupt conduct
- » the names of any private individual or entities involved
- » a description of the conduct that raises a corruption issue
- » the dates and timeframes of when the alleged corrupt conduct occurred, or may occur
- » how and when the PID officer became aware of the issue
- » any supporting documents or evidence, and
- » any other information that may be relevant to the corruption issue.

If a PID officer becomes aware of new information relating to the corruption issue after making a referral to the NACC or the IGIS, they must provide it to the NACC or the IGIS as soon as reasonably practicable.

A PID officer may also provide the reasons why they suspect the issue could involve serious or systemic corrupt conduct when making a referral to the NACC or the IGIS. This will assist the Commissioner and the IGIS to determine whether the corrupt conduct being referred is likely to meet the Commissioner's threshold for commencing a corruption investigation under the NACC Act.

10.3.6.1 Does a discloser need to consent to their name and contact details being shared with the NACC?

Under the NACC Act a discloser does not need to provide consent before their personal information, including their name or contact details, can be shared with the NACC or the IGIS.

A PID officer who is required to refer a corruption issue to the NACC or the IGIS must include all information that is relevant to issue that and in their possession or control at the time a referral is made. This means that a PID officer will be required to disclose the identity of the discloser to the NACC or the IGIS if that information is known and is relevant to the corruption issue being referred. This obligation would apply regardless of whether the discloser consents to their personal information being shared with the NACC or the IGIS. Whether identifying information is relevant to a corruption issue that is being referred will depend on the circumstances.

Part 11 of the NACC Act imposes confidentiality and information-sharing obligations on staff members of the NACC (including the Commissioner, Inspector and persons assisting the Inspector) who receive and deal with sensitive information to ensure such information is securely handled. Sensitive information includes information that could reveal, or enable a person to ascertain, the existence or identity of a confidential source of information.

It is an offence for a staff member or former staff member of the NACC to make a record or unauthorised disclosure of any information that they obtained in the course of performing their duties under the NACC Act.

Obligations under the *Privacy Act 1988*, including the Australian Privacy Principles, do not apply to the NACC (see items 152, 154 and 155 of the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022*). This exemption allows entities to disclose personal information to the NACC if the provision of the information is necessary for or directly related to the Commissioner or Inspector's functions.

10.3.6.2 What if sharing the information would breach a secrecy obligation?

A PID officer who is required to refer a corruption issue to the NACC or the IGIS must include all information that is relevant to the issue and in their possession at the time a referral is made. This requirement applies even if providing the information to the NACC or the IGIS would breach a secrecy provision in another law.

Section 36 of the NACC Act overrides the operation of most secrecy provisions to ensure that the Commissioner or the IGIS receive as much information as possible about a corruption issue, including where the information is covered by a secrecy provision. The operation of s 36 of the NACC Act means that it is not an offence for a PID officer to provide information that is covered by a secrecy provision to the NACC or the IGIS.

An exception to this rule is where the disclosure of information to the NACC or the IGIS would breach an exempt secrecy provision, as defined under s 7 of the NACC Act. This exception is explained further below.

10.3.7 Exceptions to information requirements

A PID officer is not required to provide information about a corruption issue if any of the following apply:

1. the PID officer believes on reasonable grounds that the Commissioner or the IGIS is already aware of the information
2. the Commissioner or the IGIS has advised that the information is not required
3. the information is subject to an exempt secrecy provision, or
4. the Attorney-General has certified under s 236 of the NACC Act that disclosing the information would be contrary to the public interest because it would harm Australia's international relations.

These exceptions limit the information that must be included with a mandatory referral of a corruption issue under the NACC Act. They **do not** operate to override a PID officer's mandatory referral obligation under s 35 of the NACC Act. A PID officer would still be required to refer all information relevant to the corruption issue that is not covered by an exception.

10.3.7.1 Exempt secrecy provisions

A PID officer is generally required to comply with their mandatory referral obligation, even if doing so would breach a secrecy provision under another law. However, a PID officer is **not required** to provide information to the NACC or the IGIS if that information is covered by an 'exempt secrecy provision' as defined under s 7 of the NACC Act.

As at 1 July 2023, an exempt secrecy provision includes:

- » Part 11 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
- » s 34 of the *Inspector-General of Intelligence and Security 1986*
- » secrecy provisions under the *My Health Records Act 2012*
- » a secrecy provision in Part VIIA of the *Privacy Act 1988*
- » ss 45 and 45B of the *Surveillance Devices Act 2004*
- » ss 63 and 133 of the *Telecommunications (Interception and Access) Act 1979*
- » a secrecy provision that is a provision of taxation law, and
- » a secrecy provision of another law that says it still applies despite the NACC Act.

Importantly, the exception to the mandatory referral obligation will only apply where one of the above-listed exempt secrecy provisions actually prohibits the disclosure of particular information to the NACC. For example, subsection 45(5) of the *Surveillance Devices Act 2004* permits the communication of protected information for (among other purposes) the purpose of an investigation of a complaint against, or into the conduct of, a public officer within the meaning of that Act. As such, it will be necessary for PID officers to consider whether the above-listed provisions permit the disclosure of relevant information to the NACC.

Although information covered by an exempt secrecy provision does not need to be referred to the NACC or the IGIS, all other information relevant to the corruption issue must still be referred. The existence of information

covered by an exempt secrecy provision does not provide an exception to a PID officer's mandatory referral obligation, but rather limits the information that must be disclosed. A PID officer must still make a mandatory referral to the NACC or the IGIS without the protected information.

10.3.7.2 *Attorney-General's certificate in relation to international relations*

A PID officer is **not required** to provide information about a corruption issue to the NACC if the information is covered by an international relations certificate issued by the Attorney-General under s 236 of the NACC Act.

An international relations certificate would provide that certain information or documents communicated in confidence by a foreign government or international organisation, under a legally-binding agreement, cannot be disclosed to the Commissioner or the Inspector of the NACC because it would be contrary to the public interest to do so.

The Attorney-General must issue an international relations certificate in writing, and provide a copy of the certificate to all of the following:

- » the Commissioner,
- » the Inspector of the NACC
- » the head of a Commonwealth agency which is in possession of the information, and
- » a person who is possession of the information.

A PID officer should consult with their agency head if they are unsure whether information that may form part of a referral to the NACC is covered by international relations certificate issued under s 236 of the NACC Act.

It is important to note that although information covered by an international relations certificate cannot be referred to the NACC, all other information relevant to the corruption issue must still be referred to the NACC in accordance with a PID officer's mandatory referral obligation. An international relations certificate does not provide a blanket exception to a PID officer's mandatory referral obligation, but rather limits the information that must be disclosed.

10.4 WHAT HAPPENS AFTER MAKING A REFERRAL TO THE NACC

10.4.1 Notification requirements

A PID officer is required to notify a discloser that their internal disclosure under the PID Act has been referred to the NACC or the IGIS under s 35 of the NACC Act. The PID officer must notify the discloser of such a referral as soon as reasonably practicable after making the referral (s 35(5) of the NACC Act). This obligation is consistent with a PID officer's obligation to keep a discloser informed of how their internal disclosure is being dealt with under s 44(4) (notice of a decision to allocate) and s 50 (notice in relation to an investigation) of the PID Act.

The obligation to notify the discloser when a referral has been made does not create a requirement for the PID officer to stop dealing with the disclosure under the PID Act, nor does it create a requirement for the Commissioner or the IGIS to deal with issue.

As outlined above, if a PID officer refers a corruption issue that relates to an intelligence agency to the Commissioner, they must notify the IGIS of the referral as soon as reasonably practicable.

A PID officer may also notify the Commonwealth Ombudsman that they have referred an internal disclosure that raises a corruption issue to the NACC, however, there is no legislative requirement to do so. Similarly, where the referral concerns a disclosure that relates to the intelligence functions of the ACIC or the AFP, a PID officer in that agency may wish to notify the IGIS. An exception to this is if the Commissioner issues a stop action direction in relation to the disclosure, and that direction prevents the PID officer from giving notice that an issue has been referred to the NACC. In this case, it may be appropriate for the head of the relevant Commonwealth agency to seek permission from the Commissioner to notify the Commonwealth Ombudsman of the referral to the NACC, for example, to assist the Ombudsman to effectively perform their oversight function.

10.4.2 Requirements under the PID Act after referring a corruption issue to the NACC

Referring a corruption issue to the NACC or the IGIS **does not** prevent a PID officer from continuing to take action in relation to the disclosure under the PID Act. A PID officer is still required to handle or deal with the internal disclosure in accordance with the PID Act, unless the Commissioner has issued a stop action direction (see ss 39 and 43 of the NACC Act). This means processes under the PID Act can be conducted concurrently with any process undertaken under the NACC Act, unless a stop action direction applies.

This is appropriate because the Commissioner and the IGIS are not required to consider or deal with issues that are referred to them under the NACC Act, and ensures that PID officers continue to meet their obligations under the PID Act in a timely manner.

10.4.2.1 Interaction with 'another law or power' provisions in the PID Act

Section 8 of the PID Act defines the phrase 'another law or power' to mean a law of the Commonwealth (including procedures under such a law), or the executive power of the Commonwealth. This includes the NACC Act.

Section 44A of the PID Act permits an authorised officer to decide not to allocate an internal disclosure to a relevant agency under the PID Act if they are satisfied on reasonable grounds that the disclosure would be more appropriately investigated under another law or power. However, an authorised officer cannot make a decision not to allocate a disclosure only because the conduct disclosed raises a corruption issue (see s 43(4A) of the PID Act).

Similarly, s 48(1A) would prevent a principal officer from making a decision under s 48(1)(ga) to not investigate or further investigate a disclosure only because the conduct disclosed raises a corruption issue.

The operation of these sections means that an authorised officer or principal officer who receives a disclosure under the PID Act which raises a corruption issue (as defined in the NACC Act) cannot make a decision not to allocate or investigate (as the case may be) merely because the disclosure has been referred to the NACC or the IGIS. This accords with the operation of s 39 of the NACC Act, which requires a PID officer to continue to handle an internal disclosure under Part 3 of the PID Act, even where a referral of a corruption issue has been made to the NACC or the IGIS.

10.4.3 How the Commissioner may deal with a corruption issue

If the Commissioner is satisfied that a referral raises a serious or systemic corruption issue, they may deal with it under s 41 of the NACC Act by:

- » investigating the issue
- » investigating the issue jointly with a Commonwealth agency or a State or Territory entity
- » referring the issue to a Commonwealth agency for investigation
- » referring the issue to a Commonwealth agency or a State or Territory entity for consideration
- » deciding to take no action.

It is important to note that the Commissioner is under no duty to consider whether to deal with a corruption issue that is referred to the NACC. The Commissioner may also reconsider how to deal with a corruption issue at any time.

10.4.3.1 Referring the issue to a Commonwealth agency for investigation

Section 26 of the PID Act enables public officials (within the meaning of s 69 of the PID Act) to make a PID directly to the NACC without needing to make an internal disclosure to their agency first. If a person makes a PID directly to the NACC without making an internal disclosure to their agency, and the Commissioner refers the issue back to the relevant agency for investigation under s 41(1)(c) of the NACC, the agency is not able to investigate the matter under the PID Act as no internal disclosure was made.

If no internal disclosure has been made to an authorised officer (or supervisor) of an agency, the relevant

investigation processes under Part 3 of the PID Act are not triggered. If a public official wants their disclosure to be dealt with by their agency under the PID Act, they will need to make an internal disclosure to their agency.

If the NACC refers an issue to an agency for investigation, and there has not been an internal disclosure to the agency under the PID Act in relation to that issue, the agency may be able to investigate the issue under other processes including Code of Conduct investigations. Under ss 50 and 51 of the NACC Act, the NACC may oversee and issue directions in relation to corruption investigations undertaken by a Commonwealth agency.

10.5 STOP ACTION DIRECTIONS

10.5.1 What is a stop action direction?

Section 43 of the NACC Act enables the Commissioner to direct the head of a Commonwealth agency to stop taking action in relation to a corruption issue that concerns the agency. This is called a stop action direction.

A stop action direction overrides the operation of any other Commonwealth law and can prevent an agency from taking particular action in relation to the corruption issue, or from taking any action at all.

The Commissioner may only issue a stop action direction if all of the circumstances below apply:

- » the direction is required to ensure the effectiveness of any action that the Commissioner has taken, or may take, in relation to the corruption issue—for example, to stop the agency from inadvertently prejudicing a corruption investigation under the NACC Act
- » the corruption issue concerns the agency—for example, where there is an issue of whether a staff member of the relevant agency has engaged in corrupt conduct
- » the Commissioner has consulted with the head of the relevant Commonwealth agency about the stop action direction.

10.5.1.1 Permission to take action

If a stop action direction is in place, an agency head is able to seek permission from the Commissioner to undertake action in relation to a corruption issue where the action would otherwise be prohibited by the stop action direction.

Certain actions may also be taken where a stop action direction is in place without seeking permission from the Commissioner. Section 44 of the NACC Act provides that the following actions can be taken without permission:

- » actions to prevent or lessen an imminent risk to the safety of the person, or to protect a person's life
- » actions in the interests of the security, defence or international relations of Australia
- » actions to prevent loss to the Commonwealth of an amount, greater than the amount (if any), prescribed in regulations made under the NACC Act
- » actions for which it would be unreasonable in the circumstances to wait for the Commissioner's permission.

10.5.2 How may a stop action direction impact the PID Act process?

A stop action direction issued by the Commissioner overrides the operation of any other law of the Commonwealth, including the PID Act. If a stop action direction conflicts with a requirement in another Commonwealth law, the stop action direction prevails.

A stop action direction may prevent an authorised officer and principal officer from allocating or investigating a disclosure under the PID Act, or from notifying a discloser that a particular matter has been referred to the NACC. If a stop action direction specifies that a PID officer cannot allocate or investigate a disclosure under the PID Act, the PID officer is relieved of their obligation under the PID Act for as long as the stop action direction remains in place. For example, if a principal officer refers an internal disclosure to the NACC because it raises a serious or systemic corruption issue, and the Commissioner directs the principal officer to stop investigating the issue under the PID Act, the principal officer would be required to cease their investigation under the stop action direction is

revoked.

It is important for agencies to consider the scope of a stop action direction to ensure that they are aware of what action they can and cannot take in relation to a disclosure while a stop action direction is in place.

10.5.3 Notification requirements

Authorised officers and principal officers have certain notice requirements under the PID Act if a stop action direction prevents them from allocating or investigating a disclosure under the PID Act.

10.5.3.1 Notice requirements for principal officers

If a stop action direction prevents a principal officer from investigating an internal disclosure under the PID Act, the principal officer is required to give written notice of the stop action direction to:

- » the Commonwealth Ombudsman; or
- » the IGIS—if the disclosure concerns conduct that relates to:
 - an intelligence agency
 - the IGIS; or
 - the intelligence functions of the Australian Criminal Intelligence Commission or the Australian Federal Police.

A principal officer is also required to notify the person who made the disclosure that they cannot investigate, or further investigate, the disclosure because of a stop action direction under the NACC Act (see s 50(1)(c) of the PID Act).

10.5.3.2 Notice requirements for authorised officers

If a stop action direction prevents an authorised officer from allocating an internal disclosure under Division 1 of Part 3 of the PID Act, the authorised officer is required to give written notice of the stop action direction to:

- » the Commonwealth Ombudsman; or
- » the IGIS—if the disclosure concerns conduct that relates to:
 - an intelligence agency
 - the IGIS; or
 - the intelligence functions of the ACIC or the AFP.

An authorised officer *may* notify a discloser that their disclosure cannot be allocated because of a stop action direction under the NACC Act, but they are not obliged to do so. However, the PID Standard provides that procedures established by the principal officer under s 59(3) of the PID Act must require an authorised officer to keep a written record of the following matters regarding a notice of a stop action direction under the NACC Act that prevents an authorised officer from allocating some or all of a disclosure:

- » whether the discloser was informed of the decision, and if not the reasons why
- » if a copy of the notice was given to the discloser:
 - the day and time the discloser was notified
 - the means by which the discloser was notified and
 - the content of the notification, and
- » whether the relevant principal officer considered notice to the discloser of the stop action direction reasonably practicable or appropriate.

10.5.3.3 What information must be provided when giving notice of a stop action direction

Authorised officers and principal officers are required to give written notice of the stop action direction.

Section 279 of the NACC Act permits the Commissioner to issue guidance about the information that may be disclosed when giving notice about a stop action direction.

It may also be appropriate for the head of an agency that is subject to a stop action direction to seek permission from the Commissioner to disclose certain information about the stop action direction to the discloser, the Ombudsman or the IGIS, as appropriate.

10.5.4 What happens once a stop action direction is revoked?

A stop action direction must be revoked by the Commissioner when it is no longer required.

Once a stop action direction is revoked, a PID officer will be required to continue to handle the disclosure in accordance with the PID Act. However, the statutory timeframes for a PID officer to allocate or investigate a disclosure under ss 43(11) and 52(1) of the PID Act will start again from the day the PID officer becomes aware that the stop action direction no longer applies.

This means that an authorised officer will be required to use their best endeavours to allocate a disclosure within 14 days of becoming aware that a stop action direction no longer applies in relation to the disclosure (see s 43(11)(a) of the PID Act). Similarly, a principal officer will be required to complete an investigation of the disclosure under Part 3 of the PID Act within 90 days of becoming aware that a stop action direction no longer applies (see s 52(1)(d) of the PID Act) – that is, the 90-day investigation period restarts for the PID investigation. This is regardless of any period of investigation that occurred before the stop action direction was made.

If the NACC has investigated the conduct that is the subject of the disclosure during the period that the stop action direction was in force, it may be open to the principal officer to decide to not investigate (or not further investigate) the disclosure, on the basis that the conduct has been investigated under the NACC Act, provided the principal officer is reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation (s 48(1)(d)) (see section 7.3.3 of this guide).

10.6 WHISTLEBLOWER PROTECTIONS

Part 4 of the NACC Act provides a range of protections to any person who provide information or evidence about a corruption issue to the NACC, known as a NACC disclosure.

10.6.1 Protection from liability

A person who makes a NACC disclosure will receive the following protections:

- » immunity from civil liability, criminal liability and administrative liability (including disciplinary action)
- » protection from the enforcement of contractual or other remedies or rights on the basis of making a disclosure
- » privilege in defamation proceedings
- » protection from contract termination for breach of contract in making a disclosure.

These protections align with the protections provided to a public official or witness under s 10 of the PID Act.

10.6.2 Protections from reprisal

Section 30 of the NACC Act creates criminal offences for anyone taking, or threatening to take, a reprisal in relation to a NACC disclosure. A reprisal is when a person causes another person detriment because they believe or suspect that the other person has made, may have made, proposes to make or could make a NACC disclosure.

Under the NACC Act, detriment includes:

- » dismissal of an employee
- » injury of an employee
- » alteration of an employee's position to their disadvantage
- » discrimination between an employee and other employees of the employer
- » harassment or intimidation of a person
- » harm or injury to a person, including psychological harm

- » damage to a person's property, reputation, business or financial position, and
- » any other damage to a person.

The maximum penalty under the NACC Act for taking or threatening to take a reprisal against a person who made a NACC disclosure is imprisonment for two years.

Reasonable administrative action to protect a discloser from detriment is not a reprisal. For example, if a person makes a NACC disclosure about practices in their immediate work area, it may be appropriate to transfer them to another area so that they do not experience detriment.

These protections align with the protections provided to public officials under s 19 of the PID Act. However, the NACC Act does not provide civil remedies for reprisal.

10.6.3 Protections for public official

A public official (within the meaning of s 69 of the PID Act) may make a PID that involves a corruption issue directly to the NACC without needing to make an internal disclosure to their agency first.

A public official who makes a PID that involves a corruption issue directly to the NACC may be able to access protections under both the NACC Act and the PID Act (see chapter 8 of this guide). The public official will be entitled under the protections under the NACC Act as their disclosure would constitute a NACC disclosure for the purposes of the NACC Act. However, a public official will also be able to access the protections under the PID Act if their NACC disclosure also meets the threshold for disclosable conduct under s 29 of the PID Act.

A public official who makes an internal disclosure which raises a corruption issue to their agency, and that disclosure is referred by a PID officer to the NACC, will only receive protections under the PID Act.

10.6.4 Protections for PID officers who refer an internal disclosure to the NACC

A mandatory referral or voluntary referral under Part 5 of NACC Act is a NACC disclosure for the purposes of the NACC Act. This means that a PID officer who refers an internal disclosure to the NACC or the IGIS because it raises a corruption issue will receive protection from liability and reprisal under the NACC Act.