

2022

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL ANTI-CORRUPTION COMMISSION BILL 2022

**NATIONAL ANTI-CORRUPTION COMMISSION (CONSEQUENTIAL AND TRANSITIONAL
PROVISIONS) BILL 2022**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Hon Mark Dreyfus KC MP)

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Glossary

The following abbreviations and acronyms are used throughout this Explanatory Memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
ABC	Australian Broadcasting Corporation
ACIC	Australian Criminal Intelligence Commission (formerly the Australian Crime Commission)
ACLEI	Australian Commission for Law Enforcement Integrity
ADF	Australian Defence Force
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFP	Australian Federal Police
AFP Act	<i>Australian Federal Police Act 1979</i>
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
APS	Australian Public Service
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
ASIS	Australian Secret Intelligence Service
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CDPP	Commonwealth Director of Public Prosecutions
Commissioner	National Anti-Corruption Commissioner
Committee	Parliamentary Joint Committee on the National Anti-Corruption Commission
Consequential Bill	National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022
<i>Criminal Code</i>	The Schedule to the <i>Criminal Code Act 1995</i>
ICCPR	International Covenant on Civil and Political Rights
IGIS	Inspector-General of Intelligence and Security
IGIS Act	<i>Inspector-General of Intelligence and Security Act 1986</i>
Inspector	Inspector of the National Anti-Corruption Commission
IPEA	Independent Parliamentary Expenses Authority
LEIC Act	<i>Law Enforcement Integrity Commissioner Act 2006</i>
NACC	National Anti-Corruption Commission
NACC Bill	National Anti-Corruption Commission Bill 2022
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PGPA Rule	<i>Public Governance, Performance and Accountability Rule 2014</i>
PID	Public interest disclosure
PID Act	<i>Public Interest Disclosure Act 2013</i>
POC Act	<i>Proceeds of Crime Act 2002</i>

National Anti-Corruption Commission Bill 2022

<i>Abbreviation</i>	<i>Definition</i>
SBS	Special Broadcasting Service Corporation
SD Act	<i>Surveillance Devices Act 2004</i>
SES	Senior Executive Service
TIA Act	<i>Telecommunications (Interception and Access) Act 1979</i>

General outline and financial impact

GENERAL OUTLINE

The NACC Bill would create a new Commonwealth anti-corruption agency, the National Anti-Corruption Commission. The NACC would be an independent agency that would investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption.

The NACC Bill would strengthen corruption prevention across the Commonwealth government, by enabling the NACC to undertake public inquiries and provide advice on corruption risks and vulnerabilities and strategies to address them.

The NACC Bill would establish the Commissioner as the head of the NACC, and provide the Commissioner with broad powers to investigate corruption issues and conduct public inquiries.

The Commissioner's power to deal with corruption issues will sit within a broader Commonwealth integrity framework. Other Commonwealth bodies and frameworks contribute to Australia's multi-faceted integrity framework and provide other avenues to deal with and prevent fraud and corruption in the Commonwealth public sector. For example:

- the Auditor-General supports accountability in the Australian Government sector through its audit and assurance functions;
- the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Australian Information Commissioner, the Independent Parliamentary Expenses Authority, and a number of Inspectors-General all fulfil oversight functions;
- the Foreign Influence Transparency Scheme, the Lobbying Code of Conduct, the freedom of information framework, and the National Archives of Australia fulfil a transparency function, providing and promoting public visibility of government decisions and external influence;
- the Commonwealth Fraud Control and Protective Security Policy Frameworks and the Commonwealth Fraud Prevention Centre fulfil a preventative function—the NACC would also have a complementary preventative and educative function;
- the Australian Federal Police is responsible for investigating the most serious and complex cases of fraud against the Commonwealth, in partnership with regulatory agencies, and State, Territory and international law enforcement agencies; and
- courts and tribunals are able to review government decision-making and provide redress where appropriate to persons adversely affected by government decisions.

Structure of the NACC

The NACC would be led by a Commissioner and up to three Deputy Commissioners, and would also be supported by a Chief Executive Officer appointed under the NACC Bill.

The Commissioner and Deputy Commissioners would have security of tenure, involving appointment for a single term of up to five years for the Commissioner and up to two terms of five years for the Deputy Commissioners, with the termination of their appointments generally requiring an address from each House of the Parliament on the grounds of misbehaviour or incapacity.

The NACC Bill would also provide for a requirement for a Parliamentary Joint Committee to oversee the NACC and approve the Government's nominated appointees for the offices of Commissioner and Deputy Commissioner, as well as the Inspector of the NACC.

Jurisdiction of the NACC and definition of corrupt conduct

The NACC Bill would provide the Commissioner with a broad jurisdiction to investigate Commonwealth Ministers, parliamentarians, persons engaged under the *Members of Parliament (Staff) Act 1984*, the heads and employees of Commonwealth agencies, government contractors and their employees, members of the Australian Defence Force, statutory office holders and appointees, officers and directors of Commonwealth companies, and people or bodies providing services, exercising powers or performing functions on behalf of the Commonwealth.

The Commissioner would only be able to commence an investigation (whether following a public complaint, agency referral or on their own initiative) in relation to a corruption issue that the Commissioner is of the opinion could involve serious or systemic corrupt conduct. This would include, but would not be limited to, conduct that could constitute a criminal offence—for example, the bribery, abuse of office and related offences contained in Part 7.6 of the *Criminal Code*.

The NACC Bill would define corrupt conduct to include any conduct of a person (including a public official) that adversely affects, or could adversely affect, the honest or impartial exercise or performance of any public official's powers, functions or duties. Corrupt conduct would also include any conduct of a public official that:

- constitutes or involves a breach of public trust;
- constitutes, involves, or is engaged in for the purpose of abuse of the person's office as a public official;
- constitutes or involves the misuse of information acquired in the person's capacity as a public official; or
- constitutes, involves, or is engaged in for the purpose of corruption of any other kind.

The NACC Bill would enable the Commissioner to investigate serious or systemic corrupt conduct that occurred prior to the NACC's establishment, the conduct of former public officials while they were public officials, and the misuse of information by a former public official that was acquired by the former public official in the course of their functions or duties as a public official.

Protection for whistleblowers and persons providing information

The NACC Bill would provide protections for persons who refer allegations or information raising corruption issues. This would include criminal offences for taking, or threatening to take, reprisal action that causes detriment to whistleblowers who provide information to the NACC, and immunity from criminal, administrative and civil liability. These protections would complement existing protections under the PID Act for public officials making disclosures.

Referrals

The NACC Bill would create mandatory and voluntary pathways for the referral of corruption issues to the Commissioner. The NACC Bill would define a corruption issue as an issue of whether a person has engaged, is engaging, or will engage in corrupt conduct.

The NACC Bill would allow any person to refer a corruption issue to the Commissioner. Referrals could also occur because of a public interest disclosure under the PID Act.

The NACC Bill would require agency heads and persons with responsibilities under the PID Act to refer information or allegations involving any corrupt conduct that could be serious or systemic to the NACC as soon as reasonably practicable after becoming aware of the information or allegation. Referrals in relation to intelligence agencies could also be made to the IGIS.

Dealing with corruption issues

The Commissioner would be able to deal with a corruption issue in a number of ways: by investigating the issue when the threshold outlined above is met (either by themselves or jointly with another agency), or referring the issue to an appropriate agency for investigation or consideration—for example, back to the agency within which the conduct occurred to conduct an internal investigation or to another independent investigation agency such as the AFP for its consideration.

The NACC Bill would also provide the Commissioner with a preliminary investigation power, allowing the Commissioner to gather information to confirm the existence or nature of a corruption issue, and to support a decision about how to deal with an allegation of corrupt conduct.

If a corruption issue were to be referred for investigation by the agency within which the conduct occurred, the Commissioner would have the ability to:

- oversee the investigation;
- provide directions to the agency regarding the conduct of the investigation;
- retain visibility of the investigation by requesting progress reports and a final report;
- make comments and additional recommendations on a final report;
- follow-up on the agency's implementation of recommendations; and
- assume responsibility for the investigation where appropriate.

Powers

The Commissioner would be able to exercise a range of powers under the NACC Bill and other legislation to undertake their functions.

The NACC Bill would provide the Commissioner with the power to hold hearings as part of an investigation into a corruption issue or a public inquiry. Hearings would, by default, be held in private. The NACC Bill would provide the Commissioner with the discretion to hold public hearings in relation to an investigation or public inquiry where the Commissioner decides that exceptional circumstances justify holding the hearing in public and it is in the public interest to do so.

The Commissioner would have the ability to compel the production of documents or information, obtain a warrant to enter and search premises, enter certain Commonwealth premises without a search warrant, seize evidence and exercise limited powers of arrest to ensure attendance at a hearing.

The Commissioner would also have covert investigative powers such as telecommunications interception powers and the ability to use surveillance devices, subject to existing thresholds for the use of those powers by law enforcement agencies. These arrangements are provided for in the Consequential Bill.

Reporting

The NACC Bill would include a number of reporting requirements, dealing with the preparation of reports on corruption investigations and public inquiries. The NACC Bill would require the tabling of reports in Parliament where a public hearing has been held in the course of an investigation or inquiry, or public submissions were invited on matters that were the subject of a public inquiry.

The NACC Bill would also allow the Commissioner to publish reports and disclose other information relevant to the NACC, if satisfied it is in the public interest to do so.

The NACC Bill would empower the Commissioner to make findings of fact in reports, including findings of corrupt conduct in investigation reports, but not to make determinations of criminal liability. The Commissioner could refer evidence of alleged criminal conduct to appropriate agencies, such as the Commonwealth Director of Public Prosecutions, for further consideration.

The NACC Bill would contain important safeguards around the protection of sensitive information.

The NACC Bill would also ensure the Commissioner would provide procedural fairness to individuals or agencies that are to be the subject of an adverse finding or opinion. Findings would also be subject to judicial review.

Reputational safeguards

The NACC Bill would balance the Commissioner's investigatory purpose with the need to protect against undue reputational damage. This would include a public interest test for the Commissioner to investigate a corruption issue that has already been dealt with by another Commonwealth integrity agency. It would also include provision for the Commissioner to clarify the capacity in which a witness appears at a public hearing, or to make a public statement at any time or a statement in a report where that is appropriate to avoid damage to a person's reputation.

Public inquiries

In addition to dealing with corruption issues, the NACC Bill would also enable the Commissioner to conduct public inquiries into corruption risks, vulnerabilities and measures to prevent corruption in Commonwealth agencies. Public inquiries would focus on broader systemic issues in the Commonwealth public sector rather than a specific corruption issue concerning the conduct of an individual.

The Commissioner would be able to commence a public inquiry on their own initiative and make recommendations for legislative or administrative reform in relation to these inquiries. The Commissioner would be able to exercise powers to invite submissions, hold hearings, and compel the production of documents or information from Commonwealth entities in support of an inquiry.

Oversight of the NACC

The NACC Bill would establish appropriate oversight mechanisms to provide assurance to the Government, the Parliament and the public that the NACC is functioning fairly and effectively. This would include oversight by an independent Inspector and a Parliamentary Joint Committee.

The NACC Bill would provide for the Inspector to be appointed in the same way, and have security of tenure on the same terms, as the Commissioner and Deputy Commissioners. The Inspector would be able to be appointed for up to 10 years to provide consistent oversight across the appointment of multiple Commissioners.

The NACC Bill would confer the Inspector with functions that include the investigation of corruption issues within the NACC and complaints about the conduct of the NACC or its staff. The Inspector would have complete discretion in performing their functions and carrying out their duties.

The NACC Bill would provide for a Parliamentary Joint Committee to oversee the work of the Commissioner, the NACC, and the Inspector. The functions of the Committee would include reviewing and approving the Government's nominated appointees for the offices of Commissioner, Deputy Commissioner and Inspector. The Committee would also be able to review the sufficiency of the NACC's budget and staffing levels.

The Consequential Bill

The NACC Bill would be supported by the Consequential Bill, which would amend various Acts to give effect to the NACC.

Schedule 1 to the Consequential Bill would repeal the LEIC Act. That Act established ACLEI, which would transition to become part of the NACC.

Schedule 1 would also make consequential amendments to other Commonwealth laws, including to confer powers on the Commissioner that are currently conferred on ACLEI's Integrity Commissioner, and to confer on the Commissioner industry assistance powers under Part 15 of the *Telecommunications Act 1997*.

Schedule 2 to the Consequential Bill would outline the transitional arrangements necessary to support the establishment of the NACC. These arrangements would ensure the effective transition of ACLEI's existing roles and functions to the NACC.

Date of effect

The NACC Bill and Consequential Bill would generally commence on a single day to be fixed by Proclamation, intended to be in mid-2023. However, if they do not commence within the period of 12 months beginning on the day on which the NACC Bill receives Royal Assent, they would commence on the day after the end of that period.

Provisions concerning the Committee would commence on the day following Royal Assent.

FINANCIAL IMPACT

The Government has committed \$262.6 million over four years to support the establishment of the NACC, which will be contained in the 2022-23 Budget.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Anti-Corruption Commission Bill 2022

1. The NACC Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the NACC Bill

2. Corruption is a key enabler of serious and organised crime, has the capacity to cause significant harm to individuals, society and the economy, and can undermine Australia's national security and the community's confidence in Australia's institutions.
3. The NACC Bill would create a new Commonwealth anti-corruption commission, the NACC. The NACC would be a specialist, centralised investigatory agency that would detect, investigate and report on the most serious or systemic forms of corruption in the Commonwealth public sector.
4. The NACC Bill would establish the office of the Commissioner as the head of the NACC. The Commissioner would have significant powers under the NACC Bill and other legislation. The Commissioner would use these powers to investigate corruption issues, conduct corruption inquiries and assemble evidence to support prosecutions. The Commissioner would also have powers to make recommendations for disciplinary or employment actions.
5. The NACC Bill would strengthen corruption prevention across the Commonwealth government, by enabling the NACC to undertake public inquiries and provide advice on corruption risks and vulnerabilities and strategies to address them.
6. The NACC Bill would ensure appropriate protections are in place to protect the rights and reputations of individuals, and provide robust oversight through the independent Inspector and the Committee, to ensure that the Commissioner is accountable to Parliament.
7. In addition to the key role of the Commissioner, the NACC Bill would establish three Deputy Commissioners to assist the Commissioner in the performance of the Commissioner's functions and any other function conferred on them by the NACC Bill or other legislation.
8. The Commissioner's power to deal with corruption issues will sit within a broader Commonwealth integrity framework and would build on existing anti-corruption arrangements at the Commonwealth level. A number of measures in the NACC Bill would carry over from existing arrangements for ACLEI, as the NACC would subsume ACLEI.

Human rights implications

9. The measures in the NACC Bill engage the following human rights contained in the ICCPR:
 - the right to an effective remedy contained in article 2(3);
 - the right to liberty and security of person in article 9;
 - the right to freedom of movement contained in article 12;
 - the right to a fair trial and a fair hearing under article 14(1);
 - the right to the presumption of innocence under article 14(2);
 - the right to minimum guarantees in criminal proceedings under article 14(3);
 - the prohibition on interference with privacy, and right to reputation, under article 17;
 - the right to freedom of expression under article 19(2).

10. The NACC Bill may be perceived to also engage the prohibition against retrospective operation of criminal laws in article 15 of the ICCPR.
11. Many measures in the NACC Bill engage human rights in the same way as those discussed in the Explanatory Memorandum to the Law Enforcement Amendment (Powers) Bill 2015, which included powers relating to ACLEI. As the NACC would subsume ACLEI, many powers and measures, including those relating to hearings, warrants, use and disclosure of information and other operational matters, are similarly reflected in the NACC Bill.

The right to an effective remedy contained in article 2(3) of the ICCPR

12. Article 2(3) of the ICCPR guarantees the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by competent judicial, administrative or legislative authorities. The content of the right also includes an obligation to ensure that the competent authorities enforce such remedies when they are granted.
13. This Bill would promote the right to an effective remedy for violations of the rights and freedoms under the ICCPR by ensuring:
 - people have access to legal and financial assistance in relation to matters arising under the NACC Bill (clause 280);
 - a person who provides information to the NACC for the purposes of this Bill is protected from civil, criminal and administrative liability and reprisal action;
 - concurrent investigations can occur; and
 - the NACC is subject to oversight.

Legal and financial assistance

14. The NACC Bill would promote the right to an effective remedy by allowing persons to access legal and financial assistance in relation to matters arising under, or in relation to, the NACC Bill (clause 280). This financial assistance could be in relation to a person's representation at a hearing by a legal practitioner, or an application under the ADJR Act (for example, when seeking judicial review of findings made in an investigation report (clause 280)). The statutory enshrinement of legal assistance would promote the right to an effective remedy by ensuring that people who cannot afford to pay their legal costs are not denied an opportunity to access the justice system, as required, to review relevant decisions made under the NACC Bill.

Referrals and protections for disclosers

15. Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information. The NACC Bill would promote the right to an effective remedy in relation to article 19(2) by providing a range of protections to persons who provide evidence or information about a corruption issue to the NACC. This would also enhance the effectiveness of the NACC by encouraging people to provide information about corruption issues to the NACC without fear of retribution. Any person who provides information about a corruption issue to the NACC would be afforded immunity from civil, criminal and administrative liability and protection from reprisals or the threat of reprisals (clauses 24 and 30). The NACC Bill would also provide protection from the enforcement of contractual or other remedies against a person due to their NACC disclosure (clause 24).

Concurrent investigations

16. The NACC Bill would protect the right to an effective remedy by ensuring that corruption issues can be promptly addressed by either the agency in which it occurred or the NACC. Agencies would be able to continue investigating corruption issues, and taking appropriate action, while the NACC conducts its own investigation into the issue (unless the Commissioner issues a stop action direction under clause 43). This would ensure that a corruption issue could be addressed internally by an agency, notwithstanding that the NACC may be conducting its own parallel investigation into the issue.

17. The ability for the Commissioner to issue a stop action direction to an agency would only be available if it is required to ensure the effectiveness of any action the Commissioner has taken in relation to the corruption issue and to prevent an agency's investigation causing inadvertent prejudice to NACC Bill processes. An agency would also be able to seek the permission of the Commissioner to undertake actions in relation to a corruption issue following a stop action direction (clause 43). In the context of the PID Act, this would mean that PID and NACC Act investigative processes would be able to run concurrently, unless a stop action direction is issued.

Oversight of the NACC

18. The NACC Bill would protect the right to an effective remedy by ensuring that the NACC would be overseen by a Parliamentary Joint Committee and an independent Inspector. The oversight arrangements in Part 10 of the NACC Bill would provide assurance that the NACC is performing its functions fairly, effectively, appropriately and independently, and would allow for recommendations to be made to rectify findings of corrupt conduct within the NACC.
19. The Inspector would have the ability to investigate complaints, make findings about the conduct of the NACC or its staff and make recommendations to remedy the findings. Any person would be able to refer a NACC corruption issue to the Inspector (clause 202). The Consequential Bill would ensure that the PID Act would also apply for the purpose of making PIDs to the Inspector relating to the NACC (clause 204), meaning protections and remedies provided for disclosers under that Act would also apply to disclosures of NACC corruption issues.
20. These oversight mechanisms would operate in addition to the Commonwealth Ombudsman's oversight of the use of particular coercive powers by the NACC (further details on the oversight of these powers is outlined in the Statement of Compatibility for the Consequential Bill). After the Inspector has conducted an investigation, they would be required to prepare an investigation report setting out their opinion or findings, supporting evidence, and recommendations on how to rectify any opinion or finding of corrupt conduct (clause 215). This oversight role of the Inspector would, therefore, protect the right to an effective remedy.

The right to liberty and security of person contained in article 9 of the ICCPR

21. Article 9(1) of the ICCPR provides that everyone has the right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention. The UN Human Rights Committee has stated that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. Arbitrariness may result from a law which is vague or allows for the exercise of powers in broad circumstances that are not sufficiently defined.
22. The NACC Bill would limit the right to liberty and security under Article 9(1) of the ICCPR. This is because it would provide that the Commissioner or the Inspector may:
- arrest a person in relation to their failure to attend a hearing for a corruption investigation (clauses 90 (corruption investigation) and 214 (NACC corruption investigation)), and
 - detain a person for the purposes of a contempt in relation to both investigations and inquiries (clauses 85 (corruption investigation), 163 (public inquiries) and 214 (NACC corruption investigation)).
23. Limitations on the right to liberty are permitted to the extent that they are 'in accordance with such procedures as are established by law', provided that the law and the enforcement of it is not arbitrary, and where they are reasonable, necessary and proportionate to achieve a legitimate objective.

Rational connection to a legitimate objective

24. Both the power to arrest and the power to detain limit the right to liberty and security in order to achieve the legitimate objectives of detecting and investigating serious or systemic corrupt conduct—which in turn are necessary to achieve the legitimate objectives of preventing and addressing such conduct, including where appropriate by enabling persons to be prosecuted for serious, criminal corrupt conduct. More specifically, these powers are critical aspects of the

Commissioner's and Inspector's ability to effectively conduct a hearing in connection with a corruption investigation and, in relation to the power to detain, a public inquiry.

25. Conducting hearings would be a key power available to the Commissioner and Inspector. Hearing powers would enable the Commissioner and Inspector to obtain information that would not otherwise be available—including information uniquely within the knowledge of the person being questioned—or could only be obtained after long and complex investigations. Material gathered in hearings would play a key role in furthering investigations of serious or systemic corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order.
26. The power to arrest afforded to the Commissioner and the Inspector is directed to ensure a person attends a hearing in accordance with a summons. The power to arrest a witness where a superior court judge is satisfied that there are reasonable grounds for believing that the witness has failed to attend a hearing, or is likely to attempt to do so—including by leaving Australia, or by absconding or otherwise attempting to evade the service of a summons—for the purpose of bringing them before a superior court with powers to make orders to ensure the witness's appearance at the hearing, is likely to ensure their attendance at the relevant hearing.
27. The power to detain is directed towards bringing a person before a court to be dealt with in relation to an application for contempt. This is important because relying on criminal proceedings alone may mean investigations or inquiries are compromised by the delay in the commencement of court proceedings. Contempt provisions motivate an uncooperative witness to comply with the requirements of a hearing, as the witness is immediately subject to the possibility of being taken into custody before a superior court. The capacity to detain a person in relation to whom the Commissioner or Inspector proposes to make a contempt application will ensure that person attends the court for the hearing of the contempt application, and is likely to ensure that the person complies with any direction given during a hearing.

Not arbitrary; reasonable, necessary and proportionate

The power to arrest with warrant

28. The NACC Bill places appropriate limitations on the power to arrest, to ensure that this power is not arbitrary, and is reasonable, necessary and proportionate. The power to arrest would only be able to be exercised in circumstances where the Commissioner or Inspector is of the opinion that the issue could involve corrupt conduct that is serious or systemic (clauses 55 (corruption investigation), 210 (NACC corruption investigation)), and a warrant has been issued by a superior court judge. An authorised officer may only apply to a superior court judge for a warrant to arrest a person in limited circumstances. An application may only be made where:
- the person has been ordered to deliver a travel document to the Commissioner or Inspector and the authorised officer has reasonable grounds to believe that the person is likely to leave Australia for the purpose of avoiding giving evidence at a hearing;
 - the person is to be served with a summons and the authorised officer has reasonable grounds to believe that the person has absconded or is likely to abscond, or is otherwise attempting, or likely to attempt, to evade service of the summons; or
 - the authorised officer has reasonable grounds to believe that the person has committed an offence of failure to attend a hearing, or is likely to do so.
29. The requirement for a warrant ensures that the NACC is required to obtain independent authorisation from a judge to exercise this power. The judge may only issue the warrant if satisfied, on the evidence, that there are reasonable grounds for believing that one of the circumstances outlined above applies. These criteria establish a threshold that would ensure the power to arrest is not arbitrary and only exercised where it may be justified on a reasonable basis, and in circumstances where the exercise of the power is necessary to ensure the Commissioner or Inspector is able to ensure attendance at a hearing.

- 1.1 A warrant to arrest a witness would be executed by an authorised officer of the NACC (defined in clause 7 to mean the Commissioner, a Deputy Commissioner or a person appointed under clause 267). Clause 267 seeks to ensure that authorised officers possess skills and experience that reflect the significant and coercive nature of their powers under the NACC Bill. It would only allow the Commissioner to appoint a person to be an authorised officer if the person is:
- a staff member of the NACC who the Commissioner considers has suitable qualifications or experience;
 - a staff member of the NACC who is also a member of the AFP;
 - a staff member of the NACC who is also a member of the police force or police service of a State or Territory; or
 - a member of the AFP.
30. Authorised officers who are members of the AFP or a State or Territory police force would be constables. In executing a warrant, an authorised officer who is not a constable would have the same powers and duties as a constable has in arresting a person under Divisions 4 and 5 of Part IAA of the *Crimes Act 1914*. This would apply a range of safeguards, specifically:
- force used to enter premises must be limited to that which is necessary and reasonable in the circumstances (section 3ZB);
 - premises must not be entered between 9pm and 6am for the purposes of an arrest (section 3ZB);
 - the officer must not in the course of arresting another person for an offence, use more force, or subject the person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the person after the arrest (section 3ZC);
 - the officer must inform the person of the reason for the arrest (section 3ZD);
 - an ordinary or frisk search must, if practicable, be conducted by a person of the same sex as the person being searched (section 3ZR); and
 - authorised officers must generally announce that they are authorised to enter premises and give the person at the premises the opportunity to allow entry before entering warrant premises (section 3ZS).
31. Following arrest, further statutory limits ensure a person is not detained arbitrarily and only deprived of their liberty to the extent that is reasonable, necessary and proportionate to the objective of conducting a hearing. Clause 92 would require a person arrested to be brought as soon as practicable before a superior court judge to make appropriate orders, which may include release or bail. Where a judge orders that a person should continue to be detained for the purposes of ensuring their appearance at a hearing, the legislation would ensure the person is brought back before the judge within 14 days, or a time affixed by the judge. This would ensure that a person is not held in arbitrary or indefinite detention due to a failure to act on the part of the NACC.
- The power to detain
32. The Commissioner or Inspector may only direct that a person be detained (clause 85):
- where they propose to make an application to a court for that person to be dealt with for contempt of the NACC or the Inspector; and
 - for the purpose of bringing the person before the court for the hearing of the application.
33. Clause 82 would set out the circumstances in which a person would be in contempt. These circumstances would include where the person:
- having been summonsed to attend a hearing:
 - fails to attend as required by the summons;
 - fails to appear and report from day to day unless excused or released from further attendance by the Commissioner;

- refuses or fails to take an oath or make an affirmation at the hearing;
 - refuses or fails to answer a question at the hearing that the Commissioner requires the person to answer; or
 - refuses or fails to give information or produce a document or thing, at a hearing as required (whether by a summons or by the Commissioner under clause 65); or
- is a legal practitioner who refuses, at a hearing, to give the Commissioner the name and address of a person in accordance with clause 115;
 - gives evidence or information, or produces a document, at a hearing (whether required by a summons or by the Commissioner under clause 65) that the person knows is false or misleading in a material particular;
 - insults, disturbs or uses insulting language towards someone who the person knows is a NACC Commissioner and who is holding a hearing in the performance of the NACC Commissioner’s functions, or the exercise of the NACC Commissioner’s powers;
 - creates a disturbance, or takes part in creating or continuing a disturbance, in or near a place that the person knows is being used to hold a hearing;
 - obstructs or hinders a staff member of the NACC in the performance or exercise of the staff member’s functions, powers or duties in connection with a hearing;
 - disrupts a hearing; or
 - threatens a person present at a hearing.
34. The nature of contempt, in this context, is focused on conduct that would prevent, hinder or disrupt the effective conduct of a hearing. The Commissioner or Inspector would only be permitted to direct that a person be detained where the Commissioner or Inspector propose to make an application to a court for that person to be dealt with for contempt. This would require the Commissioner or Inspector to turn their mind to the application for contempt before exercising the power to detain, which would limit the use of the power to circumstances in which a person is preventing, hindering or disrupting the effective conduct of a hearing in one or more of the ways set out in clause 82. This threshold ensures the power to detain is only exercised in circumstances where it is reasonable and necessary to ensure the effective conduct of a hearing.
35. Furthermore, the Commissioner would be required to apply and bring the person before the court as soon as practicable, so that appropriate orders may be made. This would ensure the NACC’s power to detain is proportionate to the objective of conducting a hearing, subject to scrutiny by a court immediately following its use. It would also prevent the possibility of arbitrary or indefinite detention. The NACC Bill will explicitly permit the court to make orders for the person’s continued detention, but only until the application for contempt is determined. The court may also grant the person’s release on conditional terms, including the surrender of travel documents. In effect, this would ensure the court turns its mind to whether there is a less restrictive alternative to detention that could achieve the stated objective of ensuring that a person is dealt with appropriately.
36. Where the Commissioner withdraws a contempt application, and a person is detained, the legislation would require the person be released immediately (clause 86). This affirms the rational connection between the exercise of the power and its legitimate objective, and ensures the power is not arbitrary and only exercised where necessary and proportionate to achieving that objective.

The right to freedom of movement contained in article 12 of the ICCPR

37. Articles 12 and 13 of the ICCPR protect the right to freedom of movement. They provide that anyone lawfully in a State shall have the right to liberty of movement and that everyone shall be free to leave any country, including their own and enter any country of which they are a citizen. Governments have a duty to ensure that a person’s freedom of movement is not unduly restricted.
38. The NACC Bill would limit the right to freedom of movement under article 12(2) of the ICCPR. This is because it would provide that the Commissioner or the Inspector may:

- summon a person to attend a hearing to give evidence, information, documents and things (clauses 63 (corruption investigations), 163 (public inquiries) and 214 (NACC corruption issue investigations by Inspector)); and
- make an application to a court to have a person surrender an Australian travel document or any other passport or travel document that has been issued by another government (clauses 88 (corruption investigations) and 214 (NACC corruption issue investigations by Inspector)).

39. Article 12(3) provides that the right to freedom of movement may be limited where the limitation is for a legitimate objective, is lawful, and is necessary to protect national security, public order, public health or morals, or the rights and freedom of others.

Summoning a person to attend a hearing

Rational connection to a legitimate objective

40. The ability for the Commissioner and Inspector to summon a person to a hearing at a particular time and place would serve the legitimate objectives of:

- facilitating the investigation of a corruption issue or a NACC corruption issue that could involve corrupt conduct that is serious or systemic;
- facilitating the investigation of a complaint about the NACC; and
- facilitating the inquiry into corruption risks and vulnerabilities in Commonwealth agencies and measures to prevent corruption in Commonwealth agencies.

41. Hearings would be a key power available to the Commissioner and Inspector. Hearing powers would enable the Commissioner and Inspector to obtain information that would not otherwise be available—including information uniquely within the knowledge of the person being questioned—or could only be obtained after long and complex investigations. Material gathered in hearings would play a key role in furthering investigations of corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order.

42. Limiting a witness's freedom of movement by requiring them to attend a hearing at a particular time and place to give evidence would ensure the Commissioner or Inspector can obtain material relevant to a corruption investigation or an investigation by the Inspector, or to corruption risks and vulnerabilities in Commonwealth agencies and measures to prevent corruption in Commonwealth agencies, while an investigation or inquiry is underway and at a time when it will be useful to that investigation or inquiry. A summons would be likely to be effective in ensuring attendance as failing to comply will constitute an offence that carries a maximum penalty of two years imprisonment.

Reasonable, necessary and proportionate

43. Limitations on a person's freedom of movement in appropriate circumstances are necessary to ensure the effectiveness of an investigation or public inquiry. The power to require a person to attend a hearing would be proportionate and subject to reasonable limitations and safeguards.

44. The Commissioner or Inspector may only summon a person to attend a hearing if they have reasonable grounds to suspect that the person has evidence relevant to a corruption investigation, a NACC corruption investigation or a public inquiry. Where post-charge and post-confiscation application summonses are available (for corruption investigations and NACC corruption investigations), an additional threshold applies to the issue of such summonses. The Commissioner or Inspector must also have reasonable grounds to suspect that the evidence is necessary for the purposes of the investigation even though the person has been charged or the confiscation proceeding has commenced, or that charge or proceeding is imminent.

45. The power to summon a person to attend a hearing at a particular time and place is reasonable, necessary and proportionate to ensure that hearings can be conducted in an efficient and effective manner—or at all. Conducting a hearing would be a substantial undertaking, requiring:

- significant planning and preparation, including by the Commissioner or Inspector, and counsel assisting;

- complex logistical and security arrangements, to ensure an appropriate hearing room is available for the duration of the planned hearing, relevant investigators, subject-matter experts and support staff are in attendance, and that physical security arrangements are in place; and
 - coordination with external parties, including ensuring the availability of the witness's legal representative, and any third party or legal representative approved to attend the hearing.
46. The power to summon a person to attend a hearing at a particular time and place would enable the Commissioner or Inspector to begin planning and preparations for a hearing, from the foundation of a fixed time and place for that hearing to be conducted. The Commissioner or Inspector may only require the production of information, documents and things under a summons if also requiring the person to give evidence. Information, documents and things would otherwise be required under a notice to produce, which would not limit the person's freedom of movement.
47. A person would be excused from, or released from further attendance at, a hearing once the Commissioner or Inspector is satisfied they have provided all relevant evidence.

Requiring a person to deliver travel documents

Rational connection to a legitimate objective

48. The ability for the Commissioner and Inspector to apply to a Judge of the Federal Court for an order that a person deliver a travel document would serve the legitimate objective of ensuring the person's attendance at a hearing into a corruption issue or NACC corruption issue that could involve corrupt conduct that is serious or systemic. Limiting a person's movement in this way is likely to achieve the objective of ensuring they do not leave Australia in order to avoid giving evidence, as such documents are required for international travel.
49. Hearings would be a key power available to the Commissioner and Inspector. Hearing powers would enable the Commissioner and Inspector to obtain information that would not otherwise be available—including information that is uniquely within the knowledge of the person being questioned—or could only be obtained after long and complex investigations. Material gathered in hearings would play a key role in furthering investigations of corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order.

Reasonable, necessary and proportionate

50. Limitations on a person's freedom of movement would only occur in appropriate circumstances, where it is necessary for the effective investigation into a corruption issue or NACC corruption issue that could involve corrupt conduct that is serious or systemic. The power to require travel documents to be held by the Commissioner or Inspector would be subject to safeguards and reasonable limitations.
51. The Commissioner or Inspector may only apply for an order that a person deliver a travel document in limited circumstances. An application may only be made where:
- a summons has been issued requiring the person to attend a hearing, or the person has appeared at a hearing to give evidence or to produce documents or things;
 - there are reasonable grounds to believe that the person may be able to give evidence, or further evidence, that is relevant to the corruption investigation concerned, or to produce documents or things, or further documents or things, that are relevant to the investigation concerned; and
 - there are reasonable grounds to suspect that the person has a travel document and intends to leave Australia.
52. If a Judge of the Federal Court is satisfied that the above thresholds are met, they may require the person to attend court and request the person to show cause why the person should not be ordered to deliver the travel document to the Commissioner or Inspector. This will provide the person an opportunity to argue against such an order being made.
53. The Court may, if it thinks fit, order that a person deliver a travel document to the Commissioner or Inspector and authorise the Commissioner or Inspector to retain it. Retention will only be permitted

for a limited period of up to one month, extendable by the Court by up to one month at a time to a maximum of three months.

54. The person may apply to the Federal Court for an order authorising the Commissioner or Inspector to retain a travel document to be revoked. If the Federal Court revokes the order, the Commissioner must return the travel document to the person immediately.

The right to a fair trial contained in article 14(1) of the ICCPR

55. Article 14(1) of the ICCPR protects the right to a fair and public criminal trial, and public hearing in civil proceedings. It provides that all persons shall be equal before the courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

56. The NACC Bill would limit the right to a fair trial under article 14(1) of the ICCPR by:

- abrogating legal professional privilege when a person is giving an answer or information, or producing a document or thing, under a notice to produce or at a hearing (clause 114);
- providing for post-charge and post-confiscation application notices to produce (clause 58) and summons (clause 63); and
- allowing post-charge investigation material and post-charge derivative material to be disclosed (clause 105).

57. The NACC Bill would promote and protect the right to a fair trial by ensuring people have access to legal and financial assistance in relation to matters arising under the NACC Bill.

Abrogating legal professional privilege

58. Legal professional privilege ensures the confidential nature of the communication between lawyers and their clients and therefore the quality of advice and representation the client receives at trial. Clause 114 would abrogate legal professional privilege in relation to evidence given at a hearing, or material provided in response to a notice to produce under clause 99 (see paragraphs 7.267 to 7.273). The privilege would be abrogated for any person, including a Commonwealth agency or a company. This would limit the right to a fair trial.

59. However, the abrogation of legal professional privilege would not apply to advice or a communication relating to a person's compliance with a notice to produce or attendance (or anticipated attendance) at a hearing (subclause 114(2)). It would also not apply in relation to a communication made for the purposes of, or in the course of, a person's work as a journalist in a professional capacity (subclause 114(3) and subclause 114(4)).

Rational connection to a legitimate objective

60. The abrogation of legal professional privilege in certain contexts, as outlined above and contained in the NACC Bill, would serve the legitimate objective of facilitating the prevention and investigation of corrupt conduct.

61. Abrogating legal professional privilege would allow the Commissioner and the Inspector to have access to information that would otherwise be required to be kept confidential. This would enable the Commissioner or the Inspector, as the case may be, to obtain information that could be highly relevant to:

- an investigation into a corruption issue (clause 41) or a NACC corruption issue (clause 214);
- a public inquiry (clause 161); or
- an investigation into a complaint about the NACC (clause 214).

62. Material gathered through the abrogation of legal professional privilege would play a key role in furthering investigations of corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order. These measures would also ensure that individuals could not use legal professional privilege to frustrate the Commissioner or the Inspector's ability to conduct thorough and effective investigations or inquiries for the purposes of the NACC Bill.

Reasonable, necessary and proportionate

63. The measures in the NACC Bill that abrogate legal professional privilege in certain contexts are reasonable, necessary and proportionate to achieve the legitimate objective of facilitating the effective investigation of corruption issues and NACC corruption issues, conducting a public inquiry, or an investigation into a complaint made about the NACC.
64. Legal professional privilege is only abrogated where necessary and in certain limited contexts, in particular for evidence provided at a hearing or pursuant to a notice to produce. If legal professional privilege was not abrogated in these contexts, people engaging in serious or systemic corrupt conduct would be able to prevent the NACC from accessing information that would otherwise enable an investigation or inquiry under the NACC Bill to progress. This could impede the Commissioner or the Inspector's ability to properly investigate allegations of serious or systemic corruption, which could hamper the public's confidence in the ability for the NACC and the NACC's oversight mechanisms to function effectively. For example, the Commissioner may undertake investigations into serious or systemic corrupt conduct relating to procurement or contract management processes. In these situations, there would likely be legal advice relating to contractual issues that would be relevant to the corruption issue. In such circumstances, having access to this legal advice would assist the Commissioner to understand the factors and risks considered by decision-makers.
65. The abrogation of legal professional privilege is subject to a number of limitations and safeguards in the NACC Bill, which would ensure that any limitation on the right to a fair trial would be reasonable and proportionate. For example, evidence given at a hearing that would otherwise be subject to legal professional privilege would be required to be given in private (clause 74). Despite a person being required to provide the evidence at a hearing, or comply with the notice to produce, the person would still be able to claim legal professional privilege over the information at a later time in criminal or civil proceedings (subclause 114(5)).
66. The abrogation of legal professional privilege would also not apply to advice or a communication relating to a person's compliance with a notice to produce or attendance (or anticipated attendance) at a hearing (subclause 114(2)). This is appropriate as such advice would relate to compliance with the notice or summons and not the substantial corruption issue. This limit ensures that legal professional privilege is only limited to the extent necessary to achieve the legitimate objective of facilitating the prevention and investigation of corrupt conduct.
67. In addition, legal professional privilege would not be abrogated in relation to communications made for the purposes of, or in the course of, a person's work as a journalist in a professional capacity (subclause 114(3) and subclause 114(4)). This exception upholds the value of a free press by recognising the importance of safeguarding the independence of journalists and protecting their sources. Given the limited circumstances in which this right is engaged, and the fact that a person can still claim legal professional privilege over material at a later time in criminal or civil proceedings, any effect on the right to a fair trial would be reasonable, necessary and proportionate.

Post-charge and post-confiscation application notices to produce and summons

68. When conducting an investigation into a corruption issue or a NACC corruption issue, the Commissioner or the Inspector would have the power to issue a summons to a person charged with an offence, facing confiscation proceedings, or where a charge or proceeding is imminent (post-charge or post-confiscation application summonses, in clause 63). This measure would limit the right to a fair trial as it would prevent a person from refusing to answer questions in a hearing on the grounds that the answer may incriminate them (this is discussed further in relation to the right to minimum guarantees in criminal proceedings).
69. The Commissioner or the Inspector would also be able to issue a notice to produce to a person charged with an offence, facing confiscation proceedings, or where a charge or proceeding is imminent (post-charge or post-confiscation application proceedings, in clause 58). The material, evidence, information, documents or things given or produced by a person at a hearing or in response to a notice would be investigation material under clause 99 (see paragraphs 7.267 to 7.273). This measure would limit the right to a fair trial as it would prevent a person from

refusing to provide investigation material where that material may incriminate them (this is also discussed further in relation to the right to minimum guarantees in criminal proceedings).

70. In particular, where a hearing occurs or a notice to produce is issued after the person has been charged with an offence (or such a charge is imminent), the answers given or the investigation material produced in that hearing may affect the person's subsequent trial, particularly if the investigation material is provided to the relevant prosecution pursuant to clause 105, which provides for the disclosure of post-charge investigation material and post-charge derivative material. The requirement to comply with post-charge or post confiscation summonses or applications may require the person to provide a version of events that limits their choices in how to defend charges at trial.
71. Subclause 106(4) would provide that a person's trial for an offence is not unfair merely because the person has been a witness after being charged with the offence or after such charge was imminent.

Rational connection to a legitimate objective

72. Authorising the Commissioner or the Inspector to issue a notice to produce or a summons to a person charged with an offence, or facing confiscation proceedings, would mean that the Commissioner or the Inspector, as the case may be, would not be required to wait until the charges or proceedings were resolved before obtaining highly relevant information for the purposes of investigating a corruption issue or a NACC corruption issue. Preventing delay in the conduct of corruption investigations and NACC corruption investigations would serve the legitimate objective of facilitating the timely investigation of corruption issues and NACC corruption issues.

Reasonable, necessary and proportionate

73. Limitations on the right to a fair trial are reasonable, necessary and proportionate to achieve the legitimate aim of facilitating the effective investigation of corruption issues and NACC corruption issues, and the NACC Bill contains a number of safeguards and protections.
74. Corruption is a key enabler of criminal offences, including serious and organised crimes that attract some of the most serious penalties, such as drug trafficking and the importation of firearms. It is therefore likely that, in some situations, the conduct that the Commissioner would investigate under the NACC Bill (serious or systemic corrupt conduct) would also constitute conduct that forms the basis of a charge for an offence. If the Commissioner or the Inspector were required to wait for the charges or proceedings to be resolved, potentially highly relevant evidence could be lost or investigations delayed significantly. To ensure that the NACC could undertake timely investigations, it is critical that it can receive evidence that may relate to such a charge prior to its resolution. To that end, the measures contained in the NACC Bill which authorise post-charge and post-confiscation application notices to produce and summons would be necessary to achieve the aim of the NACC Bill to facilitate the investigation and prevention of corruption.
75. These measures are reasonable as they would allow the Commissioner and the Inspector to conduct effective investigations into corruption issues and NACC corruption issues that may involve corrupt conduct that is serious or systemic. Without the ability to issue a post-charge or post-confiscation application notice to produce or summons, the Commissioner or the Inspector would have to obtain information or question a witness either before they are charged (which may alert them to law enforcement interest in their activities), or wait until all charges against the witness have been resolved, undermining the effective and timely investigation of corruption issues and NACC corruption issues.
76. These measures are proportionate, as a post-charge or post-confiscation application notice to produce or summons could only be issued if the Commissioner or the Inspector had reasonable grounds to suspect the investigation material was necessary for the purposes of the investigation despite the person having been charged, the confiscation proceeding having commenced, or the charge or proceeding being imminent (see subclauses 58(4) and 63(3)).
77. This is a higher threshold than the test for an ordinary notice to produce or summons, which requires that the Commissioner or Inspector has reasonable grounds to suspect that a person *has* information, or a document or thing, relevant to a corruption investigation. This provides assurance that the Commissioner and the Inspector would be exercising their powers for a proper purpose and

that, in deciding to issue the notice or summons, the Commissioner or the Inspector has paid due regard to the fact that the person has been charged with an offence or is the subject of confiscation proceedings. This ensures that material obtained by a notice to produce or at a hearing is intended to serve the purpose of a corruption investigation or a NACC corruption investigation, and not to bolster the prosecution of a witness to whom the notice or summons was issued.

78. The NACC Bill would contain safeguards to mitigate the prejudice that any post-charge or post-confiscation application notice to produce or hearing may cause to a witness's right to a fair trial. These would include:
- the obligation on the Commissioner or the Inspector to include a non-disclosure notation in a notice to produce or a private hearing summons if they are satisfied that not doing so would reasonably be expected to prejudice a person's fair trial, if the person has been charged with an offence or such a charge is imminent (subclause 96(1));
 - limits on the disclosure of investigation material to a prosecutor of a person post-charge (clause 105) – specifically, such investigation material could only be disclosed to a prosecutor with a court order, where the court is satisfied that it is in the interests of justice to do so (subclause 106(1));
 - the restrictions on the disclosure of sensitive information, including that evidence at a hearing must be given in private if it would disclose sensitive information (paragraph 74(b)(iii)), and the definition of *sensitive information* includes 'information that would prejudice the fair trial of any person or the impartial adjudication of any matter';
 - the obligation on the Commissioner or the Inspector, as the case may be, to give a direction about the use and disclosure of material obtained during an investigation, if they are satisfied that failure to give such a direction would reasonably be expected to prejudice a witness's fair trial, if the witness has been charged with a relevant offence or such a charge is imminent (clause 77); and
 - inclusion of an offence where a staff member of the NACC, the Inspector or a person assisting the Inspector discloses information received in the course of performing their duties that they are not otherwise authorised to disclose (see clause 228).

Disclosure of post-charge investigation material and post-charge derivative material

79. The NACC Bill would authorise the disclosure of investigation material and derivative material (including material obtained directly or indirectly from investigation material, see clause 133) to a prosecutor of the witness who provided the investigation material, and its use in evidence against that person (subject to the rules of evidence and procedure) (see clause 105). This provision would limit the right to a fair trial as it may impact on the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. The disclosure and use of derivative material in this way may limit the options of a person in their defence at trial.

Rational connection to a legitimate objective

80. The measures in the NACC Bill that would authorise the disclosure and use of investigation material and derivative material are necessary to achieve the legitimate objective of facilitating the investigation and prosecution of criminal offences. The measures would support this objective by ensuring that material obtained through the NACC's investigations can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been witnesses and who may have also engaged in criminal conduct.
81. The effective prosecution of people who have been subject to NACC's investigations, or witnesses in NACC investigations is crucial to enabling the NACC to fulfil its statutory functions and ensure public confidence in its effectiveness. The measures would ensure that prosecutors of witnesses in NACC investigations are given access to all the necessary information to conduct an effective criminal trial. Similarly, the disclosure of these materials to an agency like the AFP would assist in the investigation and prosecution of criminal offences. Without the use of these materials, the success of these investigations and prosecutions would be significantly hindered.

Reasonable, necessary and proportionate

82. These measures are reasonable, necessary and proportionate to achieve the legitimate objective of facilitating the investigation and prosecution of criminal offences. Without all relevant information, an investigating or prosecuting agency may not be able to perform their functions as effectively, thus inhibiting the enforcement of the criminal law. The disclosure and use of this material would be subject to a number of limitations in the NACC Bill, which would ensure that any limitation of the right to a fair trial would be proportionate.
83. The material referred to would only be able to be disclosed to a prosecutor of the witness pursuant to a court order (clause 105). Under clause 106, a court would be able to order disclosure of the investigative or derivative material to the prosecutor of a witness, if it was satisfied that disclosure was in the interests of justice, and despite any direction under clause 100. The court could specify who could receive the material, and would be able to place limits on the use of the material. A court order would also be required for the post-charge disclosure of pre-charge investigation material (not derivative material) to the prosecutor of the witness (clause 105). This safeguard reflects the fact that a witness during a corruption investigation or a NACC corruption investigation would not be able to rely on the privilege against self-incrimination to refuse to answer questions or produce documents or things during a hearing, or in compliance with a notice to produce (clause 113).
84. Any disclosure of this material to persons other than a prosecutor of a witness, would be subject to any direction imposed by the Commissioner or the Inspector under clause 100. This would give the Commissioner and the Inspector the discretion to specify who the information could be disclosed to, who the information could be used by, and on what conditions. The Commissioner or the Inspector could not vary a direction under clause 100 if a witness is charged with a relevant offence, or such a charge was imminent, and they were satisfied that the variation or revocation would reasonably be expected to prejudice the witness's fair trial.
85. As a further general safeguard against disclosure of derivative material, a staff member of the NACC, the Inspector or a person assisting the Inspector would commit an offence if they disclose information received in the course of their duties that they are not otherwise authorised to disclose (see clause 228).

Legal and financial assistance

86. The NACC Bill would promote the right to a fair trial by allowing persons to access legal and financial assistance in relation to matters arising under, or in relation to, the NACC Bill (clause 280). This financial assistance could be in relation to a person's representation at a hearing by a legal practitioner, an application under the ADJR Act, or any other matter arising under, or in relation to, the NACC Bill. The statutory enshrinement of legal assistance would promote the right to a fair trial as it would ensure that people who cannot afford to pay their legal costs are not denied an opportunity to access fair representation at a hearing or denied an opportunity to review a decision made under the NACC Bill.

The right to the presumption of innocence contained in article 14(2) of the ICCPR

87. Article 14(2) of the ICCPR provides that anyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.
88. The NACC Bill would limit the right to the presumption of innocence under article 14(2) of the ICCPR. This is because it would:
- place a reversed evidential burden on defendants with respect to certain offences; and
 - impose strict liability for certain offences.
89. Limitations on the right to be presumed innocent must be reasonable, necessary and proportionate to achieve a legitimate objective.

Offences containing a reversed evidential burden

90. Offences that contain a ‘reversed evidential burden’ in the NACC Bill may amount to a limitation on the right to be presumed innocent. This includes provisions where an evidential burden is created by expressing a matter to be a defence or exception to an offence or providing that the defendant must prove the matter. Reversing the evidential burden in this way may limit article 14(2), as a defendant's failure to discharge the burden may permit their conviction despite reasonable doubt as to their guilt. However, under international human rights law, a ‘reversed evidential burden’ will not necessarily limit the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused. The purpose of the reverse onus provision is relevant in determining its justification.
91. The following offences in the NACC Bill contain exemptions that reverse the evidential burden requiring the defendant to prove it was not reasonably practicable to comply with a request to provide information, documents or things, or to provide them within a specified timeframe.
92. The Commissioner or Inspector may require a person to give material relevant to an investigation to the Commissioner or Inspector (clause 58). Clause 60 creates an offence for failing to comply with a notice to produce issued by the Commissioner (or Inspector as applied by clause 214) within the time specified. An exception exists if it was not reasonably practicable to comply within the time specified, for which the defendant bears the evidential burden.
93. The Commissioner or Inspector may require a witness to produce material relevant to an investigation at a hearing (clause 65 and 214). Clause 69 creates an offence for failing to produce this material. An exception exists if it was not reasonably practicable for the person to give the information or produce the document or thing, for which the defendant would bear the evidential burden.
94. The following offences in the NACC Bill also contain exemptions that reverse the evidential burden, requiring a defendant to prove that information alleged to be false or misleading is not false or misleading in a material particular.
- Clause 61 creates an offence for providing false or misleading information, or omitting a matter or thing without which the information given is false or misleading, in response to a notice to produce issued under clause 58. An exception to the offence exists if the information or document was not false or misleading in a material particular, for which the defendant would bear the evidential burden; and
 - Clause 71, creates an offence for giving false or misleading evidence, information or documents at a hearing when required by the Commissioner or Inspector to give information or documents at a hearing under clause 65. An exception exists if the evidence, information or documents were not false or misleading in a material particular, for which the defendant would bear the evidential burden.
95. The following offences in the NACC Bill would require a defendant to prove that they recorded or disclosed protected information under certain specified circumstances.
- Clause 84 would establish an offence for disclosing information in contravention of a non disclosure notation attached to a notice to produce issued by the Commissioner or Inspector under clause 58, or a summons to attend a private hearing issued under clause 63. An exception to the offence would apply if the defendant could prove that:
 - the disclosure was made in the circumstances, if any, permitted by the notation;
 - to a legal practitioner for the purposes of obtaining legal advice or representation in relation to the notice or summons;
 - to a legal aid officer for the purpose of seeking assistance in relation to the notice, summons or another matter arising under the NACC Bill;
 - if the person is a body corporate – to an officer or agent for the purpose of ensuring compliance with the notice or summons;

- if the person is a legal practitioner – for the purpose of obtaining the agreement of another person to the legal practitioner disclosing advice or communication, or to give legal advice to or make representations on behalf of, the person on whom the notice or summons was served; or
- after the information had already been lawfully published.
- Clause 228 would establish an offence for the Commissioner, NACC staff members, the Inspector, and persons assisting the Inspector (authorised officer) to make a record of, or disclose, any information obtained in the course of being an entrusted person or in the course of performing their duties under the NACC Bill. An exception would exist if the defendant could prove that they were permitted or authorised to disclose or record the information under clauses 229 and 230.
- Clause 234 would establish an offence for disclosing the whole or part of a protected information report. An exception would exist if the defendant could prove that the disclosure was authorised under clauses 229 and 230.
- Under clause 268, a defendant who is a former authorised officer would bear the burden of proving their identity card had in fact been lost or destroyed. This defence would apply to the offence for a person who ceases to be an authorised officer to fail to return their identity card to the Commissioner or Inspector within 14 days after ceasing to be an authorised officer.

Rational connection to a legitimate objective

96. The reversed evidential burden provisions requiring the defendant to prove it was not reasonably practicable for them to comply with a request to produce a document or thing (in clauses 60 and 69) and to prove information was not false or misleading in a material particular (in clauses 61 and 71), serve the legitimate objectives of facilitating the provision of timely and accurate information to the NACC. For the purposes of the Inspector, the reversed evidential burden provisions will similarly facilitate investigation of a complaint about the NACC or a NACC corruption issue. These provisions will support the NACC or Inspector to:
- investigate a corruption issue or NACC corruption issue that could involve conduct that is serious or systemic; and
 - conduct inquiries into corruption risks and vulnerabilities in Commonwealth agencies.
97. Clauses 60 and 69 serve the legitimate objective of ensuring NACC and Inspector investigations are timely. If a person bears the burden of proving that it was not reasonably practicable for them to comply with a notice to produce (per the offence in clause 60) or a summons to attend a hearing (per the offence in clause 69), then they are more likely to comply with the notice or summons within the specified timeframe.
98. Clauses 61 and 71 serve the legitimate objective of ensuring NACC and Inspector investigations are accurate, because if a person must prove that material they provided, that is alleged to be false or misleading, was not false or misleading in a material particular, they are more likely to take care to ensure the information they provide in response to a notice to produce (per the offence in clause 61) or at a hearing (per the offence in clause 71) is complete and truthful.
99. The reversed evidential burden provisions in clauses 84, 228 and 234 requiring a defendant to prove that their alleged unlawful recording or disclosure of sensitive information was in fact permitted or authorised serve the legitimate objective of:
- preventing the disclosure of sensitive information that could, for example, harm or prejudice Australia's national security, international relations, criminal proceedings, and the safety and privacy of individuals; and
 - preventing the disclosure of information that could prejudice a NACC or Inspector's investigation or inquiry.
100. Requiring a defendant to prove that an alleged unlawful recording or disclosure of sensitive information was in fact permitted or authorised would put persons subject to non-disclosure obligations on notice to ensure they only disclose protected information if they have appropriate

authorisation. This is likely to encourage persons subject to non-disclosure obligations to properly apprise themselves of when a recording or disclosure is or is not permitted under the NACC Bill. This would reduce the risk of harm or prejudice to Australia's national security, international relations, criminal proceedings, and the safety and privacy of individuals.

101. The reversed evidential burden provision requiring a defendant to prove an identity card had been lost or destroyed is likely to encourage a former authorised officer to take care not to lose or destroy their card in order to return it to the Commissioner or Inspector as and when required. Compliance with this provision would serve the legitimate objective of ensuring the security and integrity of the NACC and Inspector's investigation processes and preventing investigation powers from being exercised without proper authorisation.

Reasonable, necessary and proportionate

102. It is reasonable and necessary for the burden of proof to be placed on the defendant where the facts in relation to the defence are peculiarly within the knowledge of the defendant. For example, a defendant is best-placed to give evidence that it was not reasonably practicable for them to comply with a requirement to produce information, documents or things within the required timeframe (see the defences in clauses 58 and 69). Similarly, a defendant is best placed to produce regarding the circumstances in which they made a particular record or disclosure (clauses 84, 228 and 234), or circumstances in which an identity card was lost or stolen (clause 268).
103. Reversed evidential burden provisions are proportionate because, consistent with section 13.3 of the *Criminal Code*, this burden requires the defendant to adduce or point to evidence that suggests a reasonable possibility that a particular matter exists or does not exist. It does not require the defendant to prove those matters beyond reasonable doubt. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove those matters beyond reasonable doubt. The reversed evidential burden provisions established in the NACC Bill also create offence-specific defences that operate in addition to, not instead of, the general defences available at criminal law.

Strict liability

104. The effect of applying strict liability to an offence, or an element of an offence, is that no fault element needs to be proved. The application of strict liability may limit the presumption of innocence to the extent that it allows for the imposition of criminal liability without requiring the prosecution to prove fault in the defendant for that particular element. Strict liability provisions will not violate the presumption of innocence so long as they are reasonable in the circumstances, and maintain rights of defence.
105. There are a number of provisions in the NACC Bill that would apply strict liability to offences, or elements of offences, and these provisions may limit the right to a presumption of innocence.
- Clause 84 would make it an offence to disclose information about a notice or summons that included a non-disclosure notation where the notation had not been cancelled. Strict liability would apply to whether the notation had not been cancelled.
 - Clause 101 would make it an offence to use or disclose investigation material in contravention of a direction under clause 100, and the use or disclosure was not authorised by or under the NACC Bill. Strict liability would apply to whether the use or disclosure was not authorised by or under the NACC Bill.
 - Subclause 268(7) would make it an offence for a former authorised officer to fail to hand in their identity card within 14 days after ceasing to be an authorised officer. The entire offence would be an offence of strict liability.

Rational connection to a legitimate objective

106. The strict liability elements of the offences in clauses 84 and 101 serve the legitimate objective of:
- preventing the disclosure of sensitive information that could, for example, harm or prejudice Australia's national security, international relations, criminal proceedings, and the safety and privacy of individuals; and

- preventing the disclosure of information that could prejudice a NACC or Inspector's investigation or inquiry.

107. Applying strict liability to the elements of the offences in clauses 84 and 101 that relate to whether a disclosure was authorised is likely to put persons subject to non-disclosure obligations on notice as to when and under what circumstances they may disclose certain classes of information, and when such disclosure is prohibited. This reduces the risk of unauthorised disclosures that may prejudice Australia's national security, international relations, criminal proceedings, safety and privacy, or investigations or inquiries by the Commissioner or Inspector.
108. The strict liability offence in clause 268 serves the legitimate objective of preventing investigation powers from being used without proper authorisation. The strict liability offence in clause 268 would reduce this risk by requiring authorised officers to promptly return their identification should they cease to be an authorised officer.

Reasonable, necessary and proportionate

109. The application of strict liability elements in the offences outlined above is reasonable and necessary to ensure that a person cannot avoid criminal responsibility because they were unaware of certain circumstances, for example that the disclosure of certain information was unauthorised by the NACC Bill. Requiring knowledge of such an element in these circumstances would undermine the deterrent effect of the offence. There are also legitimate grounds for penalising a person's lacking 'fault' in these circumstances because it would put persons on notice to guard against the possibility of a contravention, for example, by properly apprising themselves of the circumstances in which disclosure is or is not authorised under the NACC Bill. These provisions would also reflect the likely serious consequences resulting from a breach of the offences.
110. The general defence of mistake of fact as set out in section 9.2 of the *Criminal Code* would also remain available. This defence provides that a person is not criminally responsible for an offence that includes a physical element to which strict liability applies if:
- at or before the time of the conduct constituting the physical element, the person considered whether or not a fact existed, and is under a mistaken but reasonable belief about those facts, and
 - had those facts existed, the conduct would not have constituted an offence.
111. The strict liability measures under clauses 84 and 101 are proportionate as they only apply to elements of the offence and not to the offences as a whole. In this respect, the prosecution will still be required to prove, beyond a reasonable doubt, all other elements of the offence including the fault elements of intention or recklessness.
112. The strict liability offence under clause 268 is proportionate because while strict liability applies to all its elements, it could only be committed by someone who has been an authorised officer of the NACC or Inspector, and has received specific training and guidance about the appropriate exercise of their powers. It could not be committed by a member of the public. The offence would carry a maximum penalty of 60 penalty units, which reflects the possible risk of serious consequences resulting from a breach of this provision. Strict liability would significantly enhance the deterrent effect, which will put authorised officers on notice to guard against the possibility of contravention.

The right to minimum guarantees in criminal proceedings contained in article 14(3)(g) of the ICCPR

113. Article 14(3)(g) of the ICCPR sets out minimum guarantees in criminal proceedings. This includes the right to be free from self-incrimination, in that a person may not be compelled to testify against him or herself to confess guilt. Provisions which abrogate the privilege against self-incrimination engage article 14(3)(g) of the ICCPR.
114. The following measures in the NACC Bill would limit this right:
- authorising the use of self-incriminatory hearing material, and notice material, in certain criminal proceedings (clause 113); and
 - the measures which authorise the derivative use of self-incriminatory hearing material.

115. A further measure to modify the circumstances in which self-incriminatory hearing or notice material may be used in confiscation proceedings does not limit this right, however, discussion about the relationship between this measure and the privilege against self-incrimination is included below.
116. However, the authorisation to use self-incriminatory material (including derivative material) is appropriately limited as to only abrogate the right to be free from self-incrimination to the extent reasonable, necessary, and proportionate to achieve the legitimate objective of facilitating the effective investigation of conduct that is serious or systemic.
117. In the course of conducting an investigation of a corruption issue or a NACC corruption issue the Commissioner or the Inspector would have the power to issue a summons to attend a hearing to a person charged with an offence, facing confiscation proceedings, or where a charge or proceeding is imminent (post-charge or post-confiscation application summonses). The Commissioner or the Inspector would also be able to issue a notice to produce information, documents or things to a person charged with an offence, facing confiscation proceedings, or where a charge or proceeding is imminent (post-charge or post-confiscation application proceedings). The material, evidence, information, documents or things given or produced by a person at a hearing or in response to a notice would constitute investigation material under clause 99 (see paragraphs 7.267 to 7.273).
118. The investigation materials obtained through this process may include self-incriminatory materials, which could then also be used in subsequent criminal proceedings in certain circumstances – abrogating the privilege against self-incrimination.

Circumstances where self-incriminatory investigation material may be used in criminal proceedings

119. Clause 113 would abrogate the privilege against self-incrimination in the context of giving answers or other material at a hearing or producing material in response to a notice to produce (see paragraphs 7.387 to 7.400). This would be accompanied by a use immunity in relation to criminal proceedings, proceedings for the imposition or recovery of a penalty, and confiscation proceedings (see subclause 113(2)). The application of the use immunity in these circumstances would mean that the self-incriminatory investigation material would not be admissible as evidence in court against the person who provided the material.
120. However, paragraph 113(3)(b) would provide that the use immunity would not apply to proceedings for offences set out in Table 1:

Table 1—Offences for which use immunity not available

	<i>Provision</i>	<i>Offence</i>
1	clause 60	Failure to comply with notice to produce
2	Clause 61	Producing false or misleading information or documents in response to a notice to produce
3	Clause 68	Failure to attend a hearing
4	Clause 69	Failure to give information, or produce documents or things at a hearing
5	Clause 70	Destroying documents or things
6	Clause 71	Giving false or misleading evidence, information or documents at a hearing
7	Clause 72	Obstructing or hindering hearings, threatening persons present at a hearing
8	Clause 81	Failure to take an oath, make an affirmation or answer a question at a hearing
9	Clause 98	Failure to comply with non-disclosure notations

	<i>Provision</i>	<i>Offence</i>
10	Clause 101	Improper use or disclosure of investigation material
11	Section 137.1 of the <i>Criminal Code</i>	Giving false or misleading information (in relation to a notice to produce or a hearing)
12	Section 137.2 of the <i>Criminal Code</i>	Giving false or misleading documents (in relation to a notice to produce or a hearing)
13	Section 144.1 of the <i>Criminal Code</i>	Forgery (in relation to a notice to produce or a hearing)
14	Section 145.1 of the <i>Criminal Code</i>	Using forged documents (in relation to a notice to produce or a hearing)
15	Section 149.1 of the <i>Criminal Code</i>	Obstruction of Commonwealth public officials (in relation to the Bill)

Rational connection to a legitimate objective

121. Authorisation of the use of self-incriminatory investigation material in these limited circumstances is appropriate in order to achieve the legitimate objective of facilitating the effective investigation of a corruption issue or NACC corruption issue that could involve corrupt conduct that is serious or systemic.
122. The offences exempted from the use immunity listed above are intended to ensure the Commissioner and the Inspector could enforce compliance with a notice to produce or summons to attend a hearing. The ability to enforce compliance with a notice to produce or summons would ensure the material that the Commissioner and the Inspector receives is accurate and reliable. These offences would necessarily depend on evidence about the witness's compliance (or lack of compliance) with a notice or summons, or their interference with the performance of the Commissioner's or the Inspector's functions. Without the ability to admit this material into evidence, the Commissioner or the Inspector would not have an effective method to ensure compliance with these provisions. The material resulting from a hearing or notice to produce in these circumstances would often be a crucial part of proving the offences listed in paragraph 113(3)(b).

Reasonable, necessary and proportionate

123. The measures authorising the use of self-incriminatory investigation material in these limited circumstances are necessary to ensure the effectiveness of hearings and notices to produce, and the ability of the Commissioner and the Inspector to achieve their objectives. The measures are also reasonable and proportionate and include are subject to the following safeguards:
- a limit on the circumstances in which self-incriminatory investigation material can be used in criminal proceedings (paragraph 113(3)(b));
 - limits on the disclosure of investigation material to a prosecutor of a person post-charge (clause 105);
 - the obligation on the Commissioner or the Inspector to include a non-disclosure notation in a notice to produce or a private hearing summons in particular circumstances (clause 96);
 - the ability of the Commissioner or Inspector to issue a direction in relation to the use or disclosure of investigation material (clause 100);
 - the requirement that certain evidence must be given in private, including evidence that would disclose information that, if disclosed, would prejudice the fair trial of any person or the impartial adjudication of a matter (clause 74); and
 - a provision making it an offence if a staff member of the NACC, the Inspector or a person assisting the Inspector discloses information received in the course of their duties that they are not otherwise authorised to disclose (clause 228).

124. The measures would be subject to further safeguards contained in Division 4 of Part 7 of the NACC Bill. These provisions would provide for the use and disclosure of investigation material and place limits on when such material may be disclosed to the prosecutor of a witness. Relevantly, subclause 105(4) would provide that investigation material could only be disclosed post-charge to a person prosecuting the witness for a relevant offence with a court order. The disclosure would be post-charge if the disclosure occurs when the person has been charged with a relevant offence or such a charge is imminent (see clause 130). A court could only authorise such disclosure where the court is satisfied that the disclosure is required in the interests of justice (see subclause 106(1)).
125. Further, subclause 106(3) would specifically retain a courts' power to make any order necessary to ensure that the witness's fair trial is not prejudiced by the possession or use of investigation material or derivative material by a prosecutor of the witness.
126. There would also be an obligation on the Commissioner or the Inspector to include a non-disclosure notation in a notice to produce or a private hearing summons if they are satisfied that failure to do would reasonably be expected to prejudice a person's safety or reputation or a person's fair trial (see paragraphs 7.234 to 7.238). The Commissioner or Inspector also has a discretion to include a non-disclosure notation if satisfied that prejudice *might* occur or where not doing so might otherwise be contrary to the public interest. A non-disclosure notation may prohibit the disclosure of information or limit disclosure in specified circumstances.
127. In addition to non-disclosure notations, the Commissioner or Inspector would also be able to direct that investigation material must not be used or disclosed or may only be used by, or disclosed to, specified persons in specified ways or on specified conditions (subclause 100(1)). Such a direction may be issued in relation to self-incriminatory investigation material.
128. The disclosure of self-incriminatory investigation material is also generally limited by the requirement in clause 74 to only hear certain evidence in private. This requirement applies where the Commissioner is satisfied that the information is sensitive information, which includes information that would, if disclosed, prejudice the fair trial of any person or the impartial adjudication of a matter.
129. As a further general safeguard against disclosure of self-incriminatory investigation material, a staff member of the NACC, the Inspector or a person assisting the Inspector would commit an offence if they disclose information received in the course of their duties that they are not otherwise authorised to disclose (see clause 228).

Authorising derivative use of self-incriminatory investigation material

130. The NACC Bill would provide for the disclosure and use of derivative material (which would include any materials obtained directly or indirectly from investigation material, per clause 133), which could then be used in criminal proceedings against the witness (see clause 105). This would engage the right against self-incrimination in criminal proceedings by limiting the effectiveness of a person's ability to claim the privilege against self-incrimination. As noted above, clause 113 would abrogate the privilege against self-incrimination in the context of giving answers or other material at a hearing or producing material in response to a notice to produce (see paragraphs 7.387 to 7.400). The clause would specifically authorise the disclosure of derivative material to a prosecutor of the witness and its use in evidence against that person (subject to the rules of evidence and procedure). While self-incriminatory investigation material may not itself be admissible against the witness in relation to some offences (due to the use immunity discussed at paragraphs 7.390 to 7.400), material derived from it would be able to be used in the prosecution of the witness.

Rational connection to a legitimate objective

131. The derivative use of self-incriminatory investigation material is necessary to achieve the legitimate objective of facilitating the investigation and prosecution of criminal offences. Without the use of these materials, the success of these investigations and prosecutions would be significantly hindered. For further explanation, please refer to the discussion under the right to a fair trial.

Reasonable, necessary and proportionate

132. Notices to produce and hearings both support the Commissioner's and Inspector's ability to effectively investigate corruption issues or NACC corruption issues that could involve corrupt conduct that is serious or systemic. While it is appropriate that self-incriminatory hearing and notice material should generally not be admissible against a witness, it is necessary that this material can be provided to the prosecution and used in the further investigation of the person's activities in this context, for the reasons outlined below. It would also be appropriate that this evidence could be used to find additional evidence to address and prevent serious criminal activity and harm to the community.
133. The measures to specifically authorise the derivative use of self-incriminatory investigation materials would be subject to the following safeguards:
- limits on the disclosure of investigation material to a prosecutor of a person post-charge (clause 105);
 - the obligation on the Commissioner or the Inspector to include a non-disclosure notation in a notice to produce or a private hearing summons in particular circumstances (clause 96);
 - the requirement that certain evidence must be given in private, including evidence that would disclose information that, if disclosed, would prejudice the fair trial of any person or the impartial adjudication of a matter (clause 74); and
 - a provision making it an offence if a staff member of the NACC, the Inspector or a person assisting the Inspector discloses information received in the course of their duties that they are not otherwise authorised to disclose (clause 228).
134. There would be limitations on the circumstances in which derivative materials can be disclosed to a prosecutor of that witness. Under subclause 105(4), post-charge derivative material cannot be disclosed to a prosecutor of the witness without a court order. The court may only order the disclosure of post-charge derivative material to a prosecutor if it would be in the interests of justice (see subclause 106(1)). These limitations do not apply to pre-charge derivative material. It would not be appropriate to include a derivative use immunity in these provisions as it would undermine the capacity of the Commissioner to assist in investigation of serious criminal activities. If a derivative use immunity was provided, the prosecution would have to prove the provenance of every piece of evidence in the trial of a person that was the subject of, or a witness in, a NACC investigation before it could be admitted. This requirement could be used to inappropriately delay the resolution of charges against the accused.
135. It would also not be appropriate to require a person to seek a court order to disclose pre-charge derivative material to a prosecutor after the witness has been charged with an offence. This would allow a witness to challenge every post-charge disclosure of material to a prosecutor and to require proof that the material was not derivative material.
136. To the extent that there is any prejudice to the examinee or witness's fair trial resulting from the prosecutor's possession or use of derivative material, this is more appropriately managed by the court under its existing powers and process. The NACC Bill also specifically preserves a court's power to make any orders necessary to ensure that the witness's fair trial is not prejudiced by the possession or use of investigation material or derivative material by a prosecutor of the witness (see clause 106).
137. The disclosure of a self-incriminatory derivative material would also be limited by the Commissioner or the Inspector obligations to include a non-disclosure notation in a notice to produce or a private hearing summons if they are satisfied that failure to do would reasonably be expected to prejudice a person's safety or reputation or a person's fair trial (see paragraphs 7.234 to 7.338). The Commissioner or Inspector also has a discretion to include a non-disclosure notation if satisfied that prejudice *might* occur or where not doing so might otherwise be contrary to the public interest. A non-disclosure notation may prohibit the disclosure of information or limit disclosure in specified circumstances.

138. The disclosure of self-incriminatory derivative material is also generally limited by the requirement in clause 74 to only hear certain evidence in private. This requirement applies where the Commissioner is satisfied that the information is sensitive information, which includes information that would, if disclosed, prejudice the fair trial of any person or the impartial adjudication of a matter.
139. As a further general safeguard against disclosure of self-incriminatory derivative material, a staff member of the NACC, the Inspector or a person assisting the Inspector would commit an offence if they disclose information received in the course of their duties that they are not otherwise authorised to disclose (see clause 228).

Circumstances where self-incriminatory material may be used in confiscation proceedings

140. The United Nations Human Rights Committee has stated that criminal charges primarily encompass acts that are declared to be punishable under domestic criminal law, but may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal. Relevant factors in considering whether charges are criminal include whether proceedings are brought by a public authority, whether there is a punitive element to the process and whether there are potentially serious consequences such as imprisonment.¹
141. Confiscation proceedings under the NACC Bill would be a proceeding under the POC Act or a corresponding law within the meaning of that Act (clause 136). Such proceedings are brought by a public authority and have the punishment and deterrence of breaches of Commonwealth law as one of their stated objects. However, proceeds of crime orders imposed via confiscation proceedings cannot create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions such as imprisonment. As a result, confiscation proceedings are civil proceedings and would not be considered criminal in nature. These measures would therefore not limit the right to minimum guarantees in criminal proceedings contained in article 14(3).
142. The immunity against the use of self-incriminatory investigation material contained in subclause 113(2) would also not be available in a confiscation proceeding, if the information was given, or the document or thing was produced, at a time when the proceeding had not commenced and was not imminent (unless the court orders otherwise) (see paragraph 7.397). This means that self-incriminatory investigation material obtained in a post-confiscation hearing or in response to a post-confiscation notice to produce would not be admissible in confiscation hearings. However, this material would be admissible in confiscation proceedings against the witness if it was obtained in a pre-confiscation hearing or in response to a pre-confiscation notice to produce.
143. Further, subclause 109(2) would provide that a person who may lawfully disclose investigation material or derivative material may lawfully disclose that material to a proceeds of crime authority.
144. Ensuring people who have been a subject of the Commissioner's and Inspector's investigations are not able to access the proceeds of their crime is crucial to enabling the Commissioner and Inspector to prevent corrupt conduct and fulfil their statutory functions. Without the use of self-incriminatory pre-confiscation hearing or notice material, the success of the Commissioner's and Inspector's ability to prevent the use of proceeds of corrupt conduct would be significantly hindered. The ability to use such material will assist authorities in both investigating the source of individuals' criminal wealth and in confiscating the profits of their criminal activities. In addition, the measures would be subject to the following safeguards:
- limits on when self-incriminatory investigation material could be admitted into evidence in a confiscation proceeding (subparagraph 113(3)(b)(i));

¹ See the Human Rights Committee's General Comment 32.

- the ability of a person or body to disclose investigation material or derivative material to a proceeds of crime authority would be subject to a direction issued by the Commissioner or the Inspector (clause 100);
- a requirement that certain evidence must be given in private, including evidence that would disclose information that, if disclosed, would prejudice the fair trial of any person or the impartial adjudication of a matter (clause 74); and
- a provision making it an offence if a staff member of the NACC, the Inspector or a person assisting the Inspector discloses information received in the course of their duties that they are not otherwise authorised to disclose (clause 228).

145. Self-incriminatory investigation material would be inadmissible if it came from a post-confiscation application notice or hearing (see subparagraph 113(3)(b)(i)). This material can be used to further the investigation of the witness, but it cannot be used directly to bolster the confiscation proceedings against them.
146. This reinforces that material obtained by a notice to produce or at a hearing is intended to serve the purpose of a corruption investigation or a NACC corruption investigation, and not to bolster a proceeds of crime authority's case in confiscation proceedings.
147. The use and disclosure of self-incriminatory investigation material in relation to confiscation proceedings would be limited by the ability of the Commissioner or Inspector to issue a direction on its use and disclosure (see paragraphs 7.278 to 7.283), the requirement that certain evidence must be given in private (see paragraphs 7.126 to 7.127) and general confidentiality requirements (see paragraph 11.15 to 11.32).

The prohibition against retrospective operation of criminal laws contained in article 15 of the ICCPR

148. Article 15 of the ICCPR prohibits retrospective criminal laws. Relevantly, it provides that laws must not impose criminal liability for acts or omissions that were not criminal offences at the time they were committed.
149. The prohibition against retrospective operation of criminal laws is absolute and may never be justifiably limited.
150. The NACC Bill does not engage the prohibition on the retrospective operation of criminal laws in article 15 of the ICCPR. However, the NACC Bill may be *perceived* to engage the prohibition against retrospective criminal laws through the definition of corrupt conduct under clause 8.
151. The definition would enable the Commissioner to investigate past conduct that they consider could involve serious or systemic corrupt conduct, including:
- conduct that occurred prior to the establishment of the NACC (under subclause 8(4));
 - conduct of a former public official while they were a public official (under subclause 8(5)); and
 - misuse of information by a former public official that was acquired by the former public official in the course of their functions or duties as a public official (under paragraph 8(1)(d)).
152. While this definition would enable the Commissioner to investigate serious or systemic corrupt conduct that occurred prior to the establishment of the NACC, the Commissioner would only be able to make a finding of corrupt conduct where the conduct in question, at the time it occurred:
- adversely affected the honest or impartial performance by a public official of their powers, functions or duties;
 - constituted an abuse of office, breach of trust, or misuse of information obtained in an official capacity; or
 - constituted corruption of any other kind.
153. Further, the definition of corrupt conduct, and the NACC Bill more broadly, would not create any retrospective criminal offences or otherwise impose criminal liability on a person retrospectively. The Commissioner would only be able to conduct a criminal investigation where the conduct in

question could have constituted a corruption-related offence at the time it was alleged to have been committed.

154. The definition of corrupt conduct would enable the NACC to effectively investigate past conduct that is serious or systemic, including criminal conduct where appropriate. Investigating conduct of this kind is critical to ensuring the Australian community has confidence in the integrity and effective administration of public institutions.

The prohibition on interference with privacy contained in article 17 of the ICCPR

155. Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person’s privacy, family, home and correspondence, and prohibits unlawful attacks on a person’s reputation. The United Nations Human Rights Committee has interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.
156. A number of measures in the NACC Bill would limit this right, including:
- powers and mechanisms for the Commissioner and Inspector to obtain information relevant to an investigation or public inquiry;
 - information sharing mechanisms allowing for the disclosure of personal information;
 - the reporting framework allowing for the publication of personal information; and
 - measures designed to promote the right to privacy and protect against undue damage to a person’s reputation.
157. The right to privacy may be limited where the limitation is lawful and not arbitrary. The use of the term ‘arbitrary’ means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ to imply that any limitation must be proportionate and necessary to achieve a legitimate objective.

Powers and legal mechanisms to obtain information

158. The NACC Bill engages the right to privacy by providing the Commissioner, Inspector and other authorised officers powers to collect information for the purpose of investigating corruption issues that may involve corrupt conduct that is serious or systemic. Some of these powers could also be exercised:
- by the Commissioner when conducting preliminary investigations (clause 42) and when conducting public inquiries (clause 163); and
 - by the Inspector when conducting investigations, or preliminary investigations, into NACC corruption issues and complaints (see clauses 211 and 214).
159. Table 2 summarises the powers available to the Commissioner and Inspector to obtain information under this Bill. The information that may be obtained by the Commissioner, Inspector or other authorised officers exercising these powers could include personal information, or information subject to the right to privacy.

Table 2—Investigative powers afforded to the Commissioner and the Inspector

<i>Power</i>	<i>Commissioner</i>			<i>Inspector</i>	
	<i>Investigation</i>	<i>Preliminary investigation</i>	<i>Public inquiry</i>	<i>Investigation</i>	<i>Preliminary investigation</i>
Requirement to provide information with referral	Yes		No	Yes	
Entry onto Commonwealth premises	Yes	No	No	Yes	No

<i>Power</i>	<i>Commissioner</i>			<i>Inspector</i>	
	<i>Investigation</i>	<i>Preliminary investigation</i>	<i>Public inquiry</i>	<i>Investigation</i>	<i>Preliminary investigation</i>
Search warrant	Yes	No	No	No	No
Power to require agency heads to provide information, documents and things	Yes	Yes	Yes	Yes	Yes
Notice to produce	Yes	Yes	Yes	Yes	Yes
Power to require person to answer questions at hearing	Yes	No	Yes	Yes	No

Rational connection to a legitimate objective

160. The information-gathering powers that would be granted to the Commissioner by the NACC Bill would be necessary to enable the Commissioner to:
- detect and investigate corruption issues that could involve serious or systemic corrupt conduct involving public officials; and
 - inquire into corruption risks and vulnerabilities, and measures to prevent corruption, in Commonwealth agencies.
161. The information-gathering powers that would be granted to the Inspector by the NACC Bill would be necessary to enable the Inspector to:
- detect and investigate corruption issues that could involve serious or systemic corruption involving staff members of the NACC; and
 - investigate complaints made in relation to the conduct or activities of the NACC and its staff members.
162. The detection and investigation of, and the making of findings and recommendations in relation to serious or systemic corrupt conduct by the Commissioner are legitimate objectives, and would enable action being taken to address such conduct—including the prosecution of, or the taking of disciplinary or administrative action against, public officials and other persons involved in such conduct.
163. Similarly, the identification of corruption risks and vulnerabilities, and the assessment of the adequacy of measures to prevent corruption in Commonwealth agencies are legitimate objectives, and would enable the making of recommendations for remedial action to address such risks and vulnerabilities—including those that are identified in the course of an investigation.
164. The need for the Inspector to detect, investigate and address allegations of serious or systemic corrupt conduct, or misconduct more broadly, by staff members of the NACC would be particularly acute. Corruption within, or affecting, the NACC could prejudice anti-corruption investigations across the Commonwealth. Corruption or misconduct by the NACC or its staff could also undermine public and parliamentary trust and confidence in the effectiveness of the Commonwealth's anti-corruption framework—and, as a consequence, in public administration more broadly. The detection and investigation of such matters are also legitimate objectives.
165. Persons engaged in serious or systemic corruption often take steps to conceal their conduct, and to create plausibly deniable explanations as to why their conduct was done for a proper purpose. Enabling the Commissioner and Inspector to receive all relevant information would be critical for making findings of fact in relation to corruption issues, identifying risks and vulnerabilities in Commonwealth agencies, and making robust recommendations directed at preventing corruption or mitigating against any adverse consequences of corruption.

166. The information-gathering powers and mechanisms contained in the NACC Bill that would enable the Commissioner and Inspector to obtain information that would not otherwise be available—including information uniquely within the knowledge of the person being questioned—or could only be obtained after long and complex investigations. Vesting the Commissioner and Inspector with these powers would ensure they can investigate allegations of serious or systemic corrupt conduct, as well as ascertain and expose the circumstances that contribute to serious or systemic corruption within the Commonwealth public sector. Ensuring appropriate powers are available to the Commissioner when conducting public inquiries, and to the Inspector when investigating complaints raised in relation to the NACC, would strengthen the NACC’s broader inquiry and prevention functions and oversight of the NACC.

Reasonable, necessary and proportionate

167. The information-gathering powers that would be granted to the Commissioner and Inspector under the NACC Bill would be necessary and proportionate to the legitimate objectives outlined above.
168. It is necessary for the Commissioner to have powers to gather information to support their investigation and inquiry functions, and for the Inspector to have such powers to support their investigation functions through the gathering of information.
169. The NACC Bill would provide the Commissioner and Inspector with a graduated suite of powers and mechanisms to obtain information, with less intrusive powers available at the earlier stages of investigations and for the purposes of public inquiries, and the use of more intrusive powers being more tightly controlled.

Requirement for the provision of relevant information with referrals

170. The requirement for agency heads and persons with responsibilities under the PID Act to provide all relevant information as part of the mandatory referral of a corruption issue to the Commissioner or Inspector is a reasonable, necessary and proportionate requirement. The requirement would apply only where:
- the corruption issue concerns the conduct of person who is, or was, a staff member of the agency; and
 - the agency head or person with PID Act responsibilities suspects that the issue could involve corrupt conduct that is serious or systemic.
171. The requirement to provide all relevant information when referring a corruption issue would be necessary to enable the Commissioner or Inspector to:
- form a view about whether the issue is within the Commissioner or Inspector’s jurisdiction, and if so, whether and how to deal with the issue—including whether the issue might best be investigated by the Commissioner or Inspector alone, as a joint investigation, by the originating agency as an internal investigation, or by another law enforcement or integrity agency;
 - understand the potential harm that may arise from the corruption issue—including whether the corruption issue involves, or is likely to involve prejudice to the privacy or reputation of an innocent party, such as whether the issue involves the misuse of personal information by a public official;
 - have visibility of any investigative steps that the referring agency may have undertaken, or proposes to undertake; and
 - avoid taking unnecessary investigative steps, based on incomplete information.
172. The requirement would be proportionate to the achievement of such objectives. The withholding of relevant information from the Commissioner or Inspector would result in them being less than fully-informed about the above matters, and about the nature and circumstances of the alleged corrupt conduct more broadly. The requirement for the agency or person making the referral to provide all relevant information would reduce the need for the Commissioner or Inspector to exercise their powers to require the production of further information or documents to support their consideration of the issue. A referring agency or person would generally be well-placed to determine which information would be relevant to the issue they are referring, and to provide the

Commissioner or Inspector with that information—while reducing the risk that the Commissioner or Inspector may unnecessarily receive or obtain personal information that is not relevant to a corruption issue.

173. The proportionality of the requirement would be reinforced by the requirement being limited to information that is in the person’s possession or control, in their capacity as an agency head or person with responsibilities under the PID Act. In practice, this would be limited to:
- official information, being information generated or obtained by the relevant agency, in connection with the performance of its functions—which may include personal information contained, for example, in official applications relating a program to which the alleged corrupt conduct relates, or concerning the person alleged to have engaged in the corrupt conduct (including information contained in an internal disclosure that has led to the referral); and
 - information held by the agency on its systems or files, or at its premises—which may include personal information where, for example, the person alleged to have engaged in serious or systemic corrupt conduct has used their work email account for non-work-related purposes.
174. A person would have a limited expectation of privacy in such information, being information that is already in the possession or control of a government agency and that could therefore generally be used for the investigation of unlawful activity or misconduct of a serious nature that relates to the agency’s functions (see section 16A, *Privacy Act 1988*). The NACC Bill would exclude certain types of information from the application of this requirement, where persons would have a reasonable expectation of privacy in that information (see the definition of ***exempt secrecy provision*** in clause 7) including information that is subject to the *My Health Records Act 2012*.

Powers to search premises and persons, and to seize evidential material and seizable items

175. The NACC Bill would provide the Commissioner with four sets of powers to undertake searches and seize documents and things, being:
- a right to enter and search Commonwealth premises without warrant, for the purposes of a preliminary investigation or corruption investigation (see clause 117);
 - powers to obtain search warrants for the purposes of (see clause 119 and Subdivision B of Part 7):
 - a corruption investigation that is also a criminal investigation; or
 - any corruption investigation, where necessary to ensure that persons do not have the opportunity to conceal, lose, mutilate or destroy important evidential material pertaining to a corruption issue;
 - powers to stop and search conveyances in emergency situations to prevent the destruction of evidence (see clause 119 and Subdivision B of Part 7); and
 - when arresting a person under a warrant to ensure their attendance at a hearing (see clauses 90 and 91).
176. The NACC Bill would provide the Inspector with a more limited set of powers to undertake searches and seize documents and things (see clause 214), being:
- a right to enter and search Commonwealth premises without warrant, for the purposes of a preliminary investigation or corruption investigation (see clause 117); and
 - when arresting a person under a warrant to ensure their attendance at a hearing (see clauses 90 and 91).
177. The Commissioner and Inspector’s powers to require persons to give information, produce documents or things, or to answer questions are reasonable and necessary for the above purposes, as they would enable the Commissioner and Inspector to obtain information that:
- would not otherwise be available—including information uniquely within the knowledge of the person being questioned, including information about how or why a decision was made that have not been reduced to documentary form; or

- could only be obtained after long and complex investigations—including, for example, by enabling the Commissioner and Inspector to ask follow-up questions to clarify or expand on information, documents or answers given by a person.
178. There would be appropriate limits on the Commissioner’s search powers when conducting public inquiries or preliminary investigations, and the Inspector’s powers when conducting preliminary or complaint investigations, given the significant nature of these powers:
- when conducting a public inquiry or preliminary investigation, the Commissioner would not have powers to enter and search premises or to search persons (whether with or without a warrant); and
 - when conducting a preliminary investigation, the Inspector would not be permitted to enter and search Commonwealth premises; and
 - when conducting a complaint investigation, the Inspector would not be able to obtain a warrant to arrest a person to ensure their attendance at a hearing.
179. These powers would be necessary to enable the Commissioner and Inspector to obtain information relevant to a corruption investigation, or the investigation of a complaint in relation to the conduct or activities of the NACC or a staff member of the NACC. Powers to conduct searches and seize documents and things would, in particular, be necessary in circumstances where it may not be appropriate or practicable to rely on a notice to produce, for example where:
- the Commissioner or Inspector has reason to doubt that the recipient of a notice would comply with the notice;
 - the service of a notice to produce would prematurely ‘tip off’ the subject of an investigation; or
 - it would be necessary for the Commissioner or Inspector to employ specialist capabilities to locate and seize relevant documents or things—such as forensic or digital forensic capabilities.
180. There would be safeguards in place to limit the powers of the Commissioner, Inspector and authorised officers, and ensure any impact on the right to privacy is proportionate and not arbitrary. These powers would be available only as part of:
- a corruption investigation or NACC corruption investigation, where the Commissioner or Inspector are investigating a corruption issue that could involve corrupt conduct that is serious or systemic; or
 - a complaint investigation, where the Inspector is investigating a complaint about the activities or conduct of the NACC or a staff member of the NACC.
181. The NACC’s powers to conduct searches under warrant, or of a conveyance in an emergency, would be based on existing powers under the *Crimes Act 1914*, which apply generally to the investigation of Commonwealth criminal laws.
182. Before issuing a search warrant, an issuing officer would need to be satisfied by information on oath or affirmation that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours (clause 124):
- in a case where the NACC is investigating a particular offence or offences—any evidential material (within the meaning of the substituted definition outlined in paragraph 7.458) at the premises or in the possession of the person that is subject to the warrant; or
 - in a case where the NACC is investigating a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic, but where no offence, or no specific offence, has been identified:
 - there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises or in the possession of the person that is subject to the warrant; and

- there are reasonable grounds for believing that, if a person was served with a summons to produce the evidential material, the material might be concealed, lost, mutilated or destroyed.
183. The inclusion of this additional threshold for non-criminal investigations would ensure that search warrants for premises are only available where other means of obtaining the evidential material would be ineffective—because the material might be concealed, lost, mutilated or destroyed if the Commissioner sought to obtain it by serving a person with a summons to produce the material. This is consistent with the approach taken in section 4 of the *Royal Commissions Act 1902* and with investigation warrants under subsection 109(1) of the LEIC Act.
184. Similarly, searches conducted by authorised officers of the NACC under a warrant would be subject to the same limits and safeguards to limit any disproportionate impact on privacy as those conducted by constables under the *Crimes Act 1914*, including:
- warrants may only be in force for up to seven days after the date of issue (subsection 3E(5A) of the *Crimes Act 1914*);
 - warrants to search persons must state whether an ordinary or frisk search is authorised, and only that type of search may be conducted (paragraph 3E(7)(b) and subsection 3F(4));
 - warrants cannot authorise a strip search or a search of a person’s body cavities (section 3S);
 - ordinary searches and frisk searches of a person must, if practicable, be conducted by a person of the same sex as the person being searched (section 3ZR);
 - the executing officer must identify themselves to, and make a copy of the warrant available to, the person being searched or the occupier of warrant premises (section 3H);
 - if data is accessed from premises other than warrant premises under sections 3L or 3LAA, the executing officer must notify the occupier of those premises as soon as practicable, if it is practicable to notify the occupier (section 3LB); and
 - the occupier of warrant premises or their representative is entitled to observe the search being conducted (section 3P).
185. The NACC’s power to stop and search conveyances, without a warrant, would be limited to circumstances where a constable or authorised officer has reasonable grounds to suspect that things relevant to an offence or a corruption investigation are in the conveyance, and conducting the search is necessary to prevent those things from being concealed, lost or destroyed in serious or urgent circumstances. Where any element of the threshold is not met, an authorised officer would instead be required to obtain a search warrant.
186. The Commissioner and Inspector’s right to enter and search most Commonwealth premises as part of an investigation would be proportionate, as:
- the exercise of such a power would, in essence, be within the Commonwealth; and
 - working for or with the Commonwealth is voluntary—persons who choose to work for or with the Commonwealth choose to be bound by the conduct standards that apply to public officials, and to applicable enforcement frameworks, including the jurisdiction of the Commission.
187. The search powers that arise at the time of executing a warrant for a witness’s arrest would also be reasonable and subject to appropriate safeguards. Search and seizure powers at the time of arrest would be limited to circumstances where an authorised officer:
- suspects on reasonable grounds that it would be prudent to search the person to ascertain whether the person is carrying any seizeable items (being anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody);
 - suspects on reasonable grounds that the person is carrying evidential material or a seizeable item; or

- believes on reasonable grounds that a thing in plain view at the premises is evidential material in relation to an offence, or a seizable item (sections 3ZE, 3ZF and 3ZG of the *Crimes Act 1914* as applied by clause 91).

Powers to require the giving of information, production of documents and things, and the answering of questions at hearings

188. Corruption investigations conducted by the Commissioner and Inspector, and complaint investigations conducted by the Inspector, would be inherently concerned with how and why public officials have made particular decisions. Such investigations would depend not only on access to contemporaneous documents and records supporting decision-making process, but also understanding the state of mind of, and considerations taken into account by a decision-maker.
189. Similarly, public inquiries conducted by the Commissioner to identify corruption risks and vulnerabilities, and assess the adequacy of measures to prevent corruption in Commonwealth agencies, would require not only detailed information on agencies' corruption detection and prevention frameworks, but also information on how those frameworks operate in practice—and how they integrate with other systems and processes.
190. Hearings would be a key power available to the Commissioner and Inspector. Hearing powers would enable the Commissioner and Inspector to obtain information that would not otherwise be available—including information uniquely within the knowledge of the person being questioned—or could only be obtained after long and complex investigations. Material gathered in hearings would play a key role in furthering investigations of corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order.
191. The Commissioner and Inspector's powers to require persons to give information, produce documents or things, or to answer questions are reasonable and necessary for the above purposes, as they would enable the Commissioner and Inspector to obtain information that:
- would not otherwise be available—including information uniquely within the knowledge of the person being questioned, including information about how or why a decision was made that have not been reduced to documentary form; or
 - could only be obtained after long and complex investigations—including, for example, by enabling the Commissioner and Inspector to ask follow-up questions to clarify or expand on information, documents or answers given by a person.
192. Material gathered in hearings would play a key role in furthering investigations of corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order.
193. There would be appropriate limits on the Commissioner's coercive information-gathering powers when conducting a public inquiry, and the Commissioner and Inspector's powers when conducting preliminary investigations, given the significant nature of these powers:
- when conducting a public inquiry, the Commissioner's notice to produce powers could only be exercised in relation to a Commonwealth agency head; and
 - when conducting a complaint investigation, the Inspector would not be permitted to issue notices to produce or summons persons to attend hearings post-charge and post-confiscation application.
194. The exercise of the Commissioner and Inspector's coercive powers could result in a person being compelled to provide personal information. The NACC Bill would ensure that such powers would be proportionate. In certain circumstances, personal information would be directly relevant to an investigation or inquiry—for example, where it is alleged that a public official has engaged in serious or systemic corrupt conduct to obtain a benefit or advantage for another person to whom they have a family or other personal relationship, personal information about the existence and nature of that relationship, and communications between the official and the person in connection with the benefit, would potentially be directly relevant to the investigation.

195. The NACC Bill would contain a number of additional safeguards to ensure that the Commissioner and Inspector's powers to obtain personal information under a notice to produce or at a hearing are proportionate.
196. Hearings would, by default, be held in private, preventing any personal information that arises in evidence from being publicly disclosed. The NACC Bill would provide the Commissioner with the discretion to hold public hearings only where the Commissioner decides that exceptional circumstances justify holding the hearing in public and it is in the public interest to do so (see Division 3 of Part 5, clause 161 and clause 214).
197. The factors that may be considered when determining whether to hold a hearing in public would include:
- the extent to which the corruption issue could involve corrupt conduct that is serious or systemic;
 - whether certain evidence is of a confidential nature; and
 - whether a person giving evidence has a particular vulnerability.
198. Certain sensitive information would also be required to be heard in private. In particular, information that would unreasonably disclose a person's personal affairs would be required to be heard in private (see clause 74 and the definition of sensitive information in clause 227). Where such information is heard in private, the Commissioner or Inspector would be required to issue a direction under clause 100 (which has the effect that specified investigation material must not be used or disclosed, or may only be used by or disclosed to specified person in specified ways or on specified conditions) if the Commissioner is satisfied that the failure to give such a direction might lead to the publication of sensitive information that would unreasonably disclose a person's personal affairs.
199. The NACC Bill would also provide for non-disclosure notations where hearings, investigations or inquiries are held in private, and create an offence for breaches of these notations (Subdivision A, Division 4 of Part 7, clause 163 and clause 214). Non-disclosure notations would ensure the Commissioner can limit the spread of information relating to investigations or inquiries being held in private. The notation would protect the disclosure of information relating to a notice to produce information or a private hearing summons, for example, that the notice or summons exists or has been served on a particular person. Grounds for issuing a notice would include to the protect a person's reputation, to prevent prejudice to an investigation or inquiry, or to prevent harm to an individual.

Use and disclosure of information obtained through the exercise of powers

200. The NACC Bill engages the right to privacy in that the Commissioner, Inspector, and entrusted persons may disclose personal information or documents relating to individuals to other. The information that may be shared through these arrangements may include personal information, or information considered to fall within the scope of the right to privacy.
201. Clause 228 would impose confidentiality obligations on entrusted persons (being staff members of the NACC, the Commissioner, the Inspector, and persons assisting the Inspector), that would generally prohibit them from disclosing information they obtain in the course of their duties. Clause 229 would then authorise the disclosure of such information in limited circumstances.
202. For example, clause 229 would allow an entrusted person to disclose information for purposes connected with the functions, power and duties of the Commissioner or the Inspector. This would allow, for example, an entrusted person to make a disclosure or share information for the purpose of conducting a corruption investigation or public inquiry.
203. Clause 229 would also allow the Commissioner and the Inspector to disclose information to the head of a Commonwealth agency, or of a State or Territory government entity, where satisfied that it is appropriate to do so, having regard to the functions of the person or entity concerned. This would allow, for example, the Commissioner to provide information to the head of an agency conducting a criminal investigation. Similarly, this would allow the Commissioner to share information with the head of an agency conducting a joint corruption investigation with the NACC.

Rational connection to a legitimate objective

204. The information sharing mechanisms provided for under the NACC Bill would be critical to supporting both the Commissioner's and the Inspector's investigation and other functions, including by enabling the disclosure of information for purposes including:
- an investigation conducted by the Commissioner or Inspector, including disclosures between agencies as part of joint investigations conducted with other Commonwealth, State or Territory agencies;
 - referring corruption issues to other agencies for their investigation or consideration; and
 - referring evidence of criminal corrupt conduct to the CDPP or another prosecutorial agency, for prosecution.
205. This recognises the Commissioner and Inspector's functions as part of a broader Commonwealth integrity framework, and their role in supporting the proper enforcement of the law.
206. The Commissioner and Inspector would also have the ability to disclose information to a particular person, if they are satisfied that it is necessary to do so in order to protect that or any other person's life or physical safety. This recognises that the Commissioner and Inspector may come into possession of information that indicates that a person may harm themselves or another person, and would enable the Commissioner and Inspector to disclose such information in the course of seeking to protect against such harm.

Reasonable, necessary and proportionate

207. Information sharing is particularly necessary, given the nature of the matters that the Commissioner may work on and the potential for overlap with the work of State, Territory and Commonwealth integrity agencies and law enforcement bodies such as the AFP.
208. Effective information sharing mechanisms would be necessarily dependent on partial limitations to the right to privacy. It would be necessary at times to share personal information, including identifying information and information regarding a person's conduct, to ensure integrity agencies can carry out their investigations and law enforcement activities effectively.
209. Such limitations to the right to privacy would be proportionate, in that exceptions allowing for the disclosure of information would be limited, under clause 229, to:
- disclosures for purposes connected with the exercise of powers, or the performance of the functions or duties, of the Commissioner or Inspector—which relate to the detection, investigation and prevention of corruption; and
 - disclosures to the head of a Commonwealth agency, or a State or Territory government entity, that are authorised by the Commissioner or Inspector on the basis that they are satisfied that the disclosure is appropriate, having regard to the functions of the agency or entity—this could include, for example:
 - disclosing evidence of criminal corrupt conduct to the CDPP to consider prosecution;
 - disclosing evidence of serious corrupt conduct by a public official to the head of that public official's agency, to consider disciplinary or administrative action against the public official—as well as any necessary remedial action to address corruption risks or vulnerabilities identified by the Commissioner or Inspector; or
 - disclosing information about sophisticated money laundering activities detected in the course of a corruption investigation to the CEO of AUSTRAC, which is responsible for preventing, detecting and responding to criminal abuse of the financial system to protect the community from serious and organised crime;
 - disclosures between the Commissioner and Inspector—which reflect the Inspector's functions to oversee the Commissioner and the NACC;
 - disclosures that are required by another Commonwealth law; and
 - disclosures to protect life or physical safety.

210. Where no exception authorising disclosure applies, the confidentiality requirements under clause 228 would make it an offence for entrusted persons to disclose information they obtain in the course of their duties.
211. Clause 233 would enable the Commissioner or the Inspector to impose confidentiality requirements on information shared with a person through this framework. That clause would make it an offence for the person to disclose information in breach of a confidentiality requirement.
212. The NACC Bill would impose additional restrictions on the disclosure of certain information. Clauses 77, 100 and 214 would set out a confidentiality framework to ensure appropriate protection of particularly sensitive investigation material—including information the disclosure of which would unreasonably disclose a person’s personal affairs—and would require the Commissioner or the Inspector to issue a confidentiality direction in certain circumstances where evidence is obtained at a private hearing. Contravention of such a direction would be an offence under clause 101.
213. Clauses 95 and 96 would also enable the Commissioner and the Inspector to issue non-disclosure notations, prohibiting the disclosure of information about a notice to produce or summons. The Commissioner and Inspector would be required to do so if satisfied that failure to issue a non-disclosure notation would reasonably be expected to prejudice a person’s reputation, and would have a discretion to do so if satisfied that not doing so might prejudice a person’s reputation.
214. Several measures in the NACC Bill would provide protections around the use and disclosure of information that is gathered through the exercise of powers and conduct of hearings, ensuring that any limitation on the right is reasonable and proportionate.
215. The Commissioner, staff members of the NACC, the Inspector, and persons assisting the Inspector would generally not be compellable to give evidence, disclose information or produce documents in proceedings. This would protect against the disclosure of information or documents that were acquired under the NACC Bill for unintended purposes, and would reduce the risk that third parties may improperly obtain personal information obtained by the Commissioner or Inspector through discovery in proceedings—other than proceedings:
- to which a Commissioner, delegate or authorised officer, the CEO or the Inspector are party in their official capacity—for example, a challenge to the exercise of a power by the Commissioner;
 - brought for the purposes of carrying into effect a provision of the NACC Bill—for example, a contempt proceeding against a person for failing to comply with a summons to appear before the Inspector; or
 - being criminal, civil penalty or confiscation proceedings, brought as a result of an investigation under the NACC Bill or the referral of a corruption issue to another agency or entity.
216. The NACC Bill would further protect information that may arise in an investigation or inquiry by enabling the Commissioner and Inspector to impose confidentiality requirements on persons who receive information about investigations and inquiries—for example, where a staff member of the NACC discloses information to another law enforcement agency as part of a joint investigation. Clause 233 would enable the Commissioner or the Inspector to impose conditions on the making of a record of the information by the recipient, and any on-disclosure of the information. This would include, for example, any condition considered appropriate to protect the identity of any person of interest to an investigation or inquiry. Non-compliance with a condition would be an offence under clause 233.

Public reporting

217. The NACC Bill further engages the right to privacy by allowing for the potential disclosure of personal information contained in reports through the tabling or publication of those reports. The NACC Bill would require the tabling of reports in Parliament where a public hearing has been held in the course of an investigation, NACC investigation, or public inquiry, or where public submissions were invited on matters that were the subject of a public inquiry (clauses 155, 168 and 221). The Minister would also be able to table reports at their discretion, and the Commissioner

and the Inspector would be able to publish reports and disclose other information relevant to the NACC, if satisfied it is in the public interest to do so (clauses 156, 169, 222 and 230).

Rational connection to a legitimate objective

218. Any limitation of the right to privacy as a result of the robust reporting requirements in the NACC Bill would be directed towards the legitimate objective of promoting transparency and accountability to the public. Limiting the right to privacy through the public reporting of information that identifies persons connected with corruption investigations will promote transparent reporting of findings of corrupt conduct in the Commonwealth public sector. Public reporting would also enhance the NACC's educational function by bringing to light the circumstances that contribute to corruption, and the detrimental effects of corruption on public administration and the Australian community.

Reasonable, necessary and proportionate

219. Robust and transparent reporting will at times require the tabling and publication of reports, particularly where the matters dealt with in reports are already in the public domain.
220. The disclosure of personal information in reports would be limited to circumstances to where its inclusion is necessary to ensure transparency and accountability, and would be subject to strong safeguards.
221. For example, the Commissioner and the Inspector would be required to exclude information from reports they are satisfied is sensitive information (as defined under clause 227) and that is subject to a section 235 certificate. Sensitive information would include, in particular, information the disclosure of which would involve unreasonably disclosing a person's personal affairs. Such information would instead be included in a protected information report and protected from disclosure to the public (see clauses 151 and 152 in relation to the Commissioner's investigation reports, clauses 217 and 218 in relation to the Inspector's NACC investigation reports, and clauses 199 and 272 in relation to annual reports). Clause 234 would make it a criminal offence for a person to disclose a protected information report, or information contained in a protected information report, to the public.
222. In addition, a number of reputational safeguards would prevent certain information from being reported.

Measures to protect an individual's reputation

223. The NACC Bill contains a number of measures designed to protect an individual's reputation and promote the right to privacy. These measures would balance the NACC Bill's key objective, to expose corruption in public administration, with the need to protect against undue prejudice to a person's reputation. Measures would include specific requirements when conducting corruption investigations and inquiries, and when preparing reports.
224. As set out, above, hearings would, by default, be held in private, preventing any personal information that arises in evidence from being publicly disclosed. The NACC Bill would provide the Commissioner with the discretion to hold public hearings only where the Commissioner decides that exceptional circumstances justify holding the hearing in public and it is in the public interest to do so (see Division 3 of Part 5, clause 161 and clause 214).
225. Where hearings, investigations or inquiries are held in private, the NACC Bill would also provide for non-disclosure notations and create an offence for breaches of these notations (Subdivision A, Division 4 of Part 7, clause 163 and clause 214). Non-disclosure notations would ensure the Commissioner can limit the spread of information relating to investigations or inquiries being held in private. The notation would protect the disclosure of information relating to a notice to produce information or a private hearing summons, for example, that the notice or summons exists or has been served on a particular person. Grounds for issuing a notation would include to the protect a person's reputation, to prevent prejudice to an investigation or inquiry, or to prevent harm to an individual.
226. Where hearings are held in public, the Commissioner and Inspector would have the discretion to make a statement clarifying the capacity in which a witness is appearing, in particular, whether

they are appearing voluntarily or in response to a summons, and whether their conduct is the subject of the corruption investigation (clause 73). This would assist to avoid harm to a person's reputation that might arise, if there was public misunderstanding about the capacity in which the person has appeared as a witness. It would be open to a person appearing before the Commissioner or Inspector to request that they make such a statement.

227. The NACC Bill would also allow the Commissioner to issue public statements on corruption issues at any time (for example, where a person has been incorrectly identified as the subject of a corruption investigation). The NACC Bill would require certain statements be included in reports, if it would be appropriate and practicable to do so to avoid damage to a person's reputation (see subclause 149(5)).
228. The NACC Bill would further promote the right to privacy and protect against reputational risk by ensuring the NACC would operate with procedural fairness for individuals who are to be the subject of a critical finding, opinion or recommendation. Such individuals would be afforded an opportunity to respond to the adverse comment before its inclusion in a report, or prior to its publication (clauses 153, 157, 170, 166, 219, 223 and 231.)
229. These measures would ensure an appropriate balance is achieved between the exposure and prevention of corruption, and protecting against undue damage to a person's reputation.

The right to freedom of expression contained in article 19(2) of the ICCPR

230. Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media.
231. However, Article 19(3) of the ICCPR provides that the exercise of the rights provided for in article 19(2) carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of national security and for the respect of individuals' rights or reputations.
232. The NACC Bill would limit the right to freedom of expression by restricting a person's ability to refer and disclose certain sensitive information. For example:
- the Attorney-General would be able to restrict a person's ability to refer information that is subject to an international relations certificate to the NACC or the Inspector (under clause 236);
 - the Attorney-General would be able to restrict a person's ability to disclose information that is subject to an Attorney-General's certificate issued under clause 235;
 - it would be an offence to disclose whole or part of a protected information report (under clause 234);
 - the NACC would be able to restrict a person's ability to disclose certain information and material, including information subject to non-disclosure notations (under Division 4 of Part 7 (including as applied by Parts 9 and 10)).
233. The NACC Bill would also limit the right to freedom of expression by applying confidentiality requirements to certain people. For example:
- an offence for an entrusted person to make a record or disclose information obtained because of their role or in the course of their duties (clause 228);
 - an offence for a person who has received information from an entrusted person relating to certain investigations and inquiries from disclosing the information (clause 233).
234. Under article 19(3) of the ICCPR, the right to freedom of expression may be subject to limitations where those limitations are provided for by law and are necessary for the protection of national security and for the respect of individuals' rights and reputations.

Rational connection to a legitimate objective

Restricting a person's ability to refer and disclose certain sensitive information

235. In the course of performing its functions, the NACC would obtain a range of sensitive information that could, if released, prejudice Australia's national security, its relationships with foreign governments, and individuals' rights to privacy and reputation. These adverse consequences would be avoided or mitigated by the limitations on the disclosure and referral of certain sensitive information contained in the NACC Bill.
236. It is necessary for the NACC to be able to prohibit the referral and disclosure of certain secret or sensitive information in its remit. The NACC Bill would not restrict the referral or disclosure of information generally; only the most sensitive information would be subject to referral or disclosure prohibitions under the NACC Bill. This includes information that, if publicly released or handled inappropriately, could harm or prejudice Australia's national security, Australia's international relations and the privacy of individuals.
237. For example, information contained in international relations certificates generally includes information communicated in confidence to Australia by foreign governments under international agreements. The referral or disclosure of the information contained in an international relations certificate could therefore significantly damage Australia's reputation and ongoing partnerships with foreign governments. Preventing the referral or disclosure of information contained in these certificates without appropriate consent is a legitimate object of the NACC Bill.
238. It is also necessary for the NACC Bill to prevent the disclosure of sensitive information pertaining to the NACC's functions, including its powers under Part 7. Permitting information contained in a notice or summons issued by the NACC, for example, could prejudice investigations and inquiries, in addition to causing harm to individuals' reputations and privacy. Ensuring this type of information is protected from disclosure under a non-disclosure notation (and under similar directions) is a legitimate object of the NACC Bill.

Requiring certain people to abide by confidentiality requirements

239. The NACC Bill recognises that staff members of the NACC and people conducting oversight of the NACC would have access to a range of sensitive information in the course of their duties, and that the improper use and disclosure of this information could significantly damage public trust in the NACC and the Inspector and their ability to protect confidential information they receive.
240. The NACC Bill applies a range of confidentiality requirements to *entrusted persons* (see clause 227), which refers to staff members of the NACC, the Inspector, and persons assisting the Inspector. If an entrusted person were to make a record of or disclose sensitive information otherwise than in the course of their duties, this could irreparably damage the NACC's reputation and significantly deter people from providing sensitive information to the NACC in future. If entities, members of the public and public officials are not willing to make disclosures or otherwise provide assistance to the NACC due to fear the information they impart would not be dealt with confidentially, the NACC would be significantly inhibited in performing its statutory functions. The restrictions on entrusted persons making records of and disclosing sensitive information—except in connection with the exercise of their powers—is a legitimate object of this Bill.
241. Requiring staff members of the NACC, and the Inspector and persons assisting them, to only handle certain sensitive information for purposes connected with their functions, powers and duties under the NACC Bill would ensure that the NACC remains a trusted recipient of sensitive information.
242. Additionally, enabling the NACC to make third parties subject to confidentiality requirements when receiving sensitive information about certain NACC investigations and inquiries would deter third parties from improperly recording or disclosing the sensitive information, thereby safeguarding NACC processes from prejudice.
243. The NACC Bill would also apply confidentiality requirements to people who receive information from entrusted persons about certain NACC corruption investigations and public inquiries. This

would not be an absolute restriction on a person's ability to make records of or disclose information received from entrusted persons, but would instead provide entrusted persons with a mechanism for imposing conditions on the use of sensitive information pertaining to the NACC's processes, as appropriate in the circumstances. This would ensure that sensitive information capable of prejudicing a NACC investigation or inquiry is protected from improper use and communication by third parties. These restrictions on freedom of expression are therefore a legitimate object of the NACC Bill.

Reasonable, necessary and proportionate

244. The limitations on freedom of expression outlined above would be necessary to protect information obtained by the Commissioner from inappropriate referral and disclosure. These measures are particularly important given the covert nature of investigations, inquiries and other processes undertaken by the Commissioner and the Inspector, the coercive nature of the powers available to support these functions, and the sensitive nature of information they gather from entities and individuals.
245. The NACC Bill also contains safeguards to ensure that limitations on the right to freedom of expression are necessary. For example, an Attorney-General's certificate could only be issued if the information contained in the certificate was sufficiently sensitive (see clause 235). This would include information pertaining to communications between the Commonwealth Government and the Government of a State or Territory, and information that could reveal the existence or identity of a confidential source or a staff member of an Australian intelligence entity. The referral or disclosure of information contained in an Attorney-General's certificate could have serious ramifications for Australia's national security, and restricting the communication of information contained in these certificates is therefore a legitimate object of the NACC Bill.
246. Only sufficiently sensitive information may be restricted from being recorded, referred and disclosed, including information relating to Australia's national security, international relations, the privacy and reputation of individuals, and the performance of the NACC's statutory functions generally. The limitations on the right to freedom of expression contained in the NACC Bill are therefore reasonable, necessary and proportionate.
247. Further, the penalties attaching to breaches of these restrictions under the NACC Bill are reasonable and proportionate. In the absence of serious consequences for breaches, unauthorised disclosures of certain information may undermine and jeopardise the effectiveness of the NACC or be detrimental to the operations of other regulated entities. In many cases, publicly releasing the information that is the subject of these measures could have serious ramifications beyond the functions of the NACC, including for Australia's national security. The primary effect of the penalties would therefore be to act as a deterrent, and would correlate to the seriousness of the offences.
248. To ensure that the offences are sufficiently precise and do not unnecessarily limit a person's right to freedom of expression where a disclosure is in fact permitted, many of the offences include exceptions.

Conclusion

249. The NACC Bill would be compatible with human rights. To the extent that the measures in the NACC Bill may limit human rights, each of those limitations are necessary, reasonable and proportionate.

National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

250. The Consequential Bill would be compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Consequential Bill

251. The NACC Bill would be supported by the Consequential Bill, which would amend various Acts to give effect to the NACC.
252. Schedule 1 to the Consequential Bill would repeal the LEIC Act. That Act established ACLEI, which would transition to become part of the NACC. The Consequential Bill would repeal references to ACLEI and the LEIC Act currently contained in legislation. These would be replaced with references to the NACC and the NACC Bill. The effect of these amendments would be to support the transition of ACLEI to the NACC and confer powers on the NACC that are currently conferred on ACLEI. Many of these powers would be significant components of the NACC's overall investigative powers and would complement the powers conferred by the NACC Bill (in particular Part 7).
253. The arrangements for the NACC that are dealt with in the Consequential Bill would generally apply to the NACC in the way they currently apply to ACLEI. Exceptions to this are:
- certain decisions made by the Commissioner from review under the ADJR Act, including decisions made under Part 6 (dealing with corruption issues) and Part 7 (investigating corruption issues) of the NACC Bill;
 - allowing the NACC to undertake integrity testing of staff members of all Commonwealth agencies under Part IABA of the *Crimes Act 1914*, in accordance with the NACC's broader jurisdiction;
 - allowing the IGIS or the staff of the IGIS to disclose information to a staff member of the NACC if the information being disclosed is relevant to the NACC's functions or powers, and the IGIS is satisfied on reasonable grounds that the NACC has satisfactory arrangements in place to protect the information;
 - enabling a disclosure for the purposes of the PID Act to be made directly to the NACC, and enabling the NACC to issue a stop action direction to 'freeze' PID Act processes;
 - providing the NACC with access to the industry assistance framework under Part 15 of the *Telecommunications Act 1997* so the agency can obtain reasonable assistance from communications providers to support the agency's powers (such as those under the TIA Act);
 - authorising the Inspector-General of Taxation to make a disclosure to the NACC under the *Taxation Administration Act 1953* and enabling the NACC to disclose information received from the Inspector-General for the purposes of the NACC Bill; and
 - ensuring that the Ombudsman does not have to decide not to investigate before they can make a referral to the NACC under the *Ombudsman Act 1976*.
254. The Consequential Bill would provide the NACC with a range of covert investigative powers consistent with those currently available to ACLEI and other law enforcement agencies. This would mean those powers may only be used to investigate criminal offending, and would be subject to thresholds concerning the seriousness of the offence and reasonableness and appropriateness of the particular power.
255. Schedule 2 to the Consequential Bill would outline the transitional arrangements necessary to support the establishment of the NACC. These arrangements would ensure the effective transition of ACLEI's existing roles and functions to the NACC.

Human rights implications

256. The measures in the Consequential Bill would engage the following human rights contained in the ICCPR:
- the right to an effective remedy contained in article 2(3);
 - the right to a fair trial under article 14(1);
 - the right to the presumption of innocence under article 14(2);

- the prohibition on interference with privacy, and right to reputation, under article 17;
- the right to freedom of expression under article 19(2).

The right to an effective remedy contained in article 2(3) of the ICCPR

257. Article 2(3) of the ICCPR guarantees the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by competent judicial, administrative or legislative authorities. The content of the right also includes an obligation to ensure that the competent authorities enforce such remedies when they are granted.
258. This Consequential Bill would not limit the right to an effective remedy for violations of the rights and freedoms under the ICCPR. Instead, the Consequential Bill would engage the right to an effective remedy by ensuring:
- findings and decisions of the Commissioner can be subject to judicial review;
 - the NACC's use of coercive powers are subject to oversight; and
 - protections for public officials under the PID Act continue to apply for disclosures made directly to the NACC (see items 163, 165, 166, 167 and 168).

Judicial review

259. The Consequential Bill would protect the right to an effective remedy by ensuring findings and decisions of the Commissioner are reviewable under the ADJR Act.
260. A person would be able to seek judicial review in relation to findings and decisions under Part 8 of the NACC Bill, and judicial review more broadly under the *Judiciary Act 1903* or in the High Court's original jurisdiction. For example, a finding of corrupt conduct contained in a report could be subject to judicial review. These measures would promote the right to an effective remedy. While decisions made regarding intermediate steps leading up to the commencement of an investigation or inquiry (for example, under Part 6) would not be reviewable under the ADJR Act (item 2 of Schedule 1), these are interim decisions that are excluded to ensure the NACC's statutory functions are not undermined and that investigations can be conducted in a timely manner.

Oversight of the NACC's covert powers

261. The Consequential Bill would promote the right to an effective remedy by ensuring that the NACC would be subject to effective oversight mechanisms. As is the case with other law enforcement agencies that are authorised to exercise covert powers, the NACC's use of the following covert powers would be subject to oversight by the Commonwealth Ombudsman:
- the NACC's authorisation and conduct of controlled operations under Division 4 Part IAB of the Crimes Act;
 - surveillance devices and computer access powers under the SD Act;
 - telecommunications interceptions, stored communications, telecommunications data (metadata) and international production orders under the TIA Act; and
 - the NACC's access to industry assistance framework under Part 15 of the *Telecommunications Act 1997* to obtain reasonable assistance from communications providers to support the NACC's powers.
262. The NACC would also be conducted overseen by a Parliamentary Joint Committee and an independent Inspector of the NACC, to provide assurance to the Parliament, Government and the public that the NACC is performing its functions fairly and effectively.

Disclosures to the NACC

263. Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information. The Consequential Bill would promote the right to an effective remedy by amending the PID Act to ensure public officials could make direct disclosures to the NACC and, in doing so, would continue to be afforded the protections available to them under the

PID Act for these disclosures (items 163, 165, 166, 167 and 168). These protections include protection from liabilities and reprisal actions. This amendment would ensure that public officials who refer corruption issues to the NACC do not experience detriment on the basis of the agency that they make their disclosures and are able to freely impart relevant information to the NACC.

The right to a fair trial contained in article 14(1) of the ICCPR

264. Article 14(1) of the ICCPR protects the right to a fair and public criminal trial, and public hearing in civil proceedings. It provides that all persons shall be equal before the courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.
265. The following measures in the Consequential Bill may limit the right to a fair trial:
- enabling the NACC to authorise controlled operations under Part IAB of the *Crimes Act 1914* (see items 42 to 62);
 - enabling the NACC to authorise integrity testing operations and to undertake integrity testing of staff members in any Commonwealth agency within the meaning of the NACC Bill (see items 63 to 88); and
 - a measure to make it a function of the ACIC to assist the NACC in making applications for integrity testing authorities and related authorities to conduct controlled operations under the *Crimes Act 1914* (see item 14).

Controlled operations

266. Controlled operations under Part IAB of the *Crimes Act 1914* are covert law enforcement operations conducted for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious criminal offence. For example, a controlled operation could involve a person receiving currency and providing that currency to another person to obtain evidence to be used against persons involved in money laundering.
267. ACLEI is currently one of the agencies able to authorise controlled operations under Part IAB of the *Crimes Act 1914*, along with the AFP and the ACIC.
268. Items 42 to 62 of the Consequential Bill would amend Part IAB to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC and the NACC Bill. Items 35 to 39 would make related amendments to the definitions in section 3 of the *Crimes Act 1914*.
269. These amendments would enable the NACC to authorise controlled operations under Part IAB of the *Crimes Act 1914*. Specifically, the amendments would allow:
- staff members of the NACC to apply to an appropriate authorising officer for an authority to conduct a controlled operation under section 15GH; and
 - the NACC Commissioner and SES staff members of the NACC authorised in writing by the NACC Commissioner to:
 - authorise controlled operations in accordance with section 15GI where those operations relate to the conduct of a corruption investigation within the meaning of the NACC Bill; and
 - vary and cancel operations in accordance with sections 15GO and 15GY.
270. The gathering of evidence through a controlled operation may limit the choices a person has in defending the charges at trial.

Rational connection to a legitimate objective

271. The measures outlined above would serve the legitimate objective of facilitating the prevention and investigation of corrupt conduct. Allowing the NACC to authorise controlled operations would assist in ensuring the NACC can receive sufficient evidence to inform its investigations. The types of conduct the Commissioner would be tasked with investigating would often involve corrupt relationships and may be easy to conceal. Without such covert powers, the NACC may not receive

sufficient evidence to effectively expose corrupt conduct that could be serious or systemic, frustrating the purpose of the NACC, and leaving it unable to fulfil its statutory functions.

Reasonable, necessary and proportionate

272. These measures are reasonable, necessary and proportionate to achieve the legitimate objective of facilitating the investigation and prosecution of criminal offences. Without all relevant information, the NACC may not be able to perform its functions as effectively. Conducting controlled operations would be subject to a number of limitations under the *Crimes Act 1914*, which would ensure that any limitation of the right to a fair trial would be proportionate.
273. The ability to authorise controlled operations is reasonable and necessary given the very nature of corrupt conduct, as public officials involved may be able to easily conceal their behaviour. For example, corrupt public officials may be in positions of power, which could make it difficult for junior officers to come forward and provide evidence. Controlled operations and integrity testing may be the only avenue to collect evidence in relation to such conduct. The power to authorise controlled operations is therefore reasonable and necessary to ensure the Commissioner can effectively facilitate the prevention and investigation of corrupt conduct.
274. The measures would be limited by appropriate safeguards, for example, a NACC authorising officer would only be able to grant authority to conduct a controlled operation if they are satisfied on reasonable grounds:
- that either:
 - a serious Commonwealth offence or a serious State offence that has a federal aspect has been, is being or is likely to be committed; or
 - an integrity testing authority is in effect in relation to an offence that it is suspected has been, is being or is likely to be committed by a staff member of a target agency; and
 - the restrictions on controlled operations and controlled conduct outline in paragraphs 15GI(2)(b) to (h) of the *Crimes Act 1914* apply (these include a requirement to not conduct a controlled operation in such a way that a person is likely to be induced to commit a Commonwealth offence or an offence against a law of a State or Territory that the person would not otherwise have intended to commit, and a requirement that the nature and extent of the suspected criminal activity justify the controlled operation).
275. The admissibility of evidence gathered through a controlled operation would be subject to the rules of evidence and a court's discretion – the court would retain the discretion to exclude the evidence if it considered it had been obtained through entrapment, and where the evidence is intended to be used in proceedings it would be made available to the defendant.
276. As is the case with other law enforcement agencies that are authorised to exercise covert powers, the Commonwealth Ombudsman would oversee the NACC's authorisation and conduct of controlled operations under Division 4 of Part IAB of the *Crimes Act 1914*.

Integrity testing

277. Part IABA of the *Crimes Act 1914* provides a framework for operations that are designed to test the integrity of staff members of the ACIC, the AFP and the Department of Home Affairs, using controlled or simulated situations. Operations may involve offering a staff member an opportunity to engage in conduct, whether lawful or unlawful, so as to contravene principles of behaviour required of persons occupying the position of such a staff member. For example, an integrity test could involve putting false information in a database to catch a person suspected of unlawfully disclosing information.
278. Integrity testing operations may currently be authorised by the agency concerned or, where a corruption issue is involved, by ACLEI. The amendments in items 63 to 88 would enable the NACC to authorise such operations and allow the NACC to undertake integrity testing of staff members in any Commonwealth agency within the meaning of the NACC Bill. Further, item 14 would amend the *Australian Crime Commission Act 2002* making it a function of the ACIC to

assist the NACC in making applications for integrity testing authorities and related controlled operations authorities under the *Crimes Act 1914*.

Rational connection to a legitimate objective

279. The measures outlined above would serve the legitimate objective of facilitating the prevention and investigation of corrupt conduct. Allowing the NACC to conduct integrity testing would act as a deterrent, furthering the NACC's legitimate objective of preventing corrupt conduct. The measures would also provide the Commissioner with another means of investigating suspected corrupt conduct that would constitute an offence. Integrity testing would allow the Commissioner to receive evidence in relation to corrupt conduct that it would likely not otherwise receive.

Reasonable, necessary and proportionate

280. The measures are reasonable and necessary to achieve the legitimate objective of investigating, exposing, and preventing corrupt conduct. Integrity testing would provide an avenue to reveal corrupt conduct in circumstances where it may be difficult to otherwise obtain evidence. As outlined above, corrupt public officials may be in positions of power, which could make it difficult for junior officers to come forward and provide evidence. The measures would enable the deterrence of corrupt conduct by encouraging public officials to consider their actions before they engage in potentially corrupt conduct, such as accepting a bribe.
281. The measures would be limited by the following safeguards:
- the Commissioner, a Deputy Commissioner, or an SES employee of the NACC would only be permitted to authorise an integrity testing operation if they are satisfied that (sections 15JC, 15JE and 15JG of the *Crimes Act 1914*, as amended by items 65 to 75 and 77 to 80);
 - there are reasonable grounds to suspect that an offence punishable on conviction by imprisonment for 12 months or more has been, is being, or is likely to be committed by a staff member of the target agency;
 - it is appropriate in all the circumstances to conduct the operation; and
 - the operation is part of a corruption investigation (within the meaning of the NACC Bill);
 - the admissibility of evidence gathered through an integrity testing operation would be subject to the rules of evidence and a court's discretion – the court would retain the discretion to exclude the evidence if it considered it had been obtained through entrapment and where the evidence is intended to be used in proceedings it would be made available to the defendant.
282. Further, authorised integrity testing operations would not constitute entrapment. The operations would be designed to ensure that the subject of the test is provided with an equal opportunity to pass or fail the test, rather than be induced to fail the test.

The right to the presumption of innocence contained in article 14(2) of the ICCPR

283. Article 14(2) of the ICCPR provides that anyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.
284. The Consequential Bill would limit the right to the presumption of innocence under article 14(2) of the ICCPR, because it would place a reversed evidential burden on defendants with respect to certain offences.
285. Limitations on the right to be presumed innocent must be reasonable, necessary and proportionate to achieve a legitimate objective.

Offences containing reversed evidential burden provisions

286. Offences that contain a 'reversed evidential burden' in the Consequential Bill may amount to a limitation on the right to be presumed innocent. This includes provisions where an evidential burden is created by expressing a matter to be a defence, an exception to an offence or providing that the defendant must prove the matter. Reversing the evidential burden in this way may limit

article 14(2), as a defendant's failure to discharge the burden may permit their conviction despite reasonable doubt as to their guilt. However, under international human rights law, a 'reversed evidential burden' will not necessarily limit the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused. The purpose of the reverse onus provision is relevant in determining its justification.

287. The following amendments in the Consequential Bill would introduce new offences with offence-specific defences, and new circumstances in which an existing offence containing a reversed evidential burden would apply. This would reverse the evidential burden, as the defendant would bear the burden of proving the elements of each new or amended defence.
- Item 10 would amend the existing defence in subsection 121(2) of the *Anti-Money-Laundering and Counter-Terrorism Financing Act 2006* to allow AUSTRAC entrusted persons to record, access or disclose protected information for the purposes of the NACC Bill. A defendant would bear an evidential burden of proving that the record, access or disclosure was made for the purposes of the NACC Bill.
 - Items 15 and 16 would amend the defences in subsections 21C(2) and 21C(4) of the *Australian Crime Commission Act 2002* to provide that it is not an offence to disclose the existence of or information about a notice containing a non-disclosure notation if the disclosure is made as a NACC disclosure. A defendant would bear the burden of proving the disclosure was made as a NACC disclosure.
 - Items 83 to 86 would amend the defences in sections 15JQ and 15JR of the *Crimes Act 1914*. Under these existing provisions, it is an offence to disclose information relating to an integrity testing operation (subsection 15JQ(1)) or to disclose information relating to an integrity testing operation with the intention to endanger the health and safety of any person or to prejudice the effective conduct of an integrity testing operations. It would be a defence to both offences if the disclosure was made in connection with the administration or execution of the NACC Bill, or to the Commissioner concerning a corruption issue or misconduct in relation to an integrity testing operation. A defendant would bear the burden of proving the disclosure was made in connection with administering or executing the NACC Bill, or to the Commissioner for the specified purpose.
 - Item 201 would amend section 355-65 in Schedule 1 to the *Taxation Administration Act 1953* to allow a taxation officer to make a record of and disclose protected information to the Commissioner in relation to taxation matters acquired in the course of performing their duties. It would otherwise be an offence for a taxation officer to disclose protected information. The exemption would apply if the defendant could prove that the disclosure was made to the Commissioner, for the purposes of the NACC Bill, in relation to a corruption issue relating to the ATO or the Inspector-General of Taxation.
 - Item 202 would amend the existing exception in section 355-70 in Schedule 1 to the *Taxation Administration Act 1953* to the offence in section 355-25, to authorise taxation officers to disclose protected information to the NACC as a listed law enforcement agency. A defendant would bear the burden of proving the disclosure was made to an officer of the NACC as an authorised law enforcement agency, and was for the purpose of investigating a serious offence, enforcing a law the contravention of which would be a serious offence, or making, supporting or enforcing a proceeds of crime order.

- Item 203 would insert new section 355-192, which would create two new exceptions to the offence in Section 355-155 in Schedule 1 to the *Taxation Administration Act 1953*. This offence prohibits on-disclosure of protected information by specified persons who have received protected information from a taxation officer for a permitted purpose. The first new exception would apply to the Inspector-General of Taxation, if they made the record or disclosure to the Commissioner or a staff member of the NACC for the purposes of the NACC Bill in relation to a corruption issue relating to the ATO or the Inspector-General of Taxation. The second new exception would apply to the Commissioner or another staff member of the NACC if they received the protected information from the Inspector-General of Taxation, and made the record or disclosure for the purpose of performing a function or duty of the Commissioner or another staff member of the NACC under the NACC Bill. A defendant would bear the burden of proving that the record or disclosure was made in the circumstances permitted by the relevant new exception.
- Item 262 would amend the offence-specific defences in paragraphs 22(5)(c), 22A(5)(c) and 22B(3)(c) of the *Witness Protection Act 1994* to provide that it is not an offence to disclose information about individuals who are participants in the National Witness Protection Program if the disclosure is made as a NACC disclosure. A defendant would bear the burden of proving the disclosure was made as a NACC disclosure.

Rational connection to a legitimate objective

288. The reversed evidential burden provisions in items 10, 15, 16, 83-86, 201-203 and 262 requiring a defendant to prove that their alleged unlawful recording or disclosure of sensitive information was in fact permitted or authorised serve the legitimate objective of:
- preventing the disclosure of sensitive information that could, for example, harm or prejudice a criminal investigation, an integrity testing operation, or the safety of a person;
 - preventing the disclosure of sensitive information that would unreasonably interfere with a person's privacy, or that could reveal the identity of a person where this is not appropriate or safe; and
 - preventing the disclosure of information that could prejudice a NACC or Inspector's investigation or inquiry.
289. Requiring a defendant to prove that an alleged unlawful recording or disclosure of sensitive information was in fact permitted or authorised would put persons subject to non-disclosure obligations on notice to ensure they only disclose protected information if they have appropriate authorisation. This is likely to encourage persons subject to non-disclosure obligations to properly apprise themselves of when a recording or disclosure is or is not permitted under the Consequential Bill. This would reduce the risk of harm or prejudice to criminal investigations, integrity testing operations, and the safety and privacy of individuals.

Reasonable, necessary and proportionate

290. It is reasonable and necessary for the burden of proof to be placed on the defendant where the facts in relation to the defence are peculiarly within the knowledge of the defendant. For example, a defendant is best-placed to give evidence that they made a particular disclosure for the purposes of the NACC Bill (as in items 10, 15, 16, 83-86, 201-203 and 262).
291. Reversed evidential burden provisions are proportionate because, consistent with section 13.3 of the *Criminal Code*, this burden requires the defendant to adduce or point to evidence that suggests a reasonable possibility that a particular matter exists or does not exist. It does not require the defendant to prove those matters beyond reasonable doubt. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove those matters beyond reasonable doubt. The reversed evidential burden provisions in the Consequential Bill also create or amend offence-specific defences that operate in addition to, not instead of, the general defences available at criminal law.

The prohibition on interference with privacy contained in article 17 of the ICCPR

292. Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence, and prohibits unlawful attacks on a person's reputation.
293. The Human Rights Committee has interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The right to privacy may be limited where the limitation is lawful and not arbitrary, and where it is reasonable, necessary and proportionate to achieve a legitimate objective.
294. A number of measures in the Consequential Bill would engage this right, by providing for amendments to a number of Commonwealth Acts that would:
- provide the NACC with information gathering powers;
 - provide the NACC with covert investigation powers; and
 - allow for further information sharing mechanisms (in addition to those provided for under the NACC Bill).

Information gathering powers under existing legislation

295. This Consequential Bill would also engage the right to privacy, by amending relevant legislation to provide the Commissioner with a number of information gathering powers. These powers would allow for interference with individual's privacy through the gathering of personal information.
296. Items 4 to 10 and 112 to 116 of Schedule 1 would give the NACC further powers to compel information from reporting entities and cash dealers under the AML/CTF Act and the *Financial Transactions Reports Act 1988*. Amendments to these Acts would allow the Commissioner to obtain information about financial transactions that may be relevant to a corruption issue under investigation by the NACC.
297. The Consequential Bill would also make a number of amendments to the POC Act (items 158 to 162), including giving the Commissioner powers to:
- obtain information under a notice to a financial institution;
 - access property-tracking documents under a production order;
 - obtain information under a monitoring order;
 - apply for a search warrant; and
 - exercise search powers without a warrant in emergency situations.
298. Generally, these amendments would provide the Commissioner (and other staff members of the NACC) with powers to seek information about accounts held by a person of interest to a corruption investigation and to search for and seize tainted property (such as proceeds of an offence) and evidential material (such as benefits derived from commission of an offence).

Rational connection to a legitimate objective

299. Limitations on the right to privacy through allowing the NACC to obtain information under existing laws would be necessary to achieve to the fundamental aim of the NACC to investigate, expose and prevent corruption.
300. Serious and systemic corruption have significant detrimental impacts on public administration and can erode trust in the Government, Parliament and democracy. Vesting the NACC with these powers would ensure the Commissioner can investigate serious or systemic corruption within the Commonwealth public sector.
301. The ability to exercise information gathering powers ensures the Commissioner can obtain material relevant to the NACC's objectives. Enabling the NACC to receive all relevant information would be critical for making findings of fact in relation to corruption issues and making robust recommendations directed at preventing corruption or mitigating against any adverse consequences

of corruption. These powers would enable the Commissioner to access information and data that would not otherwise be available, and may be critical to an investigation.

Reasonable, necessary and proportionate

302. To undertake its key function of investigating corrupt conduct, the NACC would necessarily be invested with a range of information gathering powers – similar to other investigative bodies. These powers would be limited to situations in which it would be relevant to an investigation into suspected serious or systemic corruption of a criminal nature, and where relevant thresholds are met for use of each power.
303. Money laundering is a key enabler of criminal activity, including offending related to corruption. Information obtained under the AML/CTF Act and the *Financial Transactions Reports Act 1988* should be available to assist the investigation of corruption issues involving corrupt conduct that may be serious or systemic.
304. Providing the NACC with the powers available under the POC Act are reasonable in that these powers are intended to prevent a person who has committed an offence from being able to enjoy the benefit, or reinvest the proceeds, of their criminal conduct. These powers act as a disincentive to possible criminal corrupt actors by minimising any profit motive.
305. The oversight arrangement set out under the NACC Bill would play a critical role in ensuring the exercise of these powers is reasonable, necessary and proportionate. Oversight through a Parliamentary Joint Committee and an independent Inspector of the NACC would provide assurance to the Parliament, Government and the public that the NACC is performing its functions fairly and effectively.

Covert investigative powers

306. This Consequential Bill would also engage the right to privacy, by amending relevant legislation to provide the Commissioner with a number of covert investigative and electronic surveillance powers. These powers would allow for interference with individual's privacy through the surveillance and gathering of personal information.
307. These measures would engage the right to privacy, by allowing the collection, use and storage of personal data related to individuals.
308. In particular, the Consequential Bill would engage the right to privacy through amendments to the SD Act (items 188 to 204) and the TIA Act (see items 206 to 260). This would provide the NACC:
- surveillance device powers under the SD Act;
 - computer access powers under the SD Act;
 - interception powers for serious offences under the TIA Act;
 - access to stored communications (for example emails, SMS or voice messages stored on equipment) under the TIA Act; and
 - access to telecommunications data under the TIA Act.
309. Information gathered using these powers may consist of personal information. The use of information gathered under these Acts would be subject to the limitations of each Act around the use or disclosure of this information.
310. In addition, items 263 to 270 would amend the *Telecommunications Act 1997* to give the NACC and certain state agencies access to the industry assistance framework under Part 15 of the Act. This would provide the NACC and state agencies with ancillary powers to request assistance from communications providers to access encrypted information stored on devices gathered through the NACC's exercise of other powers.

Rational connection to a legitimate objective

311. Limitations on the right to privacy through obtaining information through covert investigative powers would be necessary to achieve the fundamental aim of the NACC to investigate, expose and prevent corrupt conduct.

312. Serious and systemic corruption have significant detrimental impacts on public administration and can erode trust in the Government, Parliament and democracy. Vesting the NACC with these powers would ensure the Commissioner can investigate serious or systemic corruption within the Commonwealth public sector.
313. The ability to exercise covert investigative and surveillance powers ensures the Commissioner can obtain material relevant to the NACC's objectives. Enabling the NACC to receive relevant information would be critical for making findings of fact in relation to corruption issues and making robust recommendations directed at preventing corruption or mitigating against any adverse consequences of corruption. These powers would enable the Commissioner to access information and data that would not otherwise be available, and may be critical to an investigation.
314. Vesting certain state agencies with industry assistance powers would ensure state-based anti-corruption agencies can obtain reasonable assistance from communications providers to support their investigation functions.
- Reasonable, necessary and proportionate
315. The NACC would be invested with a range of investigative powers in order to effectively undertake its key function of investigating corrupt conduct. These covert powers would be limited to situations in which it would be relevant to an investigation into suspected serious or systemic corruption of a criminal nature, and where the offence is of sufficient seriousness to meet the threshold for use of each power.
316. Thresholds would apply for the issuing of surveillance device and computer access warrants under the SD Act. An eligible Judge or a nominated AAT member may grant such warrants for a corruption investigation by the Commissioner if satisfied that there are reasonable grounds for the Commissioner's suspicions that:
- one or more relevant offences have been, are being, are about to be, or are likely to be, committed;
 - an investigation into those offences is being, will be, or is likely to be, conducted; and
 - the use of a surveillance device, or access to data held in a computer, is necessary in the course of that investigation for the purpose of enabling evidence to be obtained of the commission of the relevant offences or the identity or location of the offenders.
317. Similarly, under the TIA Act, an eligible Judge or a nominated AAT member may grant an interception warrant if satisfied that, among other things, there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the relevant telecommunications service, and that the information obtained would be likely to assist in connection with the investigation of a serious offence in which the person (or a person with whom they are communicating) is involved. A serious offence is defined in section 5D of the TIA Act.
318. In addition, in determining whether a warrant or production order should be issued under the SD Act or the TIA Act, the issuing Judge or AAT member would also be required to have regard to the extent to which the privacy of any person is likely to be interfered with as a result of exercising the warrant, and the existence of any alternative means of obtaining the evidence or information (subsections 16(2) and 27C(2) of the SD Act, subsections 46(2), 46A(2), 116(2) and 180F of the TIA Act, and subclauses 30(5), 39(5) and 48(5) of Schedule 1 to the TIA Act).
319. The oversight arrangement set out under the NACC Bill would play a critical role in ensuring the exercise of these powers is reasonable, necessary and proportionate. Oversight through a Parliamentary Joint Committee and an independent Inspector of the NACC would provide assurance to the Parliament, Government and the public that the NACC is performing its functions fairly and effectively.
320. These oversight mechanisms would operate in addition to the Commonwealth Ombudsman's oversight of the NACC's exercise of covert investigative powers. As is the case with other law enforcement agencies that are authorised to exercise covert powers, the Ombudsman would oversee the NACC's use of the following mechanisms:

- surveillance devices and computer access powers under the SD Act;
- telecommunications interceptions, stored communications, telecommunications data (metadata) and international production orders under the TIA Act; and
- industry assistance under the *Telecommunications Act 1997*.

321. The Commonwealth Ombudsman would also provide oversight of state-based anti-corruption commissions to the extent they exercise industry assistance powers.
322. Oversight by the Commonwealth Ombudsman would provide further assurance that the exercise of powers that limit the right to privacy are reasonable, necessary and proportionate.

Information sharing

323. The Consequential Bill would further engage the right to privacy in that it would allow for reciprocal information sharing between the Commissioner and relevant agencies. The information that may be shared through these arrangements may include personal information, or information considered to fall within the scope of the right to privacy.
324. A number of measures in Schedule 1 Part 2 of the Consequential Bill would provide for reciprocal information sharing between agencies and the Commissioner.
325. For example, items 4 to 10 would amend the AML/CTF Act to provide that information may be shared between the Commissioner (and other staff members of the NACC) and AUSTRAC for the purposes of the Consequential Bill, or in connection with the performance or exercise of the person's functions, powers or duties. Similar information sharing arrangements would be made for the AFP Act (items 20 to 33), the IGIS Act (items 117 to 121) and the *Data Availability and Transparency Act 2021* (items 108 to 111).
326. Schedule 1 of the Consequential Bill would also amend the *Crimes Act 1914*, to allow constables and Commonwealth officers to use and share documents and things that have been seized or produced under the *Crimes Act 1914* for corruption investigations, public inquiries, NACC corruption investigations and NACC complaint investigations (items 40 and 41).

Rational connection to a legitimate objective

327. The information sharing mechanisms provided for under the Consequential Bill would be critical to supporting both the Commissioner's and the Inspector's investigation and inquiry functions, by allowing other agencies to refer relevant information and material where appropriate.
328. Limiting the right to privacy through the disclosure of personal information, including identifying information, would enable the Commissioner or the Inspector to aid a corruption investigation being undertaken jointly with another agency, or a related investigation being undertaken by a Commonwealth agency, or a State or Territory government entity. This recognises the NACC's prevention functions as part of a broader integrity framework, and its role in supporting the proper enforcement of the law.

Reasonable, necessary and proportionate

329. Information sharing is particularly necessary, given the nature of the matters that the Commissioner may work on and the potential for overlap with the work of other Commonwealth integrity agencies and law enforcement agencies such as the AFP.
330. Effective information sharing mechanisms would be necessarily dependent on partial limitations to the right to privacy. It would be necessary at times for agencies to share personal information, including identifying information and information regarding a person's conduct, with the NACC to support its anti-corruption functions.
331. Such limitations to the right to privacy would be proportionate, in that exceptions allowing for the disclosure of information are limited to targeted anti-corruption and law enforcement purposes under the Consequential Bill and other Acts of the Commonwealth. For example, such purposes would include allowing the AFP to share a document obtained in the course of a criminal investigation with the NACC where it is relevant to a corruption investigation.

332. On this basis, limitations to the right to privacy are reasonable, necessary and proportionate to achieve the legitimate objective of conducting investigations or inquiries under the Consequential Bill, while preventing the disclosure of sensitive information and ensuring relevant powers are exercised with proper authority and subject to appropriate safeguards and oversight.

National Anti-Corruption Commission Bill 2022

PART 1 PRELIMINARY

1.1 This Part deals with a number of preliminary matters, including the commencement and general application of the NACC Bill, the objects of the NACC Bill and the definitions.

Clause 1—Short title

1.2 This clause provides for the short title of the Act to be enacted by the NACC Bill to be the *National Anti-Corruption Commission Act 2022*.

Clause 2—Commencement

1.3 This clause would provide for the commencement of each provision in the NACC Bill.

1.4 The NACC Bill would generally commence on a single day to be fixed by Proclamation. However, provisions for the establishment of the Committee (Division 1 of Part 10) would commence on the day following Royal Assent. This is necessary to ensure the Committee can review and approve candidates for the positions of Commissioner, Deputy Commissioners and the Inspector in advance of the NACC being established (see clause 178).

1.5 It is not necessary to commence provisions relating to the appointment of the Commissioners (Division 1 of Part 12) or the Inspector (Division 2 of Part 10) to facilitate the Committee approval process or, following the Committee's approval, the appointment of the office-holders (see section 4 of the *Acts Interpretation Act 1901*). Appointments made prior to the day fixed by proclamation would commence on that day.

1.6 The Government intends for the remaining provisions of the NACC Bill to commence by proclamation in mid-2023 and for the NACC to be operational from that time.

1.7 If a provision of the NACC Bill does not commence within the 12-month period beginning on the day on which the NACC Bill receives Royal Assent, it would commence on the day after the end of that period. A 12-month commencement period is appropriate considering the work necessary to stand-up the Commission as a new Commonwealth entity following the passage of the NACC Bill. The 12-month period extends beyond the Government's planned commencement in mid-2023 to address the risk of delay, including a delay outside the Government's control, for example relating to the Committee's approval of a Commissioner.

1.8 Part 1, including this clause, would commence on the day the NACC Bill receives Royal Assent. This is a formality and would not enable any substantial operation of the NACC Bill.

Clause 3—Objects of this Act

1.9 This clause would outline the objects of the NACC Bill. As section 15AA of the *Acts Interpretation Act 1901* provides that statutes should be interpreted in accordance with their objects, all the other provisions of the NACC Bill are to be read, as far as is possible, as being designed to carry out these objects.

Investigating serious or systemic corrupt conduct

1.10 The NACC Bill would facilitate the detection of corrupt conduct and the timely investigation of corruption issues that could involve corrupt conduct that is serious or systemic.

1.11 The NACC would be a specialised investigative body tasked specifically with investigating allegations of serious or systemic corrupt conduct.

1.12 Corrupt conduct may constitute criminal conduct. The NACC and the Inspector would be able to investigate corrupt conduct that may constitute an offence, including as a law enforcement investigation with the primary purpose of gathering evidence to support the prosecution of any offence that is substantiated.

- 1.13 Corrupt conduct may also involve serious conduct that is incompatible with a public official’s position but that is not addressed by the criminal law. In these circumstances, the Commissioner could still exercise most of their powers to investigate the issue but the investigation and any consequences flowing from it would be of an administrative character.

Timeliness of investigations

- 1.14 The Government expects the NACC to conduct investigations in a timely manner and produce its reports in a timely manner. The timeliness of these processes is an important reputational safeguard and ensures allegations of corruption do not weigh on a person for an excessive length of time. What constitutes the ‘timely’ investigation of a particular corruption issue will depend on the scale and complexity of the issue, and all of the circumstances of a case. As such, it would be inappropriate for the NACC Bill to direct the Commissioner towards any particular timeframe for investigations. The question of whether an investigation would be capable of being ‘timely’ would, however, be a relevant consideration for the Commissioner or Inspector when considering whether to commence or continue a corruption investigation.
- 1.15 This object is not intended to weigh against the investigation of past corruption issues, provided that the investigation is conducted in a timely fashion after the corruption issue comes to the Commissioner or Inspector’s attention.
- 1.16 The importance of the timeliness of investigations is also reflected in the design of the Commissioner and Inspector’s powers, and the obligations imposed on Commonwealth agencies and other persons under the NACC Bill, including through:
- requirements for agency heads and persons with responsibilities under the PID Act to refer corruption issues that they suspect may involve corrupt conduct, as soon as is reasonably practicable after becoming aware of the issue, and to include with the referral all information relevant to the issue that is in their possession or control;
 - broad discretions for the Commissioner and Inspector to deal with corruption issues, supported by powers to conduct preliminary investigations to confirm the existence or nature of a corruption issue, or assist them to decide whether or how to deal with the issue in a timely fashion;
 - powers for the Commissioner and Inspector to obtain information and documents from Commonwealth agencies with a minimum of formality, as well as a broader suite of investigative powers—including, in particular, powers to require the production of information or documents within a specified timeframe, or a person’s attendance at a hearing at a particular time; and
 - a reporting process that facilitates the timely finalisation and provision of reports, subject to procedural fairness requirements.

Enabling referral for prosecution, civil proceedings or disciplinary action

- 1.17 The NACC Bill would enable, after investigation of a corruption issue, the referral of persons for criminal prosecution, civil proceedings or disciplinary action. The NACC would be an investigative rather than a judicial body. If, during the course of a corruption investigation or public inquiry, the Commissioner uncovers evidence of criminal conduct—whether that conduct is also corrupt conduct or not—the Commissioner could refer that evidence to prosecuting authorities for criminal prosecution before a court, or to a relevant police force for further investigation. Only a court would be able to make a finding of criminal guilt or impose punishments on an offender.
- 1.18 Given the broad scope of corrupt conduct within the NACC’s jurisdiction, evidence obtained during an investigation or inquiry may not support a criminal prosecution. However, evidence could also be provided to other Commonwealth agencies responsible for commencing civil proceedings or taking disciplinary action against a person. For example, evidence could be referred to a regulator empowered to seek a civil penalty or evidence could be referred to a person’s employing agency for appropriate disciplinary action, including the termination of the person’s employment.

Preventing corrupt conduct

- 1.19 The NACC Bill supports the prevention of corruption in a number of ways, including by giving the NACC education and prevention functions.
- 1.20 By enabling the publication of investigation reports in the public interest, the NACC Bill would enable the public exposure of corrupt conduct in appropriate circumstances. The NACC Bill would also enable the Commissioner to conduct public inquiries into corruption risks and vulnerabilities in the Commonwealth, and measures to prevent corruption in Commonwealth agencies. The Commissioner may invite public submissions and hold public hearings in relation to such inquiries.
- 1.21 In the course of performing their functions, the Commissioner will obtain valuable information and insights into corruption risks, vulnerabilities and trends, of both a general and specific nature. In addition to using such information for the purpose of corruption investigations, the Commissioner would be able to use this information to provide education and information about corruption, and the detrimental effects of corruption on public administration and the Australian community. Such education and information may be provided to other Commonwealth agencies, as well as more broadly—including to State or Territory government entities, and to the public at large. Providing this education and information would be a function of the Commissioner (see paragraph 17(h)). The Commissioner would also be able to use such information in the performance of their functions of:
- collecting, correlating, analysing and disseminating general information and intelligence about corrupt conduct (see paragraph 17(i)); and
 - reporting, and making recommendations, to the Minister concerning the need for, or desirability of, legislative or administrative reform in relation to any matters dealt with by the NACC Bill (see paragraph 17(j)).

Clause 4—Simplified outline of this Act

- 1.22 This clause would provide a simplified outline of the NACC Bill, including the framework it would create for the Commissioner and the NACC to deal with corruption issues.
- 1.23 The simplified outline would be included to assist readers to understand the substantive provisions of the NACC Bill. The outline is not intended to be comprehensive. It is intended that readers should rely on the substantive provisions of the NACC Bill.

Clause 5—Application of this Act

- 1.24 This clause would provide that the NACC Bill applies both within and outside Australia, and to the external territories.
- 1.25 By providing the Commissioner with jurisdiction within and outside Australia and in every external Territory, the Commissioner would be able to investigate the conduct of public officials located overseas (for example, when travelling or living overseas on posting) and, in limited circumstances, conduct hearings overseas (see also clause 79).

Clause 6—Crown to be bound

- 1.26 This clause would provide that the NACC Bill will bind Crown in each of its capacities. This reflects the fact that government entities and public officials would be subject to obligations under the NACC Bill. For example, State or Territory government entities may receive information from the NACC or during the course of a joint investigation to which a confidentiality direction or requirement applies (see clauses 100 and 233 respectively).
- 1.27 This clause would also provide that the Crown would not be liable to a pecuniary penalty or to be prosecuted for an offence under the NACC Bill.

Clause 7—Definitions

- 1.28 This clause would set out the Dictionary for the NACC Bill and define the following terms.

- 1.29 **Accountable authority** has the same meaning as in the PGPA Act. The accountable authority of a Commonwealth entity is responsible for the entity for the purposes of the finance law, including the PGPA Act. Accountable authorities include the secretaries of Departments of State and Parliamentary Departments, the heads of certain statutory authorities and the boards of corporate Commonwealth entities. The accountable authority of many Commonwealth agencies will be the head of the agency for the purposes of the NACC Bill.
- 1.30 **AFP** means the Australian Federal Police. The Commissioner may work with the AFP and AFP members to conduct corruption investigations. The AFP is also a Commonwealth agency subject to the NACC's jurisdiction and a Commonwealth integrity agency.
- 1.31 **AFP Commissioner** means the Commissioner of Police appointed under the AFP Act. The AFP Commissioner is the head of the AFP.
- 1.32 **Annual report** is defined in subclauses 198(1) and 271(1). The Commissioner and the Inspector would be required to report on the performance of their functions during each financial year.
- 1.33 **Agency head** is defined in clause 11. The head of an agency would generally be responsible for referring corruption issues arising within their agency to the Commissioner (see clause 33).
- 1.34 **Australia**, when used in a geographical sense, includes the external Territories.
- 1.35 The **Australian Geospatial-Intelligence Organisation** forms part of the Department of Defence but would be treated as a separate Commonwealth agency for the purposes of the NACC Bill. The Australian Geospatial-Intelligence Organisation would be an intelligence agency, reflecting the nature of its work. Appropriate arrangements would be in place for intelligence agencies, for example to protect sensitive information dealt with by the Australian Geospatial-Intelligence Organisation.
- 1.36 **Australian travel document** means an Australian passport or a travel-related document issued under the *Australian Passports Act 2005*. Under clause 88, the Commissioner may apply for a court order that a witness deliver an Australian travel document or a foreign equivalent to prevent the witness from leaving the country.
- 1.37 **Authorised discloser** is defined in clause 227 to include the Commissioner and the Inspector. The confidentiality requirements in Part 11 permit authorised disclosers to disclose information obtained by the NACC and the Inspector in specific circumstances.
- 1.38 **Authorised officer** means:
- the Commissioner;
 - a Deputy Commissioner; or
 - a person appointed as an authorised officer by the Commissioner under clause 267.
- 1.39 Authorised officers would be able to exercise certain investigative powers on behalf of the NACC, for example, applying for and executing search warrants.
- 1.40 **CEO** means the Chief Executive Officer of the NACC, a position established by clause 251.
- 1.41 **Civil penalty proceeding** means a proceeding for a civil penalty in relation to a contravention of a law of the Commonwealth or of a State or Territory.
- 1.42 **Commissioner** means the National Anti-Corruption Commissioner established by clause 16.
- 1.43 **Committee** means the Parliamentary Joint Committee on the National Anti-Corruption Commission (see Division 1 of Part 10). The Committee would oversee the NACC.
- 1.44 **Commonwealth agency** is defined in clause 11. Staff members of Commonwealth agencies (see clause 12) would be public officials subject to the NACC's jurisdiction.

- 1.45 **Commonwealth company** has the same meaning as in the PGPA Act. A Commonwealth company is a body corporate that is incorporated, or taken to be incorporated, under the *Corporations Act 2001* that the Commonwealth controls directly (see section 89 of the PGPA Act). Staff members of Commonwealth companies are public officials subject to the NACC's jurisdiction. For example, NBN Co Limited is a Commonwealth company.
- 1.46 **Commonwealth contract** is defined in clause 13. A person providing goods or services for a Commonwealth contract may be a contracted service provider or a staff member of a Commonwealth agency.
- 1.47 **Commonwealth entity** has the same meaning as in the PGPA Act. In section 10 of that Act, a Commonwealth entity is:
- a Department of State;
 - a Parliamentary Department established under the *Parliamentary Service Act 1999*, for example the Department of Parliamentary Services;
 - a listed entity, as prescribed by an Act or Schedule 1 to the PGPA Rule, for example the ATO or the AFP;
 - 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 by an Act or the PGPA Rule to be a Commonwealth entity, for example Land Councils listed in section 7A of the PGPA Rule.
- 1.48 The High Court and the Future Fund Board of Guardians are not Commonwealth entities. Staff members of the High Court—excluding the Justices of the Court—and members of the Future Fund Board of Guardians are still public officials subject to the NACC's jurisdiction (see paragraphs 2.105 to 2.107).
- 1.49 **Commonwealth integrity agencies** are listed in clause 15. The Commissioner may only investigate a corruption issue that a Commonwealth integrity agency has previously investigated if the new investigation is in the public interest (see clause 45).
- 1.50 **Confiscation proceeding** is defined in clause 136 to mean a proceeding under the POC Act and equivalent State and Territory legislation. Different rules would apply to the collection, use and disclosure of investigation material that relates to a relevant confiscation proceeding that is on foot (see for example clause 58).
- 1.51 **Completion report** means a report prepared by a Commonwealth agency on the completion of an investigation of a corruption issue that was referred to the agency by the Commissioner (see clause 52).
- 1.52 **Constable** means:
- a member or special member of the AFP; or
 - a member of the police force or police service of a State or Territory.
- 1.53 The Commissioner would be able direct a constable or an authorised officer to detain a person the Commissioner considers is in contempt of the NACC (see clause 85).
- 1.54 A **container** includes:
- a trailer or other like receptacle, whether with or without wheels, that is used for the movement of goods from one place to another, including a shipping container;
 - any baggage; and
 - any other thing that is or could be used for the carriage of goods, whether or not designed for that purpose.
- 1.55 A container is included in the definition of **premises** (see paragraph 1.133) and may be the subject of a search warrant.

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- 1.56 **Contract** includes any arrangement, agreement, deed or understanding. This extended definition would mean a person may be a contracted service provider even if the person provides services to the Commonwealth without consideration. However, the definition is not intended to cover pre-contractual activities that do not amount to a settled arrangement, agreement, deed or understanding.
- 1.57 **Contracted service provider** is defined in clause 13. A provider, or an employee or officer of a provider, may be a staff member of the Commonwealth agency administering the relevant Commonwealth contract.
- 1.58 **Contravene**, in relation to a certificate issued under clause 235 or 236, is defined in those clauses. A disclosure would contravene a certificate if the disclosure would be contrary to the public interest according to the terms of the certificate.
- 1.59 A **conveyance** includes an aircraft, vehicle or vessel. A conveyance is included in the definition of **premises** (see paragraph 1.133) and may be the subject of a search warrant.
- 1.60 **Corrupt conduct** is defined in clause 8. The existence of a corruption issue (see clause 9) concerning alleged corrupt conduct forms the basis for the NACC's jurisdiction. However, the Commissioner would only be able to investigate a corruption issue if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.
- 1.61 **Corporate commonwealth entity** has the same meaning as in the PGPA Act. A corporate Commonwealth entity is a Commonwealth entity that is a body corporate (see paragraph 11(a) of the PGPA Act), for example the Commonwealth Scientific and Industrial Research Organisation. Staff members of corporate commonwealth entities are public officials subject to the NACC's jurisdiction.
- 1.62 **Corruption investigation** is defined in clause 41 to mean an investigation of a corruption issue by the Commissioner, including a joint investigation with a Commonwealth agency, or State or Territory Government entity. The Commissioner would only be able to investigate issues if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.
- 1.63 **Corruption issue** is defined in clause 9. The existence of a corruption issue concerning alleged corrupt conduct forms the basis for the NACC's jurisdiction. A corruption issue does not include a NACC corruption issue.
- 1.64 **Criminal proceeding** means a prosecution for an offence against a law of the Commonwealth or of a State or Territory.
- 1.65 **Defence Department** means the Department administered by the Minister administering Part III of the *Defence Act 1903*.
- 1.66 The **Defence Intelligence Organisation** forms part of the Department of Defence but would be treated as a separate Commonwealth agency for the purposes of the NACC Bill. The Defence Intelligence Organisation would be an intelligence agency, reflecting the nature of its work. Appropriate arrangements would be in place for intelligence agencies, for example to protect sensitive information dealt with by the Defence Intelligence Organisation.
- 1.67 **Deputy Commissioner** means a National Anti-Corruption Deputy Commissioner, a position established under clause 18.
- 1.68 **Derivative material** is defined in clause 133 to mean any evidence, information, document or thing obtained directly or indirectly from investigation material (defined in clause 99).
- 1.69 **Detriment** is defined in clause 29. The term has its ordinary meaning and includes disadvantage with respect to a person's employment, including the termination or an alteration of the person's position to their detriment (see paragraph 4.50).
- 1.70 **Direction to produce** means a direction issued by the Commissioner to the head of a Commonwealth agency requiring the agency head to produce information, documents or things for the purposes of a corruption investigation (see clause 57).
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- 1.71 **Entrusted person** is defined in clause 227 to mean staff members of the NACC, the Inspector and a person assisting the Inspector. Entrusted persons are subject to the confidentiality requirements in Part 11.
- 1.72 **Exempt secrecy provision** means:
- Part 11 (secrecy and access) of the AML/CTF Act;
 - section 34 of the IGIS Act (concerning the secrecy of information held by the IGIS and their staff);
 - a secrecy provision (see paragraph 1.148) under the *My Health Records Act 2012*;
 - a secrecy provision in Part VIIIA of the *Privacy Act 1988* (concerning COVIDSafe app data);
 - section 45 of the SD Act (a prohibition on use, recording, communication or publication of protected information or its admission in evidence);
 - section 45B of the SD Act (a prohibition on use, recording, communication or publication of protected network activity warrant information or its admission in evidence);
 - section 63 of the TIA Act (a prohibition on dealing in intercepted information or interception warrant information);
 - section 133 of the TIA Act (a prohibition on dealing with accessed information); or
 - a secrecy provision that is a provision of a taxation law, for example:
 - a law of which the Commissioner of Taxation has general administration such as the provisions of Division 355 in Schedule 1 to the *Taxation Administration Act 1953* (concerning the protection of information that was disclosed or obtained under or for the purposes of a taxation law); and
 - section 70-35 of the *Tax Agent Services Act 2009* (concerning the protection of official information that was disclosed or obtained under or for the purposes of that Act);
 - a secrecy provision that is expressed to apply despite the NACC Bill; and
 - anything done under an exempt secrecy provision.
- 1.73 An exempt secrecy provision would not be overridden by the NACC Bill. This means a person may not need to provide certain information to the Commissioner or another person for the purposes of the NACC Bill. For example, the Commissioner cannot require a person to provide access to personal medical information protected under the *My Health Records Act 2012*. There is a compelling individual interest in preserving the privacy of this information, which is unlikely to be particularly relevant to a corruption investigation.
- 1.74 The distinguishing feature of other exempt secrecy provisions from secrecy provisions more generally (see paragraph 1.148) is that they provide a complete regime for the use and protection of information obtained under relevant Commonwealth law. The NACC Bill preserves the effect of these specific kinds of secrecy provisions by providing exceptions to general secrecy overrides. This does not mean that the Commissioner cannot obtain information subject to an exempt secrecy provision. Rather, the Commissioner must access that information in accordance with those provisions, including as amended by the Consequential Bill.
- 1.75 **Federal Court** means the Federal Court of Australia.
- 1.76 **Finance law** has the same meaning as in the PGPA Act and is the collective term for that Act, the rules and other instruments made under that Act, and the Appropriation Acts.
- 1.77 **Foreign Affairs Department** is defined in clause 240 to mean the Department administered by the Minister administering the *Diplomatic Privileges and Immunities Act 1967*. Under that clause, the Commissioner or Inspector would be required to consult the Foreign Affairs Department about matters concerning foreign officials and certain conduct of foreign nationals.
- 1.78 **Head** is defined as follows:
- in relation to a Commonwealth agency—head is defined in subclause 11(1);

- in relation to a State or Territory government entity—head means the person holding, or performing the duties of, the principal office in respect of the entity;
- 1.79 **Hearing** means a hearing held under the NACC Bill (see Division 3 of Part 7).
- 1.80 The **IGIS** is the Inspector-General of Intelligence and Security. The IGIS is the head of a Commonwealth agency—the Office of the Inspector-General of Intelligence and Security. The Office is a Commonwealth integrity agency. Further, the IGIS plays an important role in dealing with corruption issues concerning intelligence agencies (see, for example, clause 34).
- 1.81 **IGIS official** means the IGIS and staff assisting the IGIS under subsection 32(1) of the IGIS Act.
- 1.82 A charge for an offence, or a confiscation proceeding, is **imminent** in the circumstances set out in clause 132. An imminent charge or proceeding is treated in the same way as a charge or proceeding that is on foot. Additional requirements apply to the Commissioner’s powers and the use and disclosure of investigation material when they relate to a charge or proceeding that is imminent or on foot.
- 1.83 **Inquiry report** means a report prepared following a public inquiry (see clause 164).
- 1.84 **Inspector** means the Inspector of the NACC, who is responsible for overseeing the NACC and is established by clause 182.
- 1.85 **Inspector-General of Biosecurity** means the person appointed under section 566A of the *Biosecurity Act 2015*.
- 1.86 **Inspector-General of Live Animal Exports** means the office established by section 9 of the *Inspector-General of Live Animal Exports Act 2019*.
- 1.87 **Inspector-General of the Australian Defence Force** means the office established by section 110B of the *Defence Act 1903*.
- 1.88 **Inspector-General of Water Compliance** means the office established by section 215B of the *Water Act 2007*.
- 1.89 The four Inspectors-General defined at paragraphs 1.85 to 1.88 above would be treated as independent Commonwealth agencies and as if they do not form part of the Department of Agriculture, Fisheries and Forestry, or the Department of Defence (see paragraphs 2.111 to 2.113). This reflects their independence from the Departments they oversee. The four Inspectors-General and their staff would be Commonwealth integrity agencies.
- 1.90 **Intelligence agency** means:
- the Australian Geospatial-Intelligence Organisation;
 - ASIS;
 - ASIO;
 - the Australian Signals Directorate;
 - the Defence Intelligence Organisation; or
 - the Office of National Intelligence.
- 1.91 The NACC Bill would establish a number of arrangements for dealing with corruption issues that concern intelligence agencies. These arrangements would be designed to protect sensitive and intelligence information used by those agencies, while allowing corruption issues to be investigated.
- 1.92 **Intelligence information** is defined in clause 239. That clause provides for the Commissioner and the Inspector to enter into arrangements with intelligence agencies for obtaining, storing, accessing, using or disclosing intelligence information.
- 1.93 **International relations** has the meaning given by section 10 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*: ‘political, military and economic relations with foreign governments and international organisations’.

- 1.94 **International relations certificate** means a certificate issued by the Attorney-General under clause 236. These certificates may restrict the disclosure of information on the grounds that the disclosure would harm or prejudice Australia's international relations in relation to information that was communicated in confidence to Australia by a foreign government under an international agreement.
- 1.95 **Investigation material** is defined in clause 99. Restrictions apply to the use and disclosure of investigation material.
- 1.96 **Investigation report** means a report prepared following a corruption investigation (see clause 149).
- 1.97 **Law enforcement agency** means an authority or person responsible for the enforcement of the laws of the Commonwealth, or of a State or Territory. This would include the AFP, and the police force or police service of a State or Territory.
- 1.98 **Law of the Commonwealth** includes a law in force in an external Territory or the Jervis Bay Territory, so far as the law is in force because of an Act providing for the acceptance, administration or government of that Territory.
- 1.99 **Legal aid officer** is defined in clause 84 to mean a member, or member of staff, of an authority established by or under a law of a State or Territory for purposes that include providing legal assistance. The regulations would be able to prescribe additional legal aid officers in connection with legal financial assistance provided under the regulations (see paragraph 13.44).
- 1.100 **Legal practitioner** means a barrister, a solicitor, a barrister and solicitor or a legal practitioner, of the High Court or of the Supreme Court of a State or Territory.
- 1.101 **Magistrate** is defined in clause 112 to mean a magistrate who is remunerated by salary or otherwise, and includes a Judge, or acting Judge, of the Local Court of the Northern Territory. That clause permits the Commissioner to apply to a magistrate for the retention, forfeiture, disposal or destruction of a thing produced to the Commissioner if the thing is likely to be used in the commission of a serious offence.
- 1.102 **NACC** means the National Anti-Corruption Commission, as established by clause 20.
- 1.103 **NACC Act process** means:
- a corruption investigation;
 - a NACC complaint investigation;
 - a NACC corruption investigation; or
 - a public inquiry.
- 1.104 A NACC Act process does not include:
- an investigation conducted by a Commonwealth agency following a referral of a corruption issue by the Commissioner;
 - an investigation of a NACC corruption issue by the Commissioner following a referral of the issue by the Inspector; or
 - a preliminary investigation conducted by either the Commissioner or the Inspector.
- 1.105 **NACC Commissioner** means the Commissioner or a Deputy Commissioner.
- 1.106 **NACC complaint investigation** means an investigation by the Inspector of a complaint against the NACC (see clause 212).
- 1.107 **NACC corruption investigation** means an investigation of a NACC corruption issue conducted by the Inspector (see clause 210).

- 1.108 **NACC corruption issue** is defined in clause 201. The existence of a NACC corruption issue concerning alleged corrupt conduct with a connection to the NACC (for example because it concerns the conduct of a NACC staff member) forms the basis for the Inspector’s jurisdiction. The Inspector would only be able to investigate NACC corruption issues if the Inspector is of the opinion that the issue could involve corrupt conduct that is serious or systemic. A NACC corruption issue is not also a corruption issue.
- 1.109 **NACC disclosure** is defined in clause 35 to include the provision of any evidence or information under the NACC Bill to the Commissioner, the IGIS or the Inspector. A person who makes a NACC disclosure receives certain protections, including immunities from liability and protections against reprisals.
- 1.110 **NACC investigation report** means a report prepared following a NACC corruption investigation (see clause 215).
- 1.111 **Non-disclosure notation** means a requirement attached to a notice to produce or a summons requiring a person not to disclose information about the notice or summons, or other official matters (see clause 81 and paragraph 1.114).
- 1.112 **Notice to produce** means a notice issued under clause 58 requiring a person to provide information, documents or things to the Commissioner.
- 1.113 **Occupier** of premises is defined in clause 268 to mean the person apparently in charge of the premises.
- 1.114 **Official matter** is defined in clause 81 to mean:
- a corruption investigation;
 - any other investigation or inquiry under the NACC Bill; or
 - court proceedings.
- 1.115 An official matter may be past, present or contingent. An official matter connected with a summons or notice to produce may be protected by a non-disclosure notation (see clause 95).
- 1.116 **Official of a registered industrial organisation** means a person who holds an office (within the meaning of the *Fair Work Act 2009*) in an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009*. Despite holding an office and exercising functions under an Act, these officials are not statutory office holders or staff members of Commonwealth agencies for the purposes of the NACC Bill because their offices and functions are not public in nature. The offices relate to the relevant organisation or association. An official may be a public official for the purposes of the NACC Bill on another basis.
- 1.117 **Paid work** means work for financial gain or reward (whether as an employee, a self-employed person or otherwise). Office holders appointed under the NACC Bill would be subject to restrictions on their ability to undertake other paid work.
- 1.118 **Parliamentarian** means:
- a senator;
 - a member of the House of Representatives;
 - a Minister of State (whether or not the Minister is a senator or a member of the House of Representatives);
 - 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;
 - 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
 - any other person to whom remuneration is payable under section 49 of the *Parliamentary Business Resources Act 2017*.

- 1.119 The *Parliamentary Presiding Officers Act 1965* provides for a person to be deemed the Speaker of the House of Representatives or President of the Senate during vacancies in those offices. For example, section 6 of that Act provides that the Presiding Officer of a House at the time the House is dissolved or expires is deemed to continue to be the Presiding Officer of that House until a new Presiding Officer is chosen. As the person remains able to exercise official powers and perform official functions despite not being a parliamentarian in the ordinary sense, they would be included in the definition to bring their conduct within the NACC's jurisdiction.
- 1.120 A parliamentarian recontesting an election remains a parliamentarian subject to the NACC's jurisdiction throughout the election period. Section 49 of the *Parliamentary Business Resources Act 2017* provides that remuneration is payable to a parliamentarian following the dissolution of the relevant House of Parliament at least until the next election if the person recontests that election (if they are re-elected, their remuneration does not cease). During that time the person is not legally a senator or member of the House of Representatives. However, because the person continues to derive public resources and may influence public affairs using their former position, they would be included in the definition to bring their conduct within the NACC's jurisdiction.
- 1.121 A Minister of State need not be a senator or member of the House of Representatives for a three-month period, for example when the relevant House of Parliament is dissolved (section 64 of the Constitution). If a Minister was a member of a House of Parliament that is dissolved—and the Minister does not seek re-election to enliven section 49 of the *Parliamentary Business Resources Act 2017*—the Minister is still taken to be a parliamentarian and a public official while continuing to serve as a Minister.
- 1.122 A member or senator who is also a Minister is a parliamentarian and a public official with respect to both capacities. Their conduct in either capacity may be subject to the NACC's jurisdiction.
- 1.123 **Parliamentary office** means the office of a parliamentarian. Staff members of a parliamentarian are public officials subject to the NACC's jurisdiction.
- 1.124 A person is a **permanent resident of Australia** if the person is a permanent resident within the meaning of the *Australian Citizenship Act 2007*, which generally refers to a person who holds a permanent visa (see clause 240).
- 1.125 **Person assisting** the Inspector is defined in clause 195.
- 1.126 **PGPA Act** means the Public Governance, Performance and Accountability Act 2013.
- 1.127 An event is **post-charge** if it occurs at a time when a witness has been charged with a relevant offence and that charge is still to be resolved (or such a charge is imminent) (see clause 130).
- 1.128 An event is **post-confiscation application** if it occurs at a time when a relevant confiscation proceeding has commenced against a witness and that proceeding is still to be resolved (or such a proceeding is imminent) (see clause 135).
- 1.129 An event is **pre-charge** if it occurs when a witness has not been charged with a relevant offence (and no such charge is imminent) or all such charges have been resolved (see clause 129).
- 1.130 An event is **pre-confiscation application** if it occurs when a relevant confiscation proceeding has not been commenced (and no such proceeding is imminent) or all such proceedings have been resolved (see clause 134).
- 1.131 For the four definitions outlined above, the events are:
- a notice to produce is issued to the person;
 - a summons is issued for the person to attend a hearing as a witness;
 - a hearing commences at which the person is to appear as a witness;
 - material at a hearing that relates to the person becomes investigation material; or
 - such investigation material or derivative material is used or disclosed.

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- 1.132 Additional rules apply to those events if they occur in post-charge or post-confiscation application circumstances. This reflects the fact that those events are more likely to affect a person’s trial for a relevant offence, or relevant confiscation proceedings, in those circumstances.
- 1.133 **Premises** includes a place, a container or a conveyance (see paragraphs 1.54 and 1.59). This term is used in the context of search warrants issued under the NACC Bill.
- 1.134 **Private hearing summons** means a summons to attend a hearing all or part of which is to be held in private (see clause 95).
- 1.135 A **proceeds of crime authority** is defined in clause 138 to mean:
- a proceeds of crime authority within the meaning of the POC Act, being the AFP Commissioner or the Director of Public Prosecutions; or
 - an authority of a State or Territory responsible for conducting a confiscation proceeding under a corresponding State or Territory law prescribed in the regulations made under that Act.
- 1.136 This term is relevant to the use and disclosure of investigation material (see clause 109).
- 1.137 A **prosecuting authority** is defined in clause 105 to mean an individual or authority, authorised by or under a law of the Commonwealth or of a State or Territory to prosecute an offence. The term is intended to include the CDPP and their State and Territory counterparts. It is also intended to extend to other bodies that may have prosecutorial functions, such as State or Territory police.
- 1.138 A **prosecutor** of a witness is defined in clause 105 to mean an individual who is a prosecuting authority or is employed or engaged by a prosecuting authority and who:
- makes, or is involved in the making of, a decision whether to prosecute the witness for a relevant offence; or
 - is one of the individuals engaging in such a prosecution of the witness.
- 1.139 The definition is intended to cover only the persons who are directly involved in the prosecution of a witness for a relevant offence or the decision about whether to prosecute the witness. This would include:
- the Director of Public Prosecutions;
 - the prosecutors who have carriage of the prosecution of the witness, other prosecutors who assist that prosecutor in the prosecution of the witness or who assist in making the decision to prosecute the witness;
 - counsel engaged to assist in the prosecution of the witness; and
 - support staff who assist in the prosecution of the witness.
- 1.140 The definition is not intended to cover the following:
- police or law enforcement officers involved in the investigation which led to the witness being charged;
 - police or law enforcement officers who are witnesses in a prosecution of the witness for a relevant offence;
 - persons involved in the prosecution of the witness for unrelated offences (whether that prosecution is by the same prosecuting authority or another prosecuting authority);
 - persons involved in the prosecution only of persons other than the witness.
- 1.141 **Protected information report** means a report of an investigation or inquiry containing sensitive information or section 235 certified information. Protected information reports are disseminated on a limited basis. The unauthorised disclosure of a protected information report would be an offence against clause 234.
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- 1.142 **Protected suspect** is defined in clause 132 by reference to Part IC of the *Crimes Act 1914*, and generally means a person being questioned about a Commonwealth, State or Territory offence that has not been arrested for the offence. If a person is a protected suspect, it indicates a charge against them is imminent (see paragraph 1.82).
- 1.143 **Public inquiry** means a public inquiry conducted under Part 9.
- 1.144 **Public official** is defined in clause 10. Public officials are subject to the NACC's jurisdiction.
- 1.145 **Relevant confiscation proceedings** are defined in clause 137. The existence of confiscation proceedings relevant to an event (or the imminence of such proceedings) will make the event a post-confiscation application event and additional restrictions will apply to the event.
- 1.146 **Relevant offence** is defined in clause 131. The existence of a charge for an offence relevant to an event (or the imminence of such a charge) will make the event a post-charge event and additional restrictions will apply to the event.
- 1.147 A charge for an offence, or a confiscation proceeding, is **resolved** in relation to a person, as set out in clause 139 by reference to the relevant proceedings and any appeal proceedings. An event will not be a post-charge event if all charges for relevant offences have been resolved (and no new charges are imminent).
- 1.148 A **secrecy provision** is a provision of a law of the Commonwealth (or anything done under such a provision) that purports to prohibit:
- the use of information, or a document or thing;
 - dealing with information, or a document or thing;
 - making a record of information, or a copy of a document or thing;
 - the disclosure or publication of information;
 - the production of, or the publication of the contents of, a document;
 - the production of a thing; or
 - access to information, a document or thing.
- 1.149 Provisions of the NACC Bill override secrecy provisions (other than exempt secrecy provisions: see paragraph 1.72). This is the case regardless of whether the secrecy provision:
- commenced before the commencement of the NACC Bill; or
 - is expressed to apply despite any other law.
- 1.150 The Commissioner's information-gathering powers would not be limited by the provisions of any other law unless that law is an exempt secrecy provision. This would include a law that expressly excludes the Commissioner's power to obtain information or expressly excludes the operation of the Act to be enacted by the NACC Bill. This requirement is to ensure that Parliament is expressly alerted to any restrictions that might be sought in the future that would limit the Commissioner's capacity to carry out their statutory functions including the investigation of corruption issues that, in the Commissioner's opinion, could involve corrupt conduct that is serious or systemic. That is, it is not intended that laws that contain merely general or blanket privacy provisions, restricting access to information other than to specified persons, should apply to the Commissioner. This approach reflects the approach to the relationship between the *Auditor-General Act 1997* and other laws.
- 1.151 The definition of secrecy provision does not need to apply to State and Territory laws because those laws would not operate to displace a power to obtain—or an obligation to provide—information, documents or things under a Commonwealth law such as the Act to be enacted by the NACC Bill.

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- 1.152 **Section 235 certified information** means information that is about a matter or contained in a document specified in a certificate in force under clause 235. Section 235 certificates are issued by the Attorney-General to protect against the disclosure of information or documents that would be contrary to the public interest.
- 1.153 **Security matters** are defined in clause 237. The Commissioner or Inspector must generally consult with the head of ASIO under that clause if they become aware of a security matter.
- 1.154 **Sensitive information** is defined in clause 227. There are restrictions on the disclosure of sensitive information throughout the NACC Bill.
- 1.155 **Serious offence** is defined in clause 112. That clause permits the Commissioner to apply to a magistrate for the retention, forfeiture, disposal or destruction of a thing produced to the Commissioner if the thing is likely to be used in the commission of a serious offence.
- 1.156 A **staff member** of a Commonwealth agency is defined in clause 12. Staff members of Commonwealth agencies are public officials subject to the NACC's jurisdiction.
- 1.157 A **staff member** of the NACC is defined in clause 266.
- 1.158 **State or Territory government entity** means:
- a department of a State or Territory; or
 - a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory.
- 1.159 **Statutory office holder** is defined in clause 14. Statutory office holders would be staff members of Commonwealth agencies and public officials within the NACC's jurisdiction.
- 1.160 **Subsidiary** has the same meaning as in the PGPA Act: an entity that is controlled by a corporate Commonwealth entity or Commonwealth company (see section 8 of the PGPA Act).
- 1.161 **Summons** means a summons issued under clause 63.
- 1.162 **Superior court judge** is defined in clause 90 to mean:
- a Judge of the Federal Court; or
 - a Judge of the Supreme Court of a State or Territory.
- 1.163 **Takes a reprisal** is defined in clause 29. Taking a reprisal or threatening to take a reprisal against a person for making a NACC disclosure is an offence against clause 30.
- 1.164 **Travel document** is defined in clause 88 to mean an Australian travel document or a passport or travel document issued by a foreign country. The Commissioner may apply to a Judge of the Federal Court under that clause for an order that a person surrender a travel document in certain circumstances.
- 1.165 **Witness** generally means a person who is required to comply with a notice to produce or a summons, or who gives evidence at a hearing.
- 1.166 **Witness** also has a specific meaning in relation to investigation material and derivative material that is provided for in clause 99. There, a witness is a person referenced in the definition of investigation material, which would include a person who complies with a notice to produce or who gives evidence during the course of a hearing, a person about whom allegations have been raised, or a person of interest to an investigation or inquiry.
- 1.167 However, there would be no witness for investigation material that consists of the fact that a private hearing has been or may be held.

PART 2 KEY CONCEPTS USED IN THIS ACT

- 2.1 This Part would set out the key concepts that would establish the Commissioner’s jurisdiction to:
- deal with corruption issues (as defined in clause 9) concerning allegations of corrupt conduct (as defined in clause 8) by public officials (as defined in clause 10), as well as any person whose conduct adversely affects, or could adversely affect, the honest or impartial exercise by a public official of their powers, functions or duties; and
 - where the Commissioner is of the opinion that a corruption issue could involve corrupt conduct that is serious or systemic—investigate the issue (as provided for in clause 41).
- 2.2 The definition of corrupt conduct would be central to the operation of the NACC Bill, and to the Commissioner’s jurisdiction. The definition would incorporate elements drawn from the LEIC Act and legislation establishing State and Territory anti-corruption bodies, and would cover criminal and non-criminal forms of corrupt conduct.
- 2.3 The Commissioner would be able to deal with corruption issues—being an issue of whether a person has engaged in, is engaging in, or will engage in corrupt conduct—in a number of ways (see clause 41).
- 2.4 The Commissioner would have broad jurisdiction to investigate corruption issues that could involve *corrupt conduct that is serious or systemic* by public officials—including Commonwealth ministers, parliamentarians, staff members of Commonwealth agencies (including staff members of parliamentarians), statutory office holders and contracted service providers. This broad jurisdiction would ensure that, where an individual exercises powers or performs functions on behalf of the Commonwealth in any capacity, they are likely to be within the Commission’s jurisdiction, regardless of the exact nature of their role. There would only be very limited exceptions to this general principle (see paragraph 2.145).
- 2.5 The Commissioner would also have jurisdiction to investigate a corruption issue that could involve serious or systemic conduct by any person that could adversely affect the honesty or impartiality of a public official’s conduct. This would ensure that the Commissioner could fully investigate serious or systemic corrupt conduct and transactions between public officials and third parties, as well as attempts by third parties to corrupt public officials.
- 2.6 The seriousness of particular instances of corrupt conduct or alleged corrupt conduct may vary significantly. The Commissioner would be able to deal with less serious corruption issues in other ways, for example, by referring the issue to the relevant Commonwealth agency for internal investigation. This would ensure that the Commissioner could focus their resources and capabilities on the investigation of serious or systemic corrupt conduct, while providing avenues for other corruption issues to be addressed by other agencies.

Division 1—Corrupt conduct and corruption issues

- 2.7 This Division would define *corrupt conduct* and *corruption issue*.

Clause 8—Meaning of *corrupt conduct*

- 2.8 This clause would define *corrupt conduct*. This clause is not intended to establish a new standard of conduct by public officials or alter the relationship between those officials and the public as reflected in Australia’s system of representative and responsible government. Rather, 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. This clause would enliven the NACC’s jurisdiction to deal with alleged conduct that breaches those standards and duties and to investigate those allegations that concern serious or systemic conduct. Corrupt conduct within the NACC’s jurisdiction would be defined in subclause 8(1) as follows:
- (a) any conduct of any person (whether or not a public official) that adversely affects, or 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;
- (b) any conduct of a public official that constitutes or involves a breach of public trust;
- (c) 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;
- (d) 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;
- (e) any conduct of a public official in that capacity that constitutes, involves or is engaged in for the purpose of corruption of any other kind.

2.9 Paragraphs 8(1)(a) to (d) of the definition of corrupt conduct are intended to be complementary and mutually reinforcing, rather than mutually exclusive. A particular instance of corrupt conduct may be covered by more than one of paragraphs 8(1)(a) to (d). Paragraph 8(1)(e) is intended to cover corruption of any other kind that is not dealt with in the preceding paragraphs.

2.10 While the definition largely focuses on the conduct of public officials, the definition of corrupt conduct would extend to the conduct of other persons (third parties) in two ways:

- if their conduct adversely affects, or could adversely affect, the honest or impartial exercise of a public official’s powers, or the honest or impartial performance of a public official’s functions and duties (see paragraphs 2.11 to 2.29); and
- if they conspire with another person (whether or not a public official) for that other person to engage in corrupt conduct covered by subclause 8(1) (see paragraphs 2.62 to 2.63).

Conduct of any person – adversely affecting the honest and impartial exercise of powers or performance of functions.

2.11 Paragraph 8(1)(a) would provide that any person engages in corrupt conduct if they engage in conduct that does or could adversely affect the honest or impartial exercise or performance of official powers, functions or duties by a public official.

2.12 Honesty is a core and consistent requirement of a person performing functions or exercising powers as a public official. The term *honest* has its ordinary meaning and requires no elaboration.

2.13 The term *impartial* is intended to be understood in the context of Australia’s system of representative and responsible government. Governments are elected to implement particular commitments, and to make policy and administrative decisions throughout a term of government. Some of those decisions will necessarily benefit some persons more than others. The New South Wales Court of Appeal considered the meaning of the term in the context of the definition of corrupt conduct in section 8 of the *Independent Commission Against Corruption Act 1988* (NSW). In *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 (in which the Court of Appeal provided declaratory relief nullifying the New South Wales Independent Commission Against Corruption’s determination that the Premier of New South Wales, Mr Greiner, had engaged in corrupt conduct), Mahoney JA considered that partial conduct would only constitute corrupt conduct where there is an obligation to act in an impartial manner and a preference was given for a purpose extraneous to the power in question. Mahoney JA articulated (at 161) five elements to indicate partiality:

1. it occurs in the context in which two or more persons or interests are in contest, in the sense of having competing claims;
2. it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another;
3. the advantage must be given in circumstances where there was a duty or at least an expectation that no one would be advantaged in the particular way over the others but, in the relevant sense, all would be treated equally;
4. what was done in preferring one over the other was done for the purpose of giving a preference or advantage to that one; and

5. the preference was given for a purpose which was extraneous to the power in question.

Examples of conduct that would not be considered partial

- 2.14 In the context of Australia's representative democratic system of government, it would not be considered partial, in and of itself, for a Minister or public official to implement the election commitments or policy platform of the government of the day. For example:
- where a government has made a commitment to amend legislation in a particular way then, at face value, the third and fifth elements of Mahoney JA's concept of partiality listed above would not be satisfied—notwithstanding that some persons may benefit more than others, from the effect of the change to the legislation; and
 - where a government has made an election commitment to provide a particular grant to a particular recipient then, subject to the rules of the grants program in question allowing the grant to be made in such a manner, at face value, the third or fifth elements of Mahoney JA's concept of partiality listed above would also not be satisfied.
- 2.15 A limited or single source tender may also be undertaken impartially. In situations where there is a compelling reason to adopt such an approach, there may be no reasonable expectation of equality. Where a limited or single source tender process is followed, the preference given to the sole-source contractor may be given for a proper purpose within the scope of the powers conferred on the official. For example, conducting a limited tender process to procure services that can only be provided by particular businesses on a panel, in compliance with the Commonwealth Procurement Rules, would likely not fall within Mahoney JA's concept of partiality and would be less likely to constitute corrupt conduct.
- 2.16 It may also be appropriate for a public official to employ staff in circumstances where there is not a merit-based recruitment requirement. For example, a Minister may appropriately employ ministerial staff under the *Members of Parliament (Staff) Act 1984* without a merit-based recruitment process. Given the close relationship of trust or confidence, and the importance of political alignment, in such roles, there would be no expectation to undertake a merit-based recruitment process.
- 2.17 A Minister may exercise their discretion in recommending an appointment to a statutory office and can disagree with the advice of officials and reach a different conclusion as to the appropriate person for a role—provided their discretion is not exercised for an improper purpose.

Examples of conduct that could be considered partial

- 2.18 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, Mahoney JA's third limb of partiality may be satisfied as 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.

- 2.19 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. Such a situation may meet Mahoney JA’s third and fifth limbs of partiality. 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— or exercising their powers in an effective manner, as discussed in greater detail at paragraph 2.36. 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.
- Corrupt conduct must be capable of adversely affecting the probity of a public official’s conduct*
- 2.20 Paragraph 8(1)(a) is limited to conduct that could adversely affect the honesty or impartiality (collectively, the probity) of a public official’s conduct in their capacity as a public official. It is not intended to cover:
- conduct that merely affects the efficacy 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.
- 2.21 This approach reflects the majority opinion of the High Court in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1. In that case, the Court considered the meaning of ‘adversely affects’ used in the definition of corrupt conduct in subsection 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW). The majority reasoned (at 10) that extending a definition of corrupt conduct to conduct (for example fraud) adversely affecting the *efficacy* of an official function would ‘result in the inclusion in “corrupt conduct” of a broad array of criminal offences and other unlawful conduct having nothing to do with the ordinary understanding of corruption in public administration’.
- 2.22 It is also appropriate to ensure the Commissioner does not exercise their coercive powers with respect to conduct having nothing to do with the ordinary understanding of corruption in public administration. The more limited application of paragraph 8(1)(a) to conduct adversely affecting the probity of official decision-making, as opposed to its efficacy, helps to ensure the Commissioner exercises their powers appropriately. This would address a key concern the majority expressed in *Cunneen*.
- 2.23 In Australia’s representative democratic system of government, it is expected that 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. Paragraph 8(1)(a) would not cover partial conduct by a third party, unless that conduct could adversely affect the probity of a public official’s conduct. For example, 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.
- 2.24 On the other hand, a person offering a payment or benefit conditional on a decision-maker exercising a power in a particular way would likely be considered to adversely affect the honest and impartial exercise of that decision-maker’s power.
- Conduct of one public official affecting the probity of a second public official’s conduct*
- 2.25 Paragraph 8(1)(a) would apply to the conduct of one public official that could adversely affect the probity of the conduct of a second public official—for example, a senior official using their influence to pressure a junior staff member to make a dishonest or partial decision could be captured under paragraph 8(1)(a). Such conduct could, depending on all of the circumstances, also constitute an abuse of office by the first public official, for the purposes of paragraph 8(1)(c).

Conduct of certain individuals is not covered by paragraph 8(1)(a)

2.26 Paragraph 8(1)(a) would not apply in relation to conduct of any of the following persons:

- the Governor-General and Deputy Governor-General;
- a Justice of the High Court or a judge of a court created by the Parliament;
- a judge of a court of a State or Territory;
- a member of a Royal Commission; or
- the Inspector or a person assisting the Inspector.

2.27 The definition of **public official** also does not apply to these persons (clause 12(5) and paragraph 2.145). The effect of these two carve-outs is that these persons are not capable of engaging in corrupt conduct within the NACC's jurisdiction. These carve-outs are appropriate to:

- ensure that Ministers alone are responsible for their decisions, including those given effect to by the Governor-General who, by constitutional convention, acts on the advice of Ministers (in the case of the Governor-General and Deputy Governor-General);
- maintain proper separation between the Executive and Judicial branches of government (in the case of a Justice of the High Court, a judge of a court created by the Parliament, or a judge of a court of a State or Territory);
- prevent improper interferences by a Commonwealth executive body in State and Territory judicial decision-making (in the case of a judge of a court of a State or Territory);
- prevent inappropriate interference with time-critical investigations and proceedings, and maintain proper independence from government (in the case of a Royal Commissioner); and
- preclude the NACC from interfering with the effective oversight of the exercise of its powers and performance of its functions (in the case of the Inspector or a person assisting the Inspector).

Conduct affecting public official's own powers or functions

2.28 Subclause 8(3) provides that paragraph 8(1)(a) would cover a public official's own conduct, if it has, or could have, the specified adverse effects in relation to the public official's powers, functions or duties. For example, if a public official attempts to solicit a bribe from a third party, but the third party refuses, the public official could still be found to have engaged in conduct that adversely affects their own honest or impartial exercise of its powers, functions, or duties.

Dishonest conduct that is in the proper performance of a public official's functions or duties

2.29 There are limited circumstances where it is within the functions or duties of certain public officials to engage in conduct that may involve dishonesty or partiality—for example, an undercover police officer using an assumed identity in accordance with Part IAC of the *Crimes Act 1914* may mislead persons as to their identity, such as when undertaking an undercover police operation. Paragraph 8(1)(a) applies only to conduct that could adversely affect the honest or impartial exercise of powers, or the performance of functions or duties by a public official—it does not apply to conduct constituting the proper exercise of a power, or the proper performance of function or duty, merely because that conduct involves dishonesty or partiality.

2.30 A member of the AFP would not engage in corrupt conduct, within the meaning of paragraph 8(1)(a), where the member:

- works with an organised criminal group to purportedly import a controlled substance as part of a controlled operation under Part IAB of the *Crimes Act 1914*;
- authorises the use of, or uses an assumed identity in accordance with Part IAC of the *Crimes Act 1914*; or
- provides a payment or benefit to a human source in exchange for information as part of a criminal investigation.

Conduct of a public official—Breach of public trust

- 2.31 Paragraph 8(1)(b) would provide that conduct of a public official that constitutes or involves a breach of public trust would amount to corrupt conduct.
- 2.32 Public office is a public trust—public officials hold their official powers, functions and duties on trust for the public, and are expected to exercise their powers, and to perform their functions and duties, for the purpose for which those powers, functions and duties were conferred. Public officials are also expected to exercise official powers in the public interest.
- 2.33 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.
- 2.34 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.
- 2.35 Decision-making in public office, and the determination of the public interest, can involve the weighing of multiple competing factors and the exercise of judgment. In the absence of an improper purpose, it is not a breach of public trust for a decision-maker to disagree with the advice of officials or reach a different conclusion as to the public interest, and thereby make a different decision to that which has been recommended—provided that, in doing so, the decision-maker does not make the decision or exercise a power for an improper purpose.
- 2.36 Decisions may be made, and powers may be exercised, for multiple or ‘mixed’ purposes. It is possible for a public official to exercise their powers in a way that achieves both the legitimate purpose for which the power was granted, and another improper purpose. In these cases, if the public official would not have exercised their power but for the improper purpose, their conduct may still constitute or involve a breach of public trust. This is the case even if the improper exercise of powers, functions or duties produced a real public benefit.
- 2.37 Comparatively, it would not be a breach of public trust for a decision-maker to exercise a power for the purpose for which it has been conferred, in the hope that they will receive some acknowledgement, recognition or benefit for effectively performing their functions.

Conduct of a public official—Abuse of office

- 2.38 Paragraph 8(1)(c) would provide that conduct of a public official that constitutes, involves, or is engaged in for the purpose of abusing the person’s office as a public official would constitute corrupt conduct.
- 2.39 The concept of an abuse of office by a public official involves the official engaging in improper acts or omissions in their official capacity, that the public official knows to be improper, with the intention of gaining a benefit for themselves or another person or causing a detriment to another person.

- 2.40 However, conduct may still constitute corrupt conduct even if it were not for the personal benefit of the public official or other persons involved in the conduct (see subclause 8(8) and further information at paragraph 2.58). In the context of an abuse of office, this means that a public official may still abuse their office if the public official intended to cause a benefit that was indirect, intangible, or several steps removed from themselves or the other persons involved in their conduct. An abuse of office can be committed through the exercise of influence arising from the person's public office or the use of information obtained in their capacity as a public official, along with any other conduct in that capacity.
- 2.41 For example, 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.
- 2.42 Further, 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.

Conduct of a public official—Misuse of information acquired in capacity as a public official

- 2.43 Paragraph 8(1)(d) would provide that conduct of a public official, or a former public official, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a public official constitutes corrupt conduct.
- 2.44 The concept of a misuse of information or documents acquired in a person's capacity as a public official 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 party. All conduct on this spectrum is capable of being characterised as corrupt conduct. The Commissioner would only be able to investigate a corruption issue after forming an opinion the relevant conduct could constitute serious or systemic corrupt conduct.
- 2.45 Corrupt conduct constituting or involving the misuse of information could encompass the following conduct, but would not be limited to these examples:
- a public servant in the ATO browsing through a celebrity's tax returns when they have no need to access that information;
 - 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.

Conduct of a public official—Corruption of any other kind

- 2.46 Paragraph 8(1)(e) would provide that the definition of corrupt conduct extends to any conduct of a public official in that capacity that constitutes, involves, or is engaged in for the purpose of corruption of any other kind.
- 2.47 This limb of the definition would provide the Commissioner with the flexibility to address emerging areas of corruption that may not currently be foreseen, and may not fall within any of the other more specific limbs of the definition.
- 2.48 Despite its broad framing, paragraph 8(1)(e) would still only apply to conduct that:
- constitutes corruption—such as a deliberate act of dishonesty, breach of the law, or abuse of public trust or power that undermines or is incompatible with the impartial exercise of an official's powers, authorities, duties or functions; and

- is engaged in by a public official, in their capacity as a public official—this limb could not apply to the conduct of any other person or of a public official in their private capacity unrelated to their public functions and duties. For a person, for example an employee of a contracted service provider, who is only a public official in relation to particular activities, the conduct would need to have a connection with those activities to constitute corrupt conduct.

2.49 A comparable provision appears in paragraph 6(1)(c) of the *Law Enforcement Integrity Commission Act 2006*.

Extensions, exclusions and clarifications

2.50 The definition of corrupt conduct would include provisions that:

- extend its application to corrupt conduct that occurred prior to the NACC’s establishment and conduct amounting to a conspiracy or attempt to engage in corrupt conduct;
- exclude from its application conduct amounting to exercises of powers and functions of a judicial nature and conduct amounting to the use of public resources to conduct parliamentary business; and
- clarify its application to conduct that did not produce a direct personal benefit to the persons involved, and to conduct engaged in with the agreement or participation of others.

Extension to past corrupt conduct

2.51 The definition would extend to corrupt conduct that occurred before the NACC was established. This means:

- if a person engaged in conduct covered by the definition before the NACC’s establishment, this conduct would be corrupt conduct within the NACC’s jurisdiction; and
- if a former public official, who has ceased to be a public official before the NACC was established, had engaged in any conduct covered by the definition, their conduct would also be corrupt conduct within the NACC’s jurisdiction.

2.52 It is appropriate that the Commissioner is able to investigate allegations of serious or systemic corrupt conduct that occurred before the NACC was established. This reflects the fact that the definition would not impose new standards of conduct in public administration, but would reflect long-standing community expectations of public officials, including the expectation to act in the public interest. It is possible that certain conduct involving public officials could have fallen short of these existing expectations before the NACC was established.

2.53 The definition would enable the Commissioner to investigate serious or systemic corrupt conduct that occurred prior to the NACC’s establishment. The Commissioner would only be able to make a finding of corrupt conduct if the conduct fell within one of the limbs of the definition, at the time it occurred.

2.54 The definition would not establish a criminal offence, and so would not impose retrospective criminal liability for any conduct. Where the Commissioner conducts an investigation into past serious or systemic corrupt conduct and forms a view that the conduct could have constituted a criminal offence at the time it was committed, the Commissioner could refer that conduct and supporting evidence to the CDPP.

Exclusion of judicial powers, functions and duties

2.55 The definition of corrupt conduct would 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 nature. Judges would also not be public officials within the NACC’s jurisdiction (see clause 12 and paragraph 2.145). For example, court registrars’ conduct would be excluded from the NACC’s jurisdiction to the extent they are performing their judicial functions or duties. However, if a registrar engaged in corrupt conduct that was unconnected to their judicial functions or duties, their conduct would be within jurisdiction.

2.56 This exclusion is appropriate to maintain proper separation between the Executive and Judicial branches of government. The NACC would form part of the Executive. Accordingly, it should not interfere with the exercise of judicial power under Chapter III of the Constitution by investigating, referring, or making findings about conduct engaged in only to perform functions or duties, or exercise powers of a judicial nature.

2.57 Further, the definition would not extend to conduct of any person if it only affected the exercise of power, or the performance of a function or duty, of a judicial nature by a public official who is a staff member of the High Court or of a court created by the Parliament.

Clarifying that conduct need not be for personal benefit

2.58 A person does not need to gain a personal benefit in order to engage in corrupt conduct. In some cases, it will be unclear whether the person's conduct involves the person receiving a direct benefit. In other cases, the benefit may be intangible or several steps removed from the persons involved in the conduct. The definition clarifies that corrupt conduct would be within jurisdiction even if there is no direct benefit to the person or public official involved in the conduct.

2.59 For example, 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.

Conduct may be corrupt whether engaged in alone or with others

2.60 A person or public official would not need to be solely responsible or engage in corrupt conduct alone for their conduct to be within the NACC's jurisdiction. This clause would provide that a person may engage in corrupt conduct alone, or with the agreement or participation of other persons (whether or not those persons are public officials). Subclause 8(9) would clarify that a person still engages in corrupt conduct even if other people are participating in the conduct or have agreed to engage in the conduct.

2.61 This rule would not affect whether the other person engaged in corrupt conduct. That person's conduct would only be corrupt or give rise to a corruption issue concerning that person if it satisfied subclause 8(1) or if it constituted a conspiracy to engage in corrupt conduct (see paragraphs 2.62 to 2.63).

Extension to conduct amounting to conspiracy or attempt

2.62 This clause would provide that conduct comprising conspiracy or an attempt to commit or engage in conduct covered by subclause 8(1) is itself corrupt conduct. This would ensure that the Commissioner can investigate persons who attempt, but fail, to engage in corrupt conduct, as well as persons who do not directly engage in corrupt conduct but are nonetheless involved in another person's corrupt conduct.

2.63 A person may also engage in corrupt conduct through either planning or attempting to engage in conduct covered by subclause 8(1). However, there must still be a level moral impropriety, and an overt act, involved in the planning or attempt to engage in corrupt conduct. For example, a hypothetical one-off discussion between two public officials in a Commonwealth agency about engaging in corrupt conduct could not, without more, constitute corrupt conduct. On the other hand, an explicit agreement and plan between a public official and a third party to dishonestly exercise the public official's powers in exchange for benefits which would be shared between the public official and the third party may constitute corrupt conduct.

Clarification that conducting parliamentary business using public resources is not corrupt conduct

2.64 Subclauses 8(11) and (12) would provide that, to avoid doubt, the use of public resources by a parliamentarian to conduct parliamentary business in accordance with the *Parliamentary Business Resources Act 2017* or the *Members of Parliament (Staff) Act 1984* does not constitute corrupt conduct. This would be intended to clarify that the legitimate use of resources within these frameworks would not be considered corrupt conduct for the purposes of the NACC Bill.

- 2.65 The *Parliamentary Business Resources Act 2017* is intended to remain as the central framework to govern the use of public resources by members of Parliament in connection with parliamentary business. It recognises that members of Parliament should be able to access public resources for reasonable costs incurred in conducting their parliamentary business, if they meet their obligations to the public in relation to the use of those resources. Under this framework, members of Parliament have obligations to use public resources for the dominant purpose of conducting parliamentary business and to ensure expenses provide value for money. Expenses provide value for money if they use public money efficiently, effectively and economically, consistent with the obligation on the proper use of public resources by Commonwealth officials under the PGPA Act.
- 2.66 The parliamentary business of a member includes:
- parliamentary duties (activities that relate directly to the member’s role as a member of the Parliament);
 - electorate duties (activities that support or serve the member’s constituents);
 - party political duties (activities that are connected with the member’s political party and their membership of the Parliament); and
 - official duties (activities that relate to the member’s role as an officer holder or Minister of State).
- 2.67 Further detail on each of these terms is contained in the *Parliamentary Business Resources (Parliamentary Business) Determination 2017*.
- 2.68 An activity of a member is not the parliamentary business of a member if the member carries it out for the dominant purpose of either providing a personal benefit to another person or pursuing a commercial purpose of the member or another person.
- 2.69 Public resources under the *Parliamentary Business Resources Act 2017* include expenses, allowances, and any goods, services, premises, equipment or facilities that are available to support a member in conducting parliamentary business. For example, that Act covers travel and accommodation costs, and allowances or the provision of an electorate office.
- 2.70 Political activities that do not involve the use of public resources would not fall within the scope of the NACC’s jurisdiction.
- 2.71 IPEA is responsible for auditing and reporting on parliamentarian’s work expenses and those of their staff. IPEA has a specific power to make a ruling determining that conduct engaged in by a particular member or any other person in relation to travel expenses of, or travel allowances for, was or was not in accordance with the *Parliamentary Business Resources Act 2017*.
- 2.72 Conduct that is not in accordance with the *Parliamentary Business Resources Act 2017* could be considered corrupt conduct and form the basis of a corruption issue if it met other parts of the definition. In such circumstances, the Commissioner would be able to deal with the conduct under clause 40. However, the circumstances in which the Commissioner may decide to deal with such a corruption issue by commencing an investigation would be limited if it involves conduct that would fall within IPEA’s jurisdiction (see clause 46). The Commissioner could only investigate such conduct if IPEA has referred the corruption issue to the Commissioner.
- 2.73 The *Members of Parliament (Staff) Act 1984* provides a framework for the engagement of staff by parliamentarians including recruitment, duties and services during employment, and ceasing current employment.
- 2.74 Under the *Members of Parliament (Staff) Act 1984* and other instruments made under that Act, parliamentarians are entitled to use public resources to employ persons as either personal or electorate office staff. Ministers may also engage consultants as contractors.
- 2.75 This framework is intended to provide a single, consistent source of guidance on the engagement of staff by parliamentarians. The Commissioner would only be able to deal with conduct that was not in accordance with this framework.

2.76 The intention of these subclauses is to provide clarity and certainty to members of parliament in relation to their legitimate use of business resources and engagement of staff, while still allowing the Commissioner to investigate conduct that does not comply with this framework that could involve serious or systemic corrupt conduct—such to the requirement for conduct to be referred by IPEA.

Clarification regarding political activities

2.77 Subclause 8(13) would provide that, to avoid doubt, conduct engaged in as part of a political activity does not constitute corrupt conduct if the conduct does not involve or affect either of the following:

- 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 PGPA Act.

2.78 The term ‘political activity’ would not be further defined, and is intended to refer to activity designed to attain a purpose by the use of political power or by activity in political channels. It is intended to include, for example:

- the internal affairs of political parties’ and individual candidates’ campaigns; and
- activities such as political campaigning or advertising, fundraising events, or campaign meetings, involving parliamentarians and candidates for political office, political parties, and third parties.

2.79 Such activities, where undertaken in a manner that does not involve or affect the exercise of power, or the performance of a function or duty, by a public official or the use of public resources would not involve corrupt conduct.

2.80 ‘Public resources’ are defined under the PGPA Act as:

- relevant money – which means money standing to the credit of any bank account of the Commonwealth or a corporate Commonwealth entity, or money held by the Commonwealth or a corporate Commonwealth entity;
- relevant property – which means property (other than money) owned or held by the Commonwealth or a corporate Commonwealth entity; or
- appropriations – being moneys appropriated from the Consolidated Revenue Fund to fund expenditure by the Government.

2.81 A political activity would not involve the use of public resources merely because it involves the use of funds:

- that have previously been appropriated and provided to a political party or candidate following a previous election in accordance with Part XX of the *Commonwealth Electoral Act 1918*;
- the political party or candidate expects to receive or claim under that Part of the *Commonwealth Electoral Act 1918*.

2.82 The expenditure of such funds, once received by a political party or candidate, would not involve ‘expenditure by the Government’.

2.83 This subclause is intended to provide clarity and certainty regarding the circumstances in which political activities would not be characterised as corrupt, in the context of Australia’s representative democratic system of government. For example, 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. Political activities would only be capable of constituting corrupt conduct if they do or could adversely affect the probity of a public official’s conduct (see paragraph 2.20), or involve the use of public resources. 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.

Clause 9 – Meaning of *corruption issue*

- 2.84 This clause would provide the definition of corruption issue. Corruption issues may be dealt with by the Commissioner in accordance with clause 40, including by investigating the issue where the Commissioner is of the opinion that the corruption issue could involve corrupt conduct that is serious or systemic.
- 2.85 A corruption issue would be an issue of whether a person:
- has already, at some time in the past, engaged in corrupt conduct as defined in clause 8;
 - is currently engaging in corrupt conduct; or
 - will, at any time in the future, engage in corrupt conduct.
- 2.86 A ***corruption issue*** is a key concept that would establish the scope of the NACC’s jurisdiction. The Commissioner would only be empowered to deal with a corruption issue. A corruption issue is a question about potential ***corrupt conduct*** (see clause 8) that arises for potential investigation on the basis of an allegation or other information that suggests a person may have engaged in corrupt conduct, or is engaging or will engage in that conduct. The purpose of the investigation would be to test any allegation and, where appropriate, make an assessment on the corruption issue, that is, to determine whether the person engaged in the alleged corrupt conduct or is engaging or will engage in that conduct.

When an allegation or information raises a corruption issue

- 2.87 For an allegation, or other information, to give rise to a corruption issue, the allegation or information would need to give rise to, bring up, or put forward all of the essential elements of a corruption issue, as defined. Central to the definition of a corruption issue is the related definition of corrupt conduct (see clause 8).
- 2.88 If an allegation or information concerns conduct that would not satisfy the definition of corrupt conduct, the allegation would not give rise to a corruption issue that is within the Commissioner’s jurisdiction to investigate or otherwise deal with. This is the case even if an allegation raises an issue concerning some other form of misconduct. The NACC would be a specialised investigative body tasked specifically with investigating serious or systemic corruption, and would only be able to deal with corrupt conduct as defined. However, in these circumstances, the Commissioner may:
- refer allegations of misconduct outside of their jurisdiction to a more appropriate person or entity to investigate (see paragraph 6.25); or
 - conduct a preliminary investigation to determine the existence of a corruption issue and determine whether it could involve serious or systemic corrupt conduct (see clause 42).

Probative value of allegation or information not relevant at this stage

- 2.89 The probative value of the allegation or information would not be relevant to the question of whether it raises a corruption issue. It would not be necessary for the allegation or information to *prove* that a person engaged in corrupt conduct. However, the allegation or information would need to coherently allege, either explicitly or implicitly, that each element of the definition of corrupt conduct was present in the alleged conduct of the relevant person.
- 2.90 The probative value of the allegation or information would be relevant at a later stage, specifically to whether and how a corruption issue that is raised may and should be dealt with under the NACC Bill. The Commissioner may conduct a corruption investigation (if the Commissioner is of the opinion that the corruption issue could involve serious or systemic corrupt conduct) or otherwise require an investigation of a corruption issue and, in doing so, test the accuracy of an allegation.
- 2.91 The Commissioner need not investigate or otherwise deal with every allegation that raises a corruption issue (see paragraph 6.29).

Corruption issues concerning future conduct

2.92 A corruption issue would generally relate to conduct that is alleged to have occurred or to be ongoing. A corruption issue could also arise in the form of a question about whether a person will engage in corrupt conduct at some time in the future. This question may arise, for example, because of concerns that the integrity of a public official has been compromised.

Division 2—Public officials

Clause 10—Meaning of *public official*

2.93 This clause would provide the definition of public official. A public official would be defined as:

- a parliamentarian—the extended definition of a parliamentarian in clause 7 includes a Minister, and means an individual will be treated as a parliamentarian and a public official even when the relevant House of Parliament is dissolved and the individual is not a senator or member (see paragraphs 1.118 to 1.122);
- a staff member of a Commonwealth agency (see clauses 11 and 12); or
- a staff member of the NACC (see clause 266).

2.94 A person who is acting for and on behalf of, or as a deputy or delegate of, any of the persons or bodies set out in this clause will also be a public official.

Division 3—Commonwealth agencies and the heads of those agencies

Clause 11—Commonwealth agencies and the heads of those agencies

2.95 This clause would specify particular bodies that are Commonwealth agencies for the purpose of the NACC’s jurisdiction. This clause would also specify the persons who are the heads of those Commonwealth agencies.

Table 3—Commonwealth agencies and the heads of those agencies

	<i>Commonwealth agency</i>	<i>Head of the agency</i>
1	A parliamentary office	The parliamentarian
2	A Commonwealth entity	The accountable authority of the entity or, if that authority is a group, the chief executive officer of the entity or another person prescribed by the regulations.
3	A Commonwealth company	The chief executive officer of the company or another person prescribed by the regulations
4	A subsidiary of a Commonwealth company or a corporate Commonwealth entity	The chief executive officer of the subsidiary or another person prescribed by the regulations
5	The High Court	The Chief Executive and Principal Registrar of the High Court
6	The Australian Geospatial-Intelligence Organisation	The Director of the Australian Geospatial-Intelligence Organisation
7	The Defence Intelligence Organisation	The Director of the Defence Intelligence Organisation
8	The Inspector-General of the Australian Defence Force	The Inspector-General of the Australian Defence Force
9	The Inspector-General of Biosecurity	The Inspector-General of Biosecurity
10	The Inspector-General of Live Animal Exports	The Inspector-General of Live Animal Exports
11	The Inspector-General of Water Compliance	The Inspector-General of Water Compliance

- 2.96 The Governor-General would be able to prescribe additional Commonwealth agencies in the regulations. A prescribed Commonwealth agency would need to be:
- established for a public purpose; and
 - established by, or under, a law of the Commonwealth (other than a general law allowing incorporation as a company or body corporate).

Parliamentary offices

- 2.97 A parliamentary office would consist of the staff of the office, primarily persons engaged under the *Members of Parliament (Staff) Act 1984* (see paragraph 2.123).
- 2.98 A parliamentarian would be the head of a parliamentary office but would not be considered a staff member of the office (see paragraph 2.123). A parliamentarian would still be a public official subject to the NACC’s jurisdiction.
- 2.99 The extended definition of a parliamentarian in clause 7 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 (see paragraphs 1.118 to 1.120).

Commonwealth entities

- 2.100 A Commonwealth entity (as referenced at item 2 of Table 3) is:
- a Department of State;
 - a parliamentary department established under the *Parliamentary Service Act 1999*, for example the Department of Parliamentary Services;
 - a listed entity, as prescribed by an Act or Schedule 1 to the PGPA Rule, for example the ATO or the AFP;
 - 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 by an Act or the PGPA Rule to be a Commonwealth entity, for example Land Councils listed in section 7A of the PGPA Rule.
- 2.101 The accountable authorities of Commonwealth entities are listed in section 12 of the PGPA Act, and include the Secretary of a Department of State or Parliamentary Department, and the governing body of a body corporate (for example, the board). For listed entities, the law prescribing the listed entity will prescribe the accountable authority of the entity.
- 2.102 The High Court and the Future Fund Board of Guardians are not Commonwealth entities and their positions in relation to the NACC Bill are outlined in paragraphs 2.105 to 2.107, 2.116 and 2.117.

Commonwealth companies and subsidiaries

- 2.103 A Commonwealth company (as referenced in item 3 of Table 3) is a body corporate that is incorporated, or taken to be incorporated, under the *Corporations Act 2001* that the Commonwealth controls directly (see section 89 of the PGPA Act). For example, NBN Co Limited is a Commonwealth company.
- 2.104 A subsidiary of a corporate Commonwealth entity or a Commonwealth company (as referenced at item 4 of Table 3) means an entity that is controlled by the corporate Commonwealth entity or Commonwealth company (see section 8 of the PGPA Act).

The High Court

- 2.105 The High Court (as referenced at item 5 of Table 3) is specifically listed as a Commonwealth agency for the purposes of the NACC Bill because the High Court is not a Commonwealth entity for the purposes of the PGPA Act.
- 2.106 The Chief Executive and Principal Registrar of the High Court is the head of the agency for the purposes of the NACC Bill.

- 2.107 For the purposes of the NACC Bill, the High Court does not include the Justices of the High Court, who do not fall within the NACC's jurisdiction (see paragraph 2.145).

The Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation

- 2.108 The Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation (as referenced at items 6 and 7 of Table 3) ordinarily form part of the Department of Defence, a Commonwealth entity and Commonwealth agency for the purposes of the NACC Bill. However, the organisations would be treated as separate Commonwealth agencies for the purposes of the NACC Bill.
- 2.109 The arrangements for the Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation reflect the specialist intelligence functions of those Organisations and their oversight by the IGIS, and facilitate their classification as intelligence agencies for the purposes of the NACC Bill. Although the Organisations form part of the Defence Department for other purposes, the Organisations are organised in a way that is sufficiently separate from the Department to allow them to be treated as separate Commonwealth agencies for the purposes of the NACC Bill.
- 2.110 The Director of each organisation would be the head of the relevant Commonwealth agency for the purposes of the NACC Bill.

The Inspector-General of the Australian Defence Force

- 2.111 The Inspector-General of the Australian Defence Force (as referenced at item 8 of Table 3) ordinarily forms part of the Department of Defence, a Commonwealth entity and Commonwealth agency for the purposes of the NACC Bill. However, the Inspector-General would be treated as a separate Commonwealth agency for the purposes of the NACC Bill. This would ensure the Inspector-General maintains its independence from the Department of Defence, which it oversees.
- 2.112 The Inspector-General of the Australian Defence Force would be the head of the relevant Commonwealth agency for the purposes of the NACC Bill.

The Inspectors-General and the Department of Agriculture, Fisheries and Forestry

- 2.113 For the purposes of the NACC Bill, the Inspector-General of Biosecurity, the Inspector-General of Live Animal Exports and the Inspector-General of Water Compliance would each be taken to be Commonwealth agencies in their own right, and not to be part of the Department of Agriculture, Fisheries and Forestry. This would ensure the Inspectors-General maintain their independence from the Department of Agriculture, Fisheries and Forestry, which they oversee.
- 2.114 Each Inspector-General would be the head of the relevant Commonwealth agency for the purposes of the NACC Bill.

The National Anti-Corruption Commission

- 2.115 The NACC would not itself be a Commonwealth agency. However, NACC staff members would be public officials. The NACC and its staff would be subject to special oversight arrangements (see Part 10).

The Future Fund Board of Guardians

- 2.116 The Fund Board of Guardians is not a Commonwealth entity (subsection 10(2) of the PGPA Act) and would not be a Commonwealth agency in its own right for the purposes of the NACC Bill. However, the members of that Board would be staff members of the Future Fund Management Agency for the purposes of the NACC Bill because the purposes of the Agency include assisting the Board (see section 75 of the *Future Fund Act 2006* and paragraph 2.137).
- 2.117 The Chair of the Board is the accountable authority for the Future Fund Management Agency and would be the head of the Agency for the purposes of the NACC Bill.

Division 4—Staff members of Commonwealth agencies

Clause 12—Meaning of *staff member* – Commonwealth agencies

- 2.118 This clause would specify which individuals are staff members of Commonwealth agencies.
- 2.119 This clause is intended to apply broadly. The majority of individuals carrying out official functions on behalf of the Commonwealth, in any capacity, will be designated as staff members of a Commonwealth agency under the NACC Bill. This means conduct of those individuals, if corrupt, would fall within the NACC’s jurisdiction. Similarly, conduct that could affect the honesty or impartiality of those persons in their official capacity may also fall within the NACC’s jurisdiction.
- 2.120 Only very limited exemptions would apply to the broad framing of *staff member*, for example judges, the Governor-General and Royal Commissioners.
- 2.121 The following paragraphs explain in detail the legal bases on which each class of individual is considered to be a *staff member* of a Commonwealth agency. This is primarily of importance to determine which agency or agencies an individual is working for as a staff member. That, in turn, determines which agency heads have responsibility for referring corrupt conduct of that individual (see for example clause 33). These considerations do not have a significant effect on how the Commissioner exercises their jurisdiction or conducts a corruption investigation.
- 2.122 Generally, an individual would be treated as being a staff member of a single Commonwealth agency. However, there may be some circumstances where it is appropriate that a staff member be a staff member of multiple agencies, for example:
- a secondee who is both a staff member of their home agency and the host agency; and
 - an employee of a contracted service provider who provides services under a Commonwealth contract to multiple agencies.
- 2.123 The following would be staff members of a Commonwealth agency:
- the head of the agency for the purposes of the NACC Bill (except for parliamentarians);
 - individuals employed or engaged as consultants by a parliamentarian under Part III, IV, or II of the *Members of Parliament (Staff) Act 1984*;
 - officials of a Commonwealth entity—generally a person who is in, or forms part of, the entity (see section 13 of the PGPA Act);
 - employees of the agency and employees of a staff member of the agency who are engaged on behalf of the Commonwealth;
 - officers and directors of a Commonwealth company or a subsidiary;
 - contracted service providers (see paragraph 2.151) who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract; and
 - secondees to the agency.
- 2.124 The reference to officials of a Commonwealth entity being ‘officials’ within the meaning of the PGPA Act, of the entity:
- includes persons who are prescribed to be officials of a Commonwealth entity by an Act or the PGPA Rule, in accordance with paragraph 13(1)(c) of the PGPA Act—for example, the PGPA Rule prescribes that a member of the ADF is an official of the Department of Defence; and
 - excludes persons who are prescribed to not be officials of a Commonwealth entity by an Act or the PGPA Rule, in accordance with paragraph 13(2)(c) of the PGPA Act—for example, the PGPA Rule prescribes that an officer, instructor or cadet in the Australian Air Force Cadets, the Australian Army Cadets, or the Australian Navy Cadets is not an official of the Department of Defence.

The High Court

- 2.125 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 would be:
- the head of the agency (the Chief Executive and Principal Registrar of the High Court);
 - contracted service providers (see paragraph 2.151) 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 *High Court of Australia Act 1979*.
- 2.126 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 (see paragraph 2.145).

The Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation

- 2.127 Special rules would apply to the Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation. The staff members of each organisation would be:
- the head of the agency (the Director of the Australian Geospatial-Intelligence Organisation and the Director of the Defence Intelligence Organisation);
 - contracted service providers (see paragraph 2.151) who are individuals, and the employees and officers of contracted service providers who provide goods or services for a Commonwealth contract;
 - secondees to the relevant agency; and
 - individuals who are employed in the relevant organisation.

The Inspector-General of Biosecurity

- 2.128 Special rules would apply to the Inspector-General of Biosecurity. The staff members of the agency would be:
- the head of the agency (the Inspector-General of Biosecurity);
 - contracted service providers (see paragraph 2.151) 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 *Public Service Act 1999* who assist the Inspector-General of Biosecurity.

The Inspector-General of Live Animal Exports

- 2.129 Special rules would apply to the Inspector-General of Live Animal Exports. The staff members of the agency would be:
- the head of the agency (the Inspector-General of Live Animal Exports);
 - contracted service providers (see paragraph 2.151) 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

- 2.130 Special rules would apply to the Inspector-General of Water Compliance. The staff members of the agency would be:

- the head of the agency (the Inspector-General of Water Compliance);
- contracted service providers (see paragraph 2.151) 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 *Public Service Act 1999* who assist the Inspector-General of Water Compliance.

The Inspector-General of the Australian Defence Force

2.131 Special rules would apply to the Inspector-General of the Australian Defence Force. The staff members of the agency would be:

- the head of the agency (the Inspector-General of the Australian Defence Force);
- contracted service providers (see paragraph 2.151) 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.

The Administrative Appeals Tribunal

2.132 Special rules would apply to the AAT. The staff members of the agency would be:

- a member (within the meaning of the AAT Act) of the AAT who is not a judge of a court created by the Parliament; and
- a member of staff of the AAT.

2.133 Special rules for the AAT are necessary to prevent non-judicial staff members of the AAT from being treated as staff members of the Attorney-General's Department because of the operation of subclause 12(3) (see paragraph 2.138). The Registrar of the AAT would be the agency head of the AAT as its accountable authority (see subclauses 11(1) and 12(1)).

2.134 Consistent with other provisions excluding judges and judicial functions from the NACC's jurisdiction, a member of the AAT who is a judge cannot be a staff member of the AAT in their non-judicial capacity (see subclauses 8(2) and 12(5) and paragraphs 2.27 and 2.145). This is appropriate to maintain the separation between the Executive and Judicial branches of government.

Special rules apply in place of normal rules

2.135 Staff members of agencies with special rules are generally not staff members of another Commonwealth agency. For example, a person who is a staff member of the Australian Geospatial-Intelligence Organisation or the Defence Intelligence Organisation is not a staff member of the Department of Defence even though, for other purposes, those individuals are employees of the Department. However, an individual who is a contracted service provider to one of those Organisations might also be a contracted service provider to the Department of Defence if they have contracts that relate to both an Organisation and another part of the Department.

Statutory office holders

2.136 Statutory office holders and other individuals exercising Commonwealth powers could be staff members of a Commonwealth agency for the purposes of the NACC Bill.

2.137 A statutory office holder could be a staff member of an agency for different reasons, including because:

- the office holder is the head of an agency for the purposes of the NACC Bill (paragraph 12(1)(b));
- the office holder is an official or officer of the agency (paragraphs 12(1)(c) and (e));

- a purpose of the agency is to assist the office holder or a body of which the office holder is a member (paragraph (a) of item 1 of the table in subclause 12(3)); or
- the primary function of the office holder is to assist the agency or another staff member of the agency in the performance of their functions (paragraph (b) of item 1 of the table in subclause 12(3)).

2.138 Alternatively, if the office holder is not a staff member of a particular agency on one of the bases outlined above, the office holder would be treated as a staff member of the department administered by the minister that administers the law by or under which the office is established (paragraph (c) of item 1 of the table in subclause 12(3)).

Persons with functions or powers under a Commonwealth law

2.139 A person may exercise powers or perform functions conferred by or under a Commonwealth law without being a statutory office holder. Similarly, an individual may be a director, officer, employee or contractor of a body corporate that exercises powers, or performs functions, conferred on the body corporate by or under a law of the Commonwealth.

2.140 Such an individual, whether the functions or powers are conferred directly on them or on the body corporate, would be a staff member of a Commonwealth agency. If the power is exercised, or the function is performed, for the purpose of assisting a Commonwealth agency or another staff member of the agency in the performance of their functions, the individual would be a staff member of that agency. Alternatively, if the function or power does not have that purpose, the individual would be treated as a staff member of the department that administers the law that confers the function or power. This is appropriate to ensure that persons who are exercising statutory powers, or performing statutory functions on behalf of the Commonwealth, are within the NACC's jurisdiction.

2.141 For the purposes of this clause, a power or function conferred by or under the following laws would be disregarded:

- a general law allowing incorporation as a company or body corporate (for example the *Corporations Act 2001*);
- the *Australian Capital Territory (Self Government) Act 1988*;
- the *Northern Territory (Self Government) Act 1978*; or
- a provision of a law prescribed in the regulations.

2.142 Functions and powers conferred under those laws (for example the functions of a director of a private company) are not functions or powers of a public nature that would be appropriate to bring within the NACC's jurisdiction. Similarly, individuals exercising powers or functions conferred by or under a Commonwealth law who are officials of registered industrial organisations would not be staff members of a Commonwealth agency. The functions and powers exercised by these individuals are also not of a public nature.

Persons appointed under section 67 of the Constitution

2.143 A person appointed under section 67 of the Constitution would be treated as a staff member of the Department of the Prime Minister and Cabinet for the purposes of the NACC Bill. Appointments under section 67 are not common but might be made where, for example, there is a need for the appointee to operate independently from the Secretary of a department, or where the appointee is to have functions relating to whole-of-government issues.

Providing for individuals to be staff members of a different agency

- 2.144 The NACC Bill would allow regulations to be made to provide that an individual who would otherwise be a staff member of a particular Commonwealth agency because of the operation of clause 12 is a staff member of a different Commonwealth agency. As discussed at paragraph 2.118 to 2.121, which agency a staff member is working for is primarily of importance for determining which agency head has mandatory obligations to refer corruption issues to the NACC. This regulation-making power is appropriate to ensure that, as circumstances and practices change, individuals are still treated as staff members of the Commonwealth agency that is best-placed to refer corruption issues involving those individuals to the NACC.

Certain individuals are not staff members

- 2.145 None of the following individuals would be staff members of a Commonwealth agency:
- the Governor-General and Deputy Governor-General;
 - a parliamentarian (however, parliamentarians are still ***public officials***, see clause 10 and paragraph 2.93);
 - a Justice of the High Court or a judge of a court created by the Parliament;
 - a judge of a court of a State or Territory;
 - a member of a Royal Commission;
 - a staff member of the NACC (however, staff members of the NACC are still ***public officials***, see clause 10 and paragraph 2.93);
 - the Inspector, or a person assisting the Inspector.
- 2.146 An individual listed above could not be a staff member of a Commonwealth agency even in a different capacity of the individual. For example, a judge who is a member of the AAT would not be a staff member of the AAT even though a non-judicial member of the AAT would be a staff member of the AAT.
- 2.147 At the Commonwealth level, excluding Justices of the High Court and judges of courts created by the Parliament maintains proper separation between the Executive and Judicial branches of government. The exclusion would prevent the NACC from improperly interfering with exercises of judicial power and judicial functions and duties by using its coercive powers to investigate a judge's conduct.
- 2.148 Excluding judges of State and Territory courts would also maintain that separation between executive and judicial power. Further, it would prevent an executive body of the Commonwealth from improperly interfering with State and Territory judicial decisions. This would include judges of State or Territory courts performing Commonwealth functions in their personal capacity.
- 2.149 The NACC Bill would also exclude:
- the Governor-General and any Deputy Governor-General. As discussed at paragraph 2.27, this is appropriate because of the Governor-General's constitutional position, including acting by convention on the advice of Ministers;
 - Royal Commissioners, whose role is time-limited and at arm's length from Government (see paragraph 2.27); and
 - the Inspector and persons assisting, because it would be inappropriate for the NACC to frustrate effective oversight of its performance of its functions and exercise of powers (see paragraph 2.27).
- 2.150 An essential element of these roles is their independence from government. This exclusion ensures the NACC does not interfere with the proper performance of those roles by those individuals.

Clause 13—Meaning of contracted service provider for a Commonwealth contract

2.151 This clause would define the related concepts of a contracted service provider and a Commonwealth contract. These concepts would be incorporated into the definition of a staff member of a Commonwealth agency (see clause 12).

Commonwealth contract

- 2.152 A ***Commonwealth contract*** is a contract, arrangement, agreement, deed or understanding:
- to which the Commonwealth or a Commonwealth agency is a party; and
 - under which goods or services are to be, or were to be, provided to the Commonwealth, a Commonwealth agency, or in connection with the activities of the Commonwealth or an agency.
- 2.153 Clause 7 defines the term contract to include any arrangement, agreement, deed or understanding (see paragraph 1.56).
- 2.154 The definition of a ***Commonwealth contract*** may include procurement arrangements and certain grants, depending on the nature of the relevant arrangement (and regardless of the nomenclature adopted by the parties).
- 2.155 The test would be clearly satisfied where goods or services are provided to the Commonwealth or the relevant agency, for example, where the Commonwealth has procured the goods or services. If the Commonwealth or agency is not the recipient of the goods or services, the test is whether the contract would involve the provision of goods or services to another party in connection with the activities of the Commonwealth or the agency.
- 2.156 It would not be necessary that there be an agency relationship between the parties for the definition to apply.

Contracted service provider

- 2.157 There would be two categories of contracted service providers for the purposes of the NACC Bill.
- 2.158 The first category would be a person who is a party to the Commonwealth contract and is responsible for the provision of goods or services under or for the Commonwealth contract.
- 2.159 The second category would be a subcontractor. In this case, the person would be:
- a party to a contract with a person who is a contracted service provider (as defined in the first category of the definition) for the Commonwealth contract; and
 - responsible for the provision of goods or services for the purposes (whether direct or indirect) of the Commonwealth contract.
- 2.160 If an individual is a contracted service provider, that individual would be a staff member of the Commonwealth agency responsible for administering the Commonwealth contract. This is intended to include, for example, individual independent contractors engaged in tripartite labour hire arrangements where they are not an employee of the labour hire firm or the Commonwealth agency (sometimes referred to as *Odco* arrangements).
- 2.161 Further, any officers or employees of a contracted service provider would be staff members of the agency if they provided goods or services for the purposes (whether direct or indirect) of the contract. This would apply, for example, if a Commonwealth agency entered into a contract with an incorporated labour hire firm for the supply of additional workers to the agency. While the firm's employees would not be contracted service providers to the Commonwealth, they would be treated as staff members of the Commonwealth agency under the NACC Bill because they would be assisting the agency in the performance of its functions, pursuant to the labour hire firm's contract with the agency.

Exceptions

- 2.162 The government of a State or Territory, the government of a foreign country or part of a foreign country, and a person in a class prescribed by the regulations, would not be a contracted service provider for a Commonwealth contract.

A subcontractor of any of these excluded entities would also not be a contracted service provider. That is, the exceptions mentioned above break the chain between the Commonwealth and the subcontractor, ensuring the subcontractor of a State, Territory or foreign government is not within the NACC's jurisdiction. For example, if the Commonwealth enters into a contract with a foreign government for the provision of goods, any subcontractors engaged by the foreign government would not be contracted service providers for the purposes of the NACC Bill.

- 2.163 However, a person employed by the government of a State or Territory or the government of a foreign country or part of a foreign country, or by a subcontractor of one of those governments, may still engage in corrupt conduct under paragraph 8(1)(a) if it is found they have adversely affected the honest or impartial exercise or performance of a public official's powers or functions. Clause 240 would require the Commissioner and the Inspector to consult the Secretary of the Foreign Affairs Department in certain circumstances—including if they become aware that a corruption issue or public inquiry relates in any way to an official of a foreign country.

Clause 14—Meaning of statutory office holder

- 2.164 This clause would define a statutory office holder for the purposes of clause 12.
- 2.165 A statutory office holder would be an individual who holds an office or appointment under a law of the Commonwealth.
- 2.166 However, offices and appointments under the following laws would be excluded:
- a general law allowing incorporation as a company or body corporate (for example the office of a company director under the *Corporations Act 2001*);
 - the *Australian Capital Territory (Self Government) Act 1988*; and
 - the *Northern Territory (Self Government) Act 1978*.
- 2.167 Most offices established under those laws (for example the office of a director of a private company) are not offices of a public nature that would be appropriate to bring within the NACC's jurisdiction.
- 2.168 Despite the exclusion of offices and appointments under general laws allowing incorporation, the following offices that have a public nature would be statutory office holders:
- the office of Registrar, or Deputy Registrar, of Aboriginal and Torres Strait Islander Corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; and
 - the office of a member of a committee convened under Part 2 of Schedule 2 to the *Corporations Act 2001* (concerning the professional regulation of liquidators).
- 2.169 The NACC Bill would allow regulations to be made excluding additional offices and appointments from being statutory office holders. Regulations could also be made to allow certain offices and appointments to be statutory office holders despite the office or appointment being made under a general law concerning incorporation. For example, if a new office that is of a public nature is established by the *Corporations Act 2001*, regulations may be made to ensure the office-holder is within the NACC's jurisdiction.

Division 5—Commonwealth integrity agencies

Clause 15—Meaning of Commonwealth integrity agency

- 2.170 This clause would define a Commonwealth integrity agency. This definition is relevant to clause 45, which would provide for an additional threshold to the commencement of a corruption investigation where the Commissioner is aware that a Commonwealth integrity agency has previously concluded an investigation into a matter regarding the conduct of a public official.

- 2.171 The following office holders, together with their staff, would be Commonwealth integrity agencies:
- the Commonwealth Ombudsman, a Deputy Commonwealth Ombudsman, the Defence Force Ombudsman, the Postal Industry Ombudsman, the Overseas Students Ombudsman, the Private Health Insurance Ombudsman and the VET Student Loans Ombudsman;
 - the Australian Public Service Commissioner;
 - the Merit Protection Commissioner;
 - the Auditor-General;
 - the AFP Commissioner;
 - the Parliamentary Service Commissioner;
 - the Parliamentary Service Merit Protection Commissioner;
 - the Australian Information Commissioner;
 - the CEO of the ACC;
 - the IGIS;
 - the Inspector-General of Taxation;
 - the CEO of the Tertiary Education Quality and Standards Agency;
 - the Inspector-General of Biosecurity;
 - the Inspector-General of Live Animal Exports;
 - the Inspector-General of Water Compliance; and
 - the Inspector-General of the Australian Defence Force.
- 2.172 Regulations could be made to prescribe additional Commonwealth integrity office holders. A prescribed office holder would be required to have functions that include investigating or inquiring into action taken by public officials.

PART 3 THE NATIONAL ANTI-CORRUPTION COMMISSION

3.1 This Part would establish the NACC and the statutory offices of the NACC, and set out the functions of the NACC and those offices.

Division 1—The Commissioner

3.2 This Division would establish the office of the Commissioner and set out their functions.

Clause 16—The Commissioner

3.3 This clause would establish the office of the National Anti-Corruption Commissioner, who will be the head of the NACC. Provisions regarding the appointment of the Commissioner would be contained in Division 1 of Part 12.

Clause 17—Functions of the Commissioner

3.4 This clause would outline the Commissioner's functions. The Commissioner would have the following functions:

- to detect corrupt conduct;
- to conduct preliminary investigations into corruption issues or possible corruption issues;
- to conduct corruption investigations into corruption issues that could involve corrupt conduct that is serious or systemic;
- to report on corruption investigations and public inquiries;
- to refer corruption issues to Commonwealth agencies and State or Territory government entities;
- to oversee investigations into corruption issues conducted by Commonwealth agencies;
- to conduct public inquiries into:
 - the risk of corrupt conduct occurring; and
 - measures directed at dealing with that risk and preventing that conduct;
- to provide education and information in relation to corrupt conduct and preventing that conduct;
- to collect, correlate, analyse and disseminate general information and intelligence about corrupt conduct;
- to report, and make recommendation, to the Minister concerning the need for, or desirability of, legislative or administrative reform in relation to any matters dealt with by this Bill;
- to provide relevant information and documents to the Committee (see Division 1 of Part 10);
- to receive and deal with PIDs;
- any other functions conferred on the Commissioner by this Bill or another Act; and
- to do anything incidental or conducive to the performance of any of the above functions.

3.5 These functions would enable the Commissioner to further the objects of the NACC Bill, as outlined in clause 3 (see paragraphs 1.9 to 1.21), and are consistent with the NACC's role as a specialist investigative body, responsible for investigating allegations of serious or systemic corrupt conduct in the Commonwealth public sector.

3.6 In addition to its investigative functions, the Commissioner would also have education and prevention functions, including the ability to conduct public inquiries into corruption risks, vulnerabilities and measures to prevent corruption in Commonwealth agencies and measures aimed at dealing with and preventing corruption. These functions are common among anti-corruption commissions at a State and Territory level, and would allow the Commissioner to enhance corruption prevention across the Commonwealth.

- 3.7 Another function of the Commissioner would be to receive PIDs under the PID Act. This is part of a comprehensive framework in the NACC Bill to ensure that persons who make disclosures directly to the NACC receive appropriate protections (see Part 4).

Division 2—The Deputy Commissioners

- 3.8 This Division would establish the office of the Deputy Commissioners, and outline their functions.

Clause 18—The Deputy Commissioner

- 3.9 This clause would provide that there are to be up to three Deputy Commissioners. Provisions regarding the appointment of the Deputy Commissioners would be in Division 1 of Part 12.

Clause 19—Functions of a Deputy Commissioner

- 3.10 This clause would outline the functions of a Deputy Commissioner. A Deputy Commissioner would have functions to assist the Commissioner in the performance of the Commissioner's functions, and to perform any other function conferred on the Deputy Commissioner by other provisions of this Bill, or by another Act. For example, a Deputy Commissioner would have functions under the *Crimes Act 1914* as an authorising officer for a controlled operation.
- 3.11 The Commissioner would have discretion to determine the responsibilities of each of the Deputy Commissioners, and would be able to delegate any or all of their powers, functions or duties to a Deputy Commissioner (see clause 276). This would provide the Commissioner with flexibility to manage the workload of the NACC.
- 3.12 In performing their functions, a Deputy Commissioner would be required to comply with any directions of the Commissioner. Given the Commissioner would be delegating their functions to a Deputy Commissioner, it is appropriate that the Commissioner is able to provide direction as to the exercise of those functions. This ensures the Commissioner—as the person on whom substantive functions are conferred (see clause 17)—remains responsible for how those functions are performed in practice.
- 3.13 A direction given to a Deputy Commissioner by the Commissioner would not be a legislative instrument. This statement is included in the NACC Bill to assist readers, as a direction is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Division 3—The National Anti-Corruption Commission

- 3.14 This Division would establish the National Anti-Corruption Commission as a Commonwealth entity and outline its functions.

Clause 20—Establishment of the National Anti-Corruption Commission

- 3.15 This clause would establish the NACC and provide that it is a listed entity for the purposes of finance law (see paragraph 1.76).
- 3.16 The NACC would be a non-corporate Commonwealth entity subject to the rules and obligations in the PGPA Act. A non-corporate Commonwealth entity is defined in the PGPA Act as a Commonwealth entity that is not a corporate Commonwealth entity. This means the NACC would legally form part of the Commonwealth and would not have a separate legal identity. As a non-corporate Commonwealth entity, the NACC would be able to enter into arrangements and commit relevant money on behalf of the Commonwealth. It would also be required to prepare a corporate plan and annual report each year.
- 3.17 The CEO would be the accountable authority of the NACC. As the accountable authority, the CEO would be responsible for managing the NACC's affairs and ensuring the NACC performs its functions (see clause 252). The CEO would have specific duties under Division 2 of Part 2-2 of the PGPA Act, for example to govern the NACC in a way that promotes the proper use and management of public resources and establish and maintain appropriate risk oversight and management systems.

- 3.18 Staff members of the NACC (as listed in clause 266) are officials for the purposes of the PGPA Act. As officials, staff members of the NACC would have specific duties under Division 3 of Part 2-2 of the that Act, such as the duty to act honestly, in good faith and for a proper purpose. An official’s employment may be terminated if they contravene these duties.
- 3.19 The PGPA Act requires accountable authorities to govern a Commonwealth entity in a way that promotes the achievement of the purposes of the entity. In addition to the purposes of a Commonwealth entity set out in the PGPA Act (the objectives, functions or role of the entity), this clause would provide that the purposes of the NACC for the purposes of the finance law would include:
- the functions of the Commissioner referred to in clause 17;
 - the functions of a Deputy Commissioner referred to in clause 19;
 - the functions of the NACC referred to in clause 22; and
 - the functions of the CEO referred to in clause 252.

Clause 21—Constitution of the NACC

- 3.20 This clause would outline the constitution of the NACC. The NACC would consist of:
- the Commissioner;
 - any Deputy Commissioners;
 - the CEO; and
 - the staff referred to in clause 262. These staff would be engaged under the *Public Service Act 1999* and do not include consultants, secondees or a counsel assisting the NACC.

Clause 22—Functions of the NACC

- 3.21 This clause would set out the functions of the NACC, which would be to assist the Commissioner in performing their functions and to assist any Deputy Commissioner in performing their functions. As outlined in clause 17, the substantive functions conferred by this Bill are conferred on the Commissioner personally rather than the NACC as a Commonwealth entity. These functions could be delegated to a Deputy Commissioner. As such, the NACC has no functions as an entity other than to support the Commissioner, and any Deputy Commissioner, in performing their functions.

PART 4 PROTECTIONS FOR DISCLOSERS UNDER THIS ACT

Overview of this Part

- 4.1 This Part would provide a range of protections to persons who provide evidence or information to the Commission for the purposes of the NACC Bill. These protections would provide immunity from civil, criminal and administrative liability for whistleblowers and other persons, and criminal penalties for anyone taking, or threatening to take reprisal action against them.
- 4.2 This Part provides one component of a broader framework for:
- the management of PIDs—particularly internal disclosures—made by public officials (within the meaning of the PID Act); and
 - the protection of persons generally who provide information for the purposes of the NACC Bill.
- 4.3 This Part would complement and align with the existing PID Act framework, which:
- provides protections to public officials and former public officials who make PIDs;
 - provides for the allocation and investigation of PIDs that are internal disclosures made to an individual's supervisor or an authorised officer; and
 - provides for oversight of the PID Act framework by the Commonwealth Ombudsman and the IGIS.
- 4.4 Other provisions of the NACC Bill and the Consequential Bill that are relevant to this Part include:
- clause 35, which provides that staff members of Commonwealth agencies who become aware of possible corruption issues in the course of performing certain functions under the PID Act are required to refer those corruption issues to the Commissioner;
 - clause 39, the effect of which is that an internal disclosure under the PID Act referred to the Commissioner must continue to be dealt with by the referring Commonwealth agency under the PID Act by default;
 - clause 43, which would permit the Commissioner to direct, among other things, that an internal investigation by a Commonwealth agency under the PID Act be stopped, if it is required to ensure the effectiveness of an action the Commissioner has taken or will take in relation to the corruption issue;
 - clauses 204, and 208, and clause 43 as applied by clause 211, which provide equivalent arrangements for NACC corruption issues; and
 - amendments to the PID Act (see paragraphs 14.132 to 14.177) to be made by the Consequential Bill, which would ensure that a public official (within the meaning of that Act) obtains the protections available under that Act regardless of whether they make a PID internally or a NACC disclosure under this Bill.

Existing protections under the PID Act for public officials

- 4.5 A current or former public official (within the meaning of the PID Act) may make a PID in relation to disclosable conduct as defined by the PID Act. **Public officials** are defined in section 69 of the PID Act, and include staff members of departments, executive agencies, contracted service providers and certain statutory office holders. **Disclosable conduct** is defined in section 29 of the PID Act, and includes conduct that contravenes a law of the Commonwealth, a State or a Territory, conduct that perverts the course of justice, involves corruption of any kind, constitutes maladministration, results in the wastage of public money, or is an abuse of public trust.
- 4.6 Instances of corrupt conduct as defined in clause 8 are likely to constitute disclosable conduct for the purposes of the PID Act. An individual who makes a PID under the PID Act will receive a range of protections under that Act. In particular:
- an individual is not subject to any civil, criminal or administrative liability, or contractual or other remedies, for making a PID (section 10);

- it is an offence to take a reprisal, or to threaten to take a reprisal, against a person because of a PID (including a proposed or a suspected PID) (section 19);
- the Federal Court or Federal Circuit and Family Court of Australia (Division 2) may make orders for civil remedies (including compensation, injunctions and reinstatement of employment) if a reprisal is taken against a person because of a PID (including a proposed or a suspected PID) (sections 14 to 16); and
- it is an offence to disclose the identity of an individual who makes a PID, unless an exception applies (section 20).

New protections in the NACC Bill

4.7 This Part would ensure appropriate protections (equivalent to those available to public officials under the PID Act) are available to:

- all persons, including those who are not public officials (within the meaning of the NACC Bill or the PID Act); and
- all information provided for the purposes of the NACC Bill, regardless of whether that information concerns disclosable conduct (within the meaning of the PID Act).

4.8 The protections that are provided for under this Part are:

- immunity from civil, criminal and administrative liability, including disciplinary action;
- protection from enforcement of contractual or other remedies against a person due to their disclosure; and
- an offence criminalising the taking of reprisals, and threatening reprisals.

4.9 These protections would reduce the likelihood of a person being deterred from referring corruption issues to the Commissioner, or assisting a corruption investigation, due to fear of retribution or proceedings being brought against them. These protections could operate to provide, for example, immunity from proceedings brought in response to breaching a condition of employment or a non-disclosure agreement by disclosing information to the NACC about a corruption issue, or stealing company property by providing documents to the NACC about a corruption issue. They could also provide for a person who takes a reprisal against someone who gives information to the NACC, or assists with a NACC investigation, to be subject to prosecution for a criminal offence.

4.10 The protections would also ensure that persons who refer matters, provide information or otherwise assist with a NACC Act process—investigations of corrupt conduct, public inquiries, and NACC complaint investigations (see paragraph 1.103)—are protected from any adverse consequences resulting from their disclosure or participation. Importantly, these protections would apply despite the effect of any other Commonwealth laws.

Protections only available under the PID Act

4.11 Compensation for detriment arising from a person taking a reprisal action would remain available only under the PID Act in relation to PIDs by current and former public officials—not to members of the public more broadly. Compensation is available under the PID Act to public officials who make a disclosure in accordance with that Act and experience a detriment, including dismissal of the person from their employment, alteration of their employment, and discrimination between the person and another employee by the employer. This is considered appropriate on the basis that members of the public who are not public officials would be less likely to experience employment-related detriment from an employer outside the NACC’s jurisdiction as a result of making a NACC disclosure.

- 4.12 Unlike the PID Act, this Part would not provide a specific protection against the disclosure of a discloser's identity. Section 20 of the PID Act makes it an offence for a person to disclose information that is likely to enable identification of a person who has made a PID, where that information was obtained in their capacity as a public official. It is unnecessary to replicate section 20 because Part 11 of the NACC Bill would provide general obligations of confidentiality on staff members of the NACC that would extend to protecting the identity of a person who made a NACC disclosure. This would be subject to exceptions where the disclosure is for the purpose of staff members performing their functions under the NACC Bill. For example, a person's identity could be shared with other staff of the NACC to assist with the investigation of a corruption issue.
- 4.13 If a disclosure to the NACC constitutes a PID, the offence in section 20 of the PID Act would apply to staff members of the NACC. That offence applies subject to relevant exceptions, including paragraph 20(3)(d) of the PID Act, which allows for the disclosure or use of identifying information for the purposes of a law of the Commonwealth. This would include the use of identifying information for the purposes of the NACC Bill, once enacted.
- 4.14 Any person who is concerned about their identity being known by the NACC would have the option of making an anonymous voluntary referral to the NACC under clause 32.

Protection for journalists' informants

- 4.15 Division 4 of this Part would relieve a journalist or their employer from disclosing identifying information about their informants.

Division 1—Meaning of NACC disclosure

Clause 23—Meaning of NACC disclosure

- 4.16 This clause would define the concept of a NACC disclosure for the purposes of the NACC Bill.
- 4.17 A person would make a NACC disclosure if they referred, or provided information about, a corruption issue to the Commissioner or to the IGIS under Part 5 of the NACC Bill.
- 4.18 A NACC disclosure would also be made where a person refers information about a NACC corruption issue to the Inspector under clause 202 or clause 203.
- 4.19 A person would also make a NACC disclosure where they give evidence or information, or produce a document or a thing, to a NACC Commissioner, the IGIS or the Inspector in relation to any of the following:
- a corruption issue;
 - a NACC Act process (see paragraph 1.103), including a corruption investigation;
 - a NACC corruption issue;
 - a complaint made in relation to the conduct or activities of the NACC or a staff member of the NACC.
- 4.20 In practice, the definition of a NACC disclosure would apply to a broad range of disclosures, including:
- a person who voluntarily refers a corruption issue to the Commissioner under clause 32, regardless of whether the person is a public official;
 - agency heads who refer corruption issues to the Commissioner or the IGIS under clause 33 or 34;
 - staff members with functions under the PID Act who refer corruption issues to the Commissioner under clause 35;
 - persons who provide evidence to the Commissioner during a corruption investigation or public inquiry, whether voluntarily or in response to a notice to produce or a summons; and

- persons who make equivalent referrals, make complaints, or provide equivalent evidence to the Inspector in relation to NACC corruption issues, NACC corruption investigations or NACC complaint investigations.

Division 2—Protection of persons from liability

- 4.21 This Division would set out the protections available to a person who makes a NACC disclosure under this Bill, and the circumstances in which those protections are available. This Division would also outline how a person may seek to invoke the protections where proceedings have been commenced against them.

Clause 24—Protection of persons from liability

- 4.22 This clause would provide immunities and other protections for persons who make NACC disclosures. This is important to ensure that a person is neither legally prevented nor deterred from making a NACC disclosure where they have information concerning potential corrupt conduct.
- 4.23 This clause would provide that a person is not subject to any civil, criminal or administrative liability (including disciplinary action) for making a NACC disclosure under clause 23. This would mean, for example, that a person making a NACC disclosure would not be subject to:
- civil liability for breach of confidence arising from the disclosure of confidential information to the Commissioner
 - criminal liability for providing classified documents to the IGIS
 - for public officials—administrative action—such as performance management, suspension or termination of their employment—as a result of disclosing information to the Inspector.
- 4.24 This clause would also provide protection against a contractual or other remedy or right that would otherwise have been able to be enforced against the person on the basis that they made a NACC disclosure. For example, a contractual remedy such as compensation for the breach of a non-disclosure agreement could not be obtained, and a contractual termination clause or statutory power could not be exercised, on the basis of the person making a NACC disclosure.
- 4.25 Further, this clause would provide that a person making a NACC disclosure would have absolute privilege in proceedings for defamation in respect of the NACC disclosure. That is, generally no action for defamation could be brought against a person in relation to a NACC disclosure.
- 4.26 These protections are subject to the limitation in clause 25 outlined below.
- 4.27 This clause is consistent with section 10 of the PID Act.

Clause 25—Liability for false and misleading statements unaffected

- 4.28 This clause would provide that the protections in clause 24 do not apply to civil, criminal or administrative liability (including disciplinary action) for knowingly making a statement that is false or misleading. This would ensure that a discloser is not protected from liability in circumstances where the discloser knowingly makes false or misleading statements.
- 4.29 A discloser would be subject to civil liability for such statements. For example, this would mean that a person could potentially be sued for defamation or a breach of their employment contract if they provided falsified information to the Commissioner.
- 4.30 A discloser who is a public official would also be subject to administrative liability, including disciplinary action, in these circumstances. For example, this would mean that a public official's security clearance could be revoked, or they could be demoted to a more junior level, if they provided information that they knew to be misleading to the NACC when purporting to refer a corruption issue.

4.31 The effect of this clause would be to ensure disclosers are not protected from criminal liability and other liabilities for knowingly making false or misleading statements. Preserving the operation of criminal liability in these circumstances would deter the making of false allegations of corrupt conduct or the provision of misleading evidence to the NACC, which could otherwise harm a person's reputation, seek to conceal corrupt conduct or divert the NACC's resources. In the absence of this provision, the operation of the offences in clauses 61 (producing false or misleading information or documents) and 71 (giving false or misleading evidence, information or documents) would be compromised.

4.32 This clause expressly preserves the operations of the offences under sections 137.1, 137.2, 144.1 and 145.1 of the *Criminal Code*, which relate to knowingly producing false or misleading information or documents to a Commonwealth entity, and making and using forged documents.

4.33 This clause is consistent with section 11 of the PID Act.

Clause 26—Person's liability for own conduct not affected

4.34 This clause would clarify that a person's liability for their own conduct is not affected if they make a NACC disclosure concerning that conduct. For example, a person who engaged in corrupt conduct and then referred that conduct to the NACC in an attempt to avoid criminal liability would not receive immunity from criminal liability under clause 24.

4.35 This clause is consistent with section 12 of the PID Act.

Clause 27—Claims for protection

4.36 This clause would outline how a person may seek to invoke the protections that would be provided under clause 24 in circumstances where civil or criminal proceedings have been instituted against that person in a court. This clause would apply if the person makes a claim, relevant to the proceedings, that they are not subject to any civil, criminal or administrative liability for making a particular NACC disclosure due to the protections in clause 24.

4.37 The person seeking to invoke protection from liability under clause 24 in these circumstances would bear the onus of adducing evidence that suggests a reasonable possibility that the protection applies. If the onus is discharged, the party who instituted the proceedings against the person would bear the onus of proving that the protection from liability did not apply.

4.38 For example, a person who had civil proceedings instituted against them for breaching a confidentiality clause in their contract of employment would be able to make a claim that the breach was for the purposes of making a NACC disclosure. The person would then need to adduce evidence that they are entitled to immunity from civil liability under clause 24. To discharge this onus, the person could, for example, adduce evidence of their disclosure to the NACC (such as an email or other record of their referral). The party instituting the proceedings would then bear the onus of proving that the person is not entitled to protection under clause 24.

4.39 A claim under this clause would be dealt with by the court in separate proceedings. The initial civil or criminal proceedings against the person would be adjourned by the court until the claim for protection under this clause was resolved.

4.40 Any admission, information or evidence made or given by the person in the separate proceedings would not be admissible in evidence against the person, except in proceedings concerning the falsity of the admission, information or evidence made or given.

4.41 If the person or another person were to give evidence in the separate proceedings under this clause, the giving of that evidence would not amount to a waiver of privilege for the purposes of any proceedings. This clause would clarify that a right under section 126K of the *Evidence Act 1995* not to be compelled to give evidence with respect to the identity of journalists' informants would be a privilege for the purposes of this clause.

4.42 This clause is consistent with section 23 of the PID Act.

Clause 28—Protection has effect despite other Commonwealth laws

- 4.43 This clause would provide that protections afforded by clause 24 would have effect despite any other provision of a law of the Commonwealth, unless the provision is enacted after the commencement of this clause and is expressed to have effect despite this Part or clause.
- 4.44 This clause would ensure that protections and remedies afforded by the NACC Bill to persons who make a disclosure to the NACC are not overridden by provisions of other laws, unless there is a clear legislative intention to do so.
- 4.45 For example, a public official who makes a NACC disclosure would receive immunity from liability under this Bill if their disclosure breaches a designated publication restriction under section 11A of the PID Act. Types of designated publication restrictions are defined in section 8 of the PID Act and include a range of suppression and non-publication orders made by a court, including under the *Judiciary Act 1903*.

Division 3—Protection from reprisals

- 4.46 This Division would make it an offence for a person to take, or threaten to take, a reprisal against another person on the basis that they have made or may make a NACC disclosure.

Clause 29—What constitutes taking a reprisal

- 4.47 This clause would set out the circumstances in which a reprisal will be taken to have occurred for the purposes of this Bill. A reprisal would occur where a person (the first person) causes (by act or omission) any detriment to another person (the second person).
- 4.48 At the time the first person's act or omission occurred, the first person must have believed or suspected that the second person (or any other person) made, may have made or is proposing to make, a NACC disclosure.
- 4.49 This clause would also require that the first person's belief or suspicion about the NACC disclosure was the reason (or part of the reason) for their act or omission that caused the second person detriment.
- 4.50 Under this clause, detriment has its ordinary meaning and includes disadvantage with respect to the second person's employment, including termination or an alteration of the second person's position to their detriment.
- 4.51 For example, taking a reprisal could include bullying or harassing a person, or passing that person over for a promotion, if it was motivated by the fact that person has or is suspected of making a NACC disclosure.
- 4.52 An exception to behaviour that might otherwise constitute a reprisal under this clause is where a person takes administrative action that is reasonable to protect another person from detriment. For example, where a person has made a disclosure in relation to practices in their immediate work area, it may be appropriate to transfer them to another work area to ensure they are not subject to any detriment.
- 4.53 This clause would also protect a person who makes a disclosure indirectly to the NACC in appropriate circumstances.
- 4.54 This clause is consistent with section 13 of the PID Act.

Clause 30—Offences—taking a reprisal or threatening to take a reprisal

- 4.55 This clause would make it an offence to take a reprisal, or threaten to take a reprisal, against another person because that person or another person has made, or may make, a NACC disclosure.

4.56 A similar offence in section 19 of the PID Act protects persons from reprisal action taken against them on the basis that they made, may have made or intended to make, a PID. This offence would not apply where a disclosure is not a valid PID for the purposes of the PID Act (for example because a person is not a public official, or where the information is not disclosable conduct under the PID Act). It is important that a person who refers a corruption issue or provides information under the NACC Bill does not experience detriment on the basis of their disclosure, regardless of whether it is made under the PID Act or otherwise. This clause would ensure that disclosers who would not be entitled to protection from reprisals under the PID Act would receive equivalent protections under the NACC Bill.

Offence of taking a reprisal

4.57 The first offence would consist of the physical element that a person (the first person) takes a reprisal against another person (the second person). The fault element for this conduct element would be intention, in accordance with section 5.6 of the *Criminal Code*.

4.58 The maximum penalty for this offence would be imprisonment for 2 years. The maximum penalty needs to be adequate to deter and punish a worst case offence, including repeat offences. Given the potentially severe consequences of a reprisal against the second person, this penalty is appropriate to punish a worst case offence. The penalty is the same as the equivalent offence under subsection 19(1) of the PID Act.

4.59 In a prosecution for such an offence, it would not be necessary to prove that a NACC disclosure was made or was intended to be made. This clause does not affect the onus of proof in a prosecution and is merely a clarification that these matters do not form part of the physical elements of the offence.

Offence of threatening to take a reprisal

4.60 This clause would also make it an offence to threaten another person with taking a reprisal. This offence recognises that a mere threat to cause detriment could deter whistleblowers from making a NACC disclosure.

4.61 The offence would consist of the following physical elements:

- the first person makes a threat to a second person to take a reprisal against the second person or a third person;
- the first person either:
 - intends the second person to fear that the threat will be carried out; or
 - is reckless as to the second person fearing that the threat will be carried out.

4.62 The fault element for the first element of the offence—concerning the person’s conduct in making the threat—would be intention.

4.63 The fault element for the second element is stated in the NACC Bill. The fault element would be that:

- the first person intends the second person to fear that the threat will be carried out; or
- the first person is reckless as to the second person fearing that the threat will be carried out.

4.64 The maximum penalty for this offence would be imprisonment for 2 years. The maximum penalty needs to be adequate to deter and punish a worst case offence, including repeat offences. Given the potentially severe consequences of a person repeatedly threatening to take a reprisal against a second person, this penalty is appropriate to punish a worst case offence. This penalty is the same as the equivalent offence under subsection 19(3) of the PID Act.

4.65 This clause would provide that a threat may be express or implied, or conditional or unconditional. This would ensure that all forms of threats are capable of falling within the scope of the offence, including where the first person avoids making the threat expressly.

- 4.66 In a prosecution for this offence, it would not be necessary to prove that the person threatened actually feared that the threat would be carried out. This clause does not affect the onus of proof in a prosecution and is merely a clarification that the threatened person's state of mind does not form a physical element of the offence.

Division 4—Protection for journalists' informants

Clause 31—Protection for journalists' informants

- 4.67 This clause would provide protections for the identities of journalists' informants. Protecting the identity of journalists' sources would assist to uphold the public interest associated with a free press.

When the protection applies

- 4.68 The protections in this clause would apply where:
- a person (the informant) gives information, directly or indirectly, to a person working in a professional capacity as a journalist;
 - the information is given in the normal course of the journalist's work as a journalist; and
 - the journalist reasonably believes that the informant provided the information on the express or implied understanding that their identity would not be disclosed.

- 4.69 A journalist would be a person working in a professional capacity as a journalist. Indicators that a person is working in a professional capacity as a journalist include regular employment, formal qualifications, adherence to enforceable ethical standards and membership of a professional body.

Scope of the protection

- 4.70 This clause would provide that a journalist and the journalist's employer would not be required to do anything under this Bill that would disclose the identity of an informant or would enable the identity of an informant to be ascertained.

- 4.71 This clause would apply to any journalist and their employer. This would include journalists who are staff members of the ABC or SBS (which are Commonwealth agencies for the purposes of the NACC Bill). For the ABC and SBS, this clause would provide that the journalist's employer (who is also entitled to the protections) would be the head of the agency.

- 4.72 Relatedly, the abrogation of legal professional privilege in the context of providing investigation material in response to a direction to produce, a notice to produce or at a hearing would not apply in relation to advice or a communication given for the purposes of, or in the course of, a person's work as a journalist (see clause 114 and paragraphs 7.405 to 7.407). This would provide additional protection for journalists' informants.

Search powers

- 4.73 This clause does not prevent an authorised officer from doing anything an authorised officer would be able to do when exercising powers under Part IAA of the *Crimes Act 1914* for the purposes of the NACC Bill. Part IAA concerns search, information-gathering, arrest and related powers (other than powers under delayed notification search warrants).

- 4.74 The effect of this clause would be that a journalist and their employer would not be able to refuse the seizure of material under a search warrant issued under Part IAA for the purposes of a corruption investigation on the basis that it would disclose an informant's identity.

- 4.75 This is appropriate because Part IAA powers to issue a search warrant involving a journalist are modified by clause 124 to require consideration of the public interest in protecting journalists' sources and the free exchange of information between journalists and members of the public. That clause would balance the importance of ensuring the NACC can conduct corruption investigations and public inquiries with the importance of preserving freedom of expression by maintaining the confidentiality of journalists' sources.

- 4.76 Further, the Commissioner's power to search premises occupied by a Commonwealth agency without a warrant (clause 117) would not extend to the premises occupied by the ABC or SBS (see paragraph 7.439).

PART 5 REFERRING CORRUPTION ISSUES

- 5.1 This Part would create voluntary and mandatory pathways for the referral of corruption issues to the Commissioner. A broad pathway for voluntary referrals and targeted requirements for mandatory referrals would ensure the Commissioner receives sufficient information to identify potential corrupt conduct and deal with corruption issues.
- 5.2 The voluntary pathway would provide for referrals to be made to the Commissioner by any person, including members of the public. This broad voluntary referral pathway would ensure the Commissioner can receive information critical to its functions, regardless of its source.
- 5.3 The mandatory referral obligations would apply to Commonwealth agencies. It would generally be a requirement for the heads of Commonwealth agencies and certain staff members of Commonwealth agencies to refer corruption issues involving a current or past staff member of their agency where they suspect it could involve corrupt conduct that is serious or systemic.

Division 1—Voluntary referrals

Clause 32—Any person may refer corruption issue

- 5.4 This clause would allow any person to voluntarily refer a corruption issue or provide information about a corruption issue to the Commissioner. This would ensure that all people, including members of the public, are able to refer corruption issues to the Commissioner. This is appropriate to ensure that anyone can refer a potential corruption issue to the Commissioner without limitation.
- 5.5 Under this clause, the Commissioner would be able to request that a referral or information is to be provided to the Commissioner in a particular way. For example, the Commissioner would be able to request that a referral be given in writing rather than orally.
- 5.6 The Commissioner would also be able to request the referral or information be accompanied or supported by further information. For example, information given to the Commissioner may be insufficient to allow the Commissioner to determine whether the corruption issue being referred is serious or systemic for the purposes of clause 41. In this situation, the Commissioner could request further information be included in the referral or be provided to support their consideration of a matter. However, a person would not be required to comply with the request.
- 5.7 The ability to request further information is appropriate to enable the Commissioner to receive as much relevant information as possible about a potential corruption issue to support their assessment of how to deal with a corruption issue.

Division 2—Mandatory referrals

- 5.8 This Division would create mandatory referral obligations for:
- a head of a Commonwealth agency, including specific obligations for the head of an intelligence agency;
 - staff members of Commonwealth agencies who have certain responsibilities under the PID Act; and
 - the IGIS.
- 5.9 The obligation on a head of an agency or relevant staff members to refer matters to the Commissioner (or alternatively to the IGIS in the case of intelligence agencies) would arise where the person becomes aware that there is a corruption issue:
- that concerns the conduct of a person who is, or was, a staff member of their agency while that person is, or was, a staff member; and
 - they suspect the issue could involve corrupt conduct that is serious or systemic.

5.10 This would ensure that mandatory referrals received by the Commissioner are aligned as much as possible with the Commissioner's threshold for commencing an investigation (see paragraphs 6.12 to 6.24). This complements the voluntary referral pathway that allows any person to refer a corruption issue to the Commissioner (see clause 32).

5.11 The meaning of the term serious or systemic is discussed further in paragraphs 6.16 to 6.19. The Commissioner would also be permitted to issue guidance to agencies to, among other things, assist agencies to determine whether alleged conduct would constitute serious or systemic corrupt conduct (see clause 279). It is expected that this guidance would be developed and updated over time and in response to the nature and volume of referrals that agencies make, agencies' experiences with complying with this Division, and the Commissioner's assessment of risk.

5.12 The requirement for the agency head or relevant staff member to 'suspect' that the issue could involve corrupt conduct that is serious or systemic is a lower threshold than 'belief' or 'knowledge'. 'Suspicion' necessarily connotes the existence of uncertainty and it is immaterial whether the suspected serious or systemic nature of the alleged conduct exists. Further, the test would be subjective, going to the genuinely held suspicions of the person potentially subject to the referral obligation.

Clause 33—Mandatory referral—Commonwealth agencies other than intelligence agencies

5.13 This clause would create an obligation for a head of a Commonwealth agency to refer corruption issues to the Commissioner. Commonwealth agencies and the head of those agencies are defined in clause 11.

5.14 The mandatory referral obligation applies where an agency head becomes aware of a corruption issue concerning the conduct of a person who was a staff member of the agency at the time of the alleged conduct. As defined in clause 9, a corruption issue is an issue of whether a person has engaged in, is engaging in, or will engage in corrupt conduct. Corrupt conduct is defined in clause 8.

5.15 The obligation to refer the issue only arises if the agency head suspects that the issue could involve corrupt conduct that is serious or systemic. This is appropriate to ensure that referrals that are unlikely to be dealt with by the Commissioner are not required to be referred and continue to be dealt with by the relevant agency.

5.16 The meaning of the term serious or systemic is discussed further in paragraphs 6.16 to 6.19. The Commissioner would also be permitted to issue guidance to agencies to, among other things, assist agencies to determine whether alleged conduct would constitute serious or systemic corrupt conduct (see clause 279). This guidance would be likely to be developed and updated over time and in response to the nature and volume of referrals that agencies make, agencies' experiences with complying with this Division, and the Commissioner's assessment of risk.

5.17 The requirement for the agency head to 'suspect' that the issue could involve corrupt conduct that is serious or systemic would be intended to operate as a low threshold, and can be contrasted with the other common legislative standards requiring a higher threshold, such as 'belief' and 'knowledge'. 'Suspicion' necessarily connotes the existence of uncertainty and it is immaterial whether the suspected serious or systemic nature of the alleged conduct exists. Further, the test would be subjective, going to the genuinely held suspicions of the person potentially subject to the referral obligation.

5.18 The mandatory referral obligations would only arise when the agency head becomes personally aware of the corruption issue, regardless of how this awareness occurs. The obligation would apply regardless of when the relevant conduct occurred, including if it occurred prior to the agency head joining the agency or prior to establishment of the NACC.

- 5.19 The mandatory referral obligations would only arise when the agency head becomes aware of the corruption issue after the commencement of this clause. The obligation would not apply to corruption issues that the agency head may have already been aware of prior to the commencement of this clause. This is intended to ensure that agency heads are not required to refer corruption issues to the Commissioner that may already be under investigation or that have previously been fully investigated, or that have been otherwise dealt with. This would not preclude an agency head from referring a corruption issue that they are already aware of to the Commissioner under clause 32.
- 5.20 Where a mandatory referral is made under this clause, the agency head must state in the referral the reasons why they suspect that the issue could involve corrupt conduct that is serious or systemic. This will assist the Commissioner to determine whether the corrupt conduct being referred is likely to meet the Commissioner's threshold for commencing an investigation.
- 5.21 The requirements under this clause would not apply to the head of an intelligence agency as this is instead dealt with in clause 34.
- 5.22 Exceptions to the mandatory referral obligation in clause 37 provide that the agency head is not required to refer a corruption issue to the Commissioner if they believe on reasonable grounds that the Commissioner is already aware of this issue or a determination made by the Commissioner provides that a referral is not required.

Clause 34—Mandatory referral—intelligence agencies

- 5.23 This clause would create an obligation for the head of an intelligence agency to refer corruption issues to the Commissioner or the IGIS. Consistent with the definition in clause 7 (see paragraph 1.90), intelligence agencies covered by this obligation are:
- the Australian Geospatial-Intelligence Organisation;
 - ASIS;
 - ASIO;
 - the Australian Signals Directorate;
 - the Defence Intelligence Organisation; and
 - the Office of National Intelligence.
- 5.24 The heads of these agencies are defined in clause 11.
- 5.25 The mandatory referral obligation applies where the head of an intelligence agency becomes aware of a corruption issue concerning the conduct of a person who was a staff member of the intelligence agency at the time of the alleged conduct. As defined in clause 9, a corruption issue is an issue of whether a person has engaged in, is engaging in, or will engage in corrupt conduct. Corrupt conduct is defined in clause 8.
- 5.26 The obligation to refer the issue only arises if the head of the intelligence agency suspects that the issue could involve corrupt conduct that is serious or systemic. This is appropriate to ensure that referrals that are unlikely to be dealt with by the Commissioner are not required to be referred and continue to be dealt with by the relevant agency.
- 5.27 The meaning of the term serious or systemic is discussed further in paragraphs 6.16 to 6.19. The Commissioner would also be permitted to issue guidance to agencies to, among other things, assist agencies to determine whether alleged conduct would constitute serious or systemic corrupt conduct (see clause 279). This guidance would likely be developed and updated over time and in response to the nature and volume of referrals that agencies make, and agencies' experiences with complying with this Division, and the Commissioner's assessment of risk.

- 5.28 The requirement for the head of the intelligence agency to ‘suspect’ that the issue could involve corrupt conduct that is serious or systemic would be intended to operate as a low threshold, and can be contrasted with the other common legislative standards requiring a higher threshold, such as ‘belief’ and ‘knowledge’. ‘Suspicion’ necessarily connotes the existence of uncertainty and it is immaterial whether the suspected serious or systemic nature of the alleged conduct exists. Further, the test would be subjective, going to the genuinely held suspicions of the person potentially subject to the referral obligation.
- 5.29 The mandatory referral obligations would only arise when the head of the intelligence agency becomes personally aware of the corruption issue, regardless of how this awareness occurs. The obligation would apply regardless of when the relevant conduct occurred, including if it occurred prior to the head joining the intelligence agency or prior to establishment of the NACC.
- 5.30 The mandatory referral obligations would only arise when the agency head becomes aware of the corruption issue after the commencement of this clause. The obligation would not apply to corruption issues that the agency head may have already been aware of prior to the commencement of this clause. This is intended to ensure that agency heads are not required to refer corruption issues to the Commissioner or the IGIS that may already be under investigation or that have previously been fully investigated, or have been otherwise dealt with. This would not preclude an agency head from referring a corruption issue that they are already aware of to the Commissioner under clause 32, or to the IGIS under the IGIS Act.
- 5.31 Providing intelligence agency heads with a discretion to refer a matter to either the Commissioner or to the IGIS would enable the head of an intelligence agency to determine which is the most appropriate body to refer the corruption issue to on a case-by-case basis. For example, there may be circumstances where it is more appropriate for a referral to be made to the IGIS given its oversight role and extensive experience in relation to the legality and propriety of the conduct of intelligence agencies.
- 5.32 Where a referral is made under this clause, the head of the intelligence agency must state in the referral the reasons why they suspect that the issue could involve corrupt conduct that is serious or systemic. This will assist the IGIS and the Commissioner to determine whether the corrupt conduct being referred is likely to meet the Commissioner’s threshold for commencing an investigation.
- 5.33 Exceptions to the mandatory referral obligation in clause 37 provide that the agency head is not required to refer a corruption issue to the Commissioner or the IGIS if they believe on reasonable grounds that the Commissioner or the IGIS is already aware of this issue or a determination made by the Commissioner provides that a referral is not required.
- 5.34 This clause would provide that when the head of an intelligence agency refers a corruption issue to the Commissioner, they must notify the IGIS of the referral as soon as reasonably practicable. As the standing oversight body for intelligence agencies, this provides visibility to the IGIS of allegations of corruption, allowing the IGIS to effectively perform their oversight role.
- 5.35 If the head of an intelligence agency refers the corruption issue to the IGIS, the IGIS would be required to consider the issue. If the IGIS is satisfied that the issue is likely to involve corrupt conduct that is serious or systemic, the IGIS would be required to refer the issue to the Commissioner. This ensures that all issues likely to involve serious or systemic corruption make their way to the Commissioner, who may then decide how to deal with the issue (see Part 6). It also provides the Commissioner with comprehensive visibility of the nature of corruption issues arising across the Commonwealth.
- 5.36 For the referral obligation to arise for the IGIS, the IGIS would require a higher level of certainty than a *suspicion* that the issue involves corrupt conduct that is serious or systemic. The IGIS must be *satisfied* that the issue is *likely* to involve corrupt conduct that is serious or systemic. This higher threshold recognises the oversight role and extensive experience of the IGIS in relation to the legality and propriety of the conduct of intelligence agencies.

- 5.37 The IGIS would not be required to consider the likelihood that the alleged conduct occurred, as that is a matter for any investigation. A corruption issue would concern serious or systemic corrupt conduct if the alleged conduct is serious or systemic, regardless of whether that conduct is likely to have occurred.

Clause 35—Mandatory referral—Public Interest Disclosure Act disclosures

- 5.38 This clause would create a mandatory referral obligation for staff members of a Commonwealth agency with certain responsibilities under the PID Act (a PID officer). This would ensure that corruption issues that come to the attention of a Commonwealth agency through a PID Act process are referred to the Commissioner at the earliest possible opportunity.
- 5.39 This clause recognises that there would be overlap between the types of disclosable conduct that can be dealt with under the PID Act and alleged corrupt conduct that can be dealt with under the NACC Bill. Under the PID Act, a public official can make an internal disclosure to their supervisor or an authorised officer. An authorised officer must allocate an internal disclosure to an agency for investigation unless satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure (section 43 of the PID Act). Subject to certain exceptions, the principal officer of that agency or their delegate must investigate the internal disclosure (section 47 of the PID Act).

PID officers

- 5.40 The mandatory referral obligation would apply to PID officers, which would include:
- ***authorised officers*** who have functions and powers in relation to the allocation of internal disclosures under Division 1 of Part 3 of the PID Act; and
 - other persons (in this Explanatory Memorandum, ***investigating officers***), who have functions and powers in relation to the investigation of internal disclosures under Division 2 of Part 3 of the PID Act.

Authorised officers

- 5.41 Division 1 of Part 3 of the PID Act details the functions and powers conferred on an authorised officer when an internal disclosure is made to that officer. Section 36 of the PID Act provides that an authorised officer is the principal officer of the agency or a public official of that agency appointed as an authorised officer by the principal officer. Under the PID Act, authorised officers may receive an internal disclosure and allocate the disclosure to another person for investigation.
- 5.42 If an authorised officer, in the course of performing their functions under the PID Act, received an internal disclosure under the PID Act that raised a corruption issue they suspect could involve corrupt conduct that is serious or systemic and that concerns the conduct of a person who was a staff member of the agency at the time of the alleged conduct, the authorised officer would be required to refer the issue to the Commissioner. This obligation on authorised officers applies even if the authorised officer considers the disclosure was not an internal disclosure under the PID Act, provided the information raising the corruption issue came to them in their capacity as an authorised officer.
- 5.43 If the authorised officer is a staff member of an intelligence agency, they would be required to refer the issue to either the Commissioner or the IGIS, consistent with the obligation on the heads of those agencies.
- 5.44 If an authorised officer handling the corruption issue is unsure whether the issue involves serious or systemic corruption, the officer would be able to have regard to any guidelines issued by the Commissioner under clause 279.
- 5.45 The obligation would arise once the authorised officer became aware of the corruption issue and suspected that it involved corrupt conduct that is serious or systemic, including after receiving an internal disclosure.

Investigating officers

- 5.46 Division 2 of Part 3 of the PID Act confers functions and powers on the principal officer of an agency and their delegates (an investigating officer) to investigate an internal disclosure allocated under Division 1 of that Part. The principal officer of an agency is defined in section 73 of the PID Act.
- 5.47 Generally, the principal officer is the same person as the head of a Commonwealth agency under the NACC Bill. However, the heads of agencies may have delegated their powers and functions under the PID Act and the NACC Bill to different officers. As a result, those officers investigating internal disclosures under the PID Act (investigating officers) may have greater awareness of corruption issues.
- 5.48 If an internal disclosure made or investigated under the PID Act raises a corruption issue, an investigating officer who suspects the issue could involve corrupt conduct that is serious or systemic and that concerns a person who was a staff member of the agency at the time of the alleged conduct, would be required to refer the issue to the Commissioner. If the principal officer is a staff member of an intelligence agency, they would be required to refer the issue to either the Commissioner or the IGIS. This requirement on investigating officers applies even if they consider the disclosure was not an internal disclosure under the PID Act, provided the information raising the corruption issue came to them in their capacity as an investigating officer.
- 5.49 The obligation would arise once the investigating officer became aware of the corruption issue, including after receiving a disclosure from an authorised officer or during the course of a disclosure investigation.

The mandatory referral obligation

- 5.50 The obligation arises where a PID officer becomes aware of a corruption issue that concerns the conduct of a person who was a staff member of the agency at the time of the alleged conduct. As defined in clause 9, a corruption issue is an issue of whether a person has engaged in, is engaging in, or will engage in corrupt conduct. Corrupt conduct is defined in clause 8.
- 5.51 The obligation to refer the issue only arises if the PID officer suspects that the issue could involve corrupt conduct that is serious or systemic. This is appropriate to ensure that referrals that are unlikely to be dealt with by the Commissioner are not required to be referred and continue to be dealt with by the relevant agency under the PID Act.
- 5.52 The meaning of the term serious or systemic is discussed further in paragraphs 6.16 to 6.19. The Commissioner would also be permitted to issue guidance to agencies to, among other things, assist agencies to determine whether alleged conduct would constitute serious or systemic corrupt conduct (see clause 279). This guidance would likely be developed and updated over time and in response to the nature and volume of referrals that agencies make, and agencies' experiences with complying with this Division.
- 5.53 The requirement for the PID officer to 'suspect' that the issue could involve corrupt conduct that is serious or systemic would be intended to operate as a low threshold, and can be contrasted with the other common legislative standards requiring a higher threshold, such as 'belief' and 'knowledge'. 'Suspicion' necessarily connotes the existence of uncertainty and it is immaterial whether the suspected serious or systemic nature of the alleged conduct exists. Further, the test would be subjective, going to the genuinely held suspicions of the person potentially subject to the referral obligation.

- 5.54 The obligation would apply regardless of when the relevant conduct occurred, including if it occurred prior to establishment of the NACC. The obligation would not arise if the corruption issue did not relate to the person’s agency. However, the mandatory referral obligations would only arise when the PID officer becomes aware of the corruption issue after the commencement of this clause. The obligation would not apply to corruption issues that the PID officer may have already been aware of prior to the commencement of this clause. This is intended to ensure that PID officers are not required to refer corruption issues to the Commissioner or the IGIS (as the case may be) that may already be under investigation or that have previously been fully investigated, or have been otherwise dealt with. This would not preclude a PID officer from referring a corruption issue that they are already aware of to the Commissioner under clause 32, or to the IGIS under the IGIS Act or PID Act.
- 5.55 The mandatory referral obligation would apply to relevant corruption issues that form all or part of a PID made to the PID officer, or a corruption issue that the PID officer becomes aware of in the course of performing their functions under the PID Act. This is appropriate to ensure that the Commissioner still receives referrals relating to corruption issues, even where the corruption issue forms part of a PID that also concerns other alleged misconduct, for example, maladministration.
- 5.56 Exceptions to the mandatory referral obligation in clause 37 provide that the PID officer is not required to refer a corruption issue to the Commissioner if they believe on reasonable grounds that the Commissioner is already aware of this issue (for example if it has already been referred by the agency head responsible for the PID officer’s agency) or a determination made by the Commissioner provides that a referral is not required.
- 5.57 In addition, a referral to the Commissioner would not prevent a PID officer from being able to continue to handle the disclosure in accordance with the PID Act (see clause 39 and paragraphs 5.91 to 5.95), unless the Commissioner has issued a stop action direction (see clause 43). This is appropriate to ensure that PID officers are still able to meet their obligations under the PID Act following a referral.

Additional steps for corruption issues concerning intelligence agencies

- 5.58 If a PID officer refers a corruption issue concerning an intelligence agency under this clause, additional requirements would apply.
- 5.59 If the PID officer referred the issue to the Commissioner, the PID officer would be required to notify the IGIS as soon as practicable. As the standing oversight body for intelligence agencies, this provides visibility to the IGIS of allegations of corruption, allowing the IGIS to effectively perform their oversight role.
- 5.60 If the PID officer referred the issue to the IGIS, the IGIS would be required to consider the issue. If the IGIS is satisfied that the issue is likely to involve corrupt conduct that is serious or systemic, the IGIS would be required to refer the issue to the Commissioner. This ensures that all issues involving serious or systemic corruption make their way to the Commissioner, who may then decide how to deal with the issue (see Part 6). It also provides the Commissioner with comprehensive visibility of the nature of corruption issues arising across the Commonwealth.
- 5.61 For the referral obligation to arise for the IGIS under this clause, the IGIS would require a higher level of certainty than a *suspicion* that the issue involves corrupt conduct that is serious or systemic. The IGIS must be *satisfied* that the issue is *likely* to involve corrupt conduct that is serious or systemic. This higher threshold recognises the oversight role and experience of the IGIS in relation to the conduct of intelligence agencies, agencies’ compliance with the law and the propriety of agencies’ activities.
- 5.62 The IGIS would not be required to consider the likelihood that the alleged conduct occurred, as that is a matter for any investigation. A corruption issue would concern serious or systemic corrupt conduct if the alleged conduct is serious or systemic, regardless of whether that conduct is likely to have occurred.

Notification to discloser

- 5.63 This clause would also provide that where a PID officer refers a corruption issue that arose from an internal disclosure made under the PID Act, the PID officer must, as soon as reasonably practicable, notify the discloser that their disclosure has been referred to the Commissioner or to the IGIS. Ensuring the discloser is notified of such a referral is consistent with a PID officer's obligations under the PID Act to keep disclosers informed of how their disclosure is being dealt with (see for example subsection 44(2) and section 50 of that Act). The obligation to notify the discloser does not create a requirement for the Commissioner or the IGIS to deal with the issue, or create a requirement for the PID officer to cease dealing with the disclosure under the PID Act.

Clause 36—Mandatory referral—secrecy protection provisions

- 5.64 This clause would ensure the obligation to refer a corruption issue under this Division would still apply despite any secrecy provision, with the exception of an exempt secrecy provision (see paragraph 1.72). This is appropriate to enable the Commissioner to receive as much information about a corruption issue as possible—including where that information is subject to a secrecy provision—which would be critical for the efficacy of the NACC's investigation function.
- 5.65 Arrangements in Part 11 of the NACC Bill concerning the NACC's confidentiality, consultation and information-sharing requirements would ensure that any information received by the Commissioner would be subject to appropriate confidentiality requirements and would be securely handled.
- 5.66 Part 11 of the NACC Bill would not impose confidentiality requirements on the IGIS in relation to information provided to the IGIS under clause 34 or 35. However, the IGIS is already subject to the confidentiality requirements in section 34 of the IGIS Act. This means that information provided to the IGIS under those clauses despite a secrecy provision would be protected from inappropriate on-disclosure.

Other ways information could be provided to the Commissioner or the IGIS

- 5.67 There is no requirement for a person under a mandatory referral obligation to disclose information to the Commissioner where that information is subject to an exempt secrecy provision. However, a person could still disclose such information to the Commissioner on a voluntary basis under Division 1 of this Part. In those circumstances, a person could rely on clause 24 (protection of persons from liability) to avoid civil, criminal or administrative liability in respect of their disclosure.
- 5.68 These arrangements reflect the established approach in section 34B of the IGIS Act, which ensures that a person who voluntarily provides information to the Inspector-General is not liable to penalties under Commonwealth laws for making a disclosure for certain IGIS Act purposes. That section may also apply to disclosures concerning corruption issues that are made to the IGIS.

Clause 37—Mandatory referral—exceptions

- 5.69 This clause would provide for two exceptions to the mandatory referral obligations under this Division:
- where the Commissioner or the IGIS (as appropriate) is already aware of the issue; and
 - in accordance with a determination made by the Commissioner.

Exception where Commissioner or the IGIS already aware

- 5.70 A person subject to a mandatory referral obligation is not required to refer a matter if they believe on reasonable grounds that the Commissioner or the IGIS (as appropriate) is already aware of the corruption issue.

- 5.71 This exception would ensure that mandatory referral obligations do not result in duplication by requiring multiple people to refer the same issue to the Commissioner or the IGIS. For example, the obligation to refer a single corruption issue may apply to multiple persons who become aware of the issue, including:
- an agency head and an authorised officer of an agency; or
 - in the case of the conduct of a secondee—the head of the secondee’s home agency and the head of the host agency to which the services of the secondee have been made available. In these circumstances, it does not matter in which capacity of the secondee the corruption issue arises.
- 5.72 Once one person has made a referral, any person who believes on reasonable grounds that the Commissioner or the IGIS (as relevant) is already aware of the referred corruption issue will be relieved of the obligation to refer the corruption issue.
- 5.73 For example, an authorised officer under the PID Act would not be required to refer a corruption issue if they believed on reasonable grounds that the principal officer of their agency had already referred the corruption issue to the Commissioner. The PID officer would equally be relieved of a mandatory referral obligation if they believed on reasonable grounds that the person who made the internal disclosure had already made a voluntary referral to the Commissioner.

Commissioner’s determinations

- 5.74 The second exception arises where the Commissioner has made a determination that the referral is not required because of the kind of corruption issue involved or the circumstances in which the issue arose. A determination need not relate to a specific corruption issue and may be made to provide a prospective exception to a class of corruption issues.
- 5.75 The ability for the Commissioner to make determinations would assist the NACC and the relevant agency by ensuring that referrals that are unlikely to be dealt with by the Commissioner are not required to be referred. For example, the Commissioner may receive large volumes of referrals regarding misuse of information where the conduct involves inappropriate browsing of internal database that may be more appropriately dealt with by the relevant agency rather than the NACC. The determination power would allow the Commissioner to relieve Commonwealth agencies of their mandatory referral obligations in relation to this conduct.
- 5.76 This clause would provide that the Commissioner’s determinations are not legislative instruments. This declaration would operate as an exception to section 8(1) of the *Legislation Act 2003* (see paragraph 8(6)(a) of that Act). As a consequence of this declaration, a determination would not need to be published on the Federal Register of Legislation, or be subject to parliamentary disallowance or sunseting under Parts 2 and 3 of Chapter 3 of the *Legislation Act 2003*.
- 5.77 It is appropriate that Commissioner’s determinations not be legislative instruments, and be excepted from tabling, publication, disallowance and sunseting. As a preliminary matter, determinations would not narrow the Commissioner’s jurisdiction to investigate corruption issues, or remove the ability for any person to voluntarily refer a corruption issue to the Commissioner (notwithstanding that the issue may be covered by a determination). A determination would only narrow the referral obligation imposed on agency heads and persons with responsibilities under the PID Act, by setting out:
- kinds of corruption issues that are not required to be referred to the Commissioner; and
 - circumstances in which corruption issues are not required to be referred to the Commissioner.
- 5.78 In some circumstances, the details of a determination may be inherently sensitive—for example, if the Commissioner were to make a determination to give effect to an agreement with another oversight or integrity authority (such as the IGIS or Inspector-General of the Australian Defence Force) about the efficient division of responsibility between their agencies, and that division of responsibility were made by reference to particular operational circumstances in which a corruption issue may arise.

- 5.79 Although the Commonwealth has a robust, multi-agency integrity framework, the publication of a determination could also result in public officials and third parties *perceiving* that they are less likely to be detected or investigated if they engage in corrupt conduct of a kind set out in a determination. In such circumstances, the publication of a determination could have the adverse effect of reducing deterrence of corruption risks in areas covered by a determination.
- 5.80 Each of the above risks would be a material barrier to the Commissioner making a determination, and could prevent the Commissioner from using the determination-making power to efficiently and effectively manage their pipeline of incoming mandatory referrals, or to give effect to sensible divisions of responsibility with other Commonwealth law enforcement, oversight and integrity agencies.
- 5.81 It would be open to the Commissioner to publish determinations on their website where the Commissioner determines it is appropriate to do so.

Clause 38—Mandatory referral—timing and information requirements

- 5.82 This clause would set out requirements for making a mandatory referral and providing relevant information to the Commissioner or the IGIS (as appropriate).

Timing requirements

- 5.83 This clause would provide that a person who is required to refer a corruption issue must make the referral as soon as reasonably practicable after becoming aware of the issue, or within such later time as is allowed by the Commissioner.
- 5.84 It is important that there is flexibility in the timing of referrals. The person who is subject to the requirement to make the referral will need sufficient time to obtain relevant information, consult with relevant stakeholders and obtain advice as to whether the referral threshold is met. On the other hand, it is important for the referral to be made to the NACC as quickly as possible, so that it can take any necessary investigative steps to capture relevant evidence. The requirement for the referral to be made as soon as reasonably practicable achieves an appropriate balance between these competing interests.

Information requirements

- 5.85 This clause would outline the information that must be included when a person makes a mandatory referral of a corruption issue to the Commissioner or to the IGIS. A person making a referral would be required to include all information relevant to the corruption issue that is in their possession or control at the time the referral is made.
- 5.86 Where a person becomes aware of further information that is relevant to the corruption issue after a referral has been made, the person would be required to give that information to the recipient of the referral as soon as reasonably practicable.
- 5.87 These requirements are appropriate to enable the Commissioner or the IGIS to receive all relevant information about a corruption issue that an agency has in its possession. This means that the Commission can proceed efficiently to decide how to deal with the corruption issue, without needing to request basic information from the relevant agency.

Exceptions to information requirements

- 5.88 The information requirements under this clause would not apply if the person has reasonable grounds to believe that the recipient of the referral is already aware of the information, for example if the information has already been provided by another person within the agency who has a mandatory referral obligation.
- 5.89 Further, the recipient of the information may advise the person that they no longer require additional information to be provided. In these circumstances, the person's obligation to continue providing relevant information would cease. For example, the Commissioner may have decided to deal with the corruption issue by referring it to another agency for consideration, in which case the Commissioner would not need to receive further information on that matter.

- 5.90 This clause is subject to the requirements contained in clause 236 (Attorney-General’s certificate in relation to international relations).

Division 3—Other matters relating to referrals

Clause 39—Effect of referral on continued actions

- 5.91 This clause would confirm that, in the absence of a stop action direction given by the Commissioner under clause 43, the referral of a corruption issue under Part 5 has no effect on the ability of a Commonwealth agency or the IGIS to take action in relation to the relevant conduct.
- 5.92 Any obligation on the relevant agency or the IGIS to handle the corruption issue under any other law also remains unaffected by a referral to the Commissioner. Except where provided for in other legislation, a referral to the Commissioner or the IGIS does not *transfer* a matter to the Commissioner such that it is no longer a matter for the referring agency to deal with under relevant legislation.
- 5.93 This is appropriate to ensure that persons with obligations under any other law continue to meet those obligations after making a referral to the NACC.
- 5.94 For example, after a PID officer refers a disclosure that raises a corruption issue to the Commissioner, the officer would need to continue to handle the disclosure in accordance with the PID Act unless the Commissioner has issued a stop action direction.
- 5.95 If the Commissioner decides to conduct a corruption investigation, this may permit a PID officer to discontinue any investigation under the PID Act (see subparagraph 48(1)(f)(i) of that Act).

PART 6 DEALING WITH CORRUPTION ISSUES

- 6.1 This Part would provide for the Commissioner to manage incoming referrals and other information by deciding how to deal with corruption issues.
- 6.2 The Commissioner would have a broad discretion to decide how to deal with a corruption issue that they become aware of, whether as the result of a referral from a Commonwealth agency or another person, or that the Commissioner becomes aware of in any other way. The ability for the Commissioner to deal with corruption issues that they become aware of, otherwise than as the result of a referral, would ensure that the Commissioner can deal with corruption issues of their own initiative.
- 6.3 The Commissioner would have a range of options when dealing with a corruption issue. The Commissioner would be able to investigate the issue, either by themselves or jointly with another agency, provided they are of the opinion that the corruption issue could involve corrupt conduct that is serious or systemic. Further, the Commissioner could refer any corruption issue to an agency to which the corruption issue relates for internal investigation—which would facilitate the timely investigation of less serious or isolated corruption issues—or to another independent investigative agency, such as the AFP, for its consideration.
- 6.4 To ensure the Commission can effectively manage its workload, the Commissioner would also have discretion to take no action in relation to a corruption issue. This would allow the Commissioner to not investigate or otherwise deal with an unmeritorious referral or allegation.

Division 1—Dealing with corruption issues

Clause 40—Commissioner may deal with corruption issues

- 6.5 This clause would provide that the Commissioner may deal with a corruption issue that is formally referred to the Commissioner under Part 5 or that the Commissioner otherwise becomes aware of through other means.
- 6.6 This clause would only allow the Commissioner to deal with matters that fall within their jurisdiction. This would mean there must be a corruption issue, which would be defined by clause 9 to mean an issue of whether a person has engaged in, is engaging in, or will engage in corrupt conduct. Corrupt conduct would be defined in clause 8.
- 6.7 Part 5 would provide for the Commissioner to receive voluntary referrals of corruption issues from any person as well as mandatory referrals of corruption issues from agency heads and certain staff with responsibilities under the PID Act. This clause would allow the Commissioner to deal with corruption issues that are referred in this way.
- 6.8 The Commissioner would also be able to deal with corruption issues that the Commissioner becomes aware of in any other way, for example through media reporting on the issue. It would ensure the Commissioner could act on their own initiative.
- 6.9 The Commissioner would be able to conduct a preliminary investigation to confirm whether a corruption issue exists (see clause 42) to enable them to make an informed decision about whether, and if so how, to deal with the issue.

Clause 41—How Commissioner deals with corruption issues

- 6.10 This clause would provide a discretion for the Commissioner to deal with a corruption issue in one or more of the following ways:
- by investigating the issue themselves;
 - by investigating the issue jointly with a Commonwealth agency, for example the AFP, or a State or Territory government entity, such as an anti-corruption commission;

- by referring the issue to a Commonwealth agency to which the issue relates for investigation by that agency, but only if the Commissioner is satisfied the agency has appropriate capabilities to investigate the issue—this would enable the Commissioner to refer less serious corruption issues to the relevant Commonwealth agency and to require the agency to conduct an internal investigation; or
- by referring the issue to a Commonwealth agency or a State or Territory government entity for its consideration—this would enable the Commissioner to refer a corruption issue to another investigative agency for their consideration, ensuring that issues can be drawn to the attention of the most-appropriate investigative agency. This would not require the investigative agency to conduct an investigation, noting that decision would be a matter for that agency.

6.11 An investigation conducted by the Commissioner, including a joint investigation, would be a **corruption investigation**.

Corruption investigation threshold—serious or systemic corrupt conduct

6.12 The Commissioner would only be able to conduct, or continue to conduct, a corruption investigation if the Commissioner is of the opinion that the corruption issue (being an issue of whether a person has engaged in, is engaging in, or will engage in corrupt conduct) could involve corrupt conduct that is serious or systemic.

Opinion is subjective

6.13 The requirement that the Commissioner be ‘of the opinion’ that the corruption issue could involve corrupt conduct that is serious or systemic is a requirement that the Commissioner subjectively hold that state of mind. It is in the public interest that credible reports and allegations of serious or systemic corrupt conduct be investigated, that unfounded allegations be dispensed with, and minor matters be handled by the agency in which they arose. The requirement is not intended to impose an onerous or impracticably high bar to the Commissioner commencing a corruption investigation.

Threshold applies throughout investigation

6.14 The objects of this Bill, as would be set out by clause 3, include the timely investigation of corruption issues that involve, or potentially involve, corrupt conduct that is serious or systemic. The Commissioner’s functions would be to conduct corruption investigations into corruption issues that could involve serious or systemic corrupt conduct.

6.15 Therefore, the ‘serious or systemic’ threshold would be ongoing throughout an investigation. For example, if evidence received during the investigation caused the Commissioner to no longer hold the opinion that the corruption issue could involve serious or systemic corrupt conduct, the Commissioner would not be able to continue investigating the corruption issue.

Meaning of serious

6.16 The term *serious* is intended to take its ordinary meaning. Corruption issues may arise in a wide range of contexts, may be criminal or non-criminal in nature, and may affect any aspect of public administration. Multiple factors may contribute to the question of whether particular corrupt conduct could be ‘serious’, including both the substance of the conduct and its result. It would not be appropriate to attempt to define these factors exhaustively, but they may include:

- 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.

6.17 The fact that a person holds a particular office or appointment will not, of itself, be relevant to the question of whether particular corrupt conduct could be serious—the focus of the threshold would be on the conduct in question, rather than on the identity or characteristics of the office-holder. However, where a person holds a position or office of particular trust or sensitivity, and is alleged or suspected of having used or abused that office to engage in the conduct, their use or abuse of that office in the course of their conduct may also be relevant to the question of whether that corrupt conduct could be ‘serious’.

6.18 For example, 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.

Meaning of systemic

6.19 The term *systemic* is intended to take its ordinary meaning. An instance of corrupt conduct would be systemic where, on its ordinary meaning, it occurs as part of a pattern of corrupt conduct, for example in one or more Commonwealth agencies. The pattern of conduct need not be coordinated in any way. For example, the Commissioner may receive multiple referrals relating to different staff members of the same agency engaging in similar corrupt conduct that does not appear to be coordinated. The first referral of conduct would raise a corruption issue. As there is information available to the Commissioner pointing to multiple instances of similar conduct in the agency, it would be open to the Commissioner to form the opinion that the corruption issue in question could involve corrupt conduct that is systemic.

Opinion concerns the nature of alleged conduct

6.20 The opinion required would go to the nature of the alleged conduct and whether that conduct—if established in a corruption investigation—could involve serious or systemic corrupt conduct. This clause would not require the Commissioner to form an opinion about whether the alleged conduct occurred; that is a matter for an investigation.

6.21 The Commissioner’s discretion to investigate a corruption issue that they consider could involve serious or systemic corrupt conduct would not depend on the probative value of the allegation. For an allegation, or other information, to give rise to a corruption issue, the allegation or information would need to give rise to, bring up, or put forward all of the essential elements of a corruption issue, as defined (see clause 9). Similarly, the allegation, or other information, would need to include, either explicitly or implicitly, coherent grounds on which the Commissioner could form the opinion that the corruption issue could—if established in a corruption investigation—involve corrupt conduct that is serious or systemic.

6.22 It would not be necessary, however, for the allegation or information to *prove* that there is a corruption issue that could involve serious or systemic corrupt conduct. The purpose of a corruption investigation would be to test the accuracy of the allegation or information.

6.23 Where the information before the Commissioner is incomplete or is otherwise not sufficient for the Commissioner to form the requisite opinion, it would be open to the Commissioner to conduct a preliminary investigation for the purposes of (see clause 42):

- confirming the existence or nature of a corruption issue (including whether a corruption issue could involve corrupt conduct that is serious or systemic); or
- to assist the Commissioner to decide whether or how to deal with a corruption issue.

6.24 The Commissioner would not be obliged to investigate if the allegation raises a corruption issue that could be serious or systemic. For example, the Commissioner may be disinclined to investigate an issue, if the Commissioner is aware that another agency is already investigating the issue.

Other corruption issues may be dealt with in other ways

- 6.25 Where the Commissioner is of the opinion that a corruption issue does not meet the threshold for the Commissioner to commence or continue a corruption investigation themselves, the Commissioner would have the power, under this clause, to refer the issue to the relevant agency for internal investigation, or to another Commonwealth, State or Territory agency for its consideration.

General matters

- 6.26 The Commissioner would be able to investigate particular corruption issues together. This is intended to enable the Commissioner to investigate related corruption issues in the most efficient and effective manner including, for example:
- where the Commissioner has received multiple referrals in relation to conduct that may demonstrate a systemic issue within an agency or multiple agencies—by allowing the Commissioner to investigate these issues together and establish whether a pattern of corrupt conduct has occurred;
 - where the Commissioner has received referrals alleging multiple instances of corrupt conduct by the same public official—by allowing the Commissioner to investigate those issues together, if they appear to be related, to enable the Commissioner to form a complete picture of the official’s conduct, and to enable an efficient approach to investigating conduct by the same person; or
 - where the Commissioner has received a referral alleging that multiple persons have engaged in corrupt conduct as part of a conspiracy—by allowing the Commissioner to investigate each of those corruption issues (being an issue of whether each person has engaged, is engaging, or will engage in corrupt conduct) together.
- 6.27 The Commissioner would also be able to reconsider whether or how to deal with a corruption issue at any time. For example, if the Commissioner ceases an investigation as they no longer hold the opinion that the corruption issue could involve serious or systemic corrupt conduct, the Commissioner could decide to deal with the corruption issue in another way under this clause, including by making a referral to the relevant Commonwealth agency.

Commissioner may decide to take no action

- 6.28 The Commissioner would also be able to decide to take no action in relation to a corruption issue. This decision would be at the discretion of the Commissioner and is not subject to additional criteria or a mandatory process. This is intended to provide the Commission with flexibility to manage its workload, maintain its focus on serious or systemic corruption issues, and to dispense with referrals in a timely fashion in circumstances where, for example:
- the referral is unsubstantiated or unmeritorious; or
 - the referring agency has advised that it, or another investigative agency, is already investigating the corruption issue.
- 6.29 The Commissioner would not be under a duty to consider whether to deal with a corruption issue, whether it is requested to do so by the person who referred the issue or by any other person, or in any other circumstances.
- 6.30 Regardless of whether the Commissioner deals with a corruption issue, the Commissioner may refer an allegation or other information to another person or body that could more appropriately deal with the matter (see paragraph 6.10).

Clause 42—Preliminary investigations by Commissioner

6.31 This clause would provide the Commissioner with the power to conduct a preliminary investigation for the purposes of:

- confirming the existence or nature of a corruption issue (including whether a corruption issue could involve corrupt conduct that is serious or systemic); or
- to assist the Commissioner to decide whether or how to deal with a corruption issue.

6.32 Referrals to the Commissioner will often not contain sufficient information for the Commissioner to form an opinion as to whether there is a corruption issue, or whether a corruption issue could involve corrupt conduct that is serious or systemic. For example, a referral may allege that a public official has exercised a particular statutory power for an improper purpose, but may not be accompanied by relevant information that would enable the Commissioner to understand the facts and circumstances of the case, or the purposes for which that power may be exercised. The ability to conduct preliminary investigations is intended to enable the Commissioner to seek information to assist them to decide whether or how to deal with a matter based on credible and sufficient information.

Exercise of certain Part 7 powers for preliminary investigations

6.33 For the purposes of preliminary investigations, the Commissioner would be able to exercise the following investigative powers in Part 7:

- the power to direct the head of a Commonwealth agency to give information, or a document or a thing, to the Commissioner;
- the power to serve a notice to produce on any person requiring the person to give information, or a document or thing, to a specified staff member of the NACC.

6.34 The Commissioner would not be able to issue a post-charge or post-confiscation notice to produce for the purposes of a preliminary investigation.

6.35 This means that in issuing a notice to produce, the Commissioner may not require the person to give the information, document or thing to the Commissioner that includes:

- the subject matter of any charge, or imminent charge, against the person; or
- the subject matter of any confiscation proceeding, or imminent confiscation proceeding, against the person.

6.36 It is not appropriate or necessary for the Commissioner to have access to all of the coercive powers available under Part 7 for the purposes of preliminary inquiries. The intrusive nature of some of these powers means that they are not appropriate in the context of confirming the existence of or nature of a corruption issue or assisting the Commissioner to decide how to deal with the corruption issue.

6.37 The availability of these particular statutory powers for the purposes of a preliminary investigation would not preclude the Commissioner from seeking or obtaining information through other means—for example, by requesting the person who made an initial referral to provide further information on a voluntary basis. This clause would not limit the information, documents or things to which the Commissioner may have regard in making a decision about whether or how to deal with a corruption issue.

6.38 The provisions in Part 7 would specify:

- the mode in which information must be provided;
- how a notice is served;
- the period for compliance;
- compliance with a direction or notice (including an offence and provision for extension of time); and

- the retention of documents and things would also apply in relation to the exercise of these powers for preliminary investigations.

Commissioner may have regard to other information

- 6.39 This clause would provide that it does not limit the information, documents or things to which the Commissioner may have regard in making a decision about whether or how to deal with a corruption issue. This would ensure that the Commissioner can make decisions about how to deal with a corruption issue regardless of whether a preliminary investigation has been undertaken.

Clause 43—Commissioner’s directions about further actions

- 6.40 This clause would permit the Commissioner to direct a Commonwealth agency to stop taking specified action in relation to a corruption issue that concerns the agency.
- 6.41 The Commissioner would be able to direct an agency head to stop taking action in relation to a corruption issue that concerns the agency, unless the action is permitted by the Commissioner. The Commissioner would only be able to give a direction to an agency where the corruption issue *concerns* the agency—for example, where there is an issue of whether a staff member of that agency has engaged in corrupt conduct. This power would not enable the Commissioner to direct other independent agencies to stop conducting a separate or related investigation or inquiry, in parallel to the Commissioner. For example, this power would not enable the Commissioner to direct the Auditor-General to stop or defer an audit. This is appropriate, as the Commissioner should not have the power to direct other independent statutory office-holders, or independent officers of the Parliament, in the performance of their functions.
- 6.42 The Commissioner would only be able to give this direction if it is required to ensure the effectiveness of any action the Commissioner has taken, or might take, in relation to the corruption issue, or any other corruption issue. A direction could direct the agency not to take particular actions set out in the direction, or not to take action of any kind in relation to a corruption issue. This power could be used to prevent an agency from taking action that may, for example, alert a suspect to the existence of a corruption investigation, or result in the loss of evidence. In particular, the Commissioner could use this power to intervene to halt standard agency practices that could inadvertently prejudice a corruption investigation.
- 6.43 For example, where an agency has referred a suspected serious or systemic corruption issue to the Commissioner it could also, depending on the facts and circumstances of the case, be appropriate for the agency to suspend the staff member who is suspected of having engaged in corrupt conduct from work, with or without pay. It could also be the case that the agency has a standard administrative practice to require staff who will be absent from work for an extended period to return their electronic devices so that they can be reset and reissued to other staff members. In such circumstances, the Commissioner could direct the agency to not reset and reissue the staff member’s devices, to ensure that potential evidence is not inadvertently lost as a result of the application of standard administrative practices.
- 6.44 The Commissioner would be required to revoke a direction if it is no longer required.

Permission to take other action

- 6.45 An agency would be able to take actions in relation to a corruption issue if the Commissioner gives permission for those actions to be taken. Certain actions can also be taken without seeking permission from the Commissioner or despite a direction under this clause (see clause 44).
- 6.46 If an agency head needs to take action in relation to a corruption issue following the Commissioner giving a direction, they could make a request to the Commissioner. For example, an agency head may request to remove a person’s access from certain IT systems if they are suspected of engaging in corrupt conduct. If such a request is made, the Commissioner would be required to, as soon as practicable, decide whether the entity can take the requested action. The Commissioner would be required to provide a written explanation if they refuse to grant permission for the entity to take action, unless doing so would prejudice any action the Commissioner has taken or might take in relation to a corruption issue, or any action taken as a result of a NACC Act process (see paragraph 1.103).

6.47 The agency head will only need to make such a request to take action if a stop action direction is in place. If there is no such direction in place, the agency can continue to take any action it is otherwise permitted to take.

Interaction with other laws

6.48 A direction by the Commissioner would apply broadly and override any other law of the Commonwealth. Therefore, if a direction conflicted with a requirement in another statute to perform an action, the direction would prevail. For example, an internal disclosure investigation required under the PID Act could be stopped using this power. Where a stop action direction is issued that has the effect of stopping an investigation under the PID Act, an investigating officer would not be required to complete an investigation under the PID Act. Once the stop action direction is revoked, the PID Act timeframes would restart again.

6.49 A stop action direction would not be a legislative instrument. The NACC Bill states this to assist readers, as a direction is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Clause 44—Action that can be taken without permission

6.50 This clause would outline actions that Commonwealth agencies can take despite any stop action direction issued by the Commissioner.

6.51 There are some circumstances in which it is appropriate and justifiable for an agency to take actions in relation to a corruption issue, even if those actions could affect a corruption investigation. This clause would allow an agency to take action if the action is:

- taken to prevent or lessen an imminent risk to a person’s safety or life;
- taken in the interests of the security, defence or international relations of Australia;
- taken to prevent loss to the Commonwealth of an amount greater than the amount (if any) prescribed by the regulations that cannot be recovered; or
- otherwise unreasonable in the circumstances to await any necessary permission (for example, immediately removing IT access if there is an imminent risk that the person subject to the investigation is about to use that access for corrupt purposes that could have a significant impact on the agency).

6.52 If such action is taken, the agency head would be required to provide details of the action to the Commissioner. The agency head must provide these details as soon as practicable, but at least within 48 hours after the action is taken. This would ensure that the Commissioner has visibility of any actions that have been taken.

6.53 The agency head would be required to take reasonable steps to:

- ensure that the action does not prejudice the investigation of a corruption issue or any other NACC Act process (see paragraph 1.103); and
- preserve evidence that is, or could be, relevant for the purposes of conducting such a NACC Act process (see paragraph 1.103).

Clause 45—Previous investigations by Commonwealth integrity agencies

6.54 This clause would provide for an additional threshold to the commencement of a corruption investigation where the Commissioner is aware that a Commonwealth integrity agency (as defined in clause 15) has previously concluded an investigation into a matter regarding the conduct of a public official. The Commissioner would only be able to commence a corruption investigation into a corruption issue involving the conduct if the Commissioner is satisfied that it is in the public interest to do so.

- 6.55 The Commissioner would have broad jurisdiction and independence in performing their functions. However, this clause reflects the fact the NACC would also fit within an existing Commonwealth integrity architecture, with specialised agencies performing complementary functions. As such, it is likely that there would be circumstances in which:
- another Commonwealth integrity agency may have completed an investigation into a matter before it comes to the attention of the Commissioner—for example, a performance audit by the Auditor-General may reveal information that may give rise to a corruption issue in relation to a particular Commonwealth agency; or
 - the Commissioner may have made an active decision to await the outcome of another Commonwealth integrity agency’s investigation, before deciding whether and how to deal with a corruption issue.
- 6.56 There is a clear public interest in the effective investigation of allegations of serious or systemic corrupt conduct. Other Commonwealth integrity agencies may not have the jurisdiction or expertise to investigate or make findings in relation to a corruption issue, or have the necessary investigative powers to fully investigate the issue—in particular, if the issue appears to involve serious, criminal corrupt conduct. However, successive investigations relating to the same or substantially similar matter may, in some circumstances, be a disproportionate response.

The public interest test

- 6.57 In deciding whether it is in the public interest to commence the investigation, the Commissioner would be permitted to have regard to the following matters:
- the significance of the corruption issue;
 - the details of the investigation undertaken by the Commonwealth integrity agency (to the extent that those details are known by, or made available to, the Commissioner and the Commissioner considers them relevant);
 - any conclusions or findings of the integrity agency in relation to the corruption issue;
 - whether the Commissioner has any new evidence in relation to the corruption issue that was not available to the integrity agency, and would not have been obtainable by the exercise of reasonable diligence by that agency;
 - any unfairness to a person that may arise as a result of the Commissioner conducting a further investigation into the corruption issue;
 - the need to ensure that the corruption issue is fully investigated.
- 6.58 These factors are non-exhaustive and the Commissioner may consider other appropriate matters when considering whether it is in the public interest to commence a corruption investigation into a matter previously investigated by a Commonwealth integrity agency.

Clause 46—Matters dealt with by Independent Parliamentary Expenses Authority

- 6.59 This clause would limit the circumstances in which the Commissioner could investigate a corruption issue involving the conduct of a parliamentarian or staff member of a parliamentary office where that conduct falls within the jurisdiction of IPEA.
- 6.60 This clause would apply to conduct that has been, is or could be the subject of either of the following by IPEA:
- an audit, or a review for the purpose of preparing a report, under the *Independent Parliamentary Expenses Authority Act 2017* into the use, by the parliamentarian or the staff member, of work resources or travel resources;
 - a ruling, under subsection 37(1) of the *Parliamentary Business Resources Act 2017*, concerning conduct by the parliamentarian or the staff member in relation to expenses or allowances.

- 6.61 Where this clause applies, the Commissioner would only be permitted to commence a corruption investigation if IPEA has referred the corruption issue to the Commissioner accompanied by a statement that the Authority considers the issue could involve serious or systemic corrupt conduct. The Commissioner would also be required to be of that opinion to conduct a corruption investigation.
- 6.62 IPEA was established as an independent authority, responsible for auditing and reporting on parliamentarian's work expenses and those of their staff, as well to provide advice, monitor and administer claims for travel expenses and allowances. IPEA is intended to provide a single, consistent source of guidance, advice and rulings on these matters. This clause is intended to preserve the role of IPEA as the Commonwealth agency with lead responsibility for the parliamentary expenses framework.

Clause 47 – Matters dealt with by Electoral Commissioner

- 6.63 This clause would limit the circumstances in which the Commissioner could investigate a corruption issue that falls within the jurisdiction of the Electoral Commissioner.
- 6.64 The clause would apply to conduct of a person that has been, is, or could be the subject of an investigation by the Electoral Commissioner under, or into compliance with the *Commonwealth Electoral Act 1918*—unless the conduct is of an officer or a member of staff of the Australian Electoral Commission.
- 6.65 The Australian Electoral Commission is established as an independent oversight authority responsible for delivering Australian citizens' right to vote. This clause is intended to preserve the role of the Electoral Commissioner as the Commonwealth agency with lead responsibility for ensuring compliance with electoral obligations, including:
- alleged contraventions of the election funding and financial disclosure requirements in Part XX of the *Commonwealth Electoral Act 1918*, as well as offences under the *Criminal Code* in relation to that Part; and
 - electoral offences under Part XXI of that Act.
- 6.66 This clause would not apply in relation to the conduct of an officer or a member of the staff of the Australian Electoral Commission, within the meaning of the *Commonwealth Electoral Act 1918*. If there were an allegation of serious or systemic corrupt conduct involving an officer or a staff member of the Australian Electoral Commission, it would be appropriate that the Commissioner could commence a corruption investigation without the requirement for a referral from the Electoral Commissioner.

Clause 48—Public statements about corruption issues

- 6.67 This clause would allow the Commissioner to make a public statement about a corruption issue at any time. Generally, any public statements by the Commissioner about a particular corruption investigation, other than those made in the course of a public hearing, would be contained in an investigation report prepared under Part 8 after the conclusion of the investigation. However, there may be circumstances where it is appropriate or necessary for the Commissioner to make a public statement about a corruption issue during the course of an investigation or otherwise.

When a public statement may be appropriate

- 6.68 The circumstances in which the Commissioner considers it would be appropriate, desirable or necessary to make a public statement could include, for example, circumstances where the statement would:
- confirm that the Commissioner has commenced a corruption investigation into a particular corruption issue;
 - explain why the Commissioner has decided to deal with a corruption issue in a particular way, including by commencing a corruption investigation or referring the issue to another agency for investigation or consideration;

- explain why the Commissioner has decided not to take any further action in relation to a corruption issue;
- explain particular actions by the Commissioner in the course of a corruption investigation;
- correct factually inaccurate information that is in the public domain about a corruption issue; or
- make a public statement to avoid damage to a person’s reputation, where the Commissioner is satisfied that it is appropriate and practicable to do so. These circumstances would include those where a person has been incorrectly identified as the subject of a corruption investigation.

When a public statement may not be appropriate

6.69 The Commissioner would have a discretion as to whether to make a public statement about a corruption issue, including to avoid damage to a person’s reputation. It is not intended that the Commissioner would be required or expected to make public statements responding to any and every issue concerning a corruption issue that may be in the public domain. There would also be circumstances in which it would be inappropriate or impracticable for the Commissioner to make a public statement. These circumstances could include, for example, where:

- making a public statement could prejudice the conduct of a corruption investigation or other action that might be taken in connection with a corruption issue;
- making a public statement could compound the damage to a person’s reputation by calling greater attention to an issue that is only marginally in the public domain;
- the Commissioner considers it would be more appropriate to allow a matter to be addressed in another way, including by allowing a corruption investigation or other process to reach its conclusion.

Limitations on Commissioner’s discretion to make public statements

6.70 The Commissioner’s ability to make public statements would be limited by the limitations in clauses 230 and 231 as if the statement were a disclosure under clause 230 (see paragraphs 11.61 to 11.76). The Commissioner would therefore be restricted from making a public disclosure that includes:

- an opinion or finding about whether a particular person engaged in corrupt conduct;
- section 235 certified information; and
- information that the Commissioner is satisfied is sensitive information (as defined in clause 227).

6.71 The Commissioner would be required to consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates about whether the information is sensitive information. This recognises that the Commissioner may not be best placed to identify whether information is sensitive in circumstances where the information relates to the functions or activities of another agency.

6.72 If the public statements included an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity or any other person, the Commissioner would be required give the head of the agency or entity or other person concerned a reasonable opportunity to respond to the opinion, finding or recommendation and the proposed disclosure.

Division 2—Investigations conducted by Commonwealth agencies

6.73 This Division would outline the Commissioner’s powers in relation to a corruption issue it has referred to a Commonwealth agency for investigation. The Commissioner would be able to oversee the investigation, request and comment on the agency’s reports, make additional recommendations and follow-up on the agency’s implementation of recommendations.

Clause 49—Application

- 6.74 This clause would provide that this Division applies if the Commissioner decides to deal with a corruption issue by referring it to a Commonwealth agency for investigation under paragraph 41(1)(c). Under that clause the Commissioner may only refer a corruption issue to a Commonwealth agency to which the corruption issue relates.

Clause 50—Commissioner may oversee investigation

- 6.75 This clause would enable the Commissioner to oversee an investigation conducted by a Commonwealth agency into a corruption issue relating to that agency following a referral from the Commissioner. This is intended to allow the Commissioner to provide investigative support to agencies that are investigating a corruption issue following a referral but do not have the same level of investigative expertise or capability as the NACC. This would assist the Commissioner to appropriately manage the NACC's resources and allow the Commissioner to focus on the most serious or systemic corruption issues, while providing support to agencies to investigate minor or lower-level corruption issue.
- 6.76 The Commissioner's ability to oversee investigations conducted by Commonwealth agencies is limited to a corruption issue that the Commissioner decides to deal with under clause 41 by referring the issue back to the agency to which the issue relates for investigation. Where the Commissioner has decided to deal with a corruption issue under clause 41 by referring it to another Commonwealth, State or Territory body for consideration, the Commissioner would not be able to oversee any investigation that the other agency then decided to undertake. This ensures that other independent investigative or oversight bodies (such as the AFP or the Commonwealth Ombudsman) cannot be the subject of direction by the Commissioner when performing their own investigative functions in relation to other Commonwealth agencies.
- 6.77 If the Commissioner decides to oversee the investigation, the Commissioner must notify the agency head.

Clause 51—Commissioner may give directions

- 6.78 This clause would provide that the Commissioner may give the agency directions about the planning and conduct of the investigation. The Commissioner may give such directions to the agency's nominated contact for the investigation. However, the agency head has an obligation to ensure the agency follows the Commissioner's directions. Directions would be the main statutory mechanism for the Commissioner to provide investigative support to agencies that are investigating a corruption issue following a referral but do not have the same level of investigative expertise or capability as the NACC. The Commissioner may also share with the agency information that is relevant to the investigation or the conduct of investigations generally (see for example clause 229).

Clause 52—Commissioner may require reports

- 6.79 This clause would provide that the Commissioner may require the agency head to provide either or both of the following:
- progress reports from time to time;
 - a completion report on the completion of the investigation.
- 6.80 The Commissioner may require such reports regardless of whether they decide to oversee the investigation.

Progress reports

- 6.81 The ability for the Commissioner to require an agency to provide progress reports would assist the Commissioner to maintain visibility of the progress of the investigation and, where appropriate, could result in the Commissioner:
- where the Commissioner is overseeing the investigation, providing further directions to the agency about the planning and conduct of the investigation;

- revisiting their decision about whether or not to oversee the investigation; or
- revisiting their decision about how to deal with the corruption issue, including by commencing a corruption investigation and directing the agency to stop its internal investigation.

Completion reports

- 6.82 Completion reports, when required by the Commissioner, would provide the Commissioner with visibility of the outcome of an investigation and the incidence of corrupt conduct within Commonwealth agencies.
- 6.83 This clause would not prescribe the form and content of completion reports. This would be a matter for the Commissioner to determine through guidance or directions to an agency when they oversee an investigation. Subject to those directions and guidance, it is envisaged that reports would deal with similar matters as reports prepared by the Commissioner under Part 8.

Clause 53—Commissioner’s comments and recommendations

- 6.84 This clause would provide that, where the Commissioner has required an agency head to provide a completion report, the Commissioner may comment on the report or provide additional recommendations in relation to the report. The Commissioner may choose to do this when they consider the agency’s completion report or the recommendations it makes are deficient.

Opportunity to respond must be given before including certain information in completion reports

- 6.85 The Commissioner would be required to comply with certain procedural fairness requirements prior to making comments or recommendations on a completion report that are critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity or any other person.
- 6.86 In such circumstances, the Commissioner would be required to provide the head of the agency, the head of the entity or the other person concerned with a statement setting out the comments or recommendations, a reasonable opportunity to respond to the comments or recommendations. This would ensure that persons who are subject to critical comments or recommendations have the opportunity to respond.
- 6.87 In relation to a critical comment or recommendation about a Commonwealth agency or a State or Territory entity, the response may be given by the head of the agency or entity. In relation to a critical comment made about another person, the response may be given by the person or, with approval of the person, their representative (for example, a person might give approval for their legal practitioner to provide a response on their behalf).
- 6.88 This clause would not prescribe what constitutes a reasonable opportunity to comment given this will vary depending on the circumstance. A reasonable opportunity to comment on a single adverse comment would be different to a case involving lengthy critical comments and recommendations.

Clause 54—Follow-up action on completion report

- 6.89 This clause would enable the Commissioner, in circumstances where the Commissioner has requested a completion report, to request an agency head to provide the details of any action that the agency head has taken, or proposes to take, with respect to:
- a recommendation included in the report; or
 - a recommendation made by the Commissioner in relation to the report.
- 6.90 The agency head would be required to comply with request. This would allow the Commissioner to ensure their recommendations are being implemented satisfactorily and, if they are not, to escalate the matter to the relevant minister or presiding officer.
- 6.91 If the Commissioner is not satisfied with the response, the Commissioner may refer the matter to specified persons who have oversight of the Commonwealth agency. Those persons are outlined in the following table by reference to the type of agency concerned.

Table 4—Referral of unsatisfactory response to request relating to a completion report

	<i>Agency providing response</i>	<i>Who the Commissioner may refer the response to</i>
1	Office of a parliamentarian who is a senator	The President of the Senate
2	Office of a parliamentarian who is a member of the House of Representatives	The Speaker of the House of Representatives
3	Department of the Senate	The President of the Senate
4	Department of the House of Representatives	The Speaker of the House of Representatives
5	Other Department of the Parliament established under the <i>Parliamentary Service Act 1999</i>	Both the President of the Senate and the Speaker of the House of Representatives
6	Statutory agency	The Minister administering that the relevant statute
7	Other Commonwealth agencies, for example Departments of State	The Minister having general responsibility for the activities of the agency

- 6.92 If the Commissioner decides to refer the matter to such a person, the Commissioner may also provide a copy of the material referred to:
- the President of the Senate for presentation to the Senate; and
 - the Speaker of the House of Representatives for presentation to the House of Representatives.
- 6.93 Given information presented to a House of Parliament would become public, the Commissioner must exclude certain information from the copy of the material sent to Parliament. Specifically, the Commissioner would be required to exclude section 235 certified information and information that the Commissioner is satisfied is sensitive information (see paragraphs 11.9 to 11.14).
- 6.94 Clause 235 certificates permit the Attorney-General to prevent the disclosure of certain information that would be contrary to the public interest, and would otherwise be required to be disclosed under the NACC Bill (see paragraphs 11.112 to 11.136). A clause 235 certificate would seek to protect this information and mitigate against the prejudicial consequences that may arise from its disclosure.
- 6.95 In determining whether the Commissioner is satisfied that information constitutes sensitive information for the purpose of its exclusion from the material sent to Presiding Officers, the Commissioner would be required to consult with the head of each Commonwealth agency or State or Territory government entity to which the material relates. This ensures that the Commissioner is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.
- 6.96 If the Commissioner would ordinarily refer a matter under this clause to a presiding officer—for example because the corruption issue concerns a parliamentary department—the Commissioner could choose to give the relevant presiding officer or officers two sets of material, one for their own use in overseeing the department and another, with the relevant exclusions made, for presentation to the Parliament.

PART 7 INVESTIGATING CORRUPTION ISSUES

7.1 This Part would set out the powers available to the Commissioner under the NACC Bill for the purposes of the Commissioner's investigation of a corruption issue that could, in the Commissioner's opinion, involve corrupt conduct that is serious or systemic, and how those powers are to be exercised. It would:

- permit the Commissioner to investigate such a corruption issue in the manner the Commissioner thinks fit, with this general power operating subject to the thresholds that apply to the use of specific powers (Division 1);
- allow the Commissioner to obtain information, documents and things through directions to Commonwealth agency heads and notices to produce that may be issued to any person (Division 2);
- allow the Commissioner to hold private and public hearings and to summon persons to give evidence, information, documents and things at a hearing; and regulate how hearings will operate (Division 3);
- include offences to protect the integrity and effectiveness of investigations and ensure persons issued with a notice to produce or summonsed to a hearing provide accurate and complete evidence, information, documents and things as required (Divisions 2 and 3);
- include a process for dealing with contempt of the NACC and orders and warrants in relation to potentially absconding or uncooperative witnesses, to ensure persons summonsed to a hearing attend and cooperate with investigations (Subdivisions D and E of Division 3);
- regulate the use and disclosure of information about certain notices to produce and summonses, and of investigation material and material derived from that material (Division 4);
- set out the privileges and protections that apply to persons giving evidence or information, or producing documents or things to the Commissioner, including limits on certain privileges and protections (Division 6);
- allow authorised officers of the NACC to:
 - enter premises occupied by most Commonwealth agencies without a warrant, exercise inspection powers, and, in limited circumstances, seize things;
 - conduct a search of a premises or person under an independently issued search warrant; and
 - stop and search conveyances for things relevant to an indictable offence or to a corruption issue the Commissioner is investigating, without a warrant, in limited circumstances (Division 7); and
- regulate the retention and return of documents and things produced to the Commissioner under the NACC Bill; and the use and sharing of documents, things, copies and photographs seized or made, and the return of things seized, under Division 7 (Divisions 5 and 7).

7.2 Some of the above powers would also be available for the purposes of preliminary investigations, public inquiries and the Inspector's functions under Parts 6, 9 and 10 of the NACC Bill respectively.

Powers under other legislation

7.3 The Consequential Bill would also provide for the Commissioner to have:

- additional information-gathering and investigative powers under other Acts, including the AML/CTF Act, POC Act, the SD Act and the TIA Act; and
- the power to conduct controlled operations and integrity testing operations, acquire and use assumed identities and issue witness identity protection certificates for operatives under the *Crimes Act 1914*.

7.4 Those powers would be subject to the existing thresholds and safeguards that apply under those Acts.

Division 1—General

Clause 55—Application of Part

- 7.5 This clause would provide that Part 7 applies to the Commissioner’s investigation of a corruption issue that could, in the Commissioner’s opinion, involve corrupt conduct that is serious or systemic. This is consistent with the scope of the Commissioner’s jurisdiction to investigate corruption issues as set out in the functions of the Commissioner (under Part 3, see paragraphs 3.4 to 3.7) and the corruption investigation threshold (under Part 6, see paragraphs 6.12 to 6.22).
- 7.6 This clause would also clarify that Part 7 applies whether the investigation is conducted solely by the Commissioner or jointly by the Commissioner and a Commonwealth agency or a State or Territory government entity. For example, the Commissioner may decide under Part 6 to jointly investigate a corruption issue with the agency concerned or with one of the NACC’s State and Territory counterpart agencies (see paragraph 6.10).
- 7.7 In a joint investigation, only the Commissioner, any delegates (see clause 276) and authorised officers (see clause 267) would be able to exercise powers under this Part. The other investigating agency would need to rely on powers conferred on that agency under other legislation, including its enabling legislation.
- 7.8 Some of the above powers would also be available for the purposes of preliminary investigations, public inquiries and the Inspector’s functions under Parts 6, 9 and 10 of the NACC Bill respectively.

Clause 56—Conduct of corruption investigations generally

- 7.9 This clause would permit the Commissioner to investigate a corruption issue in such manner as the Commissioner thinks fit. This general power would operate subject to the thresholds that apply to the use of specific powers.
- 7.10 This would ensure that the Commissioner has discretion as to the appropriate approach to a corruption investigation, including decisions about which powers should be used and in which order. This is appropriate to support the independence of the Commissioner.

Division 2—Requiring information, documents and things

- 7.11 This Division would provide two mechanisms for the Commissioner to obtain information, documents and things relevant to a corruption investigation:
- directions to the heads of Commonwealth agencies; and
 - notices to produce, which may be served on any person.
- 7.12 This Division would also create two offences related to notices to produce:
- failure to comply with a notice; and
 - providing false or misleading information or documents in response to a notice.

Subdivision A—Directions to agency heads

Clause 57—Directions to agency heads

- 7.13 This clause would allow the Commissioner to obtain information, documents and things relevant to a corruption investigation from a Commonwealth agency.
- 7.14 Where the Commissioner has reasonable grounds to suspect that a Commonwealth agency has information or a document or thing relevant to a corruption investigation, the Commissioner would be able to direct the head of the agency to provide that information, document or thing to a specified staff member of the NACC. These directions to produce must be in writing.

- 7.15 Agency heads would be required to comply with such requests as soon as practicable. This requirement is intended to balance:
- the importance of the timely investigation of corruption issues that could involve serious or systemic corrupt conduct, consistent with the objects of the NACC Bill;
 - the legitimate need for agencies to have sufficient time to comply with directions, based on the volume and accessibility of the information, documents or things required to be given—for example, where relevant documents are held in hard copy at an archival facility; and
 - where relevant, the time that may be required for an agency head to request that the Attorney-General give a certificate to protect particular information, under Subdivision A of Division 3 of Part 11 of the NACC Bill.
- 7.16 Under clause 114, the agency head would not be excused from providing the required information, documents or things on grounds of public interest immunity or, in most cases, legal professional privilege.
- 7.17 Directions under this clause would provide non-enforceable means for the Commissioner to seek information directly from another Commonwealth entity. The full process associated with a notice to produce is not needed where one Commonwealth entity is seeking information from another and the Commonwealth is wearing the cost burden of complying with that notice.
- 7.18 If an agency head failed to provide the information, document or thing requested under this clause, the Commissioner could issue a notice to produce for the information, document or thing under clause 58 (which carries a penalty for non-compliance).

Subdivision B—Notices to produce

Clause 58—Notices to produce

- 7.19 This clause would allow the Commissioner to compel a person to provide information, or produce documents or things that are relevant to a corruption investigation. The Commissioner could use this mechanism either in conjunction with their power to hold hearings or independently of that power (see subclause 58(7)).
- 7.20 The power to require a person to give information or produce documents or things would facilitate access to information, documents or things with the assistance of the recipient of the notice. For example, it may be easier for both the recipient of a notice and the Commissioner to obtain information from a database under a notice to produce that requires and enables staff members of that agency—with existing access to, and familiarity with, that database—to extract information that is responsive to the notice, than it would be for staff members of the NACC to do so under a search warrant.
- 7.21 Where the Commissioner has reasonable grounds to suspect that a person has information or a document or thing relevant to a corruption investigation, the Commissioner would be able to require the person to provide that information, document or thing to a specified staff member of the NACC. For example, the Commissioner might issue a notice requiring a financial institution to provide the financial records of a person under investigation for engaging in corrupt conduct for financial gain.
- 7.22 The Commissioner would need to serve a notice on the person in writing (for methods of service, see section 28A of the *Acts Interpretation Act 1901*). The notice must be signed by the Commissioner and specify the period within which, and the manner in which, the person must comply with the notice. The Commissioner may require that the information sought be given in writing. This would ensure that the person who needs to respond to the notice has clear, written information about the requirements imposed. This is appropriate given offences apply for non-compliance with a notice. The requirement for the notice to be signed by the Commissioner would ensure that the person can identify that the notice has been properly authorised.

7.23 Under clause 113, the privilege against self-incrimination would be abrogated for notices to produce, but information, documents and things a person provides would not be admissible against that person in most proceedings. Under clause 114, the person would not be excused from providing the required information, documents or things on grounds of public interest immunity or, in most cases, legal professional privilege. Restrictions would also apply to the disclosure of investigation material, including information, documents and things provided in response to a notice to produce, under Division 4 of this Part.

7.24 Offences would apply under clauses 60, 61 and 70 for failing to comply with a notice, producing false or misleading information or documents in response to a notice, or destroying documents or things required under a notice. Disclosing the existence of a notice, or information about the notice, may also constitute an offence in certain circumstances (see clause 98).

Post-charge and post-confiscation application notices

7.25 The Commissioner would be permitted to issue a notice to a person charged with an offence, facing confiscation proceedings, or where a charge or proceeding is imminent (these are referred to as post-charge or post-confiscation application notices: see the definitions in Division 8 of this Part). Further, the matters in relation to which the Commissioner may require the person to give the information, document or thing to the NACC would include the subject matter of any charge, confiscation proceeding, or imminent charge or proceeding. The ability to issue a post-charge or post-confiscation application notice would ensure that corruption investigations are not delayed while charges or proceedings are resolved.

7.26 An additional threshold would apply before the Commissioner may issue a post-charge or post-confiscation application notice. The Commissioner could only issue such a notice if they had reasonable grounds to suspect the information, document or thing is necessary for the purposes of the investigation despite the person having been charged or the confiscation proceeding having commenced, or the charge or proceeding being imminent.

7.27 Express provisions of this kind, and the higher threshold that applies before a post-charge or post-confiscation application notice may be issued, are necessary because of the effect such a notice has on a person in a proceeding for a related criminal offence or related confiscation proceeding. These provisions provide additional assurance that the Commissioner's powers are appropriately balanced and that, in deciding to issue a notice, the Commissioner must pay due regard to the fact that the person has been charged with an offence or is the subject of confiscation proceedings. This reinforces the point that a notice is to be issued for the purposes of a relevant corruption investigation and not to bolster confiscation action or the prosecution of a person to whom a notice is issued.

Clause 59—Period for complying

7.28 The Commissioner would generally be required to allow a person served with a notice at least 14 days to comply with the notice. This balances the need for corruption investigations to be conducted in a timely manner, consistent with the objects of the NACC Bill, with the need to ensure a person is given a reasonable opportunity to respond to a notice.

7.29 If the Commissioner considers that allowing a 14-day period would significantly prejudice an investigation, the Commissioner would be authorised to specify a shorter period of time. If a shorter period of time is specified, the Commissioner would be required to record, in writing:

- the name of the corruption investigation that would be prejudiced; and
- why a 14-day period would significantly prejudice the investigation.

7.30 This would ensure that there is an appropriate record of the Commissioner's reasons for the shorter period.

- 7.31 The Commissioner would also be able to extend the period allowed for complying with a notice, including in response to a written application by the person served with a notice. This clause would require this application to be made in writing, before the end of the period specified in the notice or as soon as possible after that. This ensures any application is made in a timely way and in order to allow the person to comply with the notice, rather than seeking to excuse non-compliance with a notice after the period for compliance has long expired.
- 7.32 The Commissioner may also extend the period for compliance of their own initiative, regardless of whether an application has been made. This allows the Commissioner to reach an agreement to an extended timeframe without requiring the person to go through the process of making an application.
- 7.33 The flexibility for the Commissioner to extend the period for compliance with a notice is important because some notices may require the production of voluminous documents or information. If this is not immediately apparent to the Commissioner when first issuing the notice, they may not realise that the person has been given insufficient time to comply with the notice. It may also be reasonable for a recipient of a notice to obtain an extension to consult with a third party who has an interest in a document sought before producing it. Where relevant, it may also be reasonable for a recipient of a notice to request an extension to allow sufficient time for the Attorney-General to issue a certificate to protect particular information sought under the notice (see clauses 235 and 236).
- 7.34 If a person served with a notice has given the specified information, or produced the specified documents or things, the Commissioner would be required to make and retain a written record of that fact. The Commissioner would also be required to give a copy of the record to the person if the person so requests. This ensures there is a clear record that the notice has been complied with, ensuring the person has certainty that they have no remaining obligations and that the criminal offences for non-compliance will not apply.

Clause 60—Offence—failure to comply with notice to produce

- 7.35 This clause would make it an offence if a person served with a notice to produce does not comply with the notice. This offence would ensure that the requirement to respond to a notice can be effectively enforced so that the Commission can gain timely access to the information it needs to fulfil its investigatory functions.
- 7.36 The offence would consist of the following physical elements:
- the person is served with a notice to produce;
 - the person fails to comply with the notice within the period specified in the notice, or such further time as the Commissioner has allowed.
- 7.37 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the circumstance that a notice has been served on the person, recklessness would be the fault element (meaning proof of intention, knowledge or recklessness will satisfy this fault element; in practice, where a notice has been served personally, the person would know of that service); and
 - for the conduct of failing to comply with the notice, intention would be the fault element.
- 7.38 A note to subclause 60(1) includes cross-references to protections for journalists' informants in clause 31 and Attorney-General's certificates in relation to international relations, which may be issued under clause 236. In some circumstances, those clauses might provide grounds for a person to rely on the defence of lawful authority under section 10.5 of the *Criminal Code*. The note also cross references Division 6 of Part 7, which deals with privileges and protections.

7.39 The maximum penalty for the offence is imprisonment for two years, consistent with the equivalent offence in the LEIC Act. This penalty is appropriate to enforce the NACC's coercive information-gathering powers and ensure they are effective in allowing the NACC to obtain material relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

Defence

7.40 A specific defence would be available in relation to this offence, in addition to the standard defences available under the *Criminal Code*. The defence would apply if it is not reasonably practicable for the person to comply with the notice to produce within the period specified in the notice (or any further time as the Commissioner allows). For example, the defence may apply where the person does not have the information, document or thing that is required for the purposes of the notice, or where it is not possible to compile all of the relevant information or documents in the time allowed.

7.41 A defendant would bear an evidential burden in relation to this defence (see subsection 13.3(3) of the *Criminal Code*). It is appropriate that the defendant bear the evidential burden for this matter given it will be peculiarly within the knowledge of the defendant.

7.42 To rely on the defence, the person would only need to adduce or point to evidence suggesting a reasonable possibility that compliance was not reasonably practicable. If the person does so, and in order for the offence to apply, the prosecution would then need to discharge its legal burden to negate that possibility beyond reasonable doubt.

Clause 61—Offence—producing false or misleading information or documents

7.43 The effectiveness of the Commissioner's powers will depend on people providing honest and complete information. To incentivise honest and complete responses to notices, this clause would make it an offence to provide false or misleading information or documents in response to a notice to produce.

7.44 The offence would consist of the following physical elements:

- the person is served with a notice to produce;
- the person gives information or a document as required by the notice;
- the information or document:
 - is false or misleading, or
 - omits a matter or thing without which the information or document is misleading.

7.45 The fault elements for the first two physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:

- for the circumstance that a notice has been served on the person, recklessness would be the fault element; and
- for the conduct of giving information or documents, intention would be the fault element.

7.46 For the third physical element—the circumstance that the information is false or misleading, or omits a matter or thing without which the information or document is misleading—the fault element is specified in the offence as knowledge.

7.47 The maximum penalty for the offence is imprisonment for five years. ACLEI currently relies on the general offences in the *Criminal Code* for providing false or misleading information to a Commonwealth official, which are punishable by a maximum penalty of 12 months' imprisonment. However, in practice this maximum penalty has often been too low to incentivise honesty. The five-year penalty for this offence is the same as applies under the *Australian Crime Commission Act 2002* for giving false or misleading evidence at an examination.

- 7.48 This penalty reflects the seriousness of deliberately misleading the NACC in relation to an investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic. It is appropriate that the deliberate giving of false or misleading information or production of false or misleading documents be subject to this higher penalty. If not detected by the Commissioner, the giving of false or misleading evidence would have the potential to significantly undermine the integrity of a corruption investigation including for example, by:
- preventing the Commissioner from following lines of inquiry that would have been available had the person not given false or misleading evidence; or
 - causing the Commissioner to form an unsound opinion, or make an unsound finding or recommendation based on that false or misleading evidence.

Defence

- 7.49 A specific defence would be available in relation to this offence, in addition to the standard defences available under the *Criminal Code*. The offence would not apply if the information or document is not false or misleading in a material particular. A defendant would bear an evidential burden in relation to this defence (see subsection 13.3(3) of the *Criminal Code*). It is appropriate that the defendant bear the evidential burden for this matter given it will be peculiarly within the knowledge of the defendant.
- 7.50 To rely on the defence, the person would only need to adduce or point to evidence suggesting a reasonable possibility that the information or document is not false or misleading in a material particular. If the person does so, and in order for the offence to apply, the prosecution would then need to discharge its legal burden to negate that possibility beyond reasonable doubt for the offence to apply.

Division 3—Hearings

- 7.51 This Division would allow the Commissioner to hold private and public hearings, and to summon persons to give evidence, information, documents and things at a hearing, for the purpose of a corruption investigation concerning conduct the Commissioner is of the opinion could involve serious or systemic corrupt conduct. This Division would also regulate how hearings operate, including providing for the legal representation of witnesses, the examination and cross-examination of witnesses and the taking of evidence on oath or affirmation.
- 7.52 The Division would also include offences and a process for dealing with contempt of the NACC. This would protect the integrity of hearings and ensure persons summonsed to hearings attend and provide accurate and complete evidence, information, documents and things as required. The Division would further include orders and warrants in relation to witnesses who are likely to abscond. This would assist the effectiveness of the Commissioner's hearing powers, by ensuring that witnesses who are summonsed to attend hearings cannot evade that obligation.
- 7.53 Hearings would be a key power available to the Commissioner. Hearing powers would enable the Commissioner to obtain information that would not otherwise be available—in particular where it is uniquely within the knowledge of a person—or could only be obtained after long and complex investigations. Material gathered in hearings would significantly assist the Commissioner in furthering corruption investigations.
- 7.54 This Division would contain clear provisions about the scope of the Commissioner's powers with respect to hearings. These provisions ensure that the Commissioner is exercising their powers for a proper purpose and that, where relevant, the Commissioner has paid due regard to the fact that the person has been charged with an offence or is the subject of confiscation proceedings. These provisions would reinforce that hearings are to be held for the purposes of a relevant corruption investigation and not to bolster confiscation action or the prosecution of a witness.

Subdivision A—Commissioner may hold hearings

- 7.55 This Subdivision would allow the Commissioner to hold hearings for the purposes of a corruption investigation and to summon a person to appear at a hearing to give evidence and to provide information, documents and things. It would also allow the Commissioner to require a person at a hearing to give information, or produce a document or thing not specified in the summons and provide for legal representation at, and records of, hearings. The Subdivision also includes several offences related to hearings.
- 7.56 Subdivision B would allow for private and public hearings, and regulate private hearings and investigation material obtained at private hearings.

Clause 62—Commissioner may hold hearings

- 7.57 This clause would provide authority for the Commissioner to hold hearings for the purpose of a corruption investigation, and, subject to this Division, to conduct the hearing in such a manner as they think fit.
- 7.58 This clause would also require that if the Commissioner considers that a person appearing at a hearing may disclose intelligence information (as defined in clause 239) relating to an intelligence agency, the Commissioner must conduct the hearing in a manner consistent with any arrangement in force between the Commissioner and the head of the agency under that clause.
- 7.59 These arrangements are intended to ensure the method used by the Commissioner to obtain, store, access, use and disclose intelligence information are appropriate and reflect the need to protect that information. In the context of a hearing concerning intelligence information, an arrangement under clause 239 may provide, for example, that:
- the hearing should be conducted in private in a secure facility that is appropriate for discussions of intelligence information; or
 - there should be protective measures in place to ensure that a witness who may be a staff member of ASIO or ASIS can arrive at, and depart from, a private hearing in a manner that ensures the protection of their identity.

Clause 63—Commissioner may summon persons

- 7.60 This clause would allow the Commissioner to summon a person to attend a hearing to give evidence. The summons may also require the person to give the Commissioner information, or produce documents or things, at the hearing.

Summons to give evidence

- 7.61 The Commissioner would be permitted to summons a person to attend a hearing at a specified time and place to give evidence. The Commissioner could only issue a summons if they had reasonable grounds to suspect the person had evidence relevant to a corruption investigation.
- 7.62 The person must attend a hearing from day to day unless excused or released from further attendance by the Commissioner. A hearing may take place over several days, and the Commissioner may not know how long the hearing will take at the outset. The duration of a hearing may depend, to some extent, on the cooperation of, and the answers provided by, the witness. The summons may specify just the day on which the hearing begins, with the summons requiring the person to continue attending until excused or released.

Other things that may be required under a summons

- 7.63 If the Commissioner summons a person to attend a hearing and give evidence, and has reasonable grounds to suspect that the person has particular information or a particular document or thing relevant to the corruption investigation, the summons may also require the person to give that information or produce the document or thing at the hearing. Although it would also be open to the Commissioner to require the person to give the same information, or produce the same document or thing, under a notice to produce under clause 58, the ability to include the requirement in a summons would enable all relevant requirements to be set out in a single document served on the person.

Post-charge and post-confiscation application summonses

- 7.64 The Commissioner would be permitted to issue a summons to a person charged with an offence, the subject of confiscation proceedings, or against whom such a charge or proceeding was imminent. These are referred to as post-charge or post-confiscation application summonses (see the definitions in Division 8 of this Part). Further, the matters in relation to which the Commissioner may require the person to give evidence or information, or produce documents or things, to the Commissioner at a hearing would include the subject matter of any charge, confiscation proceeding, or imminent charge or confiscation proceeding. The ability to issue a post-charge or post-confiscation application summons would ensure that corruption investigations are not delayed while charges or confiscation proceedings are resolved.
- 7.65 An additional threshold would apply before the Commissioner may issue a post-charge or post-confiscation application notice. The Commissioner could only issue such a notice if they had reasonable grounds to suspect the evidence, information, document or thing is necessary for the purposes of the investigation even though the person has been charged or the confiscation proceeding has commenced, or the charge or proceeding is imminent.
- 7.66 Express provisions of this kind, and the higher standard of necessity that applies before a post-charge or post-confiscation application summons may be issued, are necessary because of the effect such a summons has on a witness in a proceeding for a related criminal offence or related confiscation proceeding.
- 7.67 These provisions ensure that, in deciding to issue a summons, the Commissioner has paid due regard to the fact that the person has been charged with an offence or is the subject of confiscation proceedings. These provisions would reinforce the point that a hearing is intended to be held for the purposes of a relevant corruption investigation and not to bolster confiscation action or the prosecution of a witness.

Other matters relating to a summons

- 7.68 The summons would need to be in writing, signed by the Commissioner and served on the person required to attend the hearing. This would ensure that the person who is summonsed has clear, written information about the requirements imposed. This is appropriate given offences apply for non-compliance with a summons. The requirement for the summons to be signed by the Commissioner would ensure that the person can identify that the notice has been properly authorised.
- 7.69 The Commissioner would need to record in writing the reasons for the summons at or before the time the summons is issued. This would ensure that there is an appropriate and contemporaneous record of the Commissioner's reasons for the summons.
- 7.70 This clause would require the summons to be served on the person required to attend the hearing (for methods of service, see section 28A of the *Acts Interpretation Act 1901*).
- 7.71 Without limiting subsection 33(3) of the *Acts Administration Act 1901* (which provides that a power to make an instrument includes the power to vary or revoke the instrument), the Commissioner would be able to vary the time or place for the hearing that is specified in the summons.

- 7.72 Under Division 6 of this Part, the privilege against self-incrimination, among others, would be abrogated for hearings, but information, answers, documents and things a person provides would not be admissible against them in most proceedings. Limits will also apply to the disclosure of investigation material, including information, answers, documents and things provided at a hearing, under Division 4 of this Part.
- 7.73 Offences would apply under clauses 68, 69, 70, 71 and 81 for failing to attend a hearing; failing to provide information, or an answer, document or thing; giving false or misleading information or documents; or destroying documents or things required. Disclosing the existence of a private hearing summons, or information about the summons, may also constitute an offence in certain circumstances: see clause 84.

Clause 64—Summons must set out matters for questioning

- 7.74 This clause would require the Commissioner in most cases to set out in a summons, so far as is reasonably practicable, the general nature of the matters in relation to which the Commissioner intends to question the person. This would assist a person summonsed to prepare for attending a hearing.
- 7.75 The requirement to set out the general nature of matters would not apply if the Commissioner is satisfied that setting out that information is likely to prejudice:
- the corruption investigation to which the hearing relates or any other NACC Act process (see paragraph 1.103); or
 - any action taken as a result of a NACC Act process.
- 7.76 This limitation is appropriate to ensure the integrity of an investigation and subsequent processes, and could be used if the Commissioner is satisfied that setting out the general nature of the matters in relation to which the Commissioner intends to question the person is likely to prejudice the corruption investigation or a subsequent proceeding. For example, this may apply where the Commissioner is satisfied that it is likely that the person would use that information to coordinate their answers with other persons whom the Commissioner has summonsed to give evidence at other hearings, or who may be required to answer questions or give evidence in a related proceeding.
- 7.77 If information about proposed matters for questioning is set out in a summons, the Commissioner is not prevented from questioning the summonsed person in relation to any aspect of any corruption investigation. This is appropriate to ensure that the Commissioner can follow lines of questioning that:
- arise during the course of the hearing, as a result of the person's answers to questions, or information given, or documents or things produced, in accordance with the summons;
 - arise between the time that the Commissioner issues the summons and the time of the hearing including, for example, answers given by another person at a hearing in the intervening period; and
 - involve matters the Commissioner was satisfied could not be set out in the summons.

Clause 65—Commissioner may require information, documents and things

- 7.78 This clause would allow the Commissioner to require a witness to give information, or produce a document or thing, at a hearing, including where it was not already specified in the summons.
- 7.79 Allowing the Commissioner to require the production of items and information at a hearing and without notice would support the Commissioner's investigative capabilities, including by enabling the Commissioner to require the person to give information, or produce a document or thing, to validate or follow up on an answer given in response to a question, and reduce the scope for witnesses to tamper with or destroy information.

Clause 66—Legal representation

- 7.80 This clause would allow a person giving evidence at a hearing to be represented by a legal practitioner. This is appropriate to ensure the person has independent advice available to them about the requirements imposed on them, and the consequences of compliance and non-compliance.
- 7.81 The Commissioner would also be able to consent to the legal representation of a person who is not giving evidence if special circumstances exist. For example:
- if a person was giving evidence relating to another person who was present at the hearing but not giving evidence, that other person may wish to have their legal practitioner present; or
 - if the hearing was likely to involve the disclosure of sensitive information, information covered by a certificate issued by the Attorney-General under clause 235, or intelligence information that is subject to an arrangement under clause 239, or was likely to involve lines of questioning that may risk the disclosure of information covered by a certificate issued by the Attorney-General under clause 236, it may be appropriate for the Attorney-General or the agency concerned (acting on behalf of the Commonwealth where appropriate) to be legally represented.
- 7.82 This clause would apply subject to clause 75, which would allow the Commissioner to determine whether a person other than the legal representative of a witness may be present at a private hearing.

Clause 67—Record of hearings

- 7.83 This clause would require the Commissioner to ensure a hearing is recorded.
- 7.84 The record would be required to include any statements made by the Commissioner under clause 73 about the circumstances, and capacity, in which a witness is participating in a hearing.
- 7.85 The record would generally need to include documents produced at the hearing and a description of other things produced at the hearing. However, the Commissioner would have the discretion to direct that a document or description is not to be included in the record. This discretion would be appropriate to protect, for example, a legally-privileged document that is given by a person as required by a summons at a public hearing—consistent with the requirement in clause 74 that evidence that discloses legal advice given to a person must be given in private.
- 7.86 This clause would not stipulate the manner in which the hearing must be recorded—for example, by a stenographer, or by audio or video recording. It is appropriate that the Commissioner have the discretion to determine the manner in which a hearing is recorded, taking into account all of the circumstances. However, this clause would require a complete and accurate record of the hearing—subject to the Commissioner’s discretion to direct that a document or description is not to be included in the record.

Clause 68—Offence—failure to attending hearing

- 7.87 This clause would make it an offence if a person summonsed to attend a hearing fails to attend as required by the summons, or fails to appear and report from day to day during the hearing. The inclusion of this offence would ensure that the requirement to attend a hearing can be effectively enforced.
- 7.88 The offence would consist of the following physical elements:
- the person is served with a summons to attend a hearing;
 - the person fails to either:
 - attend as required by the summons, or
 - appear and report at the hearing from day to day;
 - the person has not been excused or released from further attendance by the Commissioner.

- 7.89 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the circumstance that the person was served with a summons to attend a hearing, recklessness would be the fault element (meaning proof of intention, knowledge or recklessness will satisfy this fault element; in practice, where a summons has been served personally, the person would know of that service);
 - for the conduct of failing to attend or appear, intention would be the fault element; and
 - for the circumstance that the person had not been excused or released from further attendance, recklessness would be the fault element.

7.90 The maximum penalty for the offence is imprisonment for two years. This is higher than the equivalent offence in the LEIC Act (which has a maximum penalty of 12 months' imprisonment). However, it would bring the potential punishment for this offence into line with penalties for similar offences of non-compliance in the NACC Bill and in the LEIC Act, such as failure to comply with a notice to produce or failure to answer a question or provide something at a hearing.

7.91 This penalty is appropriate to enforce the NACC's coercive information-gathering powers and ensure they are effective in allowing the NACC to obtain material relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

Clause 69—Offence—failure to give information, or produce documents or things

7.92 This clause would make it an offence for a person to fail to give information or produce a document or thing when required to do so (whether by a summons or by the Commissioner under clause 65). The inclusion of this offence would ensure that these requirements to provide information or produce documents or things can be effectively enforced. A separate offence would apply to failure to answer a question under clause 81.

7.93 The offence would consist of the following physical elements:

- the person is required to give information or produce a document or thing at a hearing;
- the person fails to give the information or produce the document or thing.

7.94 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:

- for the circumstance that the person was required to give information, or produce a document or thing at a hearing, recklessness would be the fault element (meaning proof of intention, knowledge or recklessness will satisfy this fault element; in practice, where a notice has been served personally, the person would know of the requirement); and
- for the conduct of failing to provide the information or produce the document or thing, intention would be the fault element.

7.95 The maximum penalty for the offence is imprisonment for two years, consistent with the equivalent offence in the LEIC Act. This penalty is appropriate to enforce the NACC's coercive information-gathering powers and ensure they are effective in allowing the NACC to obtain material relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

Defence

7.96 A specific defence will be available in relation to this offence, in addition to the standard defences available under the *Criminal Code*. The defence will apply if it is not reasonably practicable for the person to give the information or produce the document or thing. For example, the defence may apply where:

- for a requirement set out in the summons—it is not reasonably practicable to compile all of the relevant information or documents in the period between receiving the summons and attending the hearing; or

- for a requirement given in the course of a hearing—the person does not have the information, document or thing that is required at the hearing.

7.97 A defendant would bear an evidential burden in relation to this defence (see subsection 13.3(3) of the *Criminal Code*). It is appropriate that the defendant bear the evidential burden for this matter given it will be peculiarly within the knowledge of the defendant. To rely on the defence, the person would only need to adduce or point to evidence suggesting a reasonable possibility that compliance was not reasonably practicable. If the person does so, the prosecution would then need to discharge its legal burden to negate that possibility beyond reasonable doubt for the offence to apply.

Clause 70—Offence—destroying documents or things

7.98 This clause would make it an offence for a person engaged in conduct that results in a document or thing that is, or is likely to be, required by the Commissioner under a notice to produce or at a hearing (whether by a summons or by the Commissioner under clause 65). This offence is intended to ensure the Commissioner is able to access all documents and things relevant to a corruption investigation and deter people from destroying or tampering with documents or things that have been or are likely to be sought in the course of an investigation. It is similar to offences relating to the destruction of documents and things in section 39 of the *Crimes Act 1914* and section 6K of the *Royal Commissions Act 1902*.

7.99 The offence would consist of the following physical elements:

- the person acts or omits to act;
- the act or omission results in a document or thing being:
 - concealed, mutilated or destroyed, or
 - rendered incapable of identification, or
 - in the case of a document, rendered illegible or indecipherable;
- the document or thing is, or is likely to be, required by the Commissioner under a notice to produce or at a hearing.

7.100 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:

- for the conduct of acting or omitting to act, intention would be the fault element;
- for the result of the act or omission, recklessness would be the fault element; and
- for the circumstance that the document or thing is, or is likely to be, required by the Commissioner, recklessness would be the fault element.

7.101 The offence would apply in circumstances where a person is aware of a substantial risk that a document or thing will be required by the Commissioner, and a substantial risk that failure to act will result in the document's or thing's destruction. For example, a document might be destroyed through an automatic process unless a person intervenes. The person would then be subject to the offence where they are reckless as to the circumstance and result and intentionally fail to take action that could prevent that result.

7.102 Hearings before the Commissioner would be judicial proceedings under Part III of the *Crimes Act 1914* (as a consequence of the power of the Commissioner to compel a witness to take an oath or affirmation at a hearing). Given the offence in section 39 of the *Crimes Act 1914* applies to evidence that is, or may be, required in evidence in a judicial proceeding, there would be some circumstances where both that offence and an offence under clause 70 could apply. In those circumstances, it would be up to a prosecutor to determine with which of those offences a person should be charged.

7.103 The maximum penalty for the offence is five years' imprisonment, consistent with that which applies to the similar offence in section 39 of the *Crimes Act 1914*. This penalty is appropriate to ensure the integrity of investigations of corruption issues which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic, and to deter witnesses from destroying material in order to impede such investigations. The destruction of evidence would have the potential to significantly impede the conduct of a corruption investigation, by placing evidence permanently beyond the reach of the NACC.

Clause 71—Offence—giving false or misleading evidence, information or documents

7.104 The effectiveness of the Commissioner's powers will depend on witnesses providing honest and complete information. This clause would make it an offence to provide false or misleading evidence, information or documents at a hearing, and would incentivise honest and complete responses.

7.105 The offence would consist of the following physical elements:

- the person gives evidence or information or produces a document as required at a hearing (whether by a summons or by the Commissioner under clause 65);
- the evidence, information or document:
 - is false or misleading, or
 - omits a matter or thing without which the evidence, information or document is misleading.

7.106 The fault element for the first physical element (the conduct of the person giving evidence or information or producing a document) would be determined in accordance with section 5.6 of the *Criminal Code* and would be intention.

7.107 For the circumstance that the evidence, information or document is false or misleading, or omits a matter or thing without which it is misleading, the fault element is specified in the offence as knowledge.

7.108 The maximum penalty for the offence is imprisonment for five years. ACLEI currently relies on the general offences in the *Criminal Code* for providing false or misleading information to a Commonwealth official, which are punishable by a maximum penalty of 12 months' imprisonment. However, in practice the maximum penalty has often been too low to incentivise honesty.

7.109 The five-year penalty for this offence is the same as the penalty that applies to the equivalent offence in section 33 of the *Australian Crime Commission Act 2002*. This penalty reflects the seriousness of deliberately misleading the Commissioner in relation to an investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic. It is appropriate that the deliberate giving of false or misleading evidence be subject to this higher penalty. If not detected by the Commissioner, the giving of false or misleading evidence would have the potential to significantly undermine the integrity of a corruption investigation including for example, by:

- preventing the Commissioner from following lines of inquiry that would have been available had the person not given false or misleading evidence; or
- causing the Commissioner to form an unsound opinion, or make an unsound finding or recommendation based on that false or misleading evidence.

Defence

- 7.110 A specific defence would be available in relation to this offence, in addition to the standard defences available under the *Criminal Code*. The offence would not apply if the information or document is not false or misleading in a material particular. A defendant would bear an evidential burden in relation to this defence (see subsection 13.3(3) of the *Criminal Code*). It is appropriate that the defendant bear the evidential burden for this matter given they would be better placed to point to information relevant to materiality in the first instance. To rely on the defence, the person would only need to adduce or point to evidence suggesting a reasonable possibility that the information or document is not false or misleading in a material particular. If the person does so, and in order for the offence to apply, the prosecution would then need to discharge its legal burden to negate that possibility beyond reasonable doubt.

Clause 72—Offences—obstructing or hindering hearings, threatening persons present

- 7.111 This clause would create three offences designed to ensure the effective operation of hearings and protect witnesses.

Obstructing or hindering the conduct of a hearing

- 7.112 The first offence would consist of the following physical elements:
- the person engages in conduct;
 - the conduct obstructs or hinders a staff member of the NACC in the performance or exercise of the staff member’s functions, powers or duties in connection with a hearing.
- 7.113 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the conduct element, intention would be the fault element; and
 - for the result of obstruction or hindrance of a staff member of the NACC in the performance or exercise of the staff member’s functions, powers or duties in connection with a hearing, recklessness would be the fault element.
- 7.114 The maximum penalty for the offence is imprisonment for two years, consistent with the equivalent offence in the LEIC Act. Hearings would be a key information-gathering power for the Commissioner. This penalty is appropriate to protect the effective operation of hearings so the Commissioner can obtain material relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

Disrupting a hearing

- 7.115 The second offence would consist of the physical element of disrupting a hearing. The fault element would be determined in accordance with section 5.6 of the *Criminal Code* and would be intention.
- 7.116 The maximum penalty for the offence is imprisonment for two years, consistent with the equivalent offence in the LEIC Act. Hearings would be a key power available to the Commissioner. This penalty is appropriate to the need to protect the effective operation of hearings so the Commissioner can obtain material relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

Threatening a person present at a hearing

- 7.117 The third offence would consist of the physical element of threatening any person present at a hearing. The fault element would be determined in accordance with section 5.6 of the *Criminal Code* and would be intention.
- 7.118 The maximum penalty for the offence is imprisonment for five years. This reflects the higher seriousness of this offence compared to obstructing or hindering a hearing. Threatening a person at a hearing could cause a person threatened to fear for their safety, deter a person who is a witness (at that hearing, or at a later hearing) from given honest and complete evidence, and may deter other witnesses from coming forward with information about a corruption issue.

Subdivision B—Private and Public hearings

7.119 This Subdivision would:

- allow the Commissioner to hold private and public hearings;
- require certain evidence to be given in private;
- allow a witness to request to give particular evidence in private and make submissions to the Commissioner as to why the evidence should be given in private; and
- regulate private hearings and the use of investigation material obtained during private hearings.

Clause 73—Private and public hearings

7.120 This clause would require that hearings are to held in private by default. However, the Commissioner would have the discretion to hold a hearing, or part of a hearing, in public if they are satisfied that exceptional circumstances justify holding the hearing, or part of the hearing, in public and it is in the public interest to do so.

7.121 This clause would set out a non-exhaustive list of the following matters to which the Commissioner may have regard in determining whether to hold a hearing, or part of a hearing, in public:

- the extent to which the corruption issue could involve corrupt conduct that is serious or systemic;
- whether certain evidence is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence;
- any unfair prejudice to a person’s reputation, privacy, safety or wellbeing that would be likely to be caused if the hearing, or the part of the hearing, were to be held in public;
- whether a person giving evidence has a particular vulnerability, including that they are under the direct instruction or control of another person in a relative position of power;
- the benefits of exposing corrupt conduct to the public, and making the public aware of corrupt conduct.

7.122 This list highlights some of the factors that may mean a public hearing is either more (in the case of the benefits of making the public aware of corrupt conduct) or less (in the case of prejudice to a person’s reputation, privacy, safety or wellbeing) appropriate, or that otherwise go to the public interest. The Commissioner could also take account of other matters when considering whether to hold a hearing, or part of a hearing, in public.

7.123 This general discretion would be subject to the requirement that some evidence must be given in private (see clause 74).

Public statements about witnesses

7.124 This clause would also allow the Commissioner to make a statement about the circumstances and capacity in which a witness is giving evidence at a hearing before the witness gives evidence, if the Commissioner thinks it appropriate to do so. This is one of a number of measures included in the NACC Bill to protect a witness from reputational harm that could otherwise arise from public association with a corruption investigation or hearing.

7.125 For example, a statement by the Commissioner at a public hearing that a witness is appearing voluntarily and is not the subject of the corruption investigation should make it clear to anyone present or reporting on the hearing that the witness’s appearance should not be taken to mean they have engaged in, or are suspected of having engaged in, corrupt conduct.

Clause 74—Evidence that must be given in private

7.126 This clause would require certain evidence to be given in private, specifically where the evidence would:

- breach a secrecy provision; or

- disclose any of the following:
 - legal advice given to a person;
 - a communication that is protected against disclosure by legal professional privilege;
 - information that the Commissioner is satisfied is sensitive information (as defined in clause 227);
 - section 235 certified information (the Attorney-General may certify that particular disclosures of certain information would be contrary to the public interest);
 - intelligence information (as defined in clause 239).

7.127 This clause would ensure appropriate protection of classes of evidence that are not suitable to be made publicly available. Evidence that would breach a secrecy provision, or disclose legal advice given to a person or a communication that is protected against disclosure by legal professional privilege, has been included here because clause 114 would provide that a person is not excused from giving an answer or information, or producing a document or thing, on the grounds that doing so would:

- disclose legal advice given to a person;
- disclose a communication that is protected against disclosure by legal professional privilege; or
- breach a secrecy provision (other than an exempt secrecy provision).

Clause 75—Presence of others at private hearings

7.128 This clause would enable the Commissioner to determine who, other than the Commissioner, staff members of the NACC, and the witness, may be present at a private hearing. This clause would also make it an offence for a person to be present at a private hearing without authority. Attendance at private hearings would be limited to protect the witness and the evidence given.

7.129 Persons giving evidence at a hearing would be entitled to legal representation, so a legal practitioner representing a person would be entitled under this clause to be present whenever that person is giving evidence at a hearing in private. It would otherwise be up to the Commissioner to determine whether another person may be present.

7.130 It is appropriate for the Commissioner to have the power to determine that other persons may be present at a private hearing. This would enable the Commissioner to authorise, for example:

- the person who is the subject of the corruption investigation, and their legal representative, to be present to hear evidence from another witness, where the Commissioner considers it is appropriate and practicable for them to do so—it may be inappropriate or impracticable where, for example, the witness’s identity is protected, or the witness is providing confidential evidence; or
- a member of the AFP to be present to provide physical security during the hearing.

7.131 This clause would require that if the Commissioner determines that a person (other than a staff member of the NACC) is to be present while a witness is giving evidence at a private hearing, the Commissioner must inform the witness that the person is to be present and give the witness an opportunity to comment on the person’s presence.

7.132 However, if the Commissioner has determined that another person may be present, that person is entitled to be there even if the Commissioner fails to inform the witness of the person’s presence or the witness comments adversely on the person’s presence. This would ensure that:

- the person is not inadvertently exposed to criminal liability—where the Commissioner has previously approved them to be present—if the Commissioner fails to inform the witness of their presence; and
- the Commissioner’s arrangements to conduct the hearing in the manner the Commissioner thinks fit—for example by having an AFP member present to provide physical security—are not inadvertently disrupted, if the Commissioner fails to inform the witness of a person’s presence.

7.133 Similarly, it would be appropriate that the person be entitled to be present even if the witness has commented adversely on their presence, to ensure that the Commissioner is able to conduct the hearing in the manner the Commissioner thinks fit.

Offence—person present without authority

7.134 To enforce this protection of witnesses and evidence given at private hearings, it would be an offence under this clause for a person to be present at a private hearing except where authorised under this clause.

7.135 The offence would consist of the following physical elements:

- the person attends a hearing while evidence is being given in private at the hearing;
- the person is not:
 - the person giving evidence;
 - the legal practitioner representing the person giving evidence;
 - a staff member of the NACC; or
 - a person the Commissioner has determined may be present while the person is giving evidence.

7.136 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:

- for the conduct element that the person attends a hearing while evidence is being given in private, intention would be the fault element; and
- for the circumstance of the person not being one of the persons mentioned, recklessness would be the fault element.

7.137 The maximum penalty for the offence is imprisonment for two years, consistent with the equivalent offence in the LEIC Act. This penalty is appropriate to the need to protect the effective operation of hearings and ensure appropriate protection of investigation material given or produced at a private hearing.

Clause 76—Request to give evidence in private

7.138 This clause would allow a witness to request to give particular evidence in private and make submissions to the Commissioner as to why the evidence should be given in private. This provision would ensure that a person summonsed to a hearing has the opportunity to put forward a case for giving part or all of their evidence in private if they so wish.

7.139 The Commissioner would be required to consider a request and any submissions when determining whether to hold a hearing, or part of a hearing, in public or in private under clause 73. However, this clause would not limit the Commissioner's general discretion under that clause.

Clause 77—Investigation material from private hearings

7.140 This clause would require the Commissioner to issue a confidentiality direction under clause 100 in certain circumstances where evidence is taken in private. Clause 100 would allow the Commissioner to issue directions prohibiting or limiting the use of investigation material (such as evidence given at a hearing). Contravention of such a direction would be an offence under clause 101.

7.141 If all or part of a hearing is held in private, Commissioner would be required to give a direction under clause 100 if the Commissioner is satisfied that the failure to give such a direction:

- might prejudice a person's safety;
- would reasonably be expected to prejudice a witness's fair trial, if the witness has been charged with a relevant offence or such a charge is imminent;

- might lead to the publication of section 235 certified information (the Attorney-General may certify that particular disclosures of certain information would be contrary to the public interest); or
- might lead to the publication of sensitive information (as defined in clause 227).

7.142 This clause would ensure appropriate protection of particularly sensitive investigation material, and the rights and safety of a witness, where that material has been provided in a private hearing and therefore not made public.

Subdivision C—Evidence and procedure

7.143 This Subdivision would provide for matters relating to evidence and procedure for hearings held under this Division. It also contains an offence for a person failing to take an oath, make an affirmation or answer a question at a hearing when required to do so.

Clause 78—Evidence on oath or by affirmation

7.144 This clause would permit the Commissioner to administer an oath or affirmation to a witness. An oath or affirmation administered by the Commissioner would be an oath or affirmation that the evidence the witness will give will be true. Conferring power on the Commissioner to compel a witness to take an oath or affirmation aims to ensure the reliability of evidence given in a hearing.

7.145 The consequence of the power of the Commissioner to compel a witness to take an oath or affirmation is that hearings held by the Commissioner under the NACC Bill would be characterised as ‘judicial proceedings’ under Part III of the *Crimes Act 1914*. This would mean that the offences attaching to judicial proceedings as set out in Part III of that Act are applicable to hearings conducted under the NACC Bill. These offences include, for example, giving false testimony, fabricating or destroying evidence, and intimidating, corrupting or deceiving witnesses.

7.146 The Commissioner would be able to allow a person who is attending a hearing, and who has been sworn or has made an affirmation, to give evidence at the hearing by tendering a written statement and verifying it by oath or affirmation. This would improve the efficiency of hearings by allowing evidence to be provided in writing when appropriate, such as when it is of a technical nature, while still requiring that evidence to be affirmed as true.

7.147 A failure to take an oath or make an affirmation if required by the Commissioner would be an offence against clause 81.

Clause 79—Commissioner may take evidence outside Australia

7.148 This clause would permit the Commissioner to take evidence outside Australia on oath or by affirmation, or under a similar obligation, caution or admonition, in certain circumstances. This clause has been included because some public officials are located and perform functions outside Australia. This clause would enable the Commissioner to obtain evidence from those persons and others who may have information about their conduct even though they are overseas, similar to section 7B of the *Royal Commissions Act 1902* and section 84 of the LEIC Act.

How evidence may be taken outside Australia

7.149 If arrangements are made between Australia and another country in relation to the taking of evidence in that country by the Commissioner for a hearing under this Division, this clause would allow evidence to be given in that country:

- on oath or affirmation;
- under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the other country; or
- under such caution or admonition as would be accepted, by courts in the other country, for the purposes of giving testimony in proceedings before those courts.

- 7.150 For hearings in Australia, the Commissioner may take evidence on oath or affirmation under clause 78. Alternative obligations to tell the truth and cautions and admonitions, have been provided in this clause because some countries' laws do not provide for oaths or affirmations.
- 7.151 The oath, affirmation, obligation, caution or admonition must be administered in accordance with the arrangements made between Australia and the other country and the laws of that other country.

The use of evidence taken outside Australia

- 7.152 This clause would allow the Commissioner to use any evidence taken under this clause for the purpose of performing any function, or exercising any power, under this Bill. This would include, for example, the conduct of a corruption investigation, and the preparation of an investigation report under Part 8.

Making arrangements for the taking of evidence outside Australia by the Commissioner

- 7.153 The Commissioner would not enter into arrangements for the taking of evidence overseas for a hearing under this Division. Given such arrangements are between Australia and another country, they would be made by a Minister or their delegate. This clause is confined to allowing the Commissioner to take evidence overseas where such arrangements are already in place.
- 7.154 The arrangement would not be required to be a treaty level arrangement.

Clause 80—Examination and cross-examination of witnesses

- 7.155 This clause would allow the Commissioner to authorise a person to examine or cross-examine a witness during a hearing as the Commissioner thinks appropriate, on any matters that the Commissioner considers relevant. However, the only persons who the Commissioner could authorise to conduct examination and cross-examination would be:
- counsel assisting the Commissioner;
 - persons summonsed, or otherwise authorised, to appear before the Commissioner at the hearing; and
 - legal practitioners representing persons at the hearing.
- 7.156 This clause would provide a way for evidence of a witness to be adduced and tested during a hearing. It would be appropriate for the Commissioner to have a discretion as to whether to permit cross-examination of a particular witness, and if so by whom. It would be desirable for the Commissioner to be able to operate with flexible procedures and not as a body with technical rules of evidence required of the courts. In particular, this would enable the Commissioner to, for example:
- protect the identities of confidential sources of evidence;
 - hear evidence on matters that would ordinarily be protected by public interest immunity or legal professional privilege, to ensure that the Commissioner is fully-informed, without exposing that information to a third party; and
 - conduct corruption investigations in a timely fashion, consistent with the objects of the NACC Bill (see clause 3).

Clause 81—Offence—failure to take an oath, make an affirmation or answer a question

- 7.157 This clause would create an offence in order to ensure that those summonsed to give evidence comply with their obligations at a hearing. This offence would ensure that the requirement for persons to take an oath, make an affirmation, or answer a question that the Commissioner requires them to answer can be enforced.
- 7.158 The offence would consist of the following physical elements:
- the person is served with a summons to attend a hearing;
 - the person fails to either:

- take an oath or make an affirmation at the hearing when required to do so under clause 78, or
- answer a question at the hearing that the Commissioner requires the person to answer.

- 7.159 The fault element for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the circumstance that a person was served with a summons, recklessness would be the fault element (meaning proof of intention, knowledge or recklessness will satisfy this fault element; in practice, where a notice has been served personally, the person would know of the requirement); and
 - for the conduct of failing to comply with the relevant requirement, intention would be the fault element.
- 7.160 A note to this clause includes cross-references to protections for journalists' informants in clause 31, and Attorney-General's certificates in relation to international relations, which may be issued under clause 236. In some circumstances, those clauses might provide grounds for a person to rely on the defence of lawful authority under section 10.5 of the *Criminal Code*. The note also cross references Division 6 of Part 7, which deals with privileges and protections.
- 7.161 The maximum penalty for the offence is imprisonment for two years, consistent with the equivalent offence in the LEIC Act. This penalty is appropriate to enforce the Commissioner's hearing powers and ensure they are effective in allowing the Commissioner to obtain material relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

Subdivision D—Contempt of the NACC

- 7.162 This Subdivision would define when a person is in contempt of the NACC, and provide for the Commissioner to apply to a court to have a person dealt with in relation to the contempt. It would allow a person in contempt to be detained for the purpose of bringing them before a court to which an application is made and set out how a court may deal with an application.
- 7.163 The LEIC Act currently contains a framework for contempt of ACLEI (see Subdivision EA of Division 2 of Part 9), as does the ACC Act (see sections 34A to 34F). The ability to bring contempt proceedings is important because relying on criminal proceedings alone may mean investigations are compromised by the delay in the commencement of court proceedings. Witnesses may be aware that they can substantially delay or frustrate an investigation by refusing to provide certain evidence or information. Further, the penalty or consequence resulting from criminal proceedings may seem distant and relatively minor. In contrast, contempt provisions motivate an uncooperative witness to reconsider their position and comply with the requirements of a hearing, as the witness is immediately subject to the possibility of being taken into custody before a superior court.

Clause 82—Contempt of the NACC

- 7.164 This clause would outline the conduct that would amount to contempt of the NACC, which would broadly mirror the terms of offences relating to hearings in this Division.
- 7.165 A person summonsed to attend a hearing would be in contempt of the NACC if the person:
- fails to attend as required by the summons;
 - fails to appear and report from day to day unless excused or released from further attendance by the Commissioner;
 - refuses or fails to take an oath or make an affirmation at the hearing;
 - refuses or fails to answer a question at the hearing that the Commissioner requires the person to answer; or
 - refuses or fails to give information or produce a document or thing, as required at a hearing (whether by a summons or by the Commissioner under clause 65).

- is a legal practitioner who refuses, at a hearing, to give the Commissioner the name and address of a person in accordance with clause 115;
- gives evidence or information, or produces a document, at a hearing (whether required by a summons or by the Commissioner under clause 65) that the person knows is false or misleading in a material particular;
- insults, disturbs or uses insulting language towards someone who the person knows is a NACC Commissioner and who is holding a hearing in the performance of the NACC Commissioner's functions, or the exercise of the NACC Commissioner's powers;
- creates a disturbance, or takes part in creating or continuing a disturbance, in or near a place that the person knows is being used to hold a hearing;
- obstructs or hinders a staff member of the NACC in the performance or exercise of the staff member's functions, powers or duties in connection with a hearing;
- disrupts a hearing; or
- threatens a person present at a hearing.

7.166 The conduct listed in this clause would significantly impede the Commissioner's ability to conduct corruption investigations and frustrate the objects of the NACC Bill, including to facilitate the timely investigation of corruption issues that involve, or potentially involve, corrupt conduct that is serious or systemic (clause 3).

7.167 A note to this clause includes cross-references to protections for journalists' informants in clause 31, and Attorney-General's certificates in relation to international relations, which may be issued under clause 236. Those clauses provide exceptions where failure to give an answer or information, or produce a document or thing, may be permitted so would not constitute contempt. The note also cross references Division 6 of Part 7, which deals with privileges and protections.

Legal practitioners and legal privilege

7.168 Consistent with clause 115, a legal practitioner would not be in contempt of the NACC because they fail to comply with a requirement in circumstances where the Commissioner could not insist on that requirement because of the application of legal professional privilege. For example, a legal practitioner may refuse to answer a question that would disclose legal advice given to a person in connection with that person attending a hearing.

7.169 However, a legal practitioner could be required to give the Commissioner the name and address of the person who is able to waive the legal professional privilege concerned. If the practitioner refuses to comply with this requirement, the practitioner would be in contempt of the NACC.

Clause 83—Application for court to deal with contempt

7.170 The Commissioner would be able to apply to either the Federal Court or the Supreme Court of the State or Territory in which the contempt occurs to deal with the contempt.

7.171 The Commissioner would be required to inform the person alleged to be in contempt of the NACC of the Commissioner's intention to make an application before the Commissioner makes the application. This would ensure that a person is given early notification of the consequences of their conduct, giving them an opportunity to comply with the requirements of the Commissioner.

7.172 The application would need to be accompanied by a certificate setting out the grounds for the application and the supporting evidence.

7.173 A copy of the certificate would need to be given to the person alleged to be in contempt of the NACC at or before the time the Commissioner makes the application. This is a necessary and important safeguard to ensure that the person is made aware of the reasons why the Commissioner believes the person to be in contempt and is given an opportunity to prepare their own case that they are not in contempt. This would also assist to facilitate the timely resolution of the contempt application, and thereby the timely resolution of the Commissioner's corruption investigation, consistent with the objects of the NACC Bill (see clause 3).

Clause 84—Conduct of contempt proceedings

- 7.174 This clause would provide for court proceedings when a court deals with an application made under clause 83.
- 7.175 Proceedings in relation to the application would be instituted, carried on, heard and determined in accordance with the laws (including any rules of court) that apply in relation to the punishment of a contempt of the court to which the application was made. This would ensure that the court will retain overall control of the contempt proceedings from the time the person is brought before that court until the application is disposed of.
- 7.176 The Commissioner's certificate that is lodged with the application would be prima facie (or rebuttable) evidence of the matters specified in the certificate. This would allow the court to find the facts of the alleged contempt without necessarily having to rely on oral testimony. This would not prevent the defendant from challenging the evidence. However, if there is no dispute as to the facts, the certificate would expedite the contempt proceedings.
- 7.177 This clause would require the court to:
- consider the matters specified in the certificate;
 - hear or receive any evidence or statements by or in support of the application; and
 - hear or receive any evidence or statements by or in support of the person.
- 7.178 After considering the application and any further evidence adduced by the Commissioner or the relevant person, the court would be able to find that the person was in contempt of the NACC and, if it makes such a finding, to deal with the person as if the person's conduct constituted a contempt of that court.
- 7.179 The principles of criminal responsibility, set out in Chapter 2 of the *Criminal Code*, would apply for the purposes of determining whether a person was responsible for the conduct that constitutes a contempt of the NACC. For example, this would mean that the circumstances in which there is no criminal responsibility, set out in Part 2.3 of the *Criminal Code*, would apply to the contempt proceeding. This is necessary because the contempt provisions are not statutory offences to which the *Criminal Code* would otherwise apply.

Clause 85—Person in contempt may be detained

- 7.180 This clause would allow the Commissioner to detain a person the Commissioner considers is in contempt of the NACC for the purpose of bringing the person before the court for the hearing of the application.
- 7.181 While it is anticipated that in most instances, uncooperative witnesses will voluntarily attend court, there may be some instances where the assistance of law enforcement is necessary to bring the alleged contemnor to the court. This could include, for example, where a person has failed to attend a hearing as required by a summons and has been located attempting to abscond, giving rise to a significant risk that the person would also fail to attend a court hearing.
- 7.182 The Commissioner would be authorised to direct a constable or an authorised officer to detain the person. The Commissioner may do so if, during a hearing, the Commissioner proposes to make an application for the person to be dealt with for contempt of the NACC. The purpose of the person's detention must be for the Commissioner to bring the person before a court in connection with a contempt application made under clause 83. The Commissioner would be required to make the contempt application and ensure the person is brought before the relevant court as soon as practicable after detaining the person.
- 7.183 Before determining the contempt application, the court would be able to direct that a detained person be released on the condition the person appear before the court in relation to the application or order the person continue to be detained during the contempt proceedings.
- 7.184 If the court directs the release of the person, the court would be able to impose any additional conditions, including for example, that the person:

- surrenders any Australian or foreign travel documents;
- give an undertaking as to the person's living arrangements; or
- report as required to police or another law enforcement agency.

7.185 The court would be able to, at any time, vary or revoke an additional condition it imposes.

Clause 86—Commissioner may withdraw contempt application

7.186 This clause would permit the Commissioner to withdraw a contempt application at any time. This would give a person who initially refuses to comply with the Commissioner a further opportunity to cooperate.

7.187 If the Commissioner withdraws an application, any person detained in connection with the application would be required to be released immediately.

Clause 87—Double jeopardy

7.188 This clause would uphold the principle of double jeopardy in relation to contempt by preventing a person being subject to multiple punishments (criminal and contempt proceedings) in respect of the same conduct. This clause would:

- prevent a person who has been dealt with by a court for being in contempt of the NACC from being prosecuted for an offence in relation to the same conduct; and
- prevent a person who is first prosecuted for an offence from being subject to a contempt application in relation to the same conduct.

7.189 This clause does not limit the application of section 4C of the *Crimes Act 1914*, which prevents a person from being subject to punishment for the same conduct in connection with two offences (including through the concurrent application of Commonwealth and State or Territory offences).

Subdivision E—Travel documents and arrest of witnesses

7.190 This Subdivision would allow the Commissioner to, in certain circumstances, apply to a judge for:

- an order requiring a person to deliver a travel document to the Commissioner; and
- a warrant to arrest a person to ensure their attendance at a hearing.

7.191 These powers are based on those currently available under the LEIC Act. They are intended to ensure that witnesses attend or continue to attend a hearing as required for the purposes of investigating a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

7.192 A person summonsed to attend a hearing might, for example, attempt to evade service of a summons or to flee the country once summonsed to avoid having to give evidence at a hearing. The Commissioner may become aware of such attempts through various means, including, where the corrupt conduct constitutes a serious offence, through covert powers available under other Acts (provided for under the Consequential Bill). The powers in this Subdivision would provide a means by which the person's attendance can be assured in such circumstances.

Clause 88—Applying for orders to deliver travel documents

7.193 This clause would permit the Commissioner to apply to a Judge of the Federal Court for an order that a witness deliver their travel documents to the Commissioner. An application would seek to preserve the evidence of witnesses by ensuring their attendance at a hearing to provide information, documents, things or evidence where there is a reasonable suspicion that the witness intends to leave Australia (which is defined in clause 7 to include the external Territories) before providing that material.

- 7.194 The Commissioner would be able to apply for an order if the Commissioner has summonsed the person to attend a hearing (regardless of whether the summons has been served) or the person has attended a hearing. The Commissioner could only make such an application if they had reasonable grounds to:
- believe the person can give evidence or produce documents or things relevant to the corruption investigation concerned; and
 - suspect that the person has a travel document and intends to leave Australia.
- 7.195 The Commissioner must give the Judge information on oath, or by affirmation, in support of the grounds for the application.
- 7.196 A ‘travel document’ would include a passport or other travel document issued to the person by Australia or another country.

Clause 89—Orders to deliver travel documents

- 7.197 This clause would allow the Federal Court to make a decision on an application under clause 88 about whether a person’s travel documents should be delivered to the Commissioner.

Court order for a witness to appear before the court

- 7.198 If a Judge of the Federal Court, while sitting in Chambers, is satisfied on the evidence that the requirements in clause 88 are met, the Judge would be able to make an order that requires the person to appear before the Federal Court at a specified time and place to show cause for why they should not be ordered to deliver their travel documents to the Commissioner.
- 7.199 The power for the Federal Court to order a person to deliver their travel documents to the Commissioner would be a significant power. It is appropriate that the NACC Bill require a show cause hearing, prior to the Federal Court making such an order. This would allow the person the opportunity to show cause why the person should not be required to deliver their travel document to the Commissioner which may include, for example:
- evidence that the person intends to depart Australia on a temporary basis—for example, for a family holiday that was planned before the person became aware that they were likely to be summonsed to give evidence before the NACC;
 - evidence that the person intends to return to Australia, including to attend the hearing; or
 - evidence of substantial hardship or other harm that may result, to that or any other person, if the person is not permitted to temporarily depart Australia—for example, to attend a time-critical meeting or negotiation that cannot reasonably be undertaken from Australia.

Court order that a witness deliver a travel document to the Commissioner

- 7.200 The Federal Court would have the authority to make an order, if it thinks fit, requiring a person to deliver a travel document that is within the person’s possession, custody or control to the Commissioner.
- 7.201 The Court would also be able to make an order that authorises the Commissioner to retain the document for a period not exceeding one month from the date the order is made. The Court could, on application by the Commissioner, extend the period one month at a time up to a maximum period of three months.
- 7.202 Although the Commissioner is authorised to retain the travel document for this period, they are not required to do so. It would be open to the Commissioner to return a travel document to the person prior to the expiry of this period where, for example:
- the hearing at which the person is required to appear before the Commissioner is completed; or
 - the Commissioner is satisfied that there are extenuating circumstances that would justify returning the person’s travel document to them, and the person being permitted to depart Australia.

7.203 The Federal Court could only make an order if the person has appeared before the court pursuant to an initial order requiring their attendance. The Federal Court could deal with a person's failure to appear before the court pursuant to its initial order, or a failure to deliver a travel document to the Commissioner pursuant to an interlocutory or final order, as a contempt of court in accordance with the Federal Court Rules.

Revocation of court order

7.204 If the Federal Court makes an order authorising the Commissioner to retain a person's travel document, the person would be able to apply to the Federal Court for the order to be revoked. If the Court revokes the order, the Commissioner would be required to return the document to the person immediately.

Jurisdiction of the Federal Court

7.205 This clause clarifies that the Federal Court would have jurisdiction in respect of matters that arise from the operation of this clause. For example, if a person failed to comply with an order made under this clause, the Federal Court could deal with the person for contempt of Court.

Clause 90—Warrant to arrest witness

7.206 This clause would allow an authorised officer to apply to a superior court judge (defined to mean a Judge of the Federal Court or a Judge of the Supreme Court of a State or Territory) for a warrant to arrest a person the Commissioner has summonsed to appear at a hearing. Authorised officers of the NACC would not have general powers of arrest. The arrest of a person would only be justified if it occurs under a warrant and for the purposes of ensuring the person attends a hearing as required.

7.207 An authorised officer (defined in clause 7 to mean the Commissioner, a Deputy Commissioner or a person appointed under clause 267) would be authorised to apply for a warrant to arrest a person in three situations.

7.208 The first situation is where:

- the person has been ordered to deliver a travel document to the Commissioner (whether or not the person has complied with the order); and
- the authorised officer has reasonable grounds to believe that the person is likely to leave Australia (including the external Territories) for the purpose of avoiding giving evidence at a hearing before the Commissioner.

7.209 The second situation is where the person is to be served with a summons to attend a hearing under clause 63 and the authorised officer has reasonable grounds to believe that the person has absconded or is likely to abscond or is otherwise attempting, or likely to attempt, to evade service of the summons.

7.210 The third situation is where the authorised officer has reasonable grounds to believe that the person has committed an offence concerning failure to attend a hearing, or is likely to do so.

7.211 An authorised officer would be required to give the judge information on oath, or by affirmation, in support of the grounds for the application.

Clause 91—Warrant for arrest

7.212 This clause would provide for the issue and execution of a warrant for a witness's arrest.

7.213 A superior court judge (defined in clause 76 to mean a Judge of the Federal Court or a Judge of the Supreme Court of a State or Territory), sitting in Chambers, would be able to issue a warrant authorising the arrest of the person if satisfied, on the evidence, that there are reasonable grounds for believing that:

- the person has been ordered to deliver a travel document to the Commissioner (whether or not the person has complied with the order) and the person is likely to leave Australia for the purpose of avoiding giving evidence at a hearing before the Commissioner;

- the person is to be served with a summons to attend a hearing under clause 63 and the person has absconded or is likely to abscond or is otherwise attempting, or likely to attempt, to evade service of the summons; or
- the person has committed an offence concerning failure to attend a hearing, or is likely to do so.

Powers on arrest

- 7.214 A warrant to arrest a witness issued under this clause would only be executed by an authorised officer of the NACC (defined in clause 7 to mean the Commissioner, a Deputy Commissioner or a person appointed under clause 267). Clause 267 seeks to ensure that authorised officers possess skills and experience that reflect the significant and coercive nature of their powers under the NACC Bill. It would only allow the Commissioner to appoint a person to be an authorised officer if the person is:
- a staff member of the NACC who the Commissioner considers has suitable qualifications or experience;
 - a staff member of the NACC who is also a member of the AFP;
 - a staff member of the NACC who is also a member of the police force or police service of a State or Territory; or
 - a member of the AFP.
- 7.215 Authorised officers who are members of the AFP or a State or Territory police force would be constables. This clause would provide that for the purposes of executing the arrest warrant, an authorised officer of the NACC who is not a constable would have the same powers and duties as a constable has in arresting a person for an offence under Divisions 4 and 5 of Part IAA of the *Crimes Act 1914*.
- 7.216 This would provide authorised officers with appropriate powers to execute an arrest warrant issued under this clause, specifically powers to:
- enter premises the officer believes on reasonable grounds the person is on, using necessary and reasonable force (section 3ZB of the *Crimes Act 1914*);
 - use necessary and reasonable force to execute the arrest (section 3ZC);
 - conduct a frisk search of the person being arrested at or soon after arrest and seize any seizable items, if they consider on reasonable grounds that it is prudent to do so (section 3ZE);
 - conduct an ordinary search of the person being arrested at or soon after arrest, if they suspect on reasonable grounds that the person is carrying evidential material or a seizable item (section 3ZF); and
 - seize things in plain view at the premises where the arrest takes place that they believe on reasonable grounds to be evidential material or a seizable item (section 3ZG).
- 7.217 This clause would also apply appropriate safeguards to the exercise of powers on arrest, specifically:
- force used to enter premises must be limited to that which is necessary and reasonable in the circumstances (section 3ZB);
 - premises must not be entered between 9pm and 6am for the purposes of an arrest (section 3ZB);
 - the officer must not, in the course of arresting another person for an offence, use more force, or subject the person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the person after the arrest (section 3ZC);
 - the officer must inform the person of the reason for the arrest (section 3ZD);
 - an ordinary or frisk search must, if practicable, be conducted by a person of the same sex as the person being searched (section 3ZR); and

- authorised officers must generally announce that they are authorised to enter premises and give the person at the premises the opportunity to allow entry before entering warrant premises (section 3ZS).

7.218 This clause would clarify that the warrant may be executed by an authorised officer other than the authorised officer who applied for the warrant. This would allow the NACC the flexibility needed to manage its operations by using different authorised officers to obtain and execute the warrant.

Clause 92—Powers of judge in relation to person arrested

7.219 A person arrested under a warrant issued under clause 91 would be required to be brought, as soon as practicable, before a superior court judge (defined in clause 90 to mean a Judge of the Federal Court or a Judge of the Supreme Court of a State or Territory).

7.220 The judge would be able to grant the person bail on such security and conditions as the judge thinks fit. Alternatively, the judge would be able to order the person:

- continue to be detained for the purpose of ensuring that the person appears as a witness at a hearing before the Commissioner; or
- be released unconditionally.

7.221 If a judge orders that a person continue to be detained, the person would be required to be brought back before a superior court judge within 14 days (or a different period fixed by the judge on the person's last previous appearance). This would provide an opportunity for the judge to reconsider the issue of the person's detention and exercise any of the powers outlined above.

Subdivision F—Miscellaneous

7.222 This Subdivision would provide for the payment of allowances for travelling and other expenses and protections for the Commissioner and legal practitioners assisting the Commissioner.

Clause 93—Allowances for travelling and other expenses

7.223 This clause would provide that a witness appearing at a hearing would be entitled to be paid by the Commonwealth any allowances for travelling and other expenses that are prescribed by the regulations. This is consistent with arrangements for the payment of travel and other expenses for persons appearing at a hearing under the LEIC Act, or at an examination under the ACC Act.

7.224 Financial assistance in relation to a person's representation at a hearing by a legal practitioner may be provided in accordance with arrangements prescribed under clause 280 (see paragraph 13.44).

Clause 94—Protection of Commissioner and legal practitioners assisting

7.225 This clause would provide protections to participants in a hearing equivalent to those applying in judicial proceedings.

7.226 The Commissioner would have, in exercising the power to hold a hearing, the same protection and immunity as a Justice of the High Court.

7.227 A legal practitioner assisting the Commissioner, or representing a person, would have the same protection and immunity as a barrister appearing for a party in proceedings in the High Court.

7.228 This would mean, for example, that those persons could not be sued for defamation for their actions during a hearing (see also clause 269).

7.229 This clause would clarify that this would not limit the powers of the Inspector, or the powers of the Commonwealth Ombudsman under the *Ombudsman Act 1976*, to investigate issues of administrative practice in relation to a hearing. This ensures that any complaints about the Commissioner can be dealt with appropriately by relevant oversight bodies.

7.230 Clause 116 and Part 4 would provide protections for persons who give answers or information, or produce documents or things under this Part.

Division 4—Use and disclosure of certain information and material

- 7.231 This Division would regulate the use and disclosure of information relating to a corruption investigation or another NACC Act process (see paragraph 1.103). This Division is necessary to preserve:
- the integrity of corruption investigations and other processes;
 - the reputations and safety of witnesses;
 - the confidentiality of certain types of information from public disclosure; and
 - the fairness of any criminal proceedings that may take place following a corruption investigation or other NACC Act process.
- 7.232 This Division would also include offences to prevent the improper use or disclosure of the information.

Subdivision A—Non-disclosure notations

- 7.233 This Subdivision would establish non-disclosure notations and create an offence for breaches of these notations. Non-disclosure notations are necessary for the purposes of corruption investigations the Commissioner conducts in private. Similar notation frameworks are currently contained in Subdivision AA of Division 1, and Subdivision D of Division 2 of Part 9 of the LEIC Act, in relation to notices to produce and summonses to attend private hearings, respectively. This Division would ensure the Commissioner can limit the spread of information relating to a notice or summons for reasons including the protection of reputations, the prevention of prejudice to an investigation, inquiry or subsequent trial, and the prevention of harm to an individual.

Clause 95—Non-disclosure notations

- 7.234 This clause would set out the meaning of a non-disclosure notation. These notations would enable the Commissioner to limit the disclosure of information about a notice to produce or private hearing summons, or any official matter connected with such a notice or summons.
- 7.235 A non-disclosure notation may prohibit the disclosure of information, or limit disclosure in specified circumstances (for example, for specified purposes or to specified people). Information about a notice to produce or a private hearing summons that may be prohibited from being disclosed could include the fact that the notice or summons exists or has been served on a particular person.
- 7.236 A non-disclosure notation would only be included in a notice to produce or a summons to attend a private hearing. However, the notation may encompass other official matters connected with the notice or summons, including a corruption investigation, any other processes under the NACC Bill (such as a public inquiry), or a legal matter that is the subject of court proceedings.
- 7.237 For example, the Commissioner may be holding a private hearing for the purpose of a public inquiry (as provided for under Part 9 of the NACC Bill) concerning corruption risks within a particular agency. As a result of information obtained during the course of the public inquiry, the Commissioner may commence a corruption investigation into the conduct of a particular individual at that agency, and issue a summons to attend a private hearing in connection with that investigation. If a non-disclosure notation were included in the private hearing summons, it may prohibit or limit disclosure about the corruption investigation or the public inquiry, as official matters connected with the summons.
- 7.238 Where a non-disclosure notation is included in a notice or summons, it must be accompanied by a written statement setting out the rights and obligations conferred or imposed by clause 84. This would include an explanation that a failure to comply with a non-disclosure notation would be a criminal offence, unless the disclosure was otherwise permitted. For the offence, and the circumstances in which disclosure may be permitted, see clause 84.

Clause 96—When non-disclosure notations must or may be included

- 7.239 This clause would set out the specific circumstances in which the Commissioner must or may include a non-disclosure notation.
- 7.240 The Commissioner would be required to include a non-disclosure notation in the notice or summons if the Commissioner is satisfied that not doing so would reasonably be expected to prejudice:
- a person’s safety or reputation;
 - a person’s fair trial, if the person has been charged with an offence or such a charge is imminent;
 - a NACC Act process (as defined in clause 7, see paragraph 1.103); or
 - any action taken as a result of a NACC Act process.
- 7.241 The Commissioner would have the discretion to include a non-disclosure notation in a notice or summons if satisfied that not doing so might prejudice one of the matters listed above. This would mean that, in circumstances where the Commissioner is not satisfied that prejudice may be reasonably expected to occur, the Commissioner would retain a discretion to include the non-disclosure notation if satisfied that prejudice might occur.
- 7.242 This clause would also provide a discretion for the Commissioner to include a non-disclosure notation in a notice or summons if the Commissioner is satisfied that not doing so might otherwise be contrary to the public interest. For example, as part of a corruption investigation, the Commissioner may issue a private hearing summons to an officer of an intelligence agency. Notwithstanding the fact the officer may be subject to a separate non-disclosure obligation under existing intelligence legislation, the Commissioner could consider that it might be contrary to the public interest if the fact of the summons was publicly disclosed. The Commissioner could therefore include a non-disclosure notation in the summons.
- 7.243 The Commissioner would not be authorised to include a non-disclosure notation in a notice or summons unless required or permitted to do so as outlined by this clause. This would ensure that information about the NACC’s processes is not subject to inappropriate secrecy and persons involved in NACC processes are not burdened by these limitations unnecessarily, especially given that criminal penalties attach to breaches of such notations.

Clause 97—Cancelling non-disclosure notations

- 7.244 This clause would permit the Commissioner to cancel a non-disclosure notation if the reason for originally including the notation in the notice or summons ceased to exist.
- 7.245 The Commissioner would be required to advise the person on whom the notice or summons was served in writing if they cancel the non-disclosure notation. The cancellation of a non-disclosure notation would only have effect once that person is notified of its cancellation.
- 7.246 The approach to the cancellation of non-disclosure notations is a departure from the automatic cancellation approach adopted in sections 77A and 77B of the LEIC Act. This departure appropriately responds to comments made in relation to equivalent provisions of the *Independent Commission Against Corruption Act 2012* (SA) by the South Australian Supreme Court in *Bell v The Queen* (2020) 286 A Crim R 501, 561.

Reconsideration of non-disclosure notation

- 7.247 If a non-disclosure notation has not been cancelled within five years, the Commissioner would be required to consider its cancellation. If the Commissioner deems that the non-disclosure notation should continue to apply, the Commissioner will be required to reconsider the cancellation of the non-disclosure notation every two years while it remains in effect.

7.248 It may be appropriate for some non-disclosure notations to continue in force for an extended period of time. For example, a notation may have been included to protect the life or safety of a witness who is a confidential source of information in relation to an organised criminal group, and the risk to that person's life or safety if their cooperation with the NACC was exposed may endure for an extended period of time. The requirement for regular re-consideration would ensure that a non-disclosure notation does not operate in perpetuity without ongoing justification.

Relationship of notation with the Privacy Act 1988

7.249 A credit reporting body may be required to provide credit reporting information to the Commissioner under a notice or summons. If the notice or summons includes a non-disclosure notation, the body would be prevented from complying with existing legal obligations in relation to the disclosure of its information. To address this, this clause would provide that the credit reporting body would not be required, under subsection 20E(5) of the *Privacy Act 1988*, to make, and must not make, a note about the disclosure of the information until the non-disclosure notation is cancelled.

Clause 98—Offence—failure to comply with non-disclosure notations

7.250 This clause would create a criminal offence for the disclosure of information in contravention of a non-disclosure notation attached to a notice or summons. The offence would extend to the disclosure of information about the notice or summons or any official matter connected with the notice or summons.

7.251 The offence would consist of the following physical elements:

- a notice to produce (issued under clause 58) or a private hearing summons (issued under clause 63) includes a non-disclosure notation (made under clause 96);
- a person discloses information about the notice or summons (including any official matter connected with the notice or summons);
- the non-disclosure notation has not been cancelled.

7.252 The fault elements for the first two physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:

- for the circumstance element that the notice or summons includes a non-disclosure notation, the fault element of recklessness would apply (meaning proof of intention, knowledge or recklessness will satisfy this fault element);
- for the conduct element that the person discloses information, intention would be the fault element; and
- for the circumstance that the non-disclosure notation has not been cancelled, strict liability would apply meaning that no fault element would need to be proved.

7.253 Strict liability is justified in this circumstance because, if a person discloses information reckless to the fact that it is subject to a non-disclosure notation, it would be inappropriate to further consider the extent to which they knew the non-disclosure notation had not been cancelled.

7.254 Requiring the prosecution to establish fault in relation to this specific element would not be practical and would undermine the deterrent effect of the offence. The offence is intended to cover persons who disclose information while being aware of a substantial risk that the information is subject to a non-disclosure notation but who may be unaware whether the non-disclosure notation remains in force (because they are not the direct recipient of the notation). The defence of mistake of fact under section 9.2 of the *Criminal Code* would still be available in relation to this element.

7.255 The maximum penalty for the offence would be imprisonment for five years. This penalty is higher than the equivalent offence in the LEIC Act which provides a maximum penalty of two years. A maximum penalty of five years is appropriate to reflect the serious consequences that may arise from the relevant conduct, as breach of a non-disclosure notation may place a person's life or safety at risk, or significantly undermine a corruption investigation by alerting corrupt actors to the fact of the notice or hearing.

- 7.256 In addition to the standard defences available under the *Criminal Code*, the offence would not apply if the disclosure is made:
- in the circumstances, if any, permitted by the terms of the non-disclosure notation;
 - to a legal practitioner for the purpose of obtaining legal advice or representation in relation to the notice or summons;
 - to a legal aid officer for the purpose of seeking assistance in relation to the notice or summons or another matter arising under the legislation;
 - if the person is a body corporate—to an officer or agent of the body corporate for the purpose of ensuring compliance with the notice or summons;
 - if the person is a legal practitioner—for the purpose of obtaining the agreement of another person to the legal practitioner disclosing advice or a communication (see clause 115), or to give legal advice to, or make representations on behalf of, the person on whom the notice or summons was served; or
 - after the information has already been lawfully published.
- 7.257 A defendant would bear an evidential burden in relation to these matters (see subsection 13.3(3) of the *Criminal Code*). This is appropriate given the matters are, by their nature, peculiarly within the knowledge of the defendant. For example, notation terms that permit disclosure will be tailored to the circumstances of the matter, but may be expressed broadly. The reason the defendant believed a disclosure to be permitted will in some cases be peculiarly within the mind of the defendant.
- 7.258 For the purposes of this offence, information about an official matter could be disclosed indirectly because a person disclosed other information from which another person could reasonably be expected to infer the information about the official matter.
- 7.259 This clause defines **legal aid officer** to mean a member, or member of staff, of an authority established by or under a law of a State or Territory for purposes that include providing legal assistance. The regulations would be able to prescribe additional legal aid officers in connection with legal financial assistance provided under the regulations (see paragraph 13.44).

Subdivision B—Use and disclosure of investigation material

- 7.260 This Subdivision is intended to ensure, among other things, that material obtained by a notice to produce or a summons, or in a hearing, does not prejudice the fair trial of a witness for a relevant offence. This outcome would be achieved in a number of ways. For example, the Commissioner would be able to issue a confidentiality direction (see clause 100) to ensure the confidentiality of investigation material (defined in clause 99) where its disclosure would, amongst other things, prejudice the witness's fair trial in circumstances where they have been charged with a relevant offence, or such a charge is imminent.
- 7.261 This Subdivision would place a range of limitations on the circumstances in which investigation and derivative material may be disclosed. Particularly strict limits would apply to the disclosure of material to a prosecutor of the witness in some circumstances.
- 7.262 This Subdivision does not set out all permitted uses and disclosures of investigation material. Independently of this Subdivision, authorised persons may lawfully use or disclose investigation material—see for example, clause 229. Rather, this Division sets additional limits on certain uses of such material to ensure the fairness of any trial of a witness, and provides explicit authorisation for use and disclosure, consistent with the principle of legality as applied by the High Court in *X7 v Australian Crime Commission* (2013) 248 CLR 92, 86.

Limitations on disclosures of investigation material and derivative material to a prosecutor of the witness

- 7.263 The limitations that would apply to the disclosure of investigation material and derivative material to a prosecutor of the witness depend on the time at which the notice was issued, or the hearing occurred, and the time at which the material is disclosed, with the determining factor being whether or not the person had been charged with a relevant offence (or such a charge was imminent). These limitations are summarised in Table 5.

Table 5—Disclosure of investigation material and derivative material

	<i>Material</i>	<i>Disclosure to prosecutor of witness</i>
1	Pre-charge investigation material disclosed pre-charge	Can be disclosed if confidentiality direction allows it
2	Pre-charge derivative material disclosed pre-charge	No specific limitation on disclosure
3	Pre-charge investigation material disclosed post-charge	Can only be disclosed with a court order
4	Pre-charge derivative material disclosed post-charge	No specific limitation on disclosure
5	Post-charge investigation material	Can only be disclosed with a court order
6	Post-charge derivative material	Can only be disclosed with a court order

Disclosures of investigation material and derivative material relating to confiscation proceedings

- 7.264 This Subdivision would also deal with investigation material and derivative material that relates to a confiscation proceeding or imminent confiscation proceeding. A court order would not be required for the use or disclosure of pre-confiscation application material or post-confiscation application material. However, the use or disclosure of investigation material would be subject to any direction given under clause 100.
- 7.265 Further, under clause 113, answers and information given, and documents and things produced under this Part:
- would be admissible in confiscation proceedings if given or produced at a time when the proceeding had not commenced and was not imminent; and
 - would not otherwise be admissible in a confiscation proceeding.
- 7.266 The limitations in the NACC Bill reflect the limitations that currently apply to other investigative bodies, including the ACIC and ACLEI, taking into account amendments made by the *Law Enforcement Legislation Amendment (Powers) Act 2015*.

Clause 99—Meaning of investigation material

- 7.267 This clause would define the terms *investigation material* and *witness*.

Investigation material

- 7.268 The first three categories of the definition of investigation material are:
- particular information given, or a document or thing produced, by a person as required by a notice to produce;
 - particular information or evidence given by a person at a hearing; and
 - a document or thing produced by a person at a hearing.
- 7.269 These categories are intended to support the regulation of the use and disclosure of evidence that may be self-incriminatory in nature. This includes evidence, information, documents or things given or produced by a person at a hearing, or in response to a notice.

- 7.270 The Commissioner would only be permitted to provide investigation material of this kind to a prosecutor of the witness in certain circumstances (see clause 91).
- 7.271 To the extent that material is obtained by a notice or in a hearing, but also obtained through some other means, such as the execution of a search warrant, the material would not be considered investigation material. Such evidence is not capable of being self-incriminatory in nature and, as such, would not require the same level of protection as evidence that is only available because it was obtained under a notice or in a hearing.
- 7.272 This clause is also intended to support the Commissioner's control over the use of information concerning a hearing in order to prevent prejudice to an investigation or an adverse effect to a person's reputation. Investigation material would therefore consist of a range of additional material, capable of being subject to a direction made by the Commissioner regarding the use or disclosure of the material under clause 100. Some forms of investigation material would not be self-incriminatory in nature and could therefore be disclosed to a prosecutor of the witness without the same limits (see clause 107).
- 7.273 Investigation material would also include:
- information that may reveal the identity of a person who has given evidence at a hearing;
 - the identity of a person about whom allegations have been raised at a hearing or who is a person of interest in a corruption investigation;
 - the fact that a person has given or may give evidence at a hearing;
 - information, documents or things given to a witness by the NACC during the course of a hearing, to the extent that the witness only obtained the material because it was provided to them during a hearing; and
 - the fact that a private hearing has been or may be held.
- 7.274 This clause would also provide that investigation material includes copies, contents or descriptions of that material.

Witnesses

- 7.275 A witness, in relation to investigation material, would be a person referenced in the definition of investigation material, including a person called to give evidence during the course of a hearing, a person required to produce material by a notice, a person about whom allegations have been raised or a person of interest to an investigation.
- 7.276 However, the definition of witness would not apply to investigation material that consists of the fact that a private hearing has been or may be held. This is because there is no person referenced in this aspect of investigation material.
- 7.277 If material is derived from investigation material, the witness in relation to that derivative material, would be the same person as the witness in relation to the investigation material.

Clause 100—Directions about use or disclosure of investigation material

- 7.278 This clause would permit the Commissioner to issue a confidentiality direction to limit the use or disclosure of investigation material (as defined in clause 99).
- 7.279 A confidentiality direction may include terms that limit the use or disclosure of the material to specified persons or for specified purposes. The Commissioner would be required to issue a direction in certain circumstances under clause 77 and would otherwise have discretion to issue a direction as appropriate.
- 7.280 A confidentiality direction would have effect despite other clauses that permit material to be used or shared (see in particular, clauses 104, 105, 107, 108, 109, and 229).

- 7.281 The Commissioner would have a discretion to vary or revoke a confidentiality direction, but must do so in writing. However, the Commissioner must not vary or revoke the direction if the Commissioner is satisfied that such an action could prejudice a person’s safety, could reasonably be expected to prejudice a fair trial, or might lead to the publication of information that is certified by the Attorney-General under clause 235 or information that is sensitive within the meaning of clause 227 of the NACC Bill.
- 7.282 This clause would ensure that the Commissioner turns their mind to these issues prior to varying or revoking a confidentiality direction. These considerations mirror the circumstances in which the Commissioner would be required by clause 77 to issue a direction under this clause.
- 7.283 A direction issued under this clause would not be a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003* (see item 23 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

Clause 101—Offence—use or disclosure of investigation material

- 7.284 This clause would create an offence for the use or disclosure of investigation material in contravention of a confidentiality direction issued under clause 100.
- 7.285 The offence would consist of the following physical elements:
- the person uses or discloses investigation material;
 - the use or disclosure contravenes a confidentiality direction;
 - the use or disclosure is not authorised by or under the NACC Bill.
- 7.286 The fault elements for the first two physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the conduct element that the person uses or discloses investigation material, intention would be the fault element; and
 - for the first circumstance element that use or disclosure is in contravention of a direction, recklessness would be the fault element (meaning proof of intention, knowledge or recklessness will satisfy this fault element); and
 - for the second circumstance element that use or disclosure of the material is not otherwise authorised under this Bill, strict liability would apply meaning that no fault element would need to be proved.
- 7.287 Strict liability is justified in this circumstance because, if a person is reckless as to whether their conduct contravenes a direction, it is inappropriate to further consider the extent (if any) to which they considered the possible authorisation of their conduct despite the existence of the direction. Requiring the prosecution to establish fault in relation to this specific element would not be practical and would undermine the offence’s deterrent effect. The defence of mistake of fact under section 9.2 of the *Criminal Code* would still be available in relation to this element.
- 7.288 This offence would apply to disclosures regardless of whether the person who discloses the information is the first person to do so. This is appropriate, as further disclosures of information may compound the harm of an original disclosure—for example, where a further disclosure results in investigation material that has only been disclosed to a single person becoming known to a wider circle of people or to the public.
- 7.289 This offence would be punishable by a maximum penalty of two years’ imprisonment, consistent with the equivalent offence in the LEIC Act. This penalty is appropriate to ensure the Commissioner is able to restrict the use of investigation material and avoid possible prejudice to a subsequent prosecution, or the disclosure of sensitive or certified information. This is important to ensure the NACC is able to effectively fulfil its statutory functions.

7.290 This offence would override the immunity conferred by section 34B of the IGIS Act such that a person would not be able to rely on section 34B to justify breach of a confidentiality direction. This is necessary to ensure the effective operation of a confidentiality direction, which is qualified by clause 102, and which facilitates disclosure to the IGIS.

Clause 102—Disclosure to IGIS and Ombudsman officials

7.291 This clause would ensure that a confidentiality direction issued under clause 100 would not prevent:

- a person from disclosing investigation material (as defined in clause 99) to an IGIS official (as defined in clause 7: see paragraph 1.81) or staff member of the Office of the Commonwealth Ombudsman; or
- an IGIS official or staff member of the Office of the Commonwealth from using investigation material for the purpose of performing their functions.

7.292 This is intended to provide IGIS and Commonwealth Ombudsman officials with access to confidential information required to fulfil their statutory functions. Additionally, in relation to the Commonwealth Ombudsman, this is necessary because the Ombudsman would have jurisdiction to investigate complaints about the NACC.

7.293 Where access to investigation material by an IGIS official or staff member of the Office of the Commonwealth Ombudsman could prejudice an investigation by the Commissioner, this clause would confer a power on the Commissioner to issue a confidentiality direction to limit the disclosure of investigation material to, or use of such material by, the IGIS or Ombudsman. Such a direction could be issued in conjunction with a direction under clause 100. This clause may be used, for example, where a corruption investigation involves the conduct of a public official who is an IGIS official or staff member of the Office of the Commonwealth Ombudsman.

7.294 The Commissioner would be required to consult with the IGIS or the Commonwealth Ombudsman as soon as practicable after giving a direction under this clause.

7.295 A direction issued under this clause would not be a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*. This is because the direction would be covered by item 23 of subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Clause 103—Making investigation material available to courts

7.296 This clause would allow a court to access investigation material and provide it to a person being prosecuted for a relevant offence (or their lawyer) where the court considers it in the interests of justice to do so.

7.297 This clause would apply where:

- a person has been charged with an offence before a federal, State or Territory court; and
- the court considers it desirable, in the interests of justice, that the investigation material be made available to the person or a legal practitioner representing the person.

7.298 In these circumstances, the court may issue a certificate to the Commissioner and the Commissioner will be required to make the investigation material available to the court.

7.299 The court may examine the material before deciding whether to provide it to the person or their lawyer. The court would also be able to make the material available to a prosecutor of the person under this clause, provided the person is not the witness for the purposes of the material (see definition of witness in clause 99).

7.300 A defendant in a criminal proceeding would be able to make a request to the court to access investigation material if, for example, the material would be exculpatory evidence in their proceeding and was provided by another person to the Commissioner at a hearing.

7.301 This clause would apply despite any confidentiality direction issued under clause 100 because the court's decisions under this clause would constitute an authorisation of the disclosure of investigation material for the purposes of the offence in clause 101.

7.302 Clause 232 (Entrusted persons generally not compellable in proceedings) would not affect the powers of a court under this clause.

Clause 104—Obtaining derivative material

7.303 This clause would authorise particular entities who are in lawful possession of investigation material (as defined in clause 99), such as evidence given by a witness, to use and disclose that investigation material in order to obtain other material (derivative material).

7.304 Derivative material (as defined in clause 133) would be admissible in a prosecution of a witness. However there would be restrictions on the circumstances in which some types of derivative material could be provided to a prosecutor of the witness (see clause 105).

7.305 The entities authorised to use or disclose investigation material for the purpose of obtaining derivative material would be:

- a staff member of the NACC (as defined in clause 266);
- a person or body investigating whether the witness committed an offence against a law of the Commonwealth of a State or Territory;
- a prosecutor (as defined in clause 105(4)) of the witness;
- a prosecuting authority (as defined in clause 105(5));
- a proceeds of crime authority (as defined in clause 138);
- the Inspector (see clause 182);
- a person assisting the Inspector (see clause 195); and
- any other person or body lawfully in possession of the investigation material.

7.306 For example, a person or body investigating an offence would include the AFP. An authorised discloser would be able to provide investigation material to the AFP under clause 229 (authorisations to record or disclose information). So long as it would not be prevented by a confidentiality requirement imposed under clause 233 or by another legal barrier, the AFP could use that material for the purposes of its functions, including to obtain derivative material relevant to a criminal investigation.

7.307 Investigation material would be allowed to be used or disclosed regardless of whether the witness has been charged with a relevant offence (or whether such a charge is imminent) or whether confiscation proceedings have commenced against the witness (or whether such proceedings are imminent).

7.308 However, a post-charge disclosure (see clause 130) of investigation material to the prosecutor of the witness who provided the material could only be made under a court order under clause 106 (see clause 105).

7.309 The authorisation in this clause would also be subject to any confidentiality direction issued by the Commissioner under clause 100.

Clause 105—Disclosing investigation and derivative material to prosecutors of the witness

7.310 This clause would set out the circumstances in which investigation material and derivative material could be disclosed to a person prosecuting the witness for a relevant offence, consistent with Table 5.

- 7.311 This clause would apply to any disclosure of investigation material or derivative material from one person to a prosecutor, even if both persons are in the same agency. It would not affect the disclosure of investigation material or derivative material to a prosecutor engaged in the prosecution of a person other than the witness. It would not affect or limit the disclosure of material to other persons or bodies for purposes other than the prosecution of the witness.
- 7.312 The material would be able to be disclosed to a prosecutor before the witness has been charged with a relevant offence (that is, to a person making a decision whether or not to prosecute the witness, or a person assisting with that decision), when such a charge is imminent and after they have been charged with an offence. The conditions that the person or body would need to satisfy before making that disclosure would depend on the time of the disclosure (see summary at Table 5).
- 7.313 Disclosure under this clause would be subject to the terms of a confidentiality direction issued by the Commissioner under clause 100, except where the disclosure occurs under a court order made under clause 106.

Pre-charge disclosure of investigation material

- 7.314 This clause would permit the pre-charge disclosure of investigation material to a prosecutor. This would include a person who is making a decision about whether or not to prosecute a witness, and would allow for a prosecutor to give advice about the charges that may ultimately be laid against the witness.
- 7.315 Investigation material would still be inadmissible in most criminal proceedings against the witness under clause 113 (concerning self-incrimination).
- 7.316 If the witness is later charged with a relevant offence, it is expected that the prosecuting authority would take steps to ensure that the material is not available to the prosecutors of the witness who conduct that prosecution. This would minimise the risk that the witness's fair trial may be prejudiced by the prosecutors accessing relevant investigation material.

Post-charge disclosure of investigation material

- 7.317 Once the person has been charged with a relevant offence, or where such a charge is imminent, this clause would allow the post-charge disclosure of investigation material to a prosecutor only where the disclosure is authorised by a court order made under clause 106. That clause would allow a court to authorise the post-charge disclosure of investigation material to a prosecutor of the witness where disclosure is in the interests of justice.
- 7.318 The court's control over the circumstances in which investigation material can be provided to a prosecutor once the witness has been charged with a relevant offence (or such charges are imminent) is appropriate. A person cannot rely on the privilege against self-incrimination to refuse to answer questions or produce documents or things during a hearing or in compliance with a notice to produce. Giving the court control in this context is intended to ensure the witness receives a fair trial and that the prosecutor is given access to all relevant and appropriate material (including where the investigation material is exculpatory or where the witness wants the prosecutor to take matters uncovered in an investigation into account in making decisions about whether to prosecute or continue a prosecution).

Disclosure of derivative material generally

- 7.319 This clause would also set out the circumstances in which derivative material could be disclosed to a person prosecuting the witness for a relevant offence.
- 7.320 This clause would allow the disclosure (at any time) of derivative material derived from pre-charge investigation material (see clause 129) to a prosecutor for use in any prosecution of the witness. Derivative material would be admissible in the prosecution (see clause 113).

- 7.321 It is appropriate that material derived from a pre-charge hearing or notice to produce is able to be provided to a prosecutor without additional restrictions. The NACC Bill would override the privilege against self-incrimination in relation to material obtained in a hearing or by a notice to produce, but provide that investigation material over which the witness has claimed privilege would be inadmissible in most criminal proceedings against the witness.
- 7.322 While it is appropriate to ensure that there are strict limits on the disclosure of investigation material to a prosecutor of the witness, material derived from a pre-charge hearing or notice to produce stands in a different category. The intention is to authorise the derivative use of investigation material for a number of purposes, including for use in the investigation and prosecution of the witness and other people. This is an important part of enabling the NACC to fulfil its statutory role in detecting and preventing corrupt conduct, in investigating corruption issues that, in the opinion of the Commissioner, could involve corrupt conduct that is serious or systemic, and to enable the referral of persons for criminal prosecution.
- 7.323 In light of the subject matter of investigations and the gravity of the corruption activities involved, it is important that material derived from such investigations can be used to disrupt and prevent serious harm to the community and the proper administration of government, including by prosecuting persons who have been witnesses.
- 7.324 These powers are not intended to derogate from a court's overriding power to make any orders necessary to ensure that the witness receives a fair trial (see clause 106).

Post-charge disclosure of material derived from post-charge investigation material

- 7.325 In the case of a post-charge disclosure of derivative material derived from post-charge investigation material (see clause 130), a disclosure to a prosecutor of the witness would require a court order made under clause 106.
- 7.326 The order would only be made if the court is satisfied that the disclosure is in the interests of justice. This provision is intended to ensure that the court controls the circumstances in which material derived from a post-charge hearing or notice to produce can be provided to a prosecutor.
- 7.327 Giving the court control of the circumstances in which this type of derivative material may be provided to a prosecutor of the witness is intended to ensure the witness's fair trial and that the prosecutor is given access to all relevant and appropriate material. For example, where the derivative material is exculpatory or where the witness wants the prosecutor to take matters from the investigation into account in making decisions about whether to prosecute.
- 7.328 Derivative material would generally be admissible in proceedings against the witness where it is disclosed pursuant to a court order (see clause 113).

Definitions

- 7.329 This clause would define the terms ***prosecutor*** and ***prosecuting authority***.
- 7.330 A ***prosecuting authority*** means an individual or authority, authorised by or under a law of the Commonwealth or of a State or Territory to prosecute an offence. The term is intended to include the CDPP and their State and Territory counterparts. It is also intended to extend to other bodies that may have prosecutorial functions, such as State or Territory police.
- 7.331 A ***prosecutor*** of a witness means an individual who is a prosecuting authority or is employed or engaged by a prosecuting authority who:
- makes, or is involved in the making of, a decision whether to prosecute the witness for a relevant offence; or
 - is one of the individuals engaging in such a prosecution of the witness.
- 7.332 The definition is intended to cover only the persons who are directly involved in the prosecution of a witness for a relevant offence or the decision about whether to prosecute the witness. This would include:
- the Director of Public Prosecutions;

- the prosecutors who have carriage of the prosecution of the witness, and other prosecutors who assist that prosecutor in the prosecution of the witness or who assist in making the decision to prosecute the witness;
- counsel engaged to assist in the prosecution of the witness; and
- support staff who assist in the prosecution of the witness.

7.333 The definition is not intended to capture the following:

- police or law enforcement officers involved in the investigation which led to the witness being charged;
- police or law enforcement officers who are witnesses in a prosecution of the witness for a relevant offence;
- persons involved in the prosecution of the witness for unrelated offences (whether that prosecution is by the same prosecuting authority or another prosecuting authority);
- persons involved in the prosecution only of persons other than the witness (including for offences that are related to the witness's conduct).

7.334 Consistent with the definition of *prosecutor*, this clause would only apply where the subject matter of the investigation from which the material came is relevant to the subject matter of the offence.

Clause 106—Court's powers to order disclosure and to ensure a fair trial

7.335 This clause would clarify a court's powers with respect to investigation material and derivative material. This clause is intended to be protective and ensure that a person's fair trial is not prejudiced by a hearing or the use of investigation material or derivative material.

Court orders for disclosure of material

7.336 This clause would allow a person or body in possession of investigation material or derivative material to apply to a court for an order authorising the disclosure of that material to a prosecutor of the witness in accordance with clause 105. A court could also make such an order on its own initiative.

7.337 A court would be able to order disclosure of the material to the prosecutor if it were satisfied that the disclosure is in the interests of justice, and despite any direction under clause 100. This provision would allow the court flexibility in determining whether or not potentially prejudicial material should be disclosed to a prosecutor of the witness.

7.338 Whether or not a disclosure would be in the interests of justice would depend, for example, on the nature and content of the material sought to be disclosed, the circumstances of the case and the extent to which disclosure of the material could prejudice the witness's fair trial or safety.

7.339 This clause would allow a court to specify the prosecutors to whom the material may be disclosed either by class or position, or individually. The clause also allows the court to place appropriate limits on the prosecutors' use of the material to ensure that they use it consistently with the interests of justice.

7.340 This clause would set out the courts to which a person may apply for an order. If the witness is charged with an offence, the person or body should seek the order of the court hearing those charges. Where charges against a person are imminent but have not yet been laid, it is anticipated that a person or body would apply to the court that is likely to be hearing those charges for an order that material may be disclosed to the prosecution. A person would not be able to apply to the Federal Circuit and Family Court of Australia (Division 1), which deals with family law matters.

Orders necessary to ensure a fair trial

7.341 This clause would make it explicit that nothing in this Subdivision limits a court's power to make all orders necessary to ensure the fair trial of the witness, including to limit or remove any prejudice from the prosecution's lawful possession or use of investigation material or derivative material.

- 7.342 This is intended to make it clear that this Subdivision is not to be regarded as inhibiting a court's ability to manage its own procedures and to make orders to prevent prejudice to a trial that is inconsistent with a witness's fair trial.
- 7.343 This clause would clarify that a trial is not to be considered unfair merely because the Commissioner has conducted a hearing in relation to the witness. This would apply whether the hearing occurred pre-charge or post-charge (including where charges were imminent). This would apply to Commonwealth and Territory offences, and State offences with a federal aspect.
- 7.344 State offences have a federal aspect in the circumstances set out in section 3AA of the *Crimes Act 1914*. Among other circumstances, a State offence would have a federal aspect where the offence falls within Commonwealth legislative power because of:
- the elements of the State offence;
 - the circumstances in which the offence was committed; or
 - because the AFP investigation of the offence is incidental to the investigation of a Commonwealth offence.
- 7.345 Clause 232 (Entrusted persons generally not compellable in proceedings) would not affect the powers of a court under this clause.

Clause 107—Certain material may always be disclosed to prosecutors of the witness

- 7.346 This clause would provide that certain types of investigation material and derivative material may always be provided to the prosecution without a court order under clause 106.

Disclosure of material that is not self-incriminatory

- 7.347 Only certain types of investigation material—concerning evidence provided by a witness, or documents or things produced by a witness—are capable of being self-incriminatory in nature. It is investigation material of this kind that is subject to the limitations outlined in clauses 104 and 105 due to the prejudice such material may have on a witness's fair trial.
- 7.348 Other types of investigation material do not raise this issue and are appropriate to be disclosed to a prosecutor where relevant. For example, this clause would allow a person or body to disclose to the prosecutor of a witness the fact that a person has or may be about to give evidence at a hearing, or any information that may reveal the identity of a witness or person of interest to a corruption investigation. This reflects the fact that the prosecution's knowledge that a person has given or will give evidence should not affect the fairness of the trial. Further, that knowledge is necessary to allow the prosecutor to understand the risks involved in the trial of the person, including the fact that there may be applications for stays or to exclude particular evidence.
- 7.349 This clause would not apply to one type of investigation material: the fact that a hearing has been, or may be, held in private. This material does not concern a particular witness. No specific authorisation is required for the use or disclosure of that material, including by or to a prosecutor.

Disclosure of material for prosecution offences in relation to notices and hearings

- 7.350 This clause would allow the disclosure of all categories of investigation material and derivative material to the prosecutor of a witness for the purposes of prosecuting an offence set out in Table 7.2.

Table 7.2—Offences for which disclosure of material is always permitted

	<i>Provision</i>	<i>Offence</i>
1	clause 60	Failure to comply with notice to produce
2	Clause 61	Producing false or misleading information or documents in response to a notice to produce
3	Clause 68	Failure to attend a hearing

	<i>Provision</i>	<i>Offence</i>
4	Clause 69	Failure to give information, or produce documents or things at a hearing
5	Clause 70	Destroying documents or things
6	Clause 71	Giving false or misleading evidence, information or documents at a hearing
7	Clause 72	Obstructing or hindering hearings, threatening persons present at a hearing
8	Clause 81	Failure to take an oath, make an affirmation or answer a question at a hearing
9	Clause 98	Failure to comply with non-disclosure notations
10	Clause 101	Improper use or disclosure of investigation material
11	Section 137.1 of the <i>Criminal Code</i>	Giving false or misleading information (in relation to a notice to produce or a hearing)
12	Section 137.2 of the <i>Criminal Code</i>	Giving false or misleading documents (in relation to a notice to produce or a hearing)
13	Section 144.1 of the <i>Criminal Code</i>	Forgery (in relation to a notice to produce or a hearing)
14	Section 145.1 of the <i>Criminal Code</i>	Using forged documents (in relation to a notice to produce or a hearing)
15	Section 149.1 of the <i>Criminal Code</i>	Obstruction of Commonwealth public officials (in relation to the Bill)

- 7.351 This clause would only allow disclosure of all categories of investigation material where the offence concerns the hearing or notice itself. It would allow the disclosure of essential information about the witness's conduct, answers, non-compliance with a direction, or non-attendance at a hearing.
- 7.352 A person or body could disclose material as outlined in this clause at any time. It would not matter when the relevant hearing occurred or when the disclosure is to be made.
- 7.353 This clause would operate subject to a confidentiality direction issued by the Commissioner under clause 100.

Clause 108—Use of material by prosecutors

- 7.354 This clause would clarify how prosecutors may use investigation material and derivative material.
- 7.355 This clause would allow a prosecutor of a witness who is lawfully in possession of investigation material or derivative material to use that material for any lawful purpose. A prosecutor's use of investigation material would always be subject to the terms of a clause 100 direction and the admissibility of such material under clause 113 (self-incrimination).
- 7.356 This clause would clarify that investigation material and derivative material lawfully possessed by a prosecutor of the witness could be used in criminal proceedings against the witness. This provision would be intended only to allow the material to be tendered as evidence, subject to other clauses that may make the material inadmissible (for example, clause 113). Whether the material is ultimately admitted into evidence would be a matter for the court, to be decided according to the applicable laws of evidence.
- 7.357 Nothing in the Subdivision would, by implication, limit the circumstances in which investigation material or derivative material could be provided to an individual who is not prosecuting the witness. This would include investigators of the witness (for their involvement in a relevant offence), prosecutors of other persons (including for offences related to those with which a witness is charged), and persons prosecuting the witness for unrelated offences.

- 7.358 This clause would operate subject to other laws of the Commonwealth, or laws of a State or Territory, which may affect the way in which investigation material or derivative material can be used in trial.

Clause 109—Making material available to proceeds of crime authorities

- 7.359 This clause would authorise the disclosure of investigation material and derivative material to a proceeds of crime authority (as defined in clause 138) at any time, and would set out the circumstances in which the material is admissible in confiscation proceedings against the witness.
- 7.360 This clause would clarify that a person or body could disclose investigation material or derivative material to a proceeds of crime authority at any time, including after the authority had commenced confiscation proceedings. It would not matter when the relevant hearing occurred or material was produced, or when the disclosure was made.
- 7.361 This clause would clarify that the ability of a person or body to disclose investigation material or derivative material to a proceeds of crime authority would be subject to a direction issued by the Commissioner under clause 100.
- 7.362 This clause would provide that investigation material and derivative material lawfully possessed by a proceeds of crime authority could be used as evidence in confiscation proceedings against the witness. Whether it is ultimately admitted into evidence would be a matter for the court, to be decided according to the applicable laws of evidence and, in some cases, the use immunity in clause 113.
- 7.363 This clause, and the exceptions to the use immunity in clause 113, would not limit a court's power to make all orders necessary to ensure the administration of justice in a particular case. These clauses would not inhibit a court's ability to manage its own procedures and to make orders to prevent prejudice to the administration of justice, for example, by acting to prevent an abuse of process or contempt of court.

Division 5—Retention and return of documents and things

- 7.364 This Division would set out the circumstances in which the Commissioner may retain, or otherwise return, material that has been produced under the NACC Bill.
- 7.365 A document or thing may be produced under the NACC Bill in a number of ways, including in response to a direction to an agency head under clause 57, a notice to produce under clause 58, a witness summons under clause 63, or a direction during a hearing under clause 65.
- 7.366 In the absence of an order by a magistrate under clause 112, a reason to retain material for the purposes of an NACC Act process (see paragraph 1.103), or an exception set out in clause 111, the Commissioner would be required to return the material under clause 111.

Clause 110—Commissioner may retain documents and things

- 7.367 This clause would permit the Commissioner to retain possession of a document or thing produced under the NACC Bill for particular purposes.
- 7.368 The Commissioner would be authorised to retain the document or thing for as long as is necessary for the purposes of a relevant NACC Act process (defined in clause 7, see paragraph 1.103), or any action taken as a result of a NACC Act process. For example, a document obtained at a hearing may be used through the relevant corruption investigation, including as evidence to support findings made in an investigation report prepared under Part 8. Further, if a corruption investigation results in criminal proceedings being commenced against a person, the Commissioner could retain the document for use by the CDPP as evidence in the proceedings (if the document would otherwise be admissible). This is appropriate in light of the object of the NACC Bill to enable, after investigation of a corruption issue, the referral of persons for criminal prosecution.

7.369 A document or thing may also be used in a different NACC Act process. For example, a document obtained under a notice to produce issued for the purposes of a corruption investigation could be retained for use in a related corruption investigation or public inquiry. Further, if the Inspector had reason to access the document for the purposes of a NACC complaint investigation (see subclause 212(2)), the Commissioner could retain the document to facilitate the Inspector's access to the document for the purposes of that investigation.

7.370 The Commissioner would also be authorised to make copies of the document or thing, or take extracts from the document.

Providing access to retained documents and things

7.371 While the Commissioner retains the document or thing, the Commissioner would be required to allow a person who would otherwise have access to the document or thing:

- to inspect or view the document or thing at all reasonable times; and
- to copy the document or thing.

7.372 However, the Commissioner would not be required to provide this access if:

- possession of the document or thing by the person could constitute an offence;
- inspecting or copying the document or thing would compromise or damage the document or thing; or
- the Commissioner is satisfied that allowing the person to inspect the document or view the thing would prejudice a NACC Act process, or any action arising from a NACC Act process.

Clause 111—When documents and things must be returned

7.373 This clause would require the Commissioner to take reasonable steps to return materials produced under the NACC Bill to the person who produced the materials, or to the owner of the materials if the person who produced the materials is not entitled to possess them.

7.374 This requirement would apply where the Commissioner is satisfied the materials are no longer required for the purposes of a NACC Act process (see clause 110) or any action taken as a result of a NACC Act process.

7.375 The requirement to return documents and things applies to the return of the original document or thing—it does not apply to a copy of a document or thing made by the Commissioner. This is appropriate to ensure that persons are not deprived of their property for any longer than is required, while ensuring that the Commissioner can continue to retain copies of documents and things where necessary for the performance by the NACC of its functions and for compliance with its legal obligations, including under the *Archives Act 1983*.

Exceptions

7.376 The Commissioner would also be authorised not to return the materials if:

- possession of the item by the person could constitute an offence;
- the item could otherwise be retained, destroyed or disposed of under a law, or an order of a court or tribunal, of the Commonwealth or of a State or a Territory; or
- the item could be forfeited or is forfeitable to the Commonwealth or is the subject to a dispute as to ownership.

Clause 112—Magistrate may permit documents and things to be retained, forfeited etc

7.377 This clause would authorise the Commissioner to apply to a magistrate for a document or thing to be retained, forfeited, sold or destroyed.

7.378 Before making such an application, the Commissioner would be required to take reasonable steps to discover who has an interest in the document or thing and, if practicable to do so, notify each person the Commissioner believes to have an interest in the proposed application.

- 7.379 This clause would authorise a magistrate to order that:
- a thing or document be retained for a specified period of time;
 - a thing or document be forfeited to the Commonwealth;
 - a thing be sold and the proceeds given to the owner of the thing; or
 - a thing or document be destroyed or otherwise disposed of.
- 7.380 A magistrate would be authorised to make such an order on application by the Commissioner if the magistrate is satisfied there are reasonable grounds to suspect that, if the document or thing is returned, it is likely to be used in the commission of a serious offence by the owner of the document or thing, or the person who produced the document or thing.
- 7.381 The ability for the Commissioner to apply for and obtain an order for the retention, forfeiture, sale or destruction of documents and things that are likely to be used in the commission of a serious offence reflects the similar power in section 3ZQZB of the *Crimes Act 1914*, in relation to documents and things seized or produced under search warrants and notices to produce under that Act. The power is appropriate, to ensure that the Commissioner is not required to return documents and things to a person that are likely to then be used in the commission of a serious offence.
- 7.382 A magistrate would be required to allow a person who has an interest in the document or thing to appear and be heard before determining the application.

Meaning of magistrate and serious offence

- 7.383 For the purposes of this clause, a ***magistrate*** means a magistrate who is remunerated by salary or otherwise, and includes a Judge, or acting Judge, of the Local Court of the Northern Territory.
- 7.384 For the purposes of this clause, a ***serious offence*** would mean:
- an offence against a law of the Commonwealth punishable by imprisonment for 2 years or more;
 - an offence against either of the following provisions of the *Charter of the United Nations Act 1945*:
 - Part 4 of that Act,
 - Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—ISIL (Da’esh) and Al Qaida) Regulations 2008*;
 - an offence against a law of a State that:
 - has a federal aspect (see paragraph 7.344), and
 - is punishable by imprisonment for 2 years or more.

Division 6—Privileges and protections

- 7.385 This Division would set out various privileges and protections available, or not available, to a person compelled to provide material to the NACC during an investigation. This Division does not deal with parliamentary privilege, which is dealt with in clause 274.
- 7.386 This Division would complement other protections available under the NACC Bill, including for those who provide information to the Commission (under clause 24), and for journalists’ informants (under clause 31).

Clause 113—Self-incrimination

- 7.387 This clause would abrogate the privilege against self-incrimination in the context of giving evidence at a hearing or producing material in response to a notice to produce.
- 7.388 The privilege provides that a person generally cannot be required to testify to the commission of an offence by that person. Nor can a person suspected of, but not charged with, an offence, generally be required to provide a statement about the commission of the offence.

- 7.389 The abrogation of the privilege would mean that a person would be unable to refuse to comply with a summons under clause 63, or a notice to produce under clause 58 on the grounds that doing so could incriminate them.
- 7.390 The abrogation would be accompanied by an important safeguard: a use immunity in relation to criminal proceedings, proceedings for the imposition or recovery of a penalty, and confiscation proceedings. This would mean that the relevant material would not be admissible as evidence in court against the person who provided the material.
- 7.391 The use immunity would not extend to material derived from investigation material. That is, derivative material would be admissible as evidence against the person from which the investigation material was obtained, in criminal proceedings, proceedings for the imposition or recovery of a penalty, and confiscation proceedings. This is consistent with the LEIC Act, which permits the derivative use of hearing material for a range of purposes—including use in the investigation and prosecution of the witness and other persons.
- 7.392 This is appropriate to ensure the Commissioner can fulfil their statutory functions of detecting, preventing and investigating corrupt conduct that could be serious or systemic. Such conduct causes significant harm, including:
- direct harm to individual victims of serious or systemic corrupt conduct;
 - broader, direct harms across the Australian community and economy—for example, through the corrupt diversion of public resources; and
 - harm to public confidence in government and public administration.
- 7.393 It is important that material derived from investigation material can be used to investigate, disrupt and—where appropriate—prosecute persons involved in serious or systemic corrupt conduct, including by prosecuting persons who have been witnesses before the Commissioner. For example, material provided by a witness in a hearing may lead the Commissioner to pursue new lines of investigation, which ultimately culminate in a brief of evidence against the witness. It is critical that such evidence can be used to disrupt corrupt conduct, including by prosecuting persons who have been witnesses.
- 7.394 Further, it would open court proceedings up to inappropriate delay, and be contrary to the interests of justice, if evidence referred by the NACC could not be admitted until the prosecution had established its provenance. Previous experience under the former *National Crime Authority Act 1984* demonstrated that providing a derivative use immunity for examination material was inappropriate as it undermined the capacity of the National Crime Authority to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act 2001*, the derivative use immunity in the National Crime Authority Act required the prosecution to prove the provenance of each piece of evidence in the trial of a person that the National Crime Authority had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.
- 7.395 Importantly, the NACC Bill would preserve the inherent power of the courts to make orders that are necessary to ensure a fair trial of the witness (see clause 106). This could include orders to limit or remove any prejudice from the prosecution’s lawful possession or use of investigation material or derivative material.
- 7.396 The use immunity would not be applicable to documents that form part of a record of an existing or past business. This is appropriate, as business records are not records of a natural person—they are records of a company or other entity. Compulsory access to business records, and the ability to rely on those records as part of an investigation and any subsequent prosecution or proceeding, does not place the fair trial of a natural person at risk and serves public interests in:
- ensuring that corporate and business structures are not used by officers, employees or agents of the business to engage in serious or systemic corrupt conduct; and
 - protecting the interests of shareholders, partners and creditors (as the case may be) in a business involved in allegations of serious or systemic corrupt conduct.

7.397 The use immunity would also not be available in proceedings set out in Table 7.3.

Table 7.3—Offences for which use immunity not available

	<i>Provision</i>	<i>Offence</i>
1	Clause 60	Failure to comply with notice to produce
2	Clause 61	Producing false or misleading information or documents in response to a notice to produce
3	Clause 68	Failure to attend a hearing
4	Clause 69	Failure to give information, or produce documents or things at a hearing
5	Clause 70	Destroying documents or things
6	Clause 71	Giving false or misleading evidence, information or documents at a hearing
7	Clause 72	Obstructing or hindering hearings, threatening persons present at a hearing
8	Clause 81	Failure to take an oath, make an affirmation or answer a question at a hearing
9	Clause 98	Failure to comply with non-disclosure notations
10	Clause 101	Improper use or disclosure of investigation material
11	Section 137.1 of the <i>Criminal Code</i>	Giving false or misleading information (in relation to a notice to produce or a hearing)
12	Section 137.2 of the <i>Criminal Code</i>	Giving false or misleading documents (in relation to a notice to produce or a hearing)
13	Section 144.1 of the <i>Criminal Code</i>	Forgery (in relation to a notice to produce or a hearing)
14	Section 145.1 of the <i>Criminal Code</i>	Using forged documents (in relation to a notice to produce or a hearing)
15	Section 149.1 of the <i>Criminal Code</i>	Obstruction of Commonwealth public officials (in relation to the NACC Bill)

7.398 It is appropriate that the use immunity not extend to pre-confiscation application material because a confiscation proceeding is a civil proceeding. Despite this, it is appropriate the use immunity applies to post-confiscation application material so that a hearing or notice could not be used to undermine civil procedure.

7.399 The other exceptions to the use immunity are appropriate because the subject matter of those exceptions would necessarily depend on evidence relating to the witness's compliance (or lack of compliance) with a notice or summons or interference with the performance of the NACC's functions.

7.400 The exceptions to the use immunity would not affect the admissibility of material for any other purpose.

Clause 114—Public interest grounds

7.401 This clause would require a person to give an answer or information, or produce a document or thing, in compliance with a direction or a notice to produce, or at a hearing, despite certain other laws and privileges that might otherwise excuse the person from the obligation to comply.

Legal professional privilege

- 7.402 This clause would abrogate legal professional privilege in the context of providing investigation material in response to a direction to produce, a notice to produce or at a hearing. The privilege would be abrogated for any person, including a Commonwealth agency or a company, except where the privilege applies to advice or a communication relating to a person's compliance with a notice to produce or attendance (or anticipated attendance) at a hearing.
- 7.403 It is appropriate to abrogate legal professional privilege in this way due to the significant impact that corrupt conduct can have in eroding the community's trust in public administration. Privileged information can provide valuable insight into conduct, and be important evidence in a corruption investigation. This clause would prevent corrupt actors from relying on legal professional privilege as a shield from investigation by the Commissioner.
- 7.404 Further, legal advice will often be an integral component of a decision-making process that gives rise to a corruption issue that, in the Commissioner's opinion, could involve corrupt conduct that is serious or systemic. For example, access to legal advice provided to a decision-maker that indicates a particular decision would be inconsistent with the proper exercise of a power would be important to the Commissioner distinguishing a decision made by mistake from an improper decision that constitutes corrupt conduct.

Legal professional privilege relating to journalists

- 7.405 Legal professional privilege would not be abrogated in relation to advice or a communication given for the purposes of, or in the course of, a person's work as a journalist. This clause is intended to uphold the public interest associated with a free press by:
- recognising the importance of protecting the independence of journalists; and
 - reflecting the probability that legal advice relating to the work of a journalist is likely to deal with matters including the identity and conduct of confidential sources.
- 7.406 If privileged material is required to be provided at a hearing, the hearing would be required to be held in private (see clause 74).
- 7.407 Although a person may not be able to rely on legal professional privilege to withhold material at a hearing or in response to a direction to produce or a notice to produce, this clause would not affect a claim of legal professional privilege over that material in any other context. That is, a person providing privileged material to the Commissioner would not be taken to have waived the privilege.

Requirement to give information subject to legal professional privilege would not otherwise affect the privilege

- 7.408 This clause would provide that the requirement for a person to answer a question, give information, or produce a document or thing in a manner that abrogates legal professional privilege would not otherwise affect any claim of legal professional privilege that the person, or any other person, may make. This would ensure that, while the Commissioner would be able to obtain and rely on legally privileged material for the purposes of a corruption investigation, including in a private hearing (see clause 74), the material would remain privileged. As such, a person could claim legal professional privilege to prevent:
- the admission of the material in a subsequent prosecution or other proceeding;
 - the publication of the material, including in an investigation report; or
 - the disclosure of the material, for a purpose unrelated to the corruption investigation.

Secrecy provisions

- 7.409 This clause would also prevent an individual from relying on a secrecy provision (other than an exempt secrecy provision: see paragraph 1.72) to withhold material at a hearing or in response to a direction to produce or a notice to produce.

- 7.410 The Commissioner’s information-gathering powers would not be limited by the provisions of any other law unless that law is an exempt secrecy provision, which would include a law that expressly excludes the Commissioner’s power to obtain information or expressly excludes the operation of the Act to be enacted by the NACC Bill. This requirement is intended to ensure that Parliament is expressly alerted to any restrictions that might be sought in the future that would limit the Commissioner’s capacity to carry out their statutory functions including the investigation of corruption issues that, in the Commissioner’s opinion, could involve corrupt conduct that is serious or systemic. That is, it is not intended that laws that contain merely general or blanket privacy provisions, restricting access to information other than to specified persons, should apply to the Commissioner. This approach reflects the approach to the relationship between the *Auditor-General Act 1997* and other laws.
- 7.411 This clause would have the effect that a person would not commit an offence or be liable to any penalty under any other enactment if an individual is complying with a requirement in a notice to produce or at a hearing.
- 7.412 This approach is appropriate, to ensure that the Commissioner may obtain all information relevant to an investigation into a corruption issue that could involve corrupt conduct that is serious or systemic.

Public interest immunity

- 7.413 This clause would provide that a claim that complying with an obligation to provide material in a hearing or in response to a direction to produce or a notice to produce would be contrary to the public interest would not be a legitimate reason to refuse to comply. That is, a person could not refuse to comply with an obligation by claiming public interest immunity.
- 7.414 Public interest immunity is a principle at common law that provides that information may be protected from disclosure if the public interest in disclosing a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document.
- 7.415 Providing that a person could not refuse to comply with an obligation on public interest grounds would reflect the public interest in ensuring that the Commissioner may obtain all relevant information as part of an investigation into a corruption issue that could involve corrupt conduct that is serious or systemic.
- 7.416 Clause 236 would allow the Attorney-General to certify that disclosure to the Commissioner (or the Inspector) of information and documents, which are subject to a binding international agreement between Australia and another country, would be contrary to the public interest. Only where a certificate is in force under that clause could a person refuse to provide material to the Commissioner on public interest grounds.

Clause 115—Material sought from legal practitioners

- 7.417 Clause 113 abrogates claims of legal professional privilege in most circumstances, but preserves those claims in certain circumstances. For example, a legal practitioner within a media organisation may be entitled to claim legal professional privilege in respect to advice they have given for the purpose of a journalist’s work. Further, a practitioner could claim the privilege in relation to their representation of a person for the purposes of that person’s appearance before the Commissioner at a hearing or compliance with a notice to produce or direction to produce.
- 7.418 Where a legal practitioner is asked to provide material and (despite clause 113) is able to claim legal professional privilege, the legal practitioner would be able withhold the privileged material. In these circumstances, this clause would permit the Commissioner to instead require the practitioner to provide the name and address of their client. Identifying the client would enable the Commissioner to deal with the client directly, either by requesting their voluntary waiver of the privilege for the purposes of the investigation, or compelling the client to provide the material under a notice to produce or summons, request the client agree to the disclosure of the material, or to

Obtaining material from a client

- 7.419 Whether the client would be required to provide that material would depend on whether the client (as opposed to the practitioner) could rely on legal professional privilege or another protection. For example, if a practitioner's client had sought legal advice about their attendance at a hearing and, for the purposes of obtaining that advice, had provided incriminating records of their conduct to the practitioner, it is more appropriate that the Commissioner obtain those documents from the client rather than the practitioner. The Commissioner would be free to do so because, in the hands of the client, those documents would generally not be subject to an enduring claim of legal professional privilege. However, the client could not be required to provide a copy of any advice they received from their practitioner to assist them to prepare for their hearing because the privilege would be appropriately preserved in relation to that advice to facilitate the fair conduct of the hearing.

Interaction with journalist protection

- 7.420 None of a journalist, their employer or a legal practitioner representing either the journalist or the employer could be compelled to reveal a journalist's informant. The legal practitioner would be excused from revealing that information under this clause, assuming legal professional privilege applied to any identifying information in their possession. The Commissioner could ask the legal practitioner to identify the journalist or employer who owned the privilege. However, even with that information, the Commissioner could not compel either the journalist or the employer to reveal that identifying information because of the protection provided for in clause 43.

Client consent to disclosure of privileged material

- 7.421 A client would be able to consent to their legal practitioner disclosing the relevant material to the Commissioner. Such consent, and the subsequent disclosure to the Commissioner, would not otherwise affect a claim of legal professional privilege that anyone may make in relation to that material. That is, a person consenting to the disclosure of privileged material to the Commissioner would not be taken to have waived the privilege.

Clause 116—Other protections

- 7.422 This clause would outline protections available to a person providing information, or producing a document or thing, in response to a direction to produce or a notice to produce, or as a witness at a hearing.
- 7.423 The person would have the same protections as a witness in proceedings in the High Court. This would extend protections afforded by the relevant criminal offences under Part III of the *Crimes Act 1914* to witnesses, including intimidating or deceiving witnesses.
- 7.424 The Commissioner would be authorised to make arrangements to protect the safety of a person, or to protect the person from intimidation or harassment. The Commissioner would have a discretion to make any such arrangements as are necessary. This clause would not require that there be an imminent risk of prejudice to the person's safety, or evidence that the person has been intimidated or harassed—the Commissioner would be authorised to proactively make such arrangements as are necessary to prevent or protect against such eventualities. The nature of these arrangements will depend on the particular risks the Commissioner identifies in relation to the notice to produce or hearing. For example, the Commissioner could make arrangements with the Minister, the AFP Commissioner, or the head of a police force of a State or Territory.
- 7.425 These powers would be distinct from the protection that may be available under the *Witness Protection Act 1994* and this Bill would not affect any additional arrangements that could be made under that Act.

- 7.426 This clause would operate in conjunction with other protections in the NACC Bill, including clause 113, which would provide that a person does not commit an offence, and is not liable to any penalty, under the provisions of any other enactment (other than an exempt secrecy provision) because the person gives information, or produces a document or thing in response to a notice to produce. Further, no action, suit or proceeding in respect of loss, damage or injury would lie in relation to the evidence given by the person (see clause 24).
- 7.427 These protections are qualified by, for example, the offences in sections 137.1 and 137.2 of the *Criminal Code* (about false or misleading information or documents) as they apply in relation to obligations under this Part.

Division 7—Search powers

- 7.428 This Division would provide three search-related powers to the NACC for the purposes of its corruption investigations:
- the power to enter most places occupied by Commonwealth agencies without a warrant, exercise inspection powers, and, in limited circumstances, seize things;
 - the ability to conduct a search of a premises or person under a search warrant; and
 - the power to stop and search conveyances for things relevant to an indictable offence or to a corruption issue the Commissioner is investigating, without a warrant, in limited circumstances.
- 7.429 Search powers could be exercised by authorised officers of the NACC, which would include the Commissioner, any Deputy Commissioners and persons appointed under clause 267. Clause 267 seeks to ensure that authorised officers possess skills and experience that reflect the significant and coercive nature of their powers under the NACC Bill. It would allow the Commissioner to appoint a person to be an authorised officer if the person is:
- a staff member of the NACC who the Commissioner considers has suitable qualifications or experience;
 - a staff member of the NACC who is also a member of the AFP;
 - a staff member of the NACC who is also a member of the police force or police service of a State or Territory; or
 - a member of the AFP.
- 7.430 This Division would also provide for use and sharing of documents, things, copies and photographs seized or made under the Division, and the return of things seized under the Division.

Subdivision A—Search powers

- 7.431 This Subdivision would allow authorised officers of the NACC to:
- enter most places occupied by Commonwealth agencies without a warrant, exercise inspection powers, and, in limited circumstances, seize things;
 - conduct a search of a premises or person under a search warrant; and
 - stop and search conveyances without a warrant, in limited circumstances, for things relevant to an indictable offence or a corruption issue the Commissioner is investigating.
- 7.432 The second and third of these powers would be provided by applying relevant provisions of the *Crimes Act 1914*. Subdivision B would set out modifications to the application of those provisions to ensure they operate appropriately and effectively for corruption investigations.
- 7.433 This Subdivision would also make provision for use and sharing of documents, things, copies and photographs seized or made under Division 7, and the return of things seized under that Division.

Clause 117—Entering certain places without a search warrant

- 7.434 This clause would permit the Commissioner or another authorised officer of the NACC to enter and search a place occupied by a Commonwealth agency (with some exceptions) without a search warrant for the purposes of a corruption investigation.
- 7.435 As a Commonwealth entity itself, the NACC should not require external approval to enter and search the premises of Commonwealth agencies for the purposes of a corruption investigation. To search any other premises, for example the home of a public official, a warrant would be required under the *Crimes Act 1914*, including as applied by clause 119.
- 7.436 The search powers available under this clause would be more limited than those available under a search warrant, and consistent with those currently available to ACLEI in relation to law enforcement agencies.
- 7.437 The Commissioner or authorised officer would be authorised to:
- enter any place occupied by a Commonwealth agency (as defined in clause 11) at any reasonable time of the day;
 - carry on the corruption investigation at that place;
 - inspect any documents relevant to the investigation that are kept at that place;
 - make copies of, or take extracts from, any documents so inspected;
 - for the purpose of making a copy of, or taking an extract from, a document, remove the document from that place; and
 - seize documents or things found at that place if the Commissioner or other authorised officer believes on reasonable grounds that:
 - the document or thing is relevant to an indictable offence, and
 - seizure of the document or thing is necessary to prevent its concealment, loss or destruction or its use in committing an indictable offence.
- 7.438 A place occupied by a Commonwealth agency would include any premises at which the agency exercises a right of occupancy (such as where the agency owns, leases or is otherwise entitled to and does occupy the premises). A Commonwealth agency would also occupy any premises that it controls. An agency will necessarily exercise rights or occupancy and control through its staff members, including employees of contracted service providers where appropriate. Where premises are occupied by a contracted service provider in connection with a Commonwealth contract, it may be necessary to determine whether the provider occupies the premises in their own right or on behalf of a Commonwealth agency.

Exceptions

- 7.439 A search could not be conducted without a warrant at:
- premises occupied by the High Court or a court created by the Parliament (which would include the registry of any such court);
 - any place in the Parliamentary precincts (within the meaning of the *Parliamentary Precincts Act 1988*)—this would include parliamentary offices and parliamentary departments located in Parliament House;
 - premises made available to a parliamentarian under the *Parliamentary Business Resources Act 2017*—this would include Commonwealth Parliamentary Offices located in most capital cities for use by parliamentarians and parliamentarians' electorate offices; or
 - any premises occupied by the ABC or SBS.

- 7.440 The first of these exceptions reflects the separation of powers between the Executive Government and the Judiciary, and ensures that a search of a court registry may only be conducted under a warrant. The second and third ensure that where a claim of parliamentary privilege is likely to arise, a search may only be conducted under a warrant. The fourth ensures appropriate protection of press freedoms for the public broadcasters by allowing a search of ABC or SBS premises only under a warrant, where an additional threshold must be met for the issue of a warrant to search premises of a journalist's employer. Other media organisations would not be Commonwealth agencies within the scope of this clause.
- 7.441 In addition, powers under this clause would not be available at:
- a place that is a prohibited area used or occupied for the purposes of a special defence undertaking for the purposes of the *Defence (Special Undertakings) Act 1952* under section 7 of that Act; or
 - an area of land or water, or an area of land and water, that is declared under section 14 of that Act to be a restricted area for the purposes of that Act,
- unless the Minister administering that Act has approved the person entering the place or area. If the Minister imposes any conditions on the approval, the Commissioner or authorised officer would be required to comply with those conditions in order to enter and search the premises.
- 7.442 Further, if the Attorney-General is satisfied that carrying on an investigation of a corruption issue at a place might prejudice the security or defence of the Commonwealth, the Attorney-General would be able to, by written notice to the Commissioner, declare a place to be prohibited for the purposes of this clause.
- 7.443 Where a declaration by the Attorney-General is in force, the Commissioner or an authorised officer would only be able to enter and search such a place if a Minister specified in the declaration has approved the person entering the place or area (and in compliance with any conditions that Minister imposes). The Attorney-General's declaration would not be a legislative instrument because it would apply the relevant provisions of this clause to a particular place that is important to the security or defence of the Commonwealth.
- 7.444 The limitations under this clause on the ability for the Commissioner or authorised officers to enter premises covered by the *Defence (Special Undertakings) Act 1952* or a declaration given by the Attorney-General would be appropriate, as they would have the limited effect of enabling the Minister for Defence and Attorney-General, respectively, to mitigate any risks to national security that may arise from the Commissioner and authorised officers accessing highly sensitive facilities without a warrant. The limitations under this clause would not apply to the Commissioner or an authorised officer's ability to enter such premises under warrant.

Clause 118—Receipts of things seized without warrant

- 7.445 This clause would provide that, if a document or thing is seized or removed from a place under clause 117, the Commissioner (or an authorised or assisting officer) would be required to provide a receipt to the relevant Commonwealth agency. If two or more documents or things are seized or moved, they may be covered by a single receipt.

Clause 119—Search warrants, and stopping and searching conveyances

- 7.446 This clause would provide that, for the purposes of a corruption investigation, an authorised officer of the NACC who is not a constable for the purposes of the *Crimes Act 1914* would have the same powers and duties under Divisions 2 (search warrants), 3 (stopping and searching conveyances) and 5 (general) of Part IAA of the *Crimes Act 1914* as a constable has under those Divisions. Those provisions of the *Crimes Act 1914* would have effect with the modifications set out in Subdivision B.

Search warrants

- 7.447 This clause, in combination with Subdivision B, would ensure that authorised officers of the NACC have access to comprehensive and up to date search powers for the purposes of investigating a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.
- 7.448 ACLEI's search powers are currently provided for in the LEIC Act. When originally passed, these powers were consistent with those provided for policing agencies under the *Crimes Act 1914*. However, the LEIC Act powers have fallen out of date in intervening years and have not been updated to mirror amendments made to the *Crimes Act 1914* in response to advances in technology. To avoid similar issues arising for the NACC in future, the NACC Bill would allow the NACC to instead be able to use the *Crimes Act 1914* search warrant framework as in force from time to time. The *Crimes Act 1914* would apply with modifications to ensure that warrants are available for non-criminal corruption investigations, subject to an additional threshold concerning loss of evidence being met (as provided for by the modifications in Subdivision B outlined below).
- 7.449 Authorised officers of the NACC would be able to apply for and obtain search warrants in relation to premises and persons under the *Crimes Act 1914* with modified thresholds. Authorised officers would then have the same powers available to constables in executing those warrants, including, subject to relevant thresholds:
- conducting a search of the premises or person specified in the warrant (paragraphs 3F(1)(a) to (c) and (2)(a) of the *Crimes Act 1914*);
 - seizing material specified in the warrant (paragraphs 3F(1)(c) and (2)(b));
 - seizing certain other evidential material to prevent its concealment, loss or destruction, or use in the commission of an offence (paragraphs 3E(6)(a) and (7)(a), and 3F(1)(d) and (2)(c));
 - conducting an ordinary or frisk search of a person at or near warrant premises if the relevant threshold is met and the warrant so allows (paragraph 3F(1)(f));
 - using a computer or data storage device found during a search, a telecommunications facility operated or provided by the Commonwealth or a carrier, any other electronic equipment, or a data storage device to access data held in a computer or data storage device found during a search (subsections 3F(2A) and 3K(5));
 - using a computer found during a search, a telecommunications facility operated or provided by the Commonwealth or a carrier or any other electronic equipment to access account-based data related to certain persons, such as the owner or user of the computer (subsections 3F(2B) and 3K(6));
 - using equipment brought to or found at warrant premises to examine or process things at the premises (subsections 3K(1) and (4));
 - moving things to another place for examination or processing for a limited period (subsections 3K(2) to (3D));
 - operating electronic equipment at warrant premises, moved from warrant premises or the search of a person, or seized, to access data (sections 3L, 3LAA and 3ZQV); and
 - obtaining an order from a magistrate requiring a specified person to provide information or assistance reasonable and necessary to allow an authorised officer to access data held in or accessible from certain computers and data storage devices (such as providing a password or access code) (section 3LA).
- 7.450 Similarly, searches conducted by authorised officers of the NACC would be subject to the same limits and safeguards as those conducted by constables, including:
- warrants may only be in force for up to seven days after the date of issue (subsection 3E(5A) of the *Crimes Act 1914*);
 - warrants to search persons must state whether an ordinary or frisk search is authorised, and only that type of search may be conducted (paragraph 3E(7)(b) and subsection 3F(4));

- warrants cannot authorise a strip search or a search of a person's body cavities (section 3S);
- ordinary searches and frisk searches of a person must, if practicable, be conducted by a person of the same sex as the person being searched (section 3ZR);
- executing officers and authorised officers assisting may only use such force against persons and things as is necessary and reasonable in the circumstances (section 3G);
- persons assisting who are not constables or authorised officers may only use such force against things as is necessary and reasonable in the circumstances, and may not use force against persons (section 3G);
- authorised officers must generally announce that they are authorised to enter premises and give the person at the premises the opportunity to allow entry before entering warrant premises (section 3ZS);
- the executing officer must identify themselves to, and make a copy of the warrant available to, the person being searched or the occupier of warrant premises (section 3H);
- if a thing is moved for examination or processing, the relevant person must generally be informed of the address and time at which the examination or processing will take place and allowed to be present, if practicable (subsections 3K(3) and (3AA));
- things may only be moved for examination or processing for a limited period (subsections 3K(3B), (3C) and (3D));
- if data is accessed from premises other than warrant premises under sections 3L or 3LAA, the executing officer must notify the occupier of those premises as soon as practicable, if it is practicable to notify the occupier (section 3LB);
- the Commonwealth must pay compensation for damage to equipment or related data or programs if the damage resulted from insufficient care being exercised when the equipment was operated under sections 3K, 3L, 3LAA or 3ZQV (see sections 3M and 3ZQW);
- copies of documents, films, computer files, contents of storage devices or other things that can readily be copied that are seized from warrant premises must generally be provided to the occupier or their representative on request (section 3N);
- the occupier of warrant premises or their representative is entitled to observe the search being conducted (section 3P);
- the executing officer or a constable or authorised officer assisting must provide receipts for things seized under a warrant or moved for examination or processing under section 3K (section 3Q);
- parliamentary privilege is preserved (section 3SA) (see also clause 274); and
- offences apply for making a false or misleading statement in a warrant application and certain actions relating to warrants obtained by telephone or other electronic means (sections 3ZT and 3ZU).

Stopping and searching conveyances

- 7.451 This clause, in combination with Subdivision B, would ensure that authorised officers of the NACC are able to stop and search conveyances (aircraft, vehicles or vessels) for things relevant to an indictable offence or a corruption issue the Commissioner is investigating, without a warrant, in limited circumstances. Further detail is set out below in the description of the modifications to *Crimes Act 1914* search powers in Subdivision B.

Clause 120—Use and return of documents and things

- 7.452 This clause would apply use, sharing and return provisions in Division 4C of Part IAA of the *Crimes Act 1914* to documents, things, copies and photographs seized or made under Division 7 of Part 7 of the NACC Bill. It would mean that, subject to the modifications outlined below:

- Subdivision A of Division 4C of Part IAA of the *Crimes Act 1914* (which deals with purposes for which things may be used and shared, and regulates the operation of seized electronic equipment) would apply to:
 - a document, thing or copy seized or made under clause 117 (entering certain places without a warrant), and
 - a document, thing, copy or photograph seized or made under Divisions 2, 3 and 5 of Part IAA of the *Crimes Act 1914* as applied by clause 119 (search warrants, and stopping and searching conveyances);
- Subdivision B of Division 4C of Part IAA of the *Crimes Act 1914* (which deals with return of things) would apply to things seized under clause 117 (entering certain places without a warrant) as if they were seized under Division 2 of Part IAA of the *Crimes Act 1914* (meaning sections 3ZQX (return) and 3ZQZB (magistrate orders) would apply); and
- Subdivision B of Division 4C of Part IAA of the *Crimes Act 1914* would apply to things seized under Division 2 and 3 of the that Act as applied by clause 119, meaning:
 - sections 3ZQX (return) and 3ZQZB (magistrate orders) would apply to things seized under Division 2 (search warrants) as applied by clause 119, and
 - sections 3ZQY (return) and 3ZQZB (magistrate orders) would apply to things seized under Division 3 (stopping and searching conveyances) as applied by clause 119.

Modification of the Crimes Act 1914

- 7.453 Subclause 120(4) would provide for two modifications to the application of *Crimes Act 1914* provisions by clause 120.
- 7.454 Division 4C of Part IAA of the *Crimes Act 1914* would have effect for this clause as if a reference to the Commissioner (which in the *Crimes Act 1914* means the AFP Commissioner) were a reference to the National Anti-Corruption Commissioner. This would ensure that:
- obligations concerning the return of things seized by authorised officers of the NACC would fall to the National Anti-Corruption Commissioner, not the AFP Commissioner; and
 - the National Anti-Corruption Commissioner would be able to apply to a magistrate for an order permitting retention or forfeiture of a seized thing in certain circumstances under section 3ZQZB of the *Crimes Act 1914* as applied by clause 120.
- 7.455 Section 3ZQU sets out the purposes for which things seized under Part IAA of the *Crimes Act 1914* may be used and shared. Subsection 3ZQU(5) allows officers to make those things available to State, Territory and foreign agencies, including State or Territory law enforcement agencies, for certain purposes. This clause would modify that subsection as it applies for the purposes of the NACC Bill to also allow for things to be made available to State or Territory anti-corruption agencies.

Subdivision B—Modifications of Crimes Act 1914 search powers

- 7.456 This Subdivision would set out modifications of Divisions 2, 3 and 5 of Part IAA of the *Crimes Act 1914* for the purposes of their application to corruption investigations under clause 119 (search warrants, and stopping and searching conveyances) to ensure that those Divisions operate appropriately and effectively for corruption investigations. These modifications would apply only for the purposes of clause 119; the *Crimes Act 1914* itself will not be amended by these provisions.

Clause 121—Application of Subdivision

- 7.457 This clause would provide that Subdivision B applies for the purposes of clause 119 (search warrants, and stopping and searching conveyances).

Clause 122—Subsection 3C(1)—definition of *evidential material*

- 7.458 This clause would provide that the *Crimes Act 1914* has effect as if the definition of evidential material in subsection 3C(1) of that Act was substituted so that the term means the following, including in electronic form:
- a thing relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic; and
 - a thing relevant to an indictable offence or a thing relevant to a summary offence.
- 7.459 This definition is relevant to the threshold for the issue of search warrants for the purposes of a corruption investigation (see further clause 124 below) and the material able to be seized under those warrants (see further clause 126 below).
- 7.460 The first aspect of the substituted definition would allow authorised officers of the NACC to obtain warrants to search for material that is not relevant to an offence but is relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic. As outlined below, an additional threshold would apply where warrants are not for the purpose of investigating an offence. It is appropriate that the NACC be able to apply for a search warrant in relation to non-criminal corrupt conduct provided that, in the opinion of the Commissioner, the corruption issue could involve corrupt conduct that is serious or systemic, and an additional threshold (see for example paragraph 7.472) is met.
- 7.461 The second aspect of the substituted definition, relating to things relevant to indictable offences and summary offences, is consistent with the existing *Crimes Act 1914* definition. It is retained in the substituted definition, meaning the NACC can obtain warrants to search for material that is relevant to such an offence as ACLEI can currently.

Clause 123—Divisions 2, 3 and 5 of Part IAA—references to constable and Commissioner

- 7.462 This clause would provide that references in Division 2, 3 or 5 of Part IAA of the *Crimes Act 1914*, and any related definitions in that Act, to a constable have effect as if they also included a reference to an authorised officer. The one exception is subsection 3ZW(1) of the *Crimes Act 1914* where references to a constable should be read as if they were only a reference to an authorised officer.
- 7.463 Divisions 2, 3 and 5 of Part IAA of the *Crimes Act 1914* confer powers and duties on constables for the purpose of applying for and executing search warrants and stopping and searching conveyances in certain circumstances. They also include general provisions such as safeguards that apply across Part IAA.
- 7.464 This clause (in combination with clause 119) would ensure that, for the purposes of corruption investigations of corruption issues that could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic, authorised officers of the NACC (as defined in clause 7) would have access to the powers, and be subject to the duties, in those Divisions. It would mean, for example, that an authorised officer may apply for and execute a search warrant, and that, in doing so, would be subject to safeguards under Division 5 such as the offence for making false statements in warrant applications. The inclusion of related definitions in other parts of the *Crimes Act 1914* would mean, for example, that references to a constable in the definitions of ‘constable assisting’ and ‘executing officer’ in section 3C of the *Crimes Act 1914* are taken to include a reference to an authorised officer.
- 7.465 This clause would also provide that Divisions 2, 3 and 5 of Part IAA of the *Crimes Act 1914* (as applied by clause 119) have effect as if a reference to the Commissioner (which in the *Crimes Act 1914* means the AFP Commissioner) was a reference to the National Anti-Corruption Commissioner. This would ensure that obligations imposed on the AFP Commissioner to destroy copied data once no longer required (under subsections 3L(1B) and 3LAA(3)) would instead fall to the National Anti-Corruption Commissioner where they relate to the exercise of powers by authorised officers.

7.466 Finally, this clause would ensure that the National Anti-Corruption Commissioner may only delegate their Part IAA powers, functions and duties under subsection 3ZW(1) as applied by clause 119 to an authorised officer, not a constable.

Clause 124—Subsections 3E(1) and (2)—when search warrants can be issued

7.467 Subsections 3E(1) and (2) of the *Crimes Act 1914* set out the thresholds for the issue of search warrants in relation to premises and persons respectively. This clause would substitute those provisions to provide tailored thresholds for the issue of NACC search warrants and include a protection for journalists' sources.

Warrants to search premises

7.468 An issuing officer would be permitted to issue a warrant to search premises for the purposes of a corruption investigation. Under section 3C of the *Crimes Act 1914*, an issuing officer is a magistrate, a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants.

7.469 To search for evidence relevant to a particular offence or offences, the issuing officer would need to be satisfied by information on oath or affirmation that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material (within the meaning of the substituted definition outlined in paragraph 7.458) at the premises. This test is consistent with the *Crimes Act 1914* and offence warrants under subsection 109(2) of the LEIC Act.

7.470 Where the investigation concerns a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic, but where no offence, or no specific offence, has been identified, the issuing officer would need to be satisfied by information on oath or affirmation that:

- there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material (within the meaning of the substituted definition outlined in paragraph 7.458) at the premises; and
- there are reasonable grounds for believing that, if a person was served with a summons to produce the evidential material, the material might be concealed, lost, mutilated or destroyed.

7.471 The inclusion of this additional threshold for non-criminal investigations would ensure that search warrants for premises are only available where other means of obtaining the evidential material would be ineffective—because the material might be concealed, lost, mutilated or destroyed if the Commissioner sought to obtain it by serving a person with a summons to produce the material. This is consistent with the approach taken in section 4 of the *Royal Commissions Act 1902* and with investigation warrants under subsection 109(1) of the LEIC Act.

Warrants to search persons

7.472 To issue a warrant to conduct an ordinary search or a frisk search of a person to locate evidence relevant to a particular offence or offences, an issuing officer would need to be satisfied by information on oath or affirmation that there are reasonable grounds for suspecting that the person has in their possession, or will within the next 72 hours have in their possession, any evidential material (within the meaning of the substituted definition outlined in paragraph 7.458). This test is consistent with the *Crimes Act 1914* and offence warrants under subsection 109(4) of the LEIC Act.

7.473 Where the investigation concerns a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic, but where no offence, or no specific offence, has been identified, the issuing officer would need to be satisfied by information on oath or affirmation that

- there are reasonable grounds for suspecting that the person has in their possession, or will within the next 72 hours have in their possession, any evidential material (within the meaning of the substituted definition outlined in paragraph 7.458); and

- there are reasonable grounds for believing that, if the person was served with a summons to produce the evidential material, the material might be concealed, lost, mutilated or destroyed.

7.474 The inclusion of this additional threshold for non-criminal investigations would ensure that search warrants to search persons are only available where other means of obtaining the evidential material would be ineffective—because the material might be concealed, lost, mutilated or destroyed if the Commissioner sought to obtain it by serving a person with a summons to produce the material. This is consistent with the approach taken in section 4 of the *Royal Commissions Act 1902* and with investigation warrants under subsection 109(3) of the LEIC Act.

Protection for journalists’ sources

7.475 An additional threshold would apply for the issue of a search warrant if:

- the warrant is to search a person (a journalist) who works in a professional capacity as a journalist, a journalist’s employer, or premises occupied or controlled by a journalist or a journalist’s employer; and
- the evidential material relates to an alleged offence against a secrecy provision by a person other than the journalist.

7.476 A journalist would be a person working in a professional capacity as a journalist. Indicators that a person is acting in a professional capacity as a journalist include regular employment, formal qualifications, adherence to enforceable ethical standards and membership of a professional body.

7.477 The issuing officer would be required to weigh the public interest in issuing a warrant against the public interest in protecting the confidentiality of the identity of the journalist’s source. They would also be required to weigh the public interest issuing a warrant against the public interest in facilitating the exchange of information between journalists and the public so as to facilitate reporting of matters in the public interest.

7.478 The requirement to weigh up of these competing public interests in deciding a warrant application would ensure issuing officers must specifically turn their minds to the public interests associated with source confidentiality and freedom of the press, and may only issue warrants where they are satisfied it is in the public interest overall.

7.479 The purpose for this additional threshold, being the protection of public interests associated with source confidentiality and the freedom of the press, is reflected in the stipulation that this additional threshold only applies where the evidential material relates to an alleged offence against a secrecy provision by a person other than a journalist. This stipulation would ensure that the additional threshold:

- would apply where an authorised officer is seeking a search warrant in relation to a journalist as part of a corruption investigation relating to the alleged unauthorised disclosure of information by a public official—which would be the kind of investigation that could directly engage with source confidentiality and the freedom of the press; but
- would not apply where the authorised officer is seeking a search warrant in relation to a journalist as part of a corruption investigation relating to other corruption issues—for example, an attempt by a person who happens to work as a journalist who is alleged to have used their contacts with public officials and business figures to engage in a conspiracy to defraud the Commonwealth.

7.480 This safeguard is separate to broader measures to respond to the recommendations of the Parliamentary Joint Committee on Intelligence and Security and the Senate Standing Committee on Environment and Communications in their recent reports on press freedoms, but consistent with recommendations for additional protections in those reports.

Clause 125—Subsection 3E(4)—previous warrants

- 7.481 Subsection 3E(4) of the *Crimes Act 1914* requires members and special members of the AFP to include—in the information provided to an issuing officer—details of any previous search warrant applications concerning the same person or premises, and the outcomes of those applications. This clause would ensure that the same obligation applies to authorised officers of the NACC.
- 7.482 This clause would only apply to previous applications that were made in relation to a corruption issue. This limitation is appropriate to ensure that a member or special member of the AFP who is assisting the Commissioner to conduct a corruption investigation is not required to list all search warrants relating to the same person or premises that the member or special members has applied for in their capacity as an AFP member, unless those warrants also related to a corruption issue.

Clause 126—Provisions of sections 3E, 3F, 3L and 3LAA

Offence to include corruption issue

- 7.483 Division 2 of Part IAA of the *Crimes Act 1914* includes numerous references to ‘an offence’. Some of these references remain appropriate as they stand for search warrants issued in relation to a corruption investigation. However, in certain provisions, specific references to corruption issue, are required. This clause would provide that certain provisions of the *Crimes Act 1914* as applied by clause 119 have effect as if references they include to an offence included a reference to a corruption issue. This would mean that for search warrants issued for corruption investigations:
- issuing officers must state in a warrant the offence or corruption issue to which the warrant relates (under paragraph 3E(5)(a));
 - issuing officers must state in a warrant that it authorises seizure of a thing (other than evidential material to be searched for under the warrant) that is believed on reasonable grounds to be evidential material in relation to an offence or corruption issue to which the warrant relates, if the executing officer, constable or authorised officer assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence (under subparagraphs 3E(6)(a)(i) and (7)(a)(i)); and
 - a warrant in force authorises the executing officer, a constable or authorised officer assisting to seize things (other than evidential material specified in the warrant) that are believed on reasonable grounds to be evidential material in relation to an offence or corruption issue to which the warrant relates, if the officer or constable believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence (under subparagraphs 3F(1)(d)(i) and (2)(c)(i)).

Relevant things under section 3E of the Crimes Act 1914

- 7.484 Subparagraph 3E(6)(a)(ii) of the *Crimes Act 1914* provides that the issuing officer must state in a warrant that it authorises the seizure of a thing (other than evidential material to be searched for under the warrant) found at warrant premises that is believed on reasonable grounds to be ‘a thing relevant to another offence that is an indictable offence’. This requires the executing officer or constable assisting to believe on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.
- 7.485 This clause would substitute the reference to ‘a thing relevant to another offence that is an indictable offence’ with a reference to ‘a thing relevant to an offence that is an indictable offence, or to a corruption issue that the Commissioner is investigating’. The reference to a corruption issue that the Commissioner is investigating will mean that things relevant to a corruption issue may only be seized under this provision where the corruption issue could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.
- 7.486 It would also make an equivalent substitution for warrants in relation to persons (in relation to subparagraph 3E(7)(a)(ii)).

Evidential material and relevant things under section 3F of the Crimes Act 1914

- 7.487 Subparagraph 3F(1)(d)(ii) of the *Crimes Act 1914* provides that a warrant in force in relation to premises authorises the executing officer or a constable assisting to seize things (other than evidential material specified in the warrant) found at warrant premises. They must have reasonable grounds to believe the thing is to be ‘evidential material in relation to another offence that is an indictable offence’ and that the seizure is necessary to prevent their concealment, loss or destruction or their use in committing an offence.
- 7.488 This clause would substitute the reference to ‘evidential material in relation to another offence that is an indictable offence’ with a reference to ‘evidential material in relation to an offence that is an indictable offence, or to a corruption issue that the Commissioner is investigating’. The reference to a corruption issue that the Commissioner is investigating and the substituted definition of evidential material will mean that things relevant to a corruption issue may only be seized under this provision where the corruption issue could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.
- 7.489 It would also make a similar substitution for warrants in relation to persons (in relation to subparagraph 3F(2)(c)(ii)).

References to the AFP

- 7.490 Subsections 3L(1B) and 3LAA(3) of the *Crimes Act 1914* require the AFP Commissioner to arrange for the removal of copied data and the destruction of any other reproduction of it from any device in the control of the AFP once they are satisfied that the data is no longer required for certain purposes.
- 7.491 This clause, together with clause 123, would require the National Anti-Corruption Commissioner to arrange for removal of copied data and destruction of any other reproduction of it from any device in the control of the NACC once they are satisfied that the data is no longer required for those purposes.

Clause 127—Subparagraph 3LA(2)(b)(i)—accessing computer systems

- 7.492 Section 3LA of the *Crimes Act 1914* allows a constable to apply to a magistrate for an order requiring a specified person to provide information or assistance that is reasonable and necessary to allow a constable to access and do certain things with data held in, or accessible from, a computer or data storage device that is on warrant premises, found in a search of a person under a premises warrant or moved or removed with appropriate authority. Orders may, for example, require a person to provide a password or access code required to access data.
- 7.493 A magistrate may grant the order under section 3LA if they are satisfied that:
- there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer or data storage device;
 - the specified person has relevant knowledge of the computer or device or a computer network of which the computer or device forms or formed a part or measures applied to protect data held in, or accessible from, the computer or device; and
 - the specified person is one of a number of persons listed in paragraph 3LA(2)(b).
- 7.494 This clause would substitute two subparagraphs in place of subparagraph 3LA(2)(b)(i) for the purposes of NACC search warrants, so that the list of specified persons would include both:
- a person who is reasonably suspected of having committed the offence stated in the relevant warrant; and
 - a person who is reasonably suspected of having engaged in the corrupt conduct which is the subject of the corruption issue stated in the relevant warrant.

7.495 This substitution is necessary to allow for both purposes for which NACC search warrants may be issued: to obtain evidential material relevant to an offence, and to obtain evidential material relevant to an investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic. The list of persons who may be specified would be otherwise unchanged.

Clause 128—Provisions of section 3T

7.496 Section 3T of the *Crimes Act 1914* allows constables to stop and detain a conveyance, and to search the conveyance and any container in or on the conveyance, for certain things and seize those things if they find them there (subsection 3T(2)). Constables may only do so if the threshold set out in subsection 3T(1) is met.

7.497 This clause would substitute paragraph 3T(1)(a) so that for the purposes of a NACC corruption investigation, section 3T would apply if a constable or authorised officer suspects on reasonable grounds that:

- a thing relevant to an indictable offence, or to a corruption issue that the Commissioner is investigating, is in or on a conveyance;
- it is necessary to exercise a power under subsection 3T(2) (see paragraph 7.496) in order to prevent the thing from being concealed, lost or destroyed; and
- it is necessary to exercise the power without the authority of a search warrant because the circumstances are serious and urgent.

7.498 Subsection 3T(3) allows a constable to seize another thing located in a search conducted under subsection 3T(2) that is relevant to an offence in certain circumstances. This clause would also substitute subsection 3T(3) so that, for the purposes of a corruption investigation if, in the course of searching for the thing, the constable finds another thing relevant to an offence, or to a corruption issue that the Commissioner is investigating, the constable may seize that thing if the constable suspects, on reasonable grounds, that:

- it is necessary to seize it in order to prevent its concealment, loss or destruction; and
- it is necessary to seize it without the authority of a search warrant because the circumstances are serious and urgent.

7.499 This clause, together with clauses 119 and 123, would ensure constables and authorised officers of the NACC can stop and search conveyances for things relevant to an offence or a corruption investigation where necessary to prevent those things from being concealed, lost or destroyed in serious or urgent circumstances. Where any element of the threshold is not met, an authorised officer would instead be required to obtain a search warrant.

7.500 The references to a corruption issue that the Commissioner is investigating would mean that things relevant to a corruption issue may only be searched for and seized under section 3T of the *Crimes Act 1914* as incorporated by the NACC Bill where the corruption issue could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

7.501 The exercise of powers under section 3T of the *Crimes Act 1914* as incorporated by the NACC Bill would be subject to the limits set out in section 3U of the *Crimes Act 1914*. For example, the search must be conducted in a place to which members of the public have ready access and that the conveyance must not be detained for longer than is necessary and reasonable to search it and any container found in or on the conveyance.

Division 8—Interaction with criminal procedure and confiscation proceedings

7.502 This Division would define key concepts for the purposes of the NACC Bill and set out limited operation provisions. These provisions would ensure the Commissioner is able to continue to exercise their powers, and entities are able to continue to use and share investigation material or derivative material, even if particular uses of those powers, or some uses of that material, are declared to be invalid by a court.

Subdivision A—Key concepts**Clause 129—Meaning of *pre-charge***

- 7.503 This clause would define the term *pre-charge* for the purposes of the NACC Bill. An event would be *pre-charge* if it occurs when a witness has not been charged with a relevant offence (see clause 131) and no such charge is imminent (see clause 132) or all such charges have been resolved (see clause 139).
- 7.504 The collection, use and disclosure of pre-charge investigation material is subject to less stringent rules than post-charge investigation material. The collection, use and disclosure of investigation material before a person is charged with a relevant offence (or before such a charge is imminent) is less likely to affect a subsequent fair trial of a witness.
- 7.505 A notice to produce would be a *pre-charge* notice if the notice is issued at a time when the witness has not been charged with a relevant offence (and no such charge is imminent), or all such charges have been resolved.
- 7.506 A summons would be a *pre-charge* summons if the summons is issued to a person at a time when the witness has not been charged with a relevant offence (and no such charge is imminent), or all such charges have been resolved.
- 7.507 A hearing would be a *pre-charge* hearing if the hearing commences at a time when the witness has not been charged with a relevant offence (and no such charge is imminent), or all such charges have been resolved.
- 7.508 Investigation material would be *pre-charge* investigation material if the material becomes investigation material at a time when the witness has not been charged with a relevant offence (and no such charge is imminent), or all such charges have been resolved.
- 7.509 A use or disclosure of investigation material or derivative material would be a *pre-charge* use or disclosure if the use or disclosure happens at a time when the witness has not been charged with a relevant offence (and no such charge is imminent), or all such charges have been resolved.

Clause 130—Meaning of *post-charge*

- 7.510 This clause would define the term *post-charge* for the purposes of the NACC Bill. An event would be post-charge if it occurs at a time when a witness has been charged with a relevant offence (see clause 131) and that charge is still to be resolved (see clause 139) or such a charge is imminent (see clause 132). Additional rules apply to the collection, use or disclosure of investigation material if they occur in post-charge circumstances. This reflects the fact that those events are more likely to affect a person's trial for a relevant offence in those circumstances.
- 7.511 A notice to produce would be a *post-charge* notice if the notice is issued to a person at a time when the witness has been charged with a relevant offence and that charge is still to be resolved (or such a charge is imminent).
- 7.512 A summons would be a *post-charge* summons if the summons is issued to a person at a time when the witness has been charged with a relevant offence and that charge is still to be resolved (or such a charge is imminent).
- 7.513 A hearing would be a *post-charge* hearing if the hearing commences at a time when the witness has been charged with a relevant offence and that charge is still to be resolved (or such a charge is imminent).
- 7.514 Investigation material would be *post-charge* investigation material if the material becomes investigation material at a time when the witness has been charged with a relevant offence and that charge is still to be resolved (or such a charge is imminent).
- 7.515 A use or disclosure of investigation material or derivative material would be a *post-charge* use or disclosure if the use or disclosure happens at a time when the witness has been charged with a relevant offence and that charge is still to be resolved (or such a charge is imminent).

Clause 131—Meaning of *relevant offence*

- 7.516 This clause would define the term *relevant offence*. An offence would be a relevant offence if:
- for investigation material, derivative material or a witness—the subject matter of the relevant notice to produce or hearing relates to the subject matter of the offence; or
 - for a summons—the subject matter of the relevant summons relates to the subject matter of the offence.
- 7.517 There would need to be a connection between the activity or conduct that is the subject of the notice to produce, hearing or summons and those that constitute or are the subject of the offence.
- 7.518 If an offence is relevant to a notice or hearing, this will affect how investigation material and derivative material can be used in relation to the prosecution of the witness for that offence.

Clause 132—Meaning of *imminent* and *protected suspect*

- 7.519 This clause would define the term *imminent* in relation to a charge or confiscation proceedings, and define the related term *protected suspect*.

Imminent

- 7.520 A charge against a person would be imminent if:
- the person is a protected suspect (see paragraphs 7.525 to 7.527); or
 - the person is under arrest for an offence, but has not been charged with the offence.
- 7.521 A charge would also be imminent if a person with authority to commence a process for prosecuting the person for an offence has decided to commence, but not yet commenced, the process. For example, a person with authority to lay a charge may have decided to lay the charge but may not yet have laid the charge. This is intended to cover circumstances where there is sufficient evidence to initiate the relevant criminal process for the person's prosecution (for example to lay a charge or issue a court attendance notice), and a person with authority (such as a senior officer) has decided to do so, but that process has not yet been initiated against the person. It is also intended to cover circumstances where a court has decided not to commit a person on a charge, but where the Director of Public Prosecutions has decided to file an *ex officio* indictment.
- 7.522 It is not intended to cover circumstances where a junior officer has formed a view that a criminal process for the prosecution of a person should be initiated, or made a preliminary decision to initiate a criminal process for the prosecution of a person, but a person with appropriate authority to initiate the process has not yet made a final decision.
- 7.523 A confiscation proceeding against a person would be *imminent* if a person with authority to commence the proceeding has decided to commence, but has not yet commenced, the proceeding. As with a charge, those proceedings would be imminent where an officer within the relevant authority has decided to commence them, but where the proceedings have not yet been instituted.
- 7.524 A charge or confiscation proceeding that is imminent is treated consistently with a charge or proceeding that has commenced.

Protected suspects

- 7.525 The term *protected suspect* would take the meaning it has in Part IC of the *Crimes Act 1914*. It would also apply to a person who would fall within that definition if it applied to State and Territory offences in the same way as Commonwealth offences. Broadly, it means a person being questioned about a Commonwealth, State or Territory offence that has not been arrested for the offence by, or in the presence of, an official with the power to arrest or detain that person, where the official with that power:
- believes that there is sufficient evidence to establish that the person has committed the offence;
 - would not allow the person to leave, if the person wished to do so; or

- has given the person reasonable grounds to believe that they would not be allowed to leave, if they wished to do so.

7.526 The definition of protected suspect excludes a person being questioned by an official exercising a law of the Commonwealth to require the person to provide information or answer questions. As such, a witness at a hearing before the Commissioner or Inspector would not be a protected suspect on that basis.

7.527 If a person is a protected suspect, it indicates a charge against them is imminent (see paragraph 7.520).

Clause 133—Meaning of *derivative material*

7.528 This clause would define the term *derivative material*. That term would mean any evidence, information, document or thing obtained directly or indirectly from investigation material.

7.529 It is intended to be a broad definition, and to apply to all evidence, information, documents or things that have been obtained from investigation material, including:

- things obtained directly from investigation material (for example a thing whose existence and location the Commissioner revealed in the hearing, or an understanding of a particular set of financial transactions based on an explanation given at the hearing);
- things obtained from a combination of investigation material and other material (for example illicit drugs uncovered once evidence directly derived from investigation material is fused and analysed with other relevant information); and
- things obtained indirectly from investigation material (for example digital records uncovered from a laptop after the witness revealed the location of a storage facility, and the storage facility contained a document that recorded the password to the laptop).

7.530 The use and disclosure of derivative material would be subject to restrictions in some circumstances (see clause 105).

Clause 134—Meaning of *pre-confiscation application*

7.531 This clause would define the term *pre-confiscation application* for the purposes of the NACC Bill. An event is *pre-confiscation application* if it occurs when a relevant confiscation proceeding (see clause 137) has not been commenced and no such proceeding is imminent (see clause 132) or all such proceedings have been resolved (see clause 139). The collection of pre-confiscation application investigation material is subject to less stringent rules than the collection of post-confiscation application investigation material (see clauses 58 and 63). The collection of investigation material before a person is the subject of relevant confiscation proceedings (or such proceedings are imminent) is less likely to affect those proceedings.

7.532 A notice to produce is a *pre-confiscation application* notice if the notice is issued to a person at a time when a relevant confiscation proceeding has not commenced against the witness (and no such proceeding is imminent), or all such proceedings have been resolved.

7.533 A summons is a *pre-confiscation application* summons if the summons is issued to a person at a time when a relevant confiscation proceeding has not commenced against the witness (and no such proceeding is imminent), or all such proceedings have been resolved.

7.534 A hearing is a *pre-confiscation application* hearing if the hearing commences at a time when a relevant confiscation proceeding has not commenced against the witness (and no such proceeding is imminent), or all such proceedings have been resolved.

7.535 Investigation material is *pre-confiscation application* investigation material if the material becomes investigation material at a time when a relevant confiscation proceeding has not commenced against the witness (and no such proceeding is imminent), or all such proceedings have been resolved.

7.536 A use or disclosure of investigation material or derivative material is a ***pre-confiscation application*** use or disclosure if the use or disclosure happens at a time when a relevant confiscation proceeding has not commenced against the witness (and no such proceeding is imminent), or all such proceedings have been resolved.

Clause 135—Meaning of post-confiscation application

7.537 This clause would define the term ***post-confiscation application*** for the purposes of the NACC Bill. An event is post-confiscation application if it occurs at a time when a relevant confiscation proceeding (see clause 137) has commenced against a witness and that proceeding is still to be resolved (see clause 139) or such a proceeding is imminent (see clause 132). Additional rules apply to the collection of post-confiscation application investigation material (see clauses 58 and 63). This reflects the fact that those events are more likely to affect a person’s trial for a relevant offence in those circumstances.

7.538 A notice to produce is a ***post-confiscation application*** notice if the notice is issued to a person at a time when a relevant confiscation proceeding has commenced against the witness and that proceeding is still to be resolved (or such a proceeding is imminent).

7.539 A summons is a ***post-confiscation application*** summons if the summons is issued to a person at a time when a relevant confiscation proceeding has commenced against the witness and that proceeding is still to be resolved (or such a proceeding is imminent).

7.540 A hearing is a ***post-confiscation application*** hearing if the hearing commences at a time when a relevant confiscation proceeding has commenced against the witness and that proceeding is still to be resolved (or such a proceeding is imminent).

7.541 Investigation material is ***post-confiscation application*** investigation material if the material becomes investigation material at a time when a relevant confiscation proceeding has commenced against the witness and that proceeding is still to be resolved (or such a proceeding is imminent).

7.542 A use or disclosure of investigation material or derivative material is a ***post-confiscation application*** use or disclosure if the use or disclosure happens at a time when a relevant confiscation proceeding has commenced against the witness and that proceeding is still to be resolved (or such a proceeding is imminent).

Clause 136—Meaning of confiscation proceeding

7.543 This clause would define the term ***confiscation proceeding***. That term would mean a proceeding under:

- the POC Act; or
- a corresponding State or Territory law prescribed in the regulations made under that Act.

7.544 A confiscation proceeding would not include a criminal prosecution for an offence under that Act or a corresponding law.

Clause 137—Meaning of relevant confiscation proceeding

7.545 This clause would define the term ***relevant confiscation proceeding***. A confiscation proceeding would be a relevant confiscation proceeding if:

- for investigation material, derivative material or a witness—the subject matter of the relevant notice to produce or hearing relates to the subject matter of the proceeding; or
- for a summons—the subject matter of the summons relates to the subject matter of the proceeding.

7.546 There would need to be a connection between the activity or conduct that is the subject of the notice to produce, hearing or summons, and those that are the subject the confiscation proceedings.

Clause 138—Meaning of proceeds of crime authority

7.547 This clause would define the term *proceeds of crime authority*. A proceeds of crime authority means:

- a proceeds of crime authority within the meaning of the POC Act (currently the AFP Commissioner or the Director of Public Prosecutions); or
- an authority of a State or Territory responsible for conducting a confiscation proceeding under a corresponding State or Territory law prescribed in the regulations made under that Act.

7.548 This term is relevant to the use and disclosure of investigation material (see clauses 104 and 109).

Clause 139—When a charge or confiscation proceeding is resolved

7.549 This clause would outline when a charge or confiscation proceeding is taken to be *resolved*. This is relevant to the collection, use and disclosure of investigation material. For example, the disclosure of investigation material when a charge has been laid and not resolved would be a post-charge disclosure. A disclosure made after all charges are resolved would be a pre-charge disclosure because there is no charge on foot.

7.550 A charge for an offence would generally be resolved when:

- the charge is withdrawn;
- the charge is dismissed;
- the person is not committed on the charge following a committal hearing;
- the person is acquitted of the offence;
- the person is sentenced for the offence;
- the person is dealt with by being the subject of an order made as a consequence of a finding of guilt; or
- the charge is otherwise finally dealt with.

7.551 A confiscation proceeding would generally be resolved when the proceeding is discontinued.

7.552 Despite this, a charge or proceeding would not be resolved if an appeal can be lodged, or has been lodged, in relation to the charge or proceeding. A charge or proceeding would be resolved when the period to lodge an appeal ends or, if an appeal is lodged, when the appeal lapses or is finally determined. If an appeal is lodged after the end of the period for lodging an appeal, the charge or proceeding would cease to be resolved until the appeal lapses or is finally determined.

Subdivision B—Commissioner’s powers—limited operation provisions

7.553 This Subdivision would set out limited operation provisions to ensure the Commissioner is able to continue to exercise its powers, and entities are able to continue to use and share investigation material or derivative material, in the event that some exercise of those powers, or some uses of that material, are declared to be invalid by a court.

Clause 140—Limited operation—Commissioner’s power to issue notices to produce

7.554 This clause would ensure that the Commissioner’s general power to issue notices to produce (see clause 58) remains valid even if particular uses of that power were declared by a court to be invalid, including:

- post-charge and post-confiscation application notices to produce;
- post-charge notices to produce about the subject matter of the charge or imminent charge; and
- post-confiscation application notices to produce about the subject matter of the confiscation proceeding or imminent confiscation proceeding.

Clause 141—Limited operation—Commissioner’s power to hold hearings

7.555 This clause would ensure that the Commissioner’s general power to hold hearings (see clause 62) remains valid even if particular uses of that power were declared by a court to be invalid, including post-charge hearings and post-confiscation application hearings.

Clause 142—Limited operation—Commissioner’s power to summon person

7.556 This clause would ensure that the Commissioner’s general power to issue a summons (see clause 63) remains valid even if particular uses of that power were declared by a court to be invalid, including:

- post-charge summonses;
- post-confiscation application summonses;
- post-charge summonses about the subject matter of the charge or imminent charge; and
- post-confiscation application summonses about the subject matter of the confiscation proceeding or imminent confiscation proceeding.

Clause 143—Limited operation—obtaining derivative material

7.557 This clause would ensure that the use of some investigation material to obtain derivative material in accordance with clause 104 remains valid even if:

- particular uses may be declared by a court to be invalid, including post-charge use or disclosure and post-confiscation application use or disclosure; or
- use or disclosure by particular entities may be declared by a court to be invalid.

7.558 **Clause 144—Limited operation—disclosing investigation material to prosecutors of the witness**

7.559 This clause would ensure that the disclosure of some investigation material to prosecutors of the witness in accordance with see clause 105 remains valid even if particular uses may be declared by a court to be invalid, including post-charge disclosures or certain types of post-charge disclosures.

Clause 145—Limited operation—disclosing derivative material to prosecutors of the witness

7.560 This clause would ensure that some disclosures of derivative material to a prosecutor of the witness in accordance with clause 105 remain valid even if particular disclosures may be declared by a court to be invalid, including post-charge disclosure or certain types of post-charge disclosures.

Clause 146—Limited operation—material that may always be disclosed to prosecutors of the witness

7.561 This clause would ensure that some disclosures of certain types of investigation material to a prosecutor of the witness (see clause 107) remain valid even if particular disclosures may be declared by a court to be invalid, including post-charge disclosures or certain types of post-charge disclosures.

Clause 147—Limited operation—disclosing material to proceeds of crime authorities

7.562 This clause would ensure that some disclosures of investigation material and derivative material to proceeds of crime authorities (see clause 109) remain valid even if particular disclosures may be declared by a court to be invalid, including post-confiscation application disclosures or certain types of post-charge or post-confiscation application disclosures.

Subdivision C—Witness’ fair trial—limited operation

Clause 148—Limited operation—witness’ fair trial

- 7.563 This clause would ensure that the court’s powers to order that material may be disclosed under clause 106 remain valid even if the statement in subclause 106(4) that a person’s trial for an offence is not unfair merely because the person has been a witness, or particular parts of that statement, may be declared by a court to be invalid.

PART 8 REPORTING ON CORRUPTION INVESTIGATIONS

- 8.1 This Part would set out the requirements for reporting on corruption investigations by the Commissioner. Reporting by the Commissioner on public inquiries is dealt with separately under Part 9, at paragraph 9.1. Reporting by the Inspector following a NACC corruption investigation or a NACC complaint investigation is dealt with separately under Division 4 of Part 10, at paragraph 10.289.
- 8.2 The Commissioner would be required to prepare reports on all completed investigations and provide these reports to the Minister (or the Prime Minister in certain circumstances). The Commissioner would be able to make findings of fact in investigation reports, including findings of corrupt conduct, but not make determinations of criminal liability.
- 8.3 This Part would require the tabling of investigation reports in Parliament where a public hearing is held in the course of the investigation to which the report relates. It would be open to the Minister or Prime Minister (as the case may be) to table other investigation reports. The Commissioner would also be able to publish other investigation reports if satisfied it is in the public interest to do so.
- 8.4 Given the scope of the NACC's jurisdiction and the nature of the information contained in investigation reports, safeguards would apply to protect *sensitive information* (see clause 227) and information subject to an Attorney-General's certificate issued under clause 235.
- 8.5 The NACC would be required to operate with procedural fairness, by ensuring individuals or agencies that are to be the subject of an adverse finding, opinion or recommendation are given an opportunity to respond prior to that finding, opinion or recommendation being included in an investigation report.

Clause 149—Report on corruption investigation

- 8.6 This clause would require reports to be prepared on all completed investigations, provide that certain content must be included in those reports and set out some of the matters on which recommendations may be made.

Commissioner must prepare an investigation report

- 8.7 This clause would require the Commissioner to prepare an investigation report after completing a corruption investigation.
- 8.8 It would be a matter for the Commissioner to determine when an investigation is completed. It would be an object of the NACC Bill to facilitate the 'timely' investigation of corruption issues that involve, or potentially involve, corrupt conduct that is serious or systemic. However, there would be circumstances in which it is appropriate for the Commissioner to defer the completion of an investigation and the subsequent preparation of the report—for example, pending the outcome of a related criminal, disciplinary or administrative process, so as to not prejudice that process.

Contents of an investigation report

- 8.9 Reports prepared under this clause would be required to set out:
- the Commissioner's findings or opinions on the relevant corruption issue;
 - a summary of the evidence and other material on which those findings or opinions are based;
 - any recommendations that the Commissioner thinks fit to make; and
 - if recommendations are made—the reasons for those recommendations.
- 8.10 Clause 153 would require the Commissioner to give certain persons an opportunity to respond before including any critical opinions, findings or recommendations in the report. Clause 153 may also require additional information to be included in an investigation report in certain circumstances.

- 8.11 In setting out the Commissioner’s findings or opinions on the corruption issue, if the Commissioner forms the opinion that a person whose conduct has been investigated has engaged in corrupt conduct of a serious or systemic nature, the Commissioner must include a statement to that effect in the investigation report. This reflects the relevant ‘serious or systemic’ threshold required for the Commissioner to decide to investigate a corruption issue under clause 41. The Commissioner would therefore be required to clarify the nature of the corrupt conduct in their report.
- 8.12 For the avoidance of doubt, if the Commissioner forms the opinion that a person whose conduct has been investigated has not engaged in corrupt conduct, the Commissioner must set out that opinion in the report. This would balance the Commissioner’s function to investigate serious or systemic corruption with the need to protect against undue reputational damage where a person’s conduct has been investigated and no findings of corrupt conduct have been made.
- 8.13 This clause would also assist in safeguarding against reputational damage in circumstances where a person gives evidence at a hearing and is not the subject of any findings or opinions in relation to the corruption investigation. Under subclause 149(5), the Commissioner may include a statement to that effect in the investigation report if the Commissioner is satisfied that it is appropriate and practicable to do so to avoid damage to the person’s reputation.
- 8.14 The Commissioner may include such a statement, for example, in circumstances where a person’s involvement in a corruption investigation is publicly known, and their mere involvement in the investigation puts their reputation at risk. This may arise in circumstances where a person has given evidence at a public hearing, or where a person’s involvement in a private hearing was reported on in the media. Such a statement would likely not be appropriate in circumstances where its inclusion would draw attention to the person’s involvement in the investigation, and their involvement would not otherwise have been publicly known.
- 8.15 The protection against reputational damage would extend to protecting the reputation of corporations and other legal persons, as well as their representatives. For example, the head (or another representative) of a corporation may give evidence at hearing in relation to the manner in which the corporation’s services were engaged by a public official. Where either or both of the corporation, or the head of the corporation, are not the subject of any findings or opinions in relation to the corruption investigation, the Commissioner may include a statement to that effect in the investigation report if the Commissioner is satisfied that it is appropriate and practicable to do so to avoid damage to the person’s reputation.

Recommendations that may be made

- 8.16 This clause would set out the kinds of recommendations that may be included in an investigation report, without limiting the recommendations that may be made.
- 8.17 In addition to any other recommendations the Commissioner sees fit to make, the Commissioner could make recommendations on one or more of the following matters:
- taking action in relation to a person, in accordance with relevant procedures, with a view to improving their performance;
 - terminating the employment of a person in accordance with relevant procedures;
 - taking action to rectify or mitigate the effects of the conduct of a person;
 - adopting measures to remedy deficiencies in the policy, procedures or practices that facilitated:
 - the employment or engagement of an unsuitable person;
 - a person engaging in corrupt conduct; or
 - the failure to detect corrupt conduct engaged in by a person.

Section does not limit what may be included in an investigation report

- 8.18 This clause would not limit what may be included in an investigation report. This provides the Commissioner with the flexibility to tailor findings, opinions and recommendations in the context of the specific investigation, noting the diverse nature of corruption issues that may come before the Commissioner due the NACC’s broad jurisdiction.

8.19 For example, paragraphs 149(6)(a) and (b) would enable the Commissioner to make recommendations to take action or terminate the employment of a person ‘in accordance with relevant procedures’. This would be subject to any procedural fairness requirements that may apply under those procedures. Where the relevant procedures require that further procedural fairness steps be taken, it would be open to the Commissioner to instead recommend that an agency:

- *consider* taking action or terminating the employment of a person; or
- consider *the person’s conduct* and any appropriate action or sanction including termination.

Clause 150—Effect of findings or opinions about corrupt conduct

8.20 This clause would apply if an investigation report includes a finding or opinion that a person has engaged, is engaging or will engage in corrupt conduct, or conduct that could constitute or involve corrupt conduct. This clause would provide the finding or opinion does not constitute a finding or opinion that the person is guilty of or has committed, is committing or will commit an offence.

8.21 This recognises that the Commissioner would not be able to make findings of criminal guilt or liability. Such a finding would be a matter for a court to determine.

Clause 151—Excluding certain information from investigation report

8.22 This clause would require the Commissioner to exclude certain material from an investigation report. Exclusion of this information would protect information that ought not to be made public, or disclosed more widely, from being disclosed in circumstances where an investigation report is:

- required to be tabled or is tabled at the discretion of the Minister (see clause 155);
- published by the Commissioner (see clause 156); or
- given to a person other than the Minister (see clause 154).

8.23 Any information that is excluded from an investigation report must be included in a protected information report under clause 152.

8.24 The Commissioner would be required to exclude the following types of information from an investigation report:

- section 235 certified information (see clause 235); and
- information that the Commissioner is satisfied is *sensitive information* (as defined under clause 227).

8.25 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information to certain persons would be contrary to the public interest. The Commissioner would be required to exclude information that is subject to such a certificate from an investigation report. This would ensure that certain classes of information would be protected from disclosure, without requiring the Commissioner to be satisfied that the information is sensitive information.

8.26 The definition of sensitive information is explained at paragraph 11.9, including, for example, information the disclosure of which:

- could prejudice the security, defence or international relations of Australia;
- would prejudice the proper enforcement of the law or the fair trial of any person; or
- would unreasonably disclose a person’s personal affairs.

8.27 In determining whether the Commissioner is satisfied that information constitutes *sensitive information* for the purpose of its exclusion from an investigation report, the Commissioner must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. This ensures that the Commissioner is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.

Clause 152—Protected information report

- 8.28 This clause would require the Commissioner to prepare a protected information report, where the Commissioner has excluded information from an investigation report under clause 151. The preparation of the report would allow all information relevant to the corruption investigation to be provided to the Minister, and certain other recipients where relevant (see clause 154), without disclosing its content to the public.
- 8.29 The protected information report must set out the excluded information, and the reasons for excluding the information from the investigation report. The requirement to include the reasons for excluding the information from the investigation report would ensure any decision to protect information from disclosure is appropriately justified.
- 8.30 The requirement for certain information to be included in a protected information report would not impliedly preclude the Commissioner from including other information in the protected information report. For example, the Commissioner could:
- prepare a short protected information report that consists solely of the excluded information and the reasons why that information was excluded from the investigation report—which could be appropriate where there is only a small volume of excluded information;
 - include contextual information that would assist a reader to understand how the information that has been excluded from the investigation report relates to or informs the matters dealt with in the investigation report; or
 - prepare the protected information report in a manner that replicates the investigation report, with the addition of the excluded information and the required reasons as to why that information was excluded from the investigation report.
- 8.31 If a protected information report is given to a person, the person must not disclose the report, or information contained in the report, to the public or a section of the public. This would be an offence under clause 234.

Clause 153—Opportunity to respond must be given before including certain information in investigation report

- 8.32 This clause would require the Commissioner to comply with certain procedural fairness obligations before including an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, or any other person in an investigation report.
- 8.33 The Commissioner would be required to provide the head of the agency, the head of the entity, or the person concerned, with a statement setting out the opinion, finding or recommendation, and a reasonable opportunity to respond to the opinion, finding or recommendation. This would ensure that persons who are subject to findings of corrupt conduct or other critical findings, opinions or recommendations have the opportunity to respond. This requirement is intended to extend to an opinion, finding or recommendation that is critical of a corporation, noting a corporation's status as a legal person.
- 8.34 This clause would not prescribe what constitutes a reasonable opportunity to comment given this will vary depending on the circumstances—for example a reasonable opportunity to comment on a single adverse opinion in a very short report will be different to a case involving a lengthy report and multiple, inter-connected adverse findings.
- 8.35 This clause would provide the response may be given by the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head. Where the critical opinion, finding or recommendation relates to another person, the response may be given by the person concerned, or a person representing the person concerned, with their approval.

- 8.36 Where the opinion or finding is that a person has engaged in corrupt conduct, and the person provides a response to the finding or opinion, the Commissioner must include in the investigation report a summary of the substance of the response, if the person requests the Commissioner to do so. This requirement limits the Commissioner's summary to the substance of the person's response, noting a person's response may identify other individuals or raise information that would be inappropriate to include in an investigation report.
- 8.37 The requirement is intentionally limited to circumstances where the person requests a summary of their response be included, noting a person's response may raise information they do not wish to be made public. For example, a person's response may refer to their mental health, financial circumstances, or other personal information as factors contributing to or explaining their conduct, or as factors that the Commissioner should consider before finalising or publishing their report.
- 8.38 Subclause 153(4) would apply where the Commissioner includes a summary of the substance of a person's response in the investigation report. The requirement to publish the summary would be subject to clause 151, which would require certain information to be excluded from investigation reports. The Commissioner would be required to exclude section 235 certified information (see clause 235), and information that the Commissioner is satisfied is sensitive information (defined under subclause 227(3)) from the summary. The Commissioner would also be required to comply with the consultation requirements under clause 151, in determining whether the Commissioner is satisfied that information is *sensitive information* for the purpose of excluding the information from an investigation report.
- 8.39 Subclause 153(5) would apply where the Commissioner includes a summary of the substance of a person's response in the investigation report. The Commissioner must not include any information in the summary that would identify any person who, in the opinion of the Commissioner, has not engaged in corrupt conduct. This would avoid risking undue damage to the person's reputation as a result of being associated with a finding of corrupt conduct in the report.
- 8.40 However, the Commissioner may include information that would identify such a person if the Commissioner:
- is satisfied that it is necessary to do so in the public interest;
 - is satisfied that doing so will not cause unreasonable damage to the reputation, safety or wellbeing of the person; and
 - includes in the report a statement that, in the opinion of the Commissioner, the person has not engaged in corrupt conduct.
- 8.41 This clause would not by implication limit, exclude or exhaust the requirements of procedural fairness that would apply to an investigation generally, for example in connection with the making of an adverse statement of opinion in relation to a person at a public hearing.

Clause 154—Commissioner to give copies of reports to certain persons

- 8.42 This clause would require the Commissioner to provide investigation reports to the Minister. If a protected information report is prepared in relation to the investigation, the Commissioner must also provide the protected information report to the Minister. Where an investigation report relates to an investigation concerning the conduct of the Minister, the investigation report and any protected information report would instead be given to the Prime Minister.
- 8.43 Subclause 154(3) would set out a list of additional recipients who must receive a copy of an investigation report, and may receive a copy of a protected information report in certain cases. The persons are:
- for a corruption investigation concerning the conduct of a current Minister—the Prime Minister;
 - for a corruption investigation concerning the conduct of a staff member of a Commonwealth agency (including a parliamentary office)—the head of the agency and the person mentioned in subclause 154(4);

- for a corruption investigation concerning the conduct of the head of a Commonwealth agency:
 - the person mentioned in subclause 154(4); and
 - where the head of the Commonwealth agency is an Agency Head (within the meaning of the *Public Service Act 1999*) the Australian Public Service Commissioner;
- for a corruption investigation concerning the conduct of a senator—the President of the Senate; or
- for a corruption investigation concerning the conduct of a member of the House of Representatives—the Speaker of the House of Representatives.

8.44 Subclause 154(4) would provide, for the purposes of subclause 154(3), the person to which the report is to be given is:

- if the Commonwealth agency is a Department of the Parliament established under the *Parliamentary Service Act 1999* (paragraph (a)):
 - for the Department of the Senate—the President of the Senate;
 - for the Department of the House of Representatives—the Speaker of the House of Representatives; or
 - otherwise—both the President of the Senate and the Speaker of the House of Representatives; or
- if the Commonwealth agency is established or continued in existence by an Act and paragraph (a) does not apply—the Minister administering that Act (paragraph (b)); or
- if the Commonwealth agency is a Commonwealth entity and neither paragraph (a) nor paragraph (b) applies—the Minister having general responsibility for the activities of the entity (paragraph (c)).

8.45 The effect of subclauses 154(3) and (4) is to ensure a copy of the investigation report is given to other persons who have responsibility or oversight for an agency, where it is appropriate and necessary for them to receive a copy of the findings or recommended action contained in the report. For example, recommendations contained in the report may relate to taking action in relation to a staff member of a Commonwealth agency, or adopting measures to remedy deficiencies in the policy, procedures or practices of a Commonwealth agency. Providing a copy of the investigation report to the head of that agency and the relevant Minister would ensure findings and recommendations are brought to the attention of those responsible for the agency and able to action them.

8.46 In some circumstances, the Commissioner may decide that it would be appropriate for the recipient of a copy of an investigation report to also receive a copy of a related protected information report. For example, the Commissioner may consider it appropriate for the head of a Commonwealth agency to receive a copy of a protected information report, where the information in that report relates to the functions or operations of that agency.

8.47 If the recipient receives a copy of the protected information report, the person must not disclose the report, or information contained in the report, to the public or a section of the public. This would be an offence under clause 234.

Exclusion of certain information from copies of reports

8.48 This clause would require the exclusion of certain material from a protected information report given to a person under paragraph 154(3)(b).

8.49 The Commissioner must exclude section 235 certified information (see clause 235), if the disclosure of the information would *contravene* the certificate.

- 8.50 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information to certain persons would be contrary to the public interest. A certificate issued under clause 235 may allow for the disclosure of certain protected information to certain persons, including, for example, Commonwealth agency heads who may receive a copy of a protected information report under subclause 154(3).
- 8.51 This subclause would also require the Commissioner to exclude information from a protected information report if the Commissioner is satisfied:
- that the information is *sensitive information* (defined under clause 227), and
 - it is desirable in the circumstances to exclude from the report.
- 8.52 For example, where the sensitive information relates to the functions or activities of another Commonwealth agency, and it is not necessary for the person to receive the information in order to understand and act on findings and recommendations, it would be appropriate to exclude the relevant sensitive information.
- 8.53 This clause would also provide, in deciding whether to exclude sensitive information from a protected information report, the Commissioner must seek to achieve an appropriate balance between the person's interest in having the information included in the report, and the prejudicial consequences that might result from including the information in the report. This would ensure information regarding the outcome of investigations can be shared, within the Commonwealth, when it is appropriate in the circumstances, without resulting in prejudicial consequences.

Clause 155—Tabling of investigation report in Parliament

- 8.54 This clause would require the Minister or the Prime Minister to table investigation reports received under clause 154, where one or more public hearings were held in the course of the investigation to which the investigation report relates. This approach would be consistent with the existing arrangements for the tabling of reports prepared by ACLEI and would ensure transparent reporting where matters dealt with in a corruption investigation are in the public domain.
- 8.55 The Minister or Prime Minister must table the report in each House of the Parliament within 15 sitting days of that House receiving it. This would ensure there is a permanent, public record of investigation reports where the matters considered are already in the public domain. The requirement to table the report within 15 sitting days provides for an appropriately timely tabling process, while also allowing sufficient time for the Minister to consider the report prior to tabling.
- 8.56 Where an investigation report is not required to be tabled, the Minister or Prime Minister would have the discretion to table the report in each House of the Parliament under the usual Parliamentary procedures.

Clause 156—Publishing investigation report in whole or part

- 8.57 This clause would allow the Commissioner to publish investigation reports in certain circumstances.
- 8.58 The Commissioner would be able to publish the whole or part of an investigation report where the report has been given to the Minister or the Prime Minister under clause 154, and the Commissioner is satisfied that it is in the public interest to publish the report (or part of the report). The Commissioner may choose to publish a report by, for example, making it available on the NACC's website.
- 8.59 This clause would allow for transparent reporting where a report is not required to be tabled by the Minister or Prime Minister, but the Commissioner is of the opinion that it is in the public interest to make the findings of the report public. This would be consistent with the objects of the NACC Bill, which include educating and providing information about corruption and the detrimental effects of corruption on public administration and the Australian community (clause 3).
- 8.60 Allowing the Commissioner to publish part of a report would allow, for example, the Commissioner to remove identifying information, or information that the Commissioner does not consider would be in the public interest to publish.

8.61 This clause would be subject to additional procedural fairness requirements under clause 157, which require the Commissioner to give certain persons an opportunity to respond before publishing an investigation report containing critical opinions, findings or recommendations.

Clause 157—Opportunity to respond must be given before publishing an investigation report containing critical opinions etc.

8.62 This clause would require the Commissioner to comply with further procedural fairness obligations before publishing, under clause 156, an investigation report that includes an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, or any other person. This requirement would apply in addition to the procedural fairness requirements that apply under clause 153 and must be fulfilled before critical opinions, findings or recommendations are included in the investigation report.

8.63 This clause would recognise that investigation reports may be published some time after they are first prepared—for example, where the Commissioner elects to defer the publication of a report until after all criminal, disciplinary or administrative proceedings arising from the investigation are finalised. In such cases, the agency, entity or person should be afforded a further opportunity to respond to the critical opinion, finding, or recommendation, as well as the proposed publication of the investigation report. This would enable the agency, entity or person to make further representations as to whether the report should be published, and the timing of that publication. For example, if a person had suffered a bereavement, or was suffering from a serious health condition (including a mental health condition), that may weigh in favour of deferring the publication of a report.

8.64 The Commissioner would be required to provide the head of the agency, the head of the entity, or the person concerned a statement setting out the opinion, finding or recommendation, and a reasonable opportunity to respond to the opinion, finding or recommendation, and its proposed publication. This clause would not prescribe what constitutes a reasonable opportunity to comment given this will vary depending on the circumstances—for example a reasonable opportunity to comment on a single adverse opinion in a very short report will be different to a case involving a lengthy report and multiple, inter-connected adverse findings.

8.65 The requirement would not apply where the investigation report has been tabled in Parliament and therefore already made public.

8.66 Equally, the requirement would not apply if the Commissioner publishes whole or part of the investigation report within 3 months of the report being given to the Minister or the Prime Minister under subclause 154(1). This recognises that the opportunity to respond under clause 153 would be sufficient where there is no substantial delay between that initial opportunity and the publishing of the investigation report. A period of 3 months reflects the period within which the Minister would generally table investigation reports, as required by clause 155 or at their discretion.

8.67 The response may be given by the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head. Where the critical opinion, finding or recommendation relates to another person, the response may be given by the person concerned, or, with approval, a person representing the person concerned.

Clause 158—Advising person who referred corruption issue of outcome of the investigation

8.68 This clause would enable persons to be informed of the outcome of an investigation into a corruption issue, where the corruption issue was raised by the person in a referral under Part 5, including:

- clause 32 (voluntary referrals to be made by any person);
- clause 33 (mandatory referrals by agency heads);
- clause 34 (mandatory referrals by intelligence agencies); or
- clause 35 (mandatory referrals by PID officers).

- 8.69 The Commissioner would be able to advise the person, or a representative nominated by the person, of the outcome of the investigation. This would ensure that information regarding the outcome of investigations can be shared when it is appropriate in the circumstances. This may include, for example, where the head of a Commonwealth agency has referred an allegation of corruption to the Commissioner, and the Commissioner investigates the conduct of one or more staff members of that agency.
- 8.70 The Commissioner would be able to advise the person, or the person's representative, of the outcome of the investigation by providing the person or representative with a copy of all or part of the investigation report prepared in relation to the investigation. However, this would not be the only means of advising a person of the outcome—for example, the Commissioner might choose to send a letter summarising the outcome, rather than providing a copy of the report itself.
- 8.71 The Commissioner would be prohibited from disclosing certain information when advising the person of the outcome of the investigation. The Commissioner would be unable to disclose information that is subject to a certificate under clause 235, if the disclosure of the information to the person would contravene the certificate. The Commissioner would also be unable to disclose information if satisfied that the information was *sensitive information* (as defined under clause 227) and that it was desirable in the circumstances to exclude the information from the advice.
- 8.72 In determining whether the information constitutes *sensitive information* for the purpose of its exclusion from the advice, the Commissioner must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. This ensures that the Commissioner is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.
- 8.73 In practice, the Commissioner could consult with the heads of relevant agencies or entities for the purpose of some or all of the consultation requirements under clauses 151, 158, 159 and 230 simultaneously, if the Commissioner proposed to undertake the relevant steps set out in each of those clauses in close succession. This would allow the Commissioner to consult with the head of an agency to establish whether information is sensitive information for the purpose of its exclusion from an investigation report under clause 151, for the purpose of advising persons of the outcome of an investigation under clauses 158 and 159, and for the purpose of making a public statement accompanying the publication of the report under clause 230.
- 8.74 In deciding whether to exclude sensitive information from the advice, the Commissioner must seek to achieve an appropriate balance between the person's interest in having the information included in the advice, and the prejudicial consequences that might result from including the information in the advice. This would ensure information regarding the outcome of corruption investigations can be shared when it is appropriate in the circumstances, without resulting in prejudicial consequences.

Clause 159—Advising person whose conduct is investigated of outcome of the investigation

- 8.75 This clause would enable persons whose conduct is investigated to be informed of the outcome of an investigation.
- 8.76 This clause provides that the Commissioner *must* advise a person of the outcome of a corruption investigation if the Commissioner investigates a corruption issue involving the person and makes a finding that the person has engaged in corrupt conduct. It would be essential to inform a person that the Commissioner has made a finding that the person has engaged in corrupt conduct given that such a finding would affect the person's standing, career prospects and reputation, as well as potential criminal liability.

- 8.77 This clause provides that the Commissioner *may* advise a person of the outcome of the corruption investigation if the Commissioner investigates a corruption issue involving the person and forms an opinion or makes a finding about the corruption issue, other than a finding that the person has engaged in corrupt conduct (for example, a finding or opinion that the person has not engaged in corrupt conduct). In these cases, the impact of the finding on the person would be less detrimental and it would be appropriate for the Commissioner to have a discretion to decide whether to advise the person, with regard to the relevant circumstances.
- 8.78 The Commissioner would be able to advise the person of the outcome of the investigation by providing the person with a copy of all or part of the investigation report prepared in relation to the investigation. However, this would not be the only means of advising a person of the outcome—for example, the Commissioner might choose to send a letter summarising the outcome, rather than providing a copy of the report itself.
- 8.79 The Commissioner would be prohibited from disclosing certain information when advising the person of the outcome of the investigation. The Commissioner must not disclose information that is subject to a certificate under clause 235, if the disclosure of the information to the person would contravene the certificate. The Commissioner must also exclude information from the advice if the Commissioner is satisfied that the information is *sensitive information* (as defined under clause 227) and that it is desirable in the circumstances to exclude the information from the advice.
- 8.80 In determining whether the Commissioner is satisfied that information constitutes *sensitive information* for the purpose of its exclusion from the advice, the Commissioner must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. This ensures that the Commissioner is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.
- 8.81 In practice, the Commissioner could consult with the heads of relevant agencies or entities for the purpose of some or all of the consultation requirements under clauses 151, 158, 159, 230 and 231 simultaneously, if the Commissioner proposed to undertake the relevant steps set out in each of those clauses in close succession. This would allow the Commissioner to consult with the head of an agency to establish whether information is *sensitive information* for the purpose of its exclusion from an investigation report under clause 151, for the purpose of advising persons of the outcome of an investigation under clauses 158 and 159, and for the purpose of making a public statement accompanying the publication of the report under clause 230.
- 8.82 In deciding whether to exclude sensitive information from the advice, the Commissioner must seek to achieve an appropriate balance between the person’s interest in having the information included in the advice, and the prejudicial consequences that might result from including the information in the advice. This would ensure information regarding the outcome of investigations can be shared when it is appropriate in the circumstances, without resulting in prejudicial consequences.

Clause 160—Follow-up action on investigation report

- 8.83 This clause would empower the Commissioner to follow up action taken in response to recommendations directed to Commonwealth agencies in investigation reports. To achieve the objects of the NACC Bill to prevent corrupt conduct, the Commissioner’s recommendations would be expected to be actioned by Commonwealth agencies in order to address risks and vulnerabilities that give rise to corruption. The Commissioner’s ability to follow up how a recommendation has been implemented is critical to ensure recommendations are appropriately considered and addressed and the relevant corruption risk is reduced or eliminated.
- 8.84 This clause is consistent with equivalent provisions in State and Territory integrity commission legislation.
- 8.85 The Commissioner would be able to request that the head of a Commonwealth agency, to whom an investigation report is given, give the Commissioner, within a specified time, details of any action that the head of the Commonwealth agency has taken, or proposes to take, with respect to a recommendation included in the report. The head of the Commonwealth agency would be required to comply with the request.

- 8.86 If the Commissioner is not satisfied with the response of the head of the Commonwealth agency, the Commissioner may refer the recommendation and the reasons for the recommendation, the response of the head of the agency, and the Commissioner's reasons for not being satisfied with that response, to the relevant Minister or Presiding Officer of a House of the Parliament mentioned in subclause 160(4).
- 8.87 Subclause 160(4) would set out the relevant persons to whom the Commissioner may refer the material. This would be:
- if the Commonwealth agency is a parliamentary office (paragraph (a)):
 - for a parliamentarian who is a senator—the President of the Senate; or
 - for a parliamentarian who is a member of the House of Representatives—the Speaker of the House of Representatives; or
 - if the Commonwealth agency is a Department of the Parliament established under the *Parliamentary Service Act 1999* (paragraph (b)):
 - for the Department of the Senate—the President of the Senate;
 - for the Department of the House of Representatives—the Speaker of the House of Representatives; or
 - otherwise—both the President of the Senate and the Speaker of the House of Representatives; or
 - if the Commonwealth agency is established or continued in existence by an Act and paragraph (b) does not apply—the Minister administering that Act (paragraph (c)); or
 - if the Commonwealth agency is a Commonwealth entity and neither paragraph (b) nor paragraph (c) applies—the Minister having general responsibility for the activities of the entity (paragraph (d)).
- 8.88 Where the Commissioner has referred material to a person under this clause, the Commissioner may also send a copy of that material to:
- the President of the Senate for presentation to the Senate; and
 - the Speaker of the House of Representatives for presentation to the House of Representatives.
- 8.89 The effect of this clause is to allow the Commissioner to bring unactioned recommendations, or unsatisfactorily implemented recommendations, to the attention of other persons who have responsibility or oversight for an agency. This allows those persons to inform or involve themselves, as they see fit, in the proper implementation of the Commissioner's recommendations and, ultimately, the proper management of corruption risks and vulnerabilities.
- 8.90 The ability for the Commissioner to also send a copy of material to both Houses of Parliament would strengthen accountability for and oversight of any inadequate action, or lack of action, taken by Commonwealth agencies in response to recommendations.
- 8.91 This clause would require the exclusion of certain material from the copy of the material given to the Presiding Officers, noting this material would be presented to each House of Parliament and therefore be made public. The Commissioner must exclude section 235 certified information (see clause 235), and information that the Commissioner is satisfied is **sensitive information** (as defined under clause 227).
- 8.92 This clause would further provide that in determining whether the Commissioner is satisfied that information constitutes **sensitive information** for the purpose of its exclusion from the copy of material sent to the Presiding Officers, the Commissioner must consult with the head of each Commonwealth agency or State or Territory government entity to which the material relates. This ensures that the Commissioner is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.

- 8.93 In practice, the Commissioner could consult with the heads of relevant agencies or entities for the purpose of the consultation requirements under clauses 151 and 160 simultaneously, where no new information that may constitute *sensitive information* is raised in the material provided under this clause. This would allow the Commissioner to consult with the head of an agency to establish whether information is sensitive information for the purpose of its exclusion from an investigation report under clause 151 as well as its exclusion from the material provided to the Presiding Officers under clause 160.

PART 9 PUBLIC INQUIRIES

- 9.1 This Part would provide the Commissioner with a discretion to conduct public inquiries into corruption risks, vulnerabilities and measures to prevent corruption in Commonwealth agencies. The Commissioner would be able to:
- commence a public inquiry on their own initiative; and
 - report on and make recommendations in relation to these inquiries.
- 9.2 Public inquiries would have a broader focus than a corruption investigation under Part 7 of the NACC Bill, which would target specific serious or systemic corruption issues concerning the conduct of an individual. In contrast, a public inquiry could not be conducted for the purposes of investigating or inquiring into a particular corruption issue.
- 9.3 This Part would authorise the Commissioner to use powers available under Part 7 for the purposes of conducting a public inquiry, subject to certain limitations. The limitations would prevent the Commissioner from exercising powers under Division 3, Subdivision E of Part 7 (delivery of travel documents and arrest of witnesses), Division 7 of Part 7 (search powers) and powers in relation to post-charge and post-confiscation applications.
- Clause 161—Commissioner may conduct public inquiries**
- 9.4 This clause would provide the Commissioner with a discretion to conduct a public inquiry into:
- corruption risks and vulnerabilities in Commonwealth agencies; and
 - measures to prevent corruption in Commonwealth agencies.
- 9.5 The Commissioner could commence such an inquiry on their own initiative.
- 9.6 Conducting public inquiries would be a function of the Commissioner under clause 17 and would ensure the Commissioner can consider broader systemic corruption issues in the Commonwealth public sector, assess the effectiveness of corruption prevention arrangements, and make recommendations about enhancing these arrangements.
- 9.7 For example, the Commissioner would be able to undertake a public inquiry into the processes agencies have in place to monitor and control known corruption vulnerabilities in Commonwealth agencies, such as:
- the unauthorised access, modification and disclosure of sensitive information;
 - grooming of public officials by organised crime and commercial entities; and
 - the misuse of public positions or Commonwealth property to gain a benefit.
- 9.8 Following the conclusion of a public inquiry into corruption risks and vulnerabilities, the Commissioner would be able to make recommendations to agencies on actions they could take to improve corruption prevention in these areas. For example, regular auditing of systems or databases to protect the misuse of information, training and support to public officials to mitigate the risk of grooming, and enhancing pre-employment screening to mitigate integrity and security risks in employing public officials.
- 9.9 This clause would make it clear that a public inquiry is distinct from a corruption investigation conducted under Part 7 of the NACC Bill, and that the Commissioner would be unable to use this inquiry function to inquire into or investigate a particular corruption issue.
- 9.10 This clause would allow the Commissioner to conduct a public inquiry in a manner they see fit, allowing them the flexibility to adopt an approach that is appropriately targeted to the scope and scale of the inquiry.

Clause 162—Commissioner may invite submissions

- 9.11 This clause would provide the Commissioner with the ability to invite submissions from particular individuals or organisations, or the public on matters that are the subject of a public inquiry. For example, the Commissioner may wish to invite experts and academics to make submissions to a public inquiry to better understand certain corruption risks and vulnerabilities.

Clause 163—Commissioner’s powers

- 9.12 This clause would provide that Part 7 (investigating corruption issues) applies to a public inquiry in the same way as it applies to the investigation of a corruption issue.

- 9.13 However, it is not appropriate or necessary for the Commissioner to have access to all of the coercive powers available under Part 7 for the purposes of public inquiries. The intrusive nature of some of these powers means that they are appropriate in the context of investigating specific corruption issues involving corrupt conduct that could be serious or systemic, but not in the context of a public inquiry into broader corruption risks and vulnerabilities.

- 9.14 This clause would authorise the Commissioner to use a number of powers under Part 7 for the purposes of conducting a public inquiry, including to:

- direct the head of a Commonwealth agency to provide information, or a document or thing, to the Commissioner;
- serve a notice to produce on a head of a Commonwealth agency to produce information, or a document or thing, to the Commissioner;
- hold public or private hearings;
- summon any person to attend a hearing to give evidence or information, or produce a document or thing;
- require a person attending a hearing to give information, or produce a document or thing;
- apply to a court to have a person dealt with in relation to contempt of the NACC; and
- make directions about the use or disclosure of material produced or given as evidence.

- 9.15 For the purpose of conducting public inquiries, the Commissioner would be unable to exercise the following powers available under Part 7:

- powers to apply to a court for the delivery of travel documents or a warrant to arrest a witness (see Subdivision E of Division 3 of Part 7);
- powers to enter and search premises or persons with or without a warrant (see Division 7 of Part 7);
- the power to issue a notice to produce under clause 58 to anyone other than a Commonwealth agency head;
- the power to take any action in relation to a post-charge or post-confiscation application event, for example to issue a post-charge notice to produce or conduct a post-charge summons.

- 9.16 The limited powers available to the Commissioner under this Part are appropriate to ensure the NACC is able to obtain information about corruption risks and vulnerabilities to enable it to make informed findings and recommendations, without inappropriately impacting on the rights and liberties of individuals.

Clause 164—Reporting on public inquiries

- 9.17 This clause would require the Commissioner to prepare a report (an *inquiry report*) after completing a public inquiry. Without limiting what the report may include, the inquiry report would be required to include:

- the Commissioner’s findings or opinions on corruption risks, vulnerabilities and the effectiveness of corruption prevention arrangements in Commonwealth agencies;

- a summary of the evidence and other materials on which the Commissioner's findings or opinions are based;
- any recommendations concerning the need for, or desirability of, legislative or administrative reform to prevent corruption; and
- if recommendations are made, the reasons for those recommendations.

9.18 However, the Commissioner would not be able to include in an inquiry report findings or opinions about specific instances of corrupt conduct or a particular corruption issue. This is appropriate given that the purpose of a public inquiry is not to investigate allegations of corrupt conduct by an individual. If the NACC uncovers information about possible corruption issues in the course of conducting a public inquiry, it would be open to it to commence a corruption investigation under clause 41 if the corruption issue could involve corrupt conduct that is serious or systemic.

9.19 The report also could not include information specified in a certificate issued by the Attorney-General under clause 235. This ensures that information cannot be made public in an inquiry report if the Attorney-General has certified that its disclosure would be contrary to the public interest.

9.20 This clause would also provide that an inquiry report must not include information that the Commissioner is satisfied is sensitive information (as defined under clause 227). This ensures that information the disclosure of which could be harmful is not made public. For example, an inquiry report could not include information the disclosure of which could prejudice the security, defence or international relations of the Commonwealth or disclose the deliberations or decisions of Cabinet.

9.21 When determining whether to exclude sensitive information, the Commissioner would be required to consult with the head of each Commonwealth agency or State or Territory Government entity to which the information relates. This ensures that the views of relevant agencies, who will have deeper insight into the context and sensitivities associated with the disclosure of particular information, are available to the Commissioner when they are determining whether they are satisfied that particular information is sensitive information.

Clause 165—Protected information report

9.22 This clause would require the Commissioner to exclude clause 235 certified information or sensitive information from an inquiry report. In these cases, this clause would require the Commissioner prepare another report—a *protected information report*—that sets out the excluded information and the reasons for excluding the information from the inquiry report.

9.23 Under clause 167, this protected information report would be provided to the Minister, to ensure they have complete visibility of the outcome of the public inquiry, but not be made public. If a protected information report is given to a person, the person must not disclose the report, or information contained in the report, to the public or to a section of the public (see clause 234).

Clause 166—Opportunity to respond must be given before including certain information in inquiry report

9.24 This clause would require the Commissioner to provide a reasonable opportunity to respond to critical findings, opinions or recommendations, whether express or implied, in relation to a Commonwealth agency, a State or Territory government entity or any other person. The opportunity to respond must be given to the head of the agency or entity, or other person concerned before the findings, opinions or recommendations are included in an inquiry report. To facilitate the opportunity to respond, the Commissioner must also provide the person with a statement setting out the Commissioner's finding, opinion or recommendation.

9.25 If the critical opinion, finding or recommendation relates to a Commonwealth agency or a State or Territory Government entity, only the head of that agency or entity, or a person authorised by the head may give a response to the Commissioner's statement.

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- 9.26 If the adverse opinion, finding or recommendation relates to a person, only the person or their representative may provide a response.

Clause 167—Commissioner to give copies of reports to certain persons

- 9.27 This clause would require the Commissioner to give the inquiry report, and any protected information report prepared in relation to the public inquiry, to the Minister responsible for administering the NACC Bill. This provides the Minister with a complete picture of the public inquiry, including the information obtained and the findings and recommendations made. This enables the Minister to take action, in collaboration with other Ministers as required, to respond to any corruption risks or vulnerabilities identified in the report.
- 9.28 This clause would require the Commissioner to give a copy of an inquiry report concerning a Commonwealth agency to the agency's head and the Minister responsible for the relevant agency, or if the report relates to a Department of the Parliament, the relevant Presiding Officer. The Commissioner would have the discretion to provide a copy of a protected information report to the agency head and the Minister responsible for the relevant agency, or if the report relates to a Department of the Parliament, the relevant Presiding Officer.
- 9.29 This provides visibility to relevant agencies, and their responsible Ministers (or the Presiding Officer as relevant), about the findings and recommendations made in an inquiry report. This allows agencies to take appropriate steps to address any corruption risks and vulnerabilities and improve corruption prevention efforts.
- 9.30 It is appropriate for the Commissioner to have a discretion as to whether to provide a copy of a protected information report to these recipients, allowing the Commissioner to make case by case decisions depending on the nature and sensitivity of the information involved. If the Commissioner does provide a copy of a protected information report, the Commissioner would be required to exclude information covered by a certificate issued by the Attorney-General under clause 235 from the protected information report if the disclosure of the information would contravene the certificate.
- 9.31 The Commissioner would also be required to exclude information which the Commissioner is satisfied is sensitive information (as defined under clause 227) from a protected information report provided under this clause, where the Commissioner is satisfied it is desirable in the circumstances to exclude the information from the report. In deciding whether to exclude such information from a protected information report, the Commissioner would seek to achieve an appropriate balance between ensuring complete visibility of the information informing an inquiry report and the need to protect sensitive information to avoid harm flowing from its disclosure.
- 9.32 This would ensure information regarding the outcome of a public inquiry can be shared when it is appropriate under the circumstances.

Clause 168—Tabling of inquiry report in Parliament

- 9.33 This clause would require the Minister to table an inquiry report in each House of the Parliament if public submissions were invited on matters that were the subject of the inquiry, or if one or more public hearings were held in the course of the inquiry.
- 9.34 If an inquiry report is required to be tabled under this clause, the inquiry report would be required to be tabled within 15 sitting days of that House after the Minister receives the report.
- 9.35 This would ensure there is a permanent, public record of inquiry reports where the matters considered in the inquiry are already in the public domain. The requirement to table the report within 15 sitting days provides for an appropriately timely tabling process, while also allowing sufficient time for the Minister to consider the report prior to tabling.

Clause 169—Publishing inquiry report in whole or in part

- 9.36 This clause would authorise the Commissioner to publish the whole or part of an inquiry report. The Commissioner would be able to publish all or part of an inquiry report if:
- the Minister has been provided with the report under subclause 167(1), and
 - the Commissioner is satisfied that publishing the report is in the public interest.
- 9.37 This clause would provide that the Commissioner’s ability to publish all or part of an inquiry report is subject to the procedural fairness requirements set out in clause 170. This means that the Commissioner must give the head of a relevant Commonwealth agency, entity or other person an opportunity to respond to any critical findings, opinions or recommendations included in the report before the report is published.

Clause 170—Opportunity to respond must be given before publishing an inquiry report containing critical opinions etc.

- 9.38 This clause would require the Commissioner to provide a further reasonable opportunity to respond to an inquiry report that contains critical findings, opinions or recommendations, whether express or implied, in relation to a Commonwealth agency, a State or Territory Government entity or any other person before the inquiry report is published.
- 9.39 This clause would recognise that inquiry reports may be published some time after they are originally prepared and provided to a Minister or Presiding Officer, and after the first opportunity to respond under clause 166 has been provided. In such cases, this clause would ensure that procedural fairness is afforded to affected Commonwealth agencies, State or Territory government entities or other persons by permitting a further opportunity to respond and provide updated information before the inquiry report containing critical findings is published.
- 9.40 The requirement to provide a further opportunity to respond under this clause only applies where the inquiry report is published, whether whole or in part, under clause 169. It does not apply where the inquiry report has been tabled in Parliament.
- 9.41 Equally, the requirement would not apply if the Commissioner publishes whole or part of the inquiry report within 3 months of the report being given to the Minister under clause 167. This recognises that the opportunity to respond under clause 166 would be sufficient where there is no substantial delay between that initial opportunity and the publishing of the inquiry report. A period of 3 months reflects the period within which the Minister would generally table inquiry reports, as required by clause 168 or at their discretion.
- 9.42 The opportunity to respond must be given to the head of the agency, entity or other person concerned before the findings, opinions or recommendations are included in an inquiry report. To facilitate the opportunity to respond, the Commissioner must also provide the person with a statement setting out the Commissioner’s opinion, finding or recommendation.
- 9.43 If the critical opinion, finding or recommendation relates to a Commonwealth agency or a State or Territory Government entity, only the head of that agency or entity, or a person authorised by the head, may give a response to the Commissioner’s statement.
- 9.44 If the critical opinion, finding or recommendation relates to a person, only the person or their representative may provide a response.

Clause 171—Follow-up action on inquiry report

- 9.45 This clause would authorise the Commissioner to require the head of a Commonwealth agency to provide details of any action they have taken or propose to take with respect to a recommendation set out in a relevant inquiry report. The Commissioner would be authorised to request that such details be provided by an agency head within a specified timeframe.

- 9.46 This clause would ensure that the Commissioner has the power to monitor the actions taken by Commonwealth agencies to address public inquiry recommendations for legislative or administrative reform. It would promote agency consideration of the Commissioner's recommendations and increase accountability for responding to identified corruption vulnerabilities. This clause is consistent with equivalent provisions in State and Territory integrity commission legislation.
- 9.47 An agency head would be required to comply with a request made by the Commissioner under this clause.
- 9.48 This clause would authorise the Commissioner to refer a response received by an agency head to the relevant Minister or Presiding Officer if the Commissioner is not satisfied with their response.
- 9.49 In making a referral under this clause to the relevant Minister or Presiding Officer, the Commissioner may also include the Commissioner's recommendation, the reasons for that recommendation, and the Commissioner's reasons for not being satisfied with the response.
- 9.50 The Commissioner would also have the discretion to provide a copy of the relevant material contained in the referral to a Presiding Officer for presentation in the relevant House.
- 9.51 However, if the Commissioner refers material to a Presiding Officer for presentation in the relevant House, the Commissioner would be required to exclude clause 235 certified information and information that the Commissioner is satisfied is sensitive information from the material. The Commissioner would be required to consult with the head of the relevant Commonwealth agency or entity in determining whether information is sensitive information.

PART 10 OVERSIGHT OF THE NATIONAL ANTI-CORRUPTION COMMISSION

- 10.1 This Part would set out the oversight arrangements for the NACC.
- 10.2 It is crucial that the NACC operates, and is seen to operate, independently of Government by those within its jurisdiction, the Parliament, and the public. To undertake the Commissioner's key function of investigating corruption issues that could involve serious or systemic corrupt conduct, the Commissioner would necessarily be invested with broad powers.
- 10.3 The oversight arrangements set out in this Part would provide assurance to the Parliament and the public that the Commissioner is performing their functions fairly, effectively, appropriately and independently.
- 10.4 This Part would provide for two separate mechanisms to oversee the NACC:
- a Parliamentary Joint Committee on the National Anti-Corruption Commission (the Committee); and
 - an Inspector of the National Anti-Corruption Commission (the Inspector).

The Committee

- 10.5 Firstly, the Committee would be responsible for approving the appointments of proposed Commissioners, Deputy Commissioners and Inspectors nominated by the Minister. This would ensure that appointments are subject to appropriate oversight, and the recommended candidates for these important roles have the confidence of the Parliament.
- 10.6 Secondly, the Committee would ensure the Commissioner, Deputy Commissioners and Inspector are accountable to Parliament by:
- monitoring and reviewing the Commissioner and Inspector's performance of their functions, and reporting to Parliament on any matter connected with this role, with any comments it sees fit;
 - examining investigation reports and annual reports prepared by the Commissioner and Inspector, and reporting to Parliament on any matter arising out of this examination; and
 - examining trends and changes in corruption among the persons regulated by the NACC Bill, and reporting to Parliament on any changes to the NACC or Inspector's functions, powers, procedures, staffing or structure the Committee considers appropriate.
- 10.7 Thirdly, the Committee would review the NACC's budget and finances and report to Parliament on the sufficiency of the NACC's resourcing to effectively perform its functions. This would ensure a regular mechanism for external review of the sufficiency of the NACC's budget and staffing levels, ensuring the government and Parliament have clear advice on the sufficiency of the NACC's budget over time. It would also be an additional safeguard to hold future governments accountable for budget decisions regarding the NACC.

The Inspector

- 10.8 This Part would also establish the Inspector. The Inspector would be a standing oversight mechanism dedicated to investigating corruption issues that arise in relation to the NACC itself, and investigating complaints about the conduct of the NACC or its staff.
- 10.9 The oversight mechanisms established under this Part would operate in addition to the Commonwealth Ombudsman's oversight of the NACC, including the NACC's exercise of covert powers. The Consequential Bill would provide for the Ombudsman to oversee the NACC's use of the following powers and mechanisms:
- controlled operations under Part IAB of the *Crimes Act 1914*;
 - surveillance devices and computer access powers under the SD Act; and
 - telecommunications interceptions, stored communications, telecommunications data (metadata) and international production orders under the TIA Act;

- the NACC’s access to the industry assistance framework under Part 15 of the *Telecommunications Act 1997* to obtain reasonable assistance from communications providers to support the NACC’s powers.

10.10 Further information on covert powers and the Commonwealth Ombudsman’s oversight is at paragraphs 14.45 to 14.54, 14.182 to 14.199, and 14.208 to 14.241.

Division 1—Parliamentary Joint Committee on the National Anti-Corruption Commission

10.11 This Division would provide for the establishment of the Committee, and outline its functions. The Committee would oversee the Commissioner, the operation of the NACC and the Inspector, and ensure they are accountable to the Parliament. The Committee would also be responsible for confirming Commissioners, Deputy Commissioners, and Inspectors the Minister nominates for appointment.

10.12 To support its oversight role, the Committee’s functions would include reviewing, examining and inquiring into the performance of the functions of the Commissioner and the Inspector.

Clause 172—Parliamentary Joint Committee on the National Anti-Corruption Commission

10.13 This clause would provide for the establishment of the Committee as soon as practicable after the first session of each Parliament. The Committee would be a joint Committee, appointed according to the practice of the Parliament, with multi-partisan representation.

10.14 The Committee would consist of 12 members: six Senators appointed by the Senate and six members of the House of Representatives. The six members to be appointed by each of the Senate and House of Representatives must consist of three members of the Government, two members of the Opposition, and one member of the Parliament who is a member of neither the Government nor the Opposition.

10.15 This would ensure that members of minor parties and independent members of Parliament would be eligible to serve on the Committee, allowing the Committee to take a multi-partisan approach to its work.

Clause 173 – Chair of the Committee

10.16 This clause would provide that there must be a Chair of the Committee, who must be a member of the Government elected by the members of the Committee from time to time. This is consistent with arrangements for other legislated joint committees, such as the Parliamentary Joint Committee on Intelligence and Security.

10.17 This clause would provide that a person holding office as Chair would no longer hold the office if they cease to be a member of the Committee or resign the office. The Chair of the Committee may resign the office by giving a signed notice of resignation to a meeting of the Committee. In such cases, a new Chair would need to be appointed.

10.18 At meetings of the Committee at which the Chair is present, the Chair would have a deliberative vote, and would have a casting vote if votes are equal. If the Chair was absent, it would be the case that either a casting vote would not be needed if there was an odd number of Committee members left, or a vote could be delayed until the Chair returned.

Clause 174—Eligibility for appointment as a Committee member

10.19 This clause would provide that a member of the Parliament would not be eligible for appointment as a member of the Committee if the member holds any of the following offices:

- a Minister;
- the President of the Senate;
- the Speaker of the House of Representatives;

- the Deputy-President and Chair of Committees of the Senate;
- the Deputy Speaker of the House of Representatives.

10.20 Consistent with parliamentary practice, Ministers are precluded from membership of the Committee because their presence could give rise to questions of conflict of interest or bias where the Committee may be inquiring into actions of government for which those Ministers may be collectively or individually responsible.

10.21 The Committee is expected to have a substantial workload given the broad scope of the matters under its oversight. Accordingly, the President of the Senate and Speaker of the House, along with their Deputies, are also not eligible for appointment to the Committee due to their existing commitments.

Clause 175—Terms of office of Committee members

10.22 This clause would provide that a member of Parliament would cease to be a member of the Committee if:

- the House of Representatives expires by the passing of time or is dissolved, in which case the Committee would be dissolved;
- the member becomes the holder of an office specified in paragraph 10.19;
- the member ceases to be a member of the relevant House of Parliament; or
- a member appointed by a House of Parliament resigns their position in writing to the Presiding Officer of that House.

10.23 Either House of the Parliament would be able to appoint one of its members to fill a vacancy among the members of the Committee appointed by that House.

Clause 176—Powers and proceedings of the Committee

10.24 This clause would provide that all matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of Parliament.

Clause 177—Functions of the Committee

10.25 This clause would set out the Committee's functions, as follows:

- consider proposed recommendations for the appointment of the Commissioner, a Deputy Commissioner and the Inspector, in accordance with clause 178;
- monitor and review the performance of functions by the Commissioner and the Inspector;
- report to both Houses of the Parliament, with such comments as it thinks fit, on any matter connected with the performance of the functions of the Commissioner or the Inspector;
- examine and report to the Parliament on any matter in, or arising out of:
 - an investigation report (see clause 155) or a NACC investigation report (see clause 221) that is laid before the Houses of the Parliament;
 - an annual report prepared by the Commissioner (see clause 271) or the Inspector (see clause 198);
- examine trends and changes in corruption among those who are subject to this Bill and report to both Houses of the Parliament on any change that the Committee thinks desirable to the following:
 - the functions or powers of the Commissioner or the Inspector;
 - the procedures followed by the Commissioner or the Inspector;
 - the NACC's staffing or structure;
 - the staffing arrangements for the Inspector;

- inquire into any question in connection with the Committee’s functions that is referred to it by either House of the Parliament, and to report to that House on that question;
 - review the NACC’s budget and finances, and report to both Houses of the Parliament on the following matters:
 - whether the NACC has sufficient finances and resources to effectively perform its functions;
 - whether the NACC’s budget should be increased to ensure that it will have sufficient finances and resources to effectively perform its functions;
 - any other matter arising out of the review that the Committee considers relevant.
- 10.26 Under this clause the Committee would be able to request the Inspector’s assistance with the Committee’s review of the NACC’s budget and finances.
- 10.27 Similar functions are conferred on comparable Parliamentary Joint Committees, for example the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on the Australian Commissioner for Law Enforcement Integrity.
- 10.28 This clause would outline the functions which the Committee is not authorised to undertake. It would provide that the Committee would not be authorised to do any of the following:
- investigate a corruption issue or a NACC corruption issue;
 - reconsider a decision or recommendation made by the Commissioner or the Inspector in relation to a corruption issue, a NACC corruption issue or a complaint made in relation to the conduct or activities of the NACC or a staff member of the NACC;
 - review a decision made, or an operational activity carried out, in relation to a corruption investigation, a public inquiry, a NACC corruption investigation or a NACC complaint investigation that is still being conducted;
 - review an operational activity undertaken or proposed to be undertaken by the NACC, the Inspector, a Commonwealth agency or a State or Territory government entity;
 - review any of the following insofar as they are available to the NACC, the Inspector, a Commonwealth agency or a State or Territory government entity:
 - sensitive operational information;
 - operationally sensitive information (within the meaning of Schedule 1 to the *Intelligence Services Act 2001*);
 - operational methods;
 - operational assistance;
 - review information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information;
 - review an aspect of the activities of an intelligence agency that does not affect an Australian person;
 - review the content of, or conclusions reached in, assessments or reports made by an intelligence agency, or review sources of information on which such assessments or reports are based;
 - review anything done by the ONI in carrying out its function of evaluating matters relating to the national intelligence community (see section 9 of the *Office of National Intelligence Act 2018*).
- 10.29 ‘Operationally sensitive information’ is defined in Schedule 1 to the *Intelligence Services Act 2001* and covers sources of information available to, and particular operations that are, have been or are proposed to be undertaken by, specific intelligence agencies set out in that Act. ‘Sensitive operational information’ is intended to apply to operations and sources of information available to the NACC itself and other agencies within the NACC’s jurisdiction not covered by Schedule 1 to the *Intelligence Services Act 2001*.

- 10.30 This clause would prevent the Committee from interfering with operational decisions made by the NACC or any other jurisdictional agency in the course of its investigations and inquiries, or raise the risk of compromising confidential sources or investigative techniques. These limitations are consistent with those that apply to the Parliamentary Joint Committee on Intelligence and Security, the Parliamentary Joint Committee on Law Enforcement, and the Parliamentary Joint Committee on the Australian Commissioner for Law Enforcement Integrity.
- 10.31 Despite this limitation on its functions, the Committee may nevertheless request access to certain sensitive information in the course of performing its other functions. To mitigate this risk, clauses 180 and 181 would set out requirements for the protection and security of information disclosed to the Committee, and restrict the Committee's access to certain classes of other information (see paragraph 10.41-10.49).

Clause 178—Committee may approve or reject recommendation for appointment

- 10.32 This clause would provide for the Committee to approve or reject the Minister's recommendation for the appointment of the Commissioner, a Deputy Commissioner and the Inspector.
- 10.33 The role of the Committee in considering proposed recommendations for appointments would ensure that the Commissioner, Deputy Commissioners and the Inspector would have the confidence of the Parliament. This is particularly important given the jurisdiction of the NACC will include Commonwealth parliamentarians.
- 10.34 If the Minister refers a proposed recommendation for an appointment of the Commissioner, a Deputy Commissioner or the Inspector, the Committee would be required to decide whether to approve or reject the recommendation:
- within 14 calendar days after the referral of the appointment; or
 - if, within the first 14 calendar days after the referral, the Committee notifies the Minister that it requires additional time to consider the referral—44 calendar days after the referral.
- 10.35 The Committee's decision whether to approve or reject a proposed recommendation for an appointment would need to be made by a majority.
- 10.36 As soon as practicable after making the decision, the Committee would need to give notice in writing to the Minister and report to both Houses of the Parliament.
- 10.37 The Committee would be taken to have approved a proposed recommendation for an appointment if the Committee had not given notice within the required timeframe. This would ensure the Committee could not unnecessarily delay the appointment of candidates to these roles, which could affect the NACC's operations.
- 10.38 The Committee would not be required to approve the appointment of the NACC CEO. This reflects the function of the CEO would be to manage the affairs of the NACC and ensure the NACC performs its functions. It is the Commissioner and the Deputy Commissioners who would be responsible for the exercise of investigative powers under the NACC Bill and other legislation.

Clause 179—Staff of the Committee must be cleared for security purposes

- 10.39 This clause would provide that staff of the Committee would be required to possess a security clearance that is appropriate, having regard to the information the staff member will deal with in that capacity.
- 10.40 The NACC's jurisdiction would cover intelligence agencies and the NACC will deal with sensitive and highly classified information. It is essential that such information is appropriately protected and not handled by Committee staff who do not have the requisite security clearance. This is consistent with arrangements for the Parliamentary Joint Committee on Intelligence and Security, which also oversees intelligence agencies, under clause 21 of Schedule 1 to the *Intelligence Services Act 2001*.

Clause 180—Protection of information and documents

- 10.41 This clause would require the Committee to have arrangements in place for the protection and security of all information held, and all records made, by the Committee while such information and records remained in the Committee’s possession.
- 10.42 The Committee would need to ensure that any documents having a security classification of ‘SECRET’ or ‘TOP SECRET’ that had been provided to the Committee by a person are returned to the person as soon as possible after the members had examined the documents.
- 10.43 The NACC’s jurisdiction would cover intelligence agencies and the NACC will deal with sensitive and highly classified information. It is essential that such information is appropriately stored and handled. These arrangements are consistent with those that apply to the Parliamentary Joint Committee on Intelligence and Security under clause 22 of Schedule 1 to the *Intelligence Services Act 2001*.

Clause 181—Committee’s access to certain information

- 10.44 This clause would provide that a person who would otherwise be required to provide information or a document to the Committee would be prohibited from doing so if the information or document was subject to a clause 235 or clause 236 certificate, and the disclosure would contravene the terms of the certificate.
- 10.45 Clause 235 certificates would permit the Attorney-General to prevent the disclosure of certain information that would be contrary to the public interest, and would otherwise be required to be disclosed under the NACC Bill. A clause 235 certificate would seek to protect this information and mitigate against the prejudicial consequences that may arise from its disclosure.
- 10.46 Clause 236 certificates would permit the Attorney-General to prevent the disclosure of information to the Commissioner or the Inspector from the outset, where the Australian Government has given a legally binding undertaking to a foreign government about the use and disclosure of particular information.
- 10.47 Restricting the Committee’s access to clause 235 and 236 certified information is consistent with the rationale for the certificate regime – namely, to protect the public interest in preventing the disclosure of certified information.
- 10.48 To issue either certificate, the Attorney-General would need to be satisfied, on reasonable grounds, that disclosure would be contrary to the public interest. The Attorney-General may not issue a certificate on grounds that are irrational, absurd or ridiculous, fanciful, imaginary or contrived, or merely on the grounds that disclosure would cause embarrassment or prejudice to a person’s reputation (see paragraph 11.112).
- 10.49 The effect of this clause is to act as a declaration for the purposes of section 49 of the Constitution (see paragraphs 13.2 to 13.10). That section permits the Parliament to make laws declaring the powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House.

Division 2—The Inspector of the National Anti-Corruption Commission

- 10.50 This Division would establish the Inspector of the National Anti-Corruption Commission.
- 10.51 The Inspector would play a key role in the oversight of the NACC. The Inspector would be able to deal with NACC corruption issues, issues concerning potential corrupt conduct occurring within the NACC, having an adverse effect on the NACC or that may otherwise be inappropriate for the Commissioner to deal with. The Inspector would be able to investigate a NACC corruption issue if the Inspector was of the opinion that the issue could involve corrupt conduct that is serious or systemic.
- 10.52 The Inspector would also investigate external complaints about the conduct and activities of the NACC or its staff members, where this fell short of the standard of corrupt conduct.

- 10.53 This Division would provide for:
- the Inspector’s functions;
 - the administrative arrangements of the Inspector including their appointment and the circumstances in which that appointment could be terminated;
 - arrangements for persons assisting the Inspector to perform their functions;
 - the Inspector’s immunity from liability to civil proceedings where they have acted in accordance with their functions and powers; and
 - the Inspector’s annual reporting arrangements.
- 10.54 Division 3 would set out when and how the Inspector may deal with a corruption issue occurring within or affecting the NACC (known as a NACC corruption issue).
- 10.55 Division 4 would set out the Inspector’s powers to investigate NACC corruption issues and complaints against the NACC (known as a NACC complaint investigation), and would provide for the Inspector to produce reports on these investigations.

Subdivision A—Functions and powers of the Inspector

Clause 182—The Inspector

- 10.56 This clause would provide that there is to be an Inspector of the NACC. The Inspector would be an independent officer of the Parliament in recognition of the role of the Inspector in complementing the oversight of the NACC provided by the Committee, and the Inspector’s independence from the Commissioner and the government of the day (see clause 183).
- 10.57 There are no implied functions, powers, rights, immunities or obligations arising from the Inspector being an officer of the Parliament. Instead, the Inspector’s functions, powers, rights, immunities or obligations would be set out in the NACC Bill, or in any other Act that conferred them on the Inspector.

Clause 183—Independence

- 10.58 This clause would provide for the Inspector’s independence. The Inspector would have complete discretion in performing their functions and carrying out their duties. The Inspector would not be subject to direction from anyone in doing so, including the government of the day, or the Commissioner.

Clause 184—Functions of the Inspector

- 10.59 This clause would set out the functions of the Inspector. The Inspector would have the following functions:
- to detect corrupt conduct within, and relating to, the NACC;
 - to undertake preliminary investigations into NACC corruption issues or possible NACC corruption issues;
 - to investigate NACC corruption investigations that could involve corrupt conduct that is serious or systemic;
 - to refer NACC corruption issues to the NACC, Commonwealth agencies and State or Territory government entities;
 - to investigate complaints made in relation to the conduct or activities of:
 - the NACC; or
 - a staff member of the NACC;
 - to provide relevant information and documents to the Committee;
 - to receive and deal with PIDs;

- to report, and make recommendations, to both Houses of the Parliament on the results of performing any of its functions;
- 10.60 These functions would enable the Inspector to effectively investigate or otherwise deal with NACC corruption issues (in accordance with Divisions 3 and 4) and conduct NACC complaint investigations (in accordance with Division 4), and are consistent the Inspector’s role as a key oversight mechanism.
- 10.61 The NACC Bill would not specify any requirements for referring complaints about the NACC to the Inspector. Neither would it prescribe any requirements for the Inspector to deal with complaints, or to deal with them in a particular way. This ensures the Inspector has appropriate flexibility to determine the best approach to dealing with any NACC complaints it receives, using the powers conferred by Division 4.

Subdivision B—Appointment of the Inspector

Clause 185—Appointment of the Inspector

- 10.62 This clause would provide for the appointment of the Inspector, including the appointment process, requisite qualifications, period of appointment, and basis of appointment.

Appointment

- 10.63 The arrangements for the Inspector’s appointment would be consistent with those for appointing the Commissioner (see paragraphs 12.4 to 12.15). It is appropriate for the Inspector to be appointed in the same manner as the Commissioner as the Inspector would exercise many of the same powers as are available to the Commissioner in performing their oversight role. For this reason, it is appropriate for the Inspector’s appointment to have the confidence of the Parliament, as demonstrated by the approval of the Committee, and for the appointment to be made by the Governor-General.
- 10.64 The Inspector would be appointed by the Governor-General by written instrument on the recommendation of the Minister, after approval of the appointment by the Committee.
- 10.65 Before the Minister makes a recommendation to the Governor-General regarding the Inspector’s appointment, the Minister must have referred the proposed recommendation to the Committee under clause 178. Approval of the appointment may be obtained either by the Committee notifying the Minister that it has decided to approve the proposed recommendation, or by being taken to have approved the proposed recommendation.
- 10.66 Where the Minister refers a proposed recommendation for the appointment of the Inspector, the Committee would be required to decide whether to approve or reject the recommendation:
- within 14 calendar days after the referral of the appointment; or
 - if, within the first 14 calendar days after the referral, the Committee notifies the Minister that it requires additional time to consider the referral—44 calendar days after the referral.
- 10.67 The Committee’s decision whether to approve or reject a proposed recommendation for an appointment would need to be made by a majority. As soon as practicable after making the decision, the Committee would need to give notice in writing to the Minister and report to both Houses of the Parliament.
- 10.68 The Committee would be taken to have approved a proposed recommendation for an appointment if the Committee does not give notice within the required timeframe.
- 10.69 Requiring the appointment to be approved by the Committee would ensure that the appointment is subject to appropriate oversight, and the recommended Inspector has the confidence of the Parliament.

Qualifications for the Inspector

- 10.70 This clause would set out the minimum requirements for a person to be appointed as the Inspector. The Inspector would be required to have the same minimum qualifications as the Commissioner. This would ensure that the Inspector has the appropriate skills to oversee the use of powers by the NACC.
- 10.71 To be eligible for appointment as the Inspector, a person must be:
- a retired judge of a federal court or a court of a State or Territory; or
 - enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory, and has been enrolled for at least 5 years.
- 10.72 The role of Inspector is a significant statutory appointment. To effectively discharge the functions of the Inspector, a person would be required to have specialist skills and expertise in applying statutory frameworks. These skills will be possessed by a former judge of a federal, State or Territory court. Experienced legal practitioners will also have these skills, and the requirement for them to have enrolled as a legal practitioner for at least 5 years is consistent with the qualification requirements for Justices of the High Court as set out in section 7 of the *High Court of Australia Act 1979*.
- 10.73 In addition, a person would not be eligible for appointment as the Inspector if they had previously been appointed as the Commissioner. This would reduce the risk of a conflict of interest arising out of a previous role as Commissioner, and would ensure the Inspector's independence from the NACC when carrying out their functions.

Period and basis for appointment

- 10.74 The Inspector would hold office for a single fixed term specified in the instrument of appointment. The period must not exceed ten years.
- 10.75 A ten-year term is appropriate given the Inspector's role in overseeing the NACC. The longer maximum term for the Inspector would provide consistent oversight across the appointment of multiple Commissioners (whose term would be limited to five years).
- 10.76 The Inspector would not be able to be reappointed. This ensures the Inspector's independence, as they would not be concerned about their reappointment when conducting investigations, with no incentive to consider the regard in which they are held by the government of the day.
- 10.77 The Inspector could be appointed on either a full-time or a part-time basis. This reflects the fact that there may be inconsistency in the Inspector's workload, with more or fewer investigations on foot at any one time. Depending on the circumstances, the role could be effectively performed in either a full-time or a part-time capacity.

Clause 186—Acting appointments

- 10.78 This clause would enable the Minister to appoint a person as the Inspector on an acting basis, by written instrument, in certain circumstances.
- 10.79 An acting appointment could be made:
- during a vacancy in the office of the Inspector (whether or not an appointment has previously been made to the office); or
 - during any period, or during all periods, when the Inspector is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- 10.80 Over the course of a ten-year appointment, it will be essential for the Inspector to have regular leave for rest and recreation, as well as personal leave for any illness or injury. Given that appointments processes can be lengthy, and the approval of the Committee will also be needed for appointments to the position of the Inspector, it is also possible that the position could be vacant following the end of an Inspector's appointment. This clause would ensure that a suitable and appropriate person occupies the role of Inspector across all of these circumstances.

- 10.81 Sections 33AB and 33A of the *Acts Interpretation Act 1901* provide further rules that apply to acting appointments. These rules relate to the validity of things done under appointments and provide for the terms, conditions and duration of acting appointments.

Qualification for acting appointments

- 10.82 A person would be required to have the requisite qualifications for an acting appointment. The qualification requirement for acting appointments reflect those for substantive appointments.
- 10.83 If a person is to act as the Inspector, they must meet the qualification requirements, as set out in paragraph 10.70, for the Inspector (that is, they must be a former judge or experienced legal practitioner).

Clause 187—Remuneration

- 10.84 This clause would set out the means for determining the remuneration and allowances for the Inspector.
- 10.85 The Inspector would be paid the remuneration that is determined by the Remuneration Tribunal. In the absence of a determination by the Tribunal, the Inspector would be paid the remuneration that is prescribed by the regulations.
- 10.86 It is appropriate for the remuneration of the Inspector to be determined by the Remuneration Tribunal as it is an independent statutory body that handles the remuneration of key Commonwealth offices. Given the significant responsibilities of the office of the Inspector, it is desirable for the remuneration to be determined by an experienced, independent authority. Such a determination would be a disallowable instrument under the *Legislation Act 2003*. This means that the determination would be required to be tabled in both Houses of Parliament, and either House may pass a resolution disallowing the determination within 15 sittings days of the determination being tabled.
- 10.87 The ability to prescribe the remuneration in the regulations allows flexibility to ensure the Inspector can be appropriately remunerated if there is any delay in the making or a determination by the Tribunal, or if a determination is disallowed by either House of Parliament.
- 10.88 The regulations would also be able to prescribe the allowances that the Inspector would be paid.
- 10.89 The scope of the regulation-making power conferred by this clause would be subject to the *Remuneration Tribunal Act 1973*. This means that the remuneration prescribed in the regulations could only be enforced where no determination by the Tribunal is in operation.

Clause 188—Leave of absence

- 10.90 This clause would set out the leave arrangements for the Inspector when appointed on a full-time or part-time basis.
- 10.91 If the Inspector is appointed on a full-time basis, they would have the recreation leave entitlements that are determined by the Remuneration Tribunal. It is appropriate for the recreation leave entitlements for the Inspector, when appointed on a full-time basis, to be determined by the Remuneration Tribunal as it is an independent statutory body that handles the remuneration and allowances of key Commonwealth offices. Given the significance of the responsibilities of the office of the Inspector, particularly when appointed on a full-time basis, it is desirable for the recreation leave entitlements to be determined by an experienced, independent authority.
- 10.92 The Minister would be able to grant the Inspector (when appointed on a full-time basis) leave of absence, other than recreation leave, on any terms and conditions that the Minister determines. This provides flexibility for the Minister to consider requests from the Inspector for other types of leave—for example discretionary leave to attend a funeral where it may not be desirable for the Inspector to use their recreation leave entitlements for this purpose.
- 10.93 If the Inspector is appointed on a part-time basis, the Minister would be able to grant a leave of absence to the Inspector on the terms and conditions that the Minister determines.

Clause 189—Other paid work

- 10.94 This clause would provide that the Inspector is not permitted to engage in paid work outside their office unless they receive approval from the Minister. This would minimise the likelihood of conflicts of interests arising, and ensure their independence and performance are not compromised by outside commitments.

Clause 190—Disclosure of interests to the Minister

- 10.95 The Inspector would be required to disclose conflicts of interest to the Minister. This refers to a situation where the Inspector has, or acquires, an interest that may conflict with the performance of their functions. The Inspector must give the Minister written notice of all interests as and when they arise, whether these interests are pecuniary or otherwise.

Clause 191—Other terms and conditions

- 10.96 This clause would allow the Minister to determine additional terms and conditions of the Inspector's appointment, to the extent those terms and conditions are not otherwise covered by the NACC Bill. This could include matters such as the location where the duties of the office are to be performed.

Clause 192—Resignation

- 10.97 This clause would permit the Inspector to resign in writing to the Governor-General. Such a resignation would take effect on the day it is received by the Governor-General, or on a later date specified in the resignation.

Clause 193—Termination of appointment

- 10.98 This clause would set out the circumstances in which the Inspector's appointment could be terminated by the Governor-General.
- 10.99 The Governor-General would have the discretion to terminate the appointment of the Inspector on certain grounds where each House of the Parliament, in the same session of the Parliament, presents an address to the Governor-General praying for the removal of the Inspector. Such a removal could be on the grounds of misbehaviour or that the Inspector is unable to perform their duties because of physical or mental incapacity.
- 10.100 This clause would ensure the independence of the Inspector by ensuring they cannot be removed from office by the government of the day without the agreement of the Parliament. The grounds for removal are extremely limited, ensuring that the Inspector can undertake corruption investigations without fear of removal from office due to potentially making findings of corruption involving the NACC and current government officials, or persons with close connections to the government of the day.
- 10.101 Requiring an address from both Houses of the Parliament before the termination of the Inspector is consistent with the arrangements for the removal of federal judges under the Constitution.
- 10.102 The Governor-General would be required to terminate the appointment of the Inspector in circumstances where they become financially compromised. This would include circumstances where the Inspector:
- becomes bankrupt;
 - applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
 - compounds with the Inspector's creditors; or
 - makes an assignment of the Inspector's remuneration for the benefit of Inspector's creditors.
- 10.103 This provision would guard against the potential for the Inspector to become financially vulnerable to corruption. These circumstances would be sufficiently objective and serious so as to warrant termination of an appointment without discretion or parliamentary consideration. This is consistent with arrangements for the Auditor-General under the *Auditor-General Act 1997*.

Subdivision C—Persons assisting the Inspector

Clause 194—Persons assisting the Inspector

- 10.104 This clause would provide for persons to assist the Inspector in performing their functions. The services of the following persons would be able to be made available to the Inspector:
- APS employees in the Attorney-General’s Department;
 - officers and employees of agencies (within the meaning of the *Public Service Act 1999*);
 - persons employed under the *Intelligence Services Act 2001*;
 - Parliamentary Service employees (within the meaning of the *Parliamentary Service Act 1999*);
 - members of the ADF;
 - members of the AFP.
- 10.105 Persons performing services for the Inspector would be subject to directions of the Inspector.
- 10.106 The Inspector may also engage a consultant, on behalf of the Commonwealth, to assist in the performance of their functions. For example, the Inspector could engage an IT specialist to assist with a NACC corruption investigation. The consultants would be engaged on the terms and conditions the Inspector determines in writing. Ordinarily, this would be the written agreement providing for the engagement of the consultant.
- 10.107 The Inspector may, in relation to a particular NACC corruption investigation, appoint a legal practitioner to assist the Inspector.
- 10.108 This clause would provide the necessary flexibility for the Inspector to increase or decrease their capacity as required. For example, if the Inspector is conducting a large number of investigations, they may need to increase the number of persons assisting them at short notice. It also provides for the Inspector to recruit for specialised expertise.
- 10.109 Persons assisting the Inspector from within the public service, *Intelligence Services Act 2001* framework, parliamentary service, AFP or ADF would be made available as secondees from their home organisation.

Clause 195—Meaning of person assisting the Inspector

- 10.110 This clause would provide that all persons referred to in clause 194 would be persons assisting the Inspector. This would be the case regardless of whether they were engaged as a consultant from the private sector, appointed as legal counsel or otherwise made available to the Inspector from within the public service, *Intelligence Services Act 2001* framework, parliamentary service, ADF or AFP.

Subdivision D—Immunity from civil proceedings for the Inspector and persons assisting

- 10.111 This Subdivision would provide certain immunities for the Inspector and persons assisting the Inspector. It is important that appropriate arrangements are in place to protect the Inspector and persons assisting the Inspector in the performance of their duties.
- 10.112 Further, the Inspector and persons assisting the Inspector would be taken not to engage in corrupt conduct while performing those roles. This is important to ensure that the NACC could not frustrate the Inspector’s oversight of the NACC by investigating the Inspector or persons assisting the Inspector (see paragraph 2.27).

Clause 196—Immunity from civil proceedings for the Inspector and persons assisting

- 10.113 This clause would outline the immunity from civil proceedings afforded to the Inspector and persons assisting the Inspector.
- 10.114 The Inspector would not be liable to civil proceedings in relation to acts or omissions done in good faith, in the performance or exercise, or purported performance or exercise, of their functions, powers or duties under the NACC Bill.

- 10.115 Persons assisting the Inspector would also be immune from liability to civil proceedings in the same way as the Inspector. This immunity would also extend to persons from whom the Inspector has requested assistance, in writing. This means that if a person had not been formally engaged as a consultant, appointed as a legal counsel, or otherwise made available to the Inspector, but had received a written request for assistance, they would be immune from liability in the same way as the Inspector or a person assisting the Inspector.
- 10.116 This clause would ensure that the Inspector and persons assisting the Inspector are able to perform their functions and duties under the NACC Bill without fear of personal liability for any actions they perform in good faith. Without immunity from civil proceedings, the Inspector or a person assisting may be exposed to civil liability in the performance of their duties. For example, the Inspector may be exposed in circumstances where a person wishes to bring legal action to seek compensation for damage to their personal property arising from a search on Commonwealth premises. This clause would protect the Inspector and persons assisting the Inspector from such action.
- 10.117 The immunities would not apply to conduct engaged in other than in good faith. The mere purported performance or exercise of functions, powers or duties requires more than the absence of dishonesty or malice by the relevant person. Rather, there must be a genuine attempt to perform the function correctly, having regard to the caution and diligence that is expected of an honest person of ordinary prudence.

Clause 197—Immunities from certain State and Territory Laws

- 10.118 This clause would outline the immunities from certain State and Territory laws available to the Inspector and persons assisting the Inspector. The Inspector and persons assisting the Inspector would not be required to:
- obtain or have a licence or other official permission for doing any act or thing in the exercise of their powers or performance of their duties as the Inspector; or
 - to register any vehicle, vessel, animal or article belonging to the Commonwealth.
- 10.119 This clause is intended to prevent the Inspector and persons assisting the Inspector being restricted in the performance of their functions, powers or duties because of different State and Territory regulatory requirements.

Subdivision E—Annual report by Inspector

- 10.120 This Division would outline the requirements for annual reporting by the Inspector. Annual reports would be intended to provide general information on the operations of the Inspector, rather than detailed information on particular NACC corruption investigations or NACC complaint investigations. That information would be included in specific reports of those investigations.

Clause 198—Annual report

- 10.121 This clause would set out the requirements for the Inspector to produce an annual report at the end of each financial year.
- 10.122 As soon as practicable after the end of each financial year, the Inspector must prepare an annual report relating to the performance of the Inspector's functions during the financial year.
- 10.123 The Inspector must also cause a copy of the annual report to be tabled in each House of the Parliament. The copy of the annual report must be tabled as soon as practicable after the end of the financial year, and in any case, by the following 31 December of that year.
- 10.124 The Governor-General would be able to make regulations prescribing the required content of the Inspector's annual report. The Inspector's annual report must include such information as is prescribed by the regulations.

- 10.125 Allowing for the regulations to prescribe the matters to be included in the Inspector’s annual report would provide greater flexibility for those matters to be determined over time once the NACC is operational. This could be adjusted over time, including in response to views from the Committee and the Parliament to on what it considers useful for the Inspector to report on annually.
- 10.126 As the Inspector would not be an accountable authority under the PGPA Act, they would not be required to adhere to the financial reporting requirements under that regime. However, the Inspector must include such information as prescribed by the regulations in their annual report.
- 10.127 The Inspector would be a secondary statutory structure rather than its own primary body for the purposes of the PGPA Act. The Inspector’s activities require independence from the responsible Minister and are included within the NACC Bill to achieve higher levels of accountability and transparency for the NACC. This means that, from a financial perspective, the Inspector would operate within the Attorney-General’s Department but would carry out its functions independently.
- 10.128 Annual reports would be intended to provide general information on the operations of the Inspector, and an overview of the exercise of its powers and functions. The contents of the Inspector’s annual reports would also inform the Committee in its oversight role of the NACC and Inspector. One of the Committee’s functions would include examining information set out in annual reports and reporting to the Parliament on matters arising out of this examination (see paragraph 10.25).

Clause 199—Exclusion of certain information from annual report

- 10.129 This clause would require certain material to be excluded from annual reports prepared under this Division, noting annual reports would be tabled in each House of the Parliament and therefore made public (see paragraph 10.123). The Inspector must exclude section 235 certified information, and information that the Inspector is satisfied is sensitive information (as defined under clause 227).
- 10.130 This clause would provide that section 235 certified information and sensitive information must in all cases be excluded from the Inspector’s annual report. Further, the regulations made for the purposes of clause 198 would not be able to require the annual report to include section 235 certified information or sensitive information.
- 10.131 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information to certain persons would be contrary to the public interest. The Inspector would be required to exclude information that is subject to such a certificate from an investigation report. This would ensure that certain classes of information would be protected from disclosure, without requiring the Inspector’s satisfaction that the information constitutes sensitive information.
- 10.132 The definition of sensitive information is set out in clause 227 and explained at paragraph 11.9. It would broadly include, for example:
- information the disclosure of which would prejudice the security, defence or international relations of Australia;
 - information that may prejudice an investigation or fair trial;
 - information that would unreasonably disclose a person’s personal affairs; and
 - other types of confidential information.
- 10.133 In determining whether the Inspector is satisfied that information constitutes *sensitive information* for the purpose of its exclusion from an investigation report, the Inspector must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. This recognises that the Inspector may not be best placed to identify whether information is sensitive in circumstances where the information relates to the functions or activities of another agency. Excluding sensitive information and clause 235 certified information from the Inspector’s annual report is consistent with other reports by the Inspector or Commissioner that must be tabled or published.

Clause 200—Effect of findings or opinions about corrupt conduct

- 10.134 This clause would apply if an annual report includes a finding or opinion that a person has engaged, is engaging or will engage in corrupt conduct or conduct that could constitute or involve corrupt conduct.
- 10.135 This clause would provide that the finding or opinion included in the annual report would not constitute a finding or opinion that a person is guilty of, has committed, is committing or will commit an offence. This recognises that the Inspector would not be able to make findings of criminal liability. Such a finding would be a matter for a court to determine.

Division 3—NACC corruption issues

- 10.136 This Division would establish the concept of a *NACC corruption issue* and would set out the arrangements for the Inspector to manage incoming referrals and other information by deciding how to deal with NACC corruption issues.
- 10.137 The Inspector would be able to deal with NACC corruption issues—being whether a person has engaged, is engaging, or will engage in corrupt conduct that occurs within the NACC, adversely affects the NACC or that may otherwise be inappropriate for the Commissioner to deal with.
- 10.138 The Inspector would have a broad discretion to decide how to deal with a NACC corruption issue that they become aware of, whether as the result of a referral from the NACC or another person, or that the Inspector becomes aware of in any other way. The ability for the Inspector to deal with corruption issues that they become aware of, otherwise than as the result of a referral, would ensure that the Inspector can deal with NACC corruption issues on their own initiative.
- 10.139 The Inspector would have a range of options when dealing with a NACC corruption issue. The Inspector would be able to investigate the issue, either by themselves or jointly with another agency, provided they are of the opinion that the corruption issue could involve corrupt conduct that is serious or systemic. Further, the Inspector could refer any NACC corruption issue to the NACC for internal investigation—which would facilitate the timely investigation of less serious or isolated corruption issues—or to another independent investigative agency, such as the AFP, for its consideration.

Subdivision A—Meaning of NACC corruption issue

Clause 201—Meaning of NACC corruption issue

- 10.140 This clause would set out the definition of a *NACC corruption issue* as an issue of corrupt conduct that occurs within, is connected to, or adversely affects the NACC. This is consistent with the definition of a *corruption issue* set out in clause 9, but applies to conduct within the NACC itself. A NACC corruption issue is not a corruption issue and would only be dealt with under this Part. This is appropriate to ensure a NACC corruption issue does not form part of the Commissioner’s jurisdiction absent a referral of the issue by the Inspector.
- 10.141 A NACC corruption issue would be an issue of whether a person, in certain circumstances:
- has already, at some time in the past, engaged in corrupt conduct;
 - is currently engaging in corrupt conduct; or
 - will, at any time in the future, engage in corrupt conduct.
- 10.142 The definition would incorporate the definition of corrupt conduct in clause 8. Corrupt conduct is defined in subclause 8(1) as follows:
- (a) any conduct of any person (whether or not a public official) that adversely affects, or 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;

- (b) any conduct of a public official that constitutes or involves a breach of public trust;
- (c) 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;
- (d) 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;
- (e) any conduct of a public official in that capacity that constitutes, involves or is engaged in for the purpose of corruption of any other kind.

- 10.143 This is the same definition of corrupt conduct that defines the NACC's jurisdiction, and its operation is explained in further detail at paragraph 2.8. However, for an instance of corrupt conduct to give rise to a NACC corruption issue, the corrupt conduct must arise under the following circumstances:
- the person who was, is or may be engaging in the corrupt conduct is a staff member of the NACC (as defined in clause 266); or
 - the corrupt conduct adversely affects, or could adversely affect, either directly or indirectly:
 - the honest or impartial exercise of the powers of a staff member of the NACC; or
 - the honest or impartial performance of the functions or duties of a staff member of the NACC; or
 - the person's corrupt conduct occurs in conspiracy with a staff member of the NACC.
- 10.144 The second dot point would, for example, apply to a person who is the subject of a corruption investigation by the Commissioner seeking to adversely affect the honest performance of that investigative function. Regardless of whether that adverse effect occurs, it would be more appropriate for that conduct to be dealt with by the Inspector in the first instance given the potential for the conduct to relate to a NACC corruption issue concerning the conduct of the NACC staff member who the individual sought to influence.
- 10.145 Corrupt conduct giving rise to a NACC corruption issue could arise before the individual concerned became a staff member of the NACC, or while they are or were a staff member of the NACC. This is intended to apply in situations where, for example, a person engages in corrupt conduct at one Commonwealth agency and later gains employment as a staff member of the NACC. Even though the relevant conduct would not necessarily affect the individual's conduct as a staff member of the NACC, it would not necessarily be appropriate for the Commissioner to deal with the conduct of a person who is now a staff member of the NACC.
- 10.146 The effect of this provision is that once a person becomes a staff member of the NACC, all prior corrupt conduct they engaged in before that time, and all future corrupt conduct they may engage in as a staff member of the NACC, gives rise to a NACC corruption issue and is within the Inspector's jurisdiction. The allocation of this conduct to the Inspector's jurisdiction would not change if the individual ceased to be a staff member of the NACC. This is appropriate to provide clarity and certainty as to which jurisdiction can deal with any corrupt conduct involving a person who is or has been a staff member of the NACC. It would prevent confusion arising from a matter being passed between the NACC's and Inspector's jurisdiction. However, it would be open to the Inspector to refer such a NACC corruption issue back to the NACC for internal investigation, or to refer it to another Commonwealth agency for their consideration.
- 10.147 If a former staff member of the NACC engages in corrupt conduct after ceasing to be a staff member of the NACC, that conduct would give rise to a corruption issue within the Commissioner's jurisdiction.
- 10.148 Consistent with the definition of a corruption issue in clause 9, for an allegation or other information to give rise to a NACC corruption issue, the allegation or information would need to give rise to, bring up, or put forward all of the essential elements of a NACC corruption issue, as defined by this clause.

- 10.149 If an allegation or information concerns conduct that would not satisfy the definition of corrupt conduct, the allegation would not give rise to a NACC corruption issue that is within the Inspector's power to deal with as a NACC corruption issue. This is the case even if an allegation raises an issue concerning some other form of misconduct.
- 10.150 However, if the Inspector received a complaint about conduct of the NACC or a staff member of the NACC that falls short of the definition of corrupt conduct, it would be open to the Inspector to investigate it with a NACC complaint investigation.

Subdivision B—Referring NACC corruption issues

- 10.151 This Subdivision would create voluntary and mandatory pathways for the referral of NACC corruption issues to the Inspector. A broad pathway for voluntary referrals and targeted requirements for mandatory referrals would ensure the Inspector receives sufficient information to identify potential corrupt conduct occurring within or adversely affecting the NACC and deal with NACC corruption issues.
- 10.152 The voluntary pathway would provide for referrals to be made to the Inspector by any person, including members of the public. This broad voluntary referral pathway would ensure the Inspector can receive information critical to their functions, regardless of its source.
- 10.153 The mandatory referral obligations would apply to the Commissioner and to staff members of the NACC with responsibilities under the PID Act. These persons would generally be required to refer NACC corruption issues involving a current or past staff member of the NACC if they become aware of such an issue.

Clause 202—Any person may refer NACC corruption issue

- 10.154 This clause would provide that any person may refer a NACC corruption issue or provide other information about a NACC corruption issue to the Inspector.
- 10.155 This clause would also provide for the Inspector to be able to request the referral or information to be given in a particular way (including in writing), or be accompanied or supported by further information.

Clause 203—Mandatory referral—Commissioner

- 10.156 This clause would require the Commissioner to refer a NACC corruption issue to the Inspector if the Commissioner became aware of a NACC corruption issue.
- 10.157 Unlike the equivalent mandatory referral provisions for Commonwealth agencies (see paragraphs 5.8 to 5.68), the threshold of serious or systemic corruption does not apply to the Commissioner's mandatory referral obligation. This means that if the Commissioner becomes aware of *any* NACC corruption issue, the Commissioner must refer it to the Inspector. This obligation applies regardless of whether the Commissioner considers the NACC corruption issue to be serious or systemic.
- 10.158 This would allow the Inspector to have oversight of any corrupt conduct occurring within or adversely affecting the NACC, regardless of its severity, and allows the Inspector to decide whether a NACC corruption issue meets the serious or systemic threshold to warrant an investigation. This is appropriate given the NACC's central role in detecting and investigating corruption issues within the Commonwealth public sector. Providing this broader visibility of potential NACC corruption issues to the Inspector will support the NACC to achieve the objects of the NACC Bill, as set out in clause 3, and have the confidence of the public and those falling within its jurisdiction.

Clause 204—Mandatory referral—Public Interest Disclosure Act disclosures

- 10.159 Once the NACC is established, the Commissioner, Deputy Commissioners, CEO, staff members of the NACC and other secondees, consultants and legal practitioners would fall within the definition of 'public official' under section 69 of the PID Act. This would mean that the PID Act framework would apply to the NACC.

- 10.160 Staff members of the NACC would be able to make disclosures under the PID Act, and have those disclosures dealt with in accordance with that Act. The NACC would be required to ensure relevant officers have or are given responsibility for handling PIDs raised within the NACC. This would include allocating internal disclosures (under Division 1 of Part 3 of the PID Act), and investigating internal disclosures (under Division 2 of Part 3 of the PID Act).
- 10.161 This clause would require staff members of the NACC who become aware of a NACC corruption issue in the course of exercising powers or performing functions under Divisions 1 or 2 of Part 3 of the PID Act to refer that NACC corruption issue to the Inspector.
- 10.162 Unlike the equivalent mandatory referral provisions for authorised officers or investigating officers outside of the NACC, staff members of the NACC with PID Act responsibilities are not required to assess whether the NACC corruption issue is serious or systemic before referring it to the Inspector.
- 10.163 This means that a staff member of the NACC with PID Act responsibilities who becomes aware of *any* NACC corruption issue in the course of carrying out functions under the relevant PID Act provisions must refer that NACC corruption issue to the Inspector. This is consistent with the Commissioner’s mandatory referral obligations set out at clause 203 (see paragraph 10.158), and would ensure the Inspector has oversight of all corrupt conduct, regardless of its severity.
- 10.164 Further information on the overlap between disclosable conduct under the PID Act and corrupt conduct under this Bill is at paragraph 5.38.
- 10.165 If the staff member of the NACC:
- becomes aware of a NACC corruption issue because of an internal disclosure made under the PID Act; and
 - refers that NACC corruption issue to the Inspector;
- they must notify the person who made the internal disclosure that they have done so, as soon as reasonably practicable.
- 10.166 This notification obligation would ensure the discloser is kept informed of the progress of their PID, including that it was referred to the Inspector. This would be consistent with a PID officer’s obligations under the PID Act to keep disclosers informed of how their PID is being dealt with, for example, to notify a discloser of an allocation decision or an investigation decision under sections 44(2) and 50, respectively, of the PID Act.

Clause 205—Mandatory referral—secrecy provisions

- 10.167 This clause would operate to override any secrecy provision (other than an exempt secrecy provision) that may interfere with the Commissioner’s or a NACC staff member’s obligation to refer NACC corruption issues to the Inspector once they become aware of them.
- 10.168 This would mean that the Commissioner or staff member of the NACC must still refer a NACC corruption issue to the Inspector, even if a secrecy provision applies.

Clause 206—Mandatory referral—exceptions

- 10.169 This clause would provide that the Commissioner or staff member of the NACC is not required to refer a NACC corruption issue to the Inspector if they believe on reasonable grounds that the Inspector is already aware of the NACC corruption issue.
- 10.170 This would ensure that mandatory referral obligations do not result in duplication by requiring multiple people to refer the same issue to the Inspector. This could arise where, for example, the Commissioner became aware of corrupt conduct within the NACC shortly before a staff member of the NACC made an internal disclosure of the same conduct under the PID Act. If the Commissioner had already referred the NACC corruption issue to the Inspector, the staff member of the NACC to whom the internal disclosure was made would not need to refer the same issue to the Inspector if they were aware the Commissioner had already made the referral.

- 10.171 Unlike the equivalent exemptions for Commonwealth agencies and the IGIS (see paragraph 5.69), the Inspector would not have a power to determine other circumstances in which the Commissioner does not have to refer a NACC corruption issue to the Inspector. This reflects the level of seriousness with which NACC corruption issues would be treated and is consistent with the Commissioner's obligation to refer all NACC corruption issues to the Inspector.

Clause 207—Mandatory referral—timing and information requirements

- 10.172 This clause would set out requirements for making a mandatory referral and providing relevant information to the Inspector.

Timing requirements

- 10.173 This clause would provide that the Commissioner or staff member of the NACC who is required to refer a NACC corruption issue must do so as soon as reasonably practicable after becoming aware of the issue, or within such other time as is allowed by the Inspector.

- 10.174 It is important that there is flexibility in the timing of referrals. The person who is subject to the requirement to make the referral will need sufficient time to obtain relevant information and consult with relevant stakeholders. On the other hand, it is important for the referral to be made to the Inspector as quickly as possible, so that it can take any necessary investigative steps to capture relevant evidence. The requirement for the referral to be made as soon as reasonably practicable achieves an appropriate balance between these competing interests.

Information requirements

- 10.175 This clause would outline the information that must be included when the Commissioner or staff member of the NACC makes a mandatory referral of a NACC corruption issue to the Inspector. The person making the referral would be required to include all information relevant to the corruption issue that is in their possession or control at the time the referral is made.
- 10.176 Where the Commissioner or staff member of the NACC becomes aware of further information that is relevant to the NACC corruption issue after a referral has been made, the person would be required to give that information to the recipient of the referral as soon as reasonably practicable.
- 10.177 These requirements are appropriate to enable the Inspector to receive all relevant information about a corruption issue that the NACC has in its possession. This means that the Inspector can proceed efficiently to make a decision about how to deal with the corruption issue, without needing to request basic information from the NACC.

Exceptions to information requirements

- 10.178 The information requirements under this clause would not apply if the Commissioner or staff member of the NACC has reasonable grounds to believe that the Inspector is already aware of the information, for example if the information has already been provided by another person within the NACC who has a mandatory referral obligation.
- 10.179 Further, the Inspector may advise the Commissioner or staff member of the NACC that they no longer require additional information to be provided. In these circumstances, the person's obligation to continue providing relevant information would cease. For example, the Inspector may have decided to deal with the corruption issue by referring it to another agency for consideration, in which case the Inspector would not need to receive further information on that matter.
- 10.180 This clause is subject to the requirements contained in clause 236 (Attorney-General's certificate in relation to international relations).

Clause 208—Effect of referral on continued actions

- 10.181 This clause would confirm that, in the absence of a stop action direction given by the Inspector under clause 43 (as modified by clause 211, see paragraphs 5.91 and 10.212), the NACC could continue to take action in relation to the conduct giving rise to the NACC corruption issue.

- 10.182 This clause would also provide that having referred a NACC corruption issue to the Inspector would not affect any other obligations the NACC may have in relation to the conduct giving rise to the NACC corruption issue under any other law, for example the PID Act.
- 10.183 The effect of a referral on continued actions under this clause operates in the same way as the equivalent provision for Commonwealth agencies and the IGIS referring corruption issues to the NACC (see paragraph 5.91).

Subdivision C—Dealing with NACC corruption issues

Clause 209—Inspector may deal with NACC corruption issues

- 10.184 This clause would provide that the Inspector may deal with a NACC corruption issue if it is formally referred or notified to the Inspector under Subdivision B, or that the Inspector otherwise becomes aware of through other means.
- 10.185 This clause would allow the Inspector to deal with NACC corruption issues falling within their jurisdiction. This means there must be an issue of whether a person is, has or may engage in corrupt conduct within the NACC, that adversely affects the NACC or that may otherwise be inappropriate for the Commissioner to deal with. Corrupt conduct would be defined in clause 8.
- 10.186 Subdivision B would provide for the Inspector to receive voluntary referrals of NACC corruption issues from any person as well as mandatory referrals of NACC corruption issues from the NACC. This clause would allow the Inspector to deal with NACC corruption issues that are referred in this way.
- 10.187 The Inspector would also be able to deal with NACC corruption issues that they become aware of in any other way, for example, through media reporting on the issue. This would allow the Inspector to act on their own initiative. The Inspector could deal with a NACC corruption issue on their own initiative in any circumstance.

Clause 210—How Inspector deals with NACC corruption issues

- 10.188 This clause would outline the ways in which the Inspector may decide to deal with a NACC corruption issue.
- 10.189 The arrangements for how the Inspector may deal with a NACC corruption issue would be broadly similar to how the Commissioner may deal with a corruption issue under Part 6.
- 10.190 As is the case for the Commissioner with corruption issues, there would be no requirement that the Inspector deal with every NACC corruption issue that is brought to their attention. There would be no circumstances in which the Inspector must decide not to deal with a NACC corruption issue. Instead, the Inspector may choose those issues that it is appropriate for the Inspector to deal with in some way.
- 10.191 This clause would provide a broad discretion for the Inspector to deal with NACC corruption issues in one or more of the following ways:
- by investigating the NACC corruption issue themselves;
 - by investigating the NACC corruption issue jointly with a Commonwealth agency or a State or Territory government entity;
 - by referring, for investigation, the corruption issue to the NACC, if the Inspector is satisfied that it is appropriate for the NACC to investigate the issue—for example, the Inspector could refer less serious NACC corruption issues, such as low-level unauthorised access to information, to the NACC and require the NACC to conduct an internal investigation; or

- by referring, for consideration, the NACC corruption issue to a Commonwealth agency, the NACC or a State or Territory government entity. This would enable the Inspector to refer a NACC corruption issue to another investigative agency for their consideration, ensuring that issues can be brought to the attention of the most appropriate investigative agency. This would not require the investigative agency to conduct their own investigation, noting that decision would be a matter for that agency.

10.192 This broad discretion to deal with NACC corruption issues in different ways is suitable to provide the Inspector with flexibility to consider the most appropriate approach to a NACC corruption issue. For example, the Inspector may have limited capacity to investigate all NACC corruption issues brought to its attention, and may have to prioritise according to the seriousness or urgency of particular matters. This discretion would ensure there are still suitable options to deal with other NACC corruption issues.

10.193 An investigation, including a joint investigation or an investigation referred to a Commonwealth agency would be defined as a *NACC corruption investigation*.

Serious or systemic threshold

10.194 As is the case for the Commissioner to investigate a corruption issue, the Inspector may only conduct, or continue to conduct, a NACC corruption investigation if the Inspector is of the opinion that the issue could involve corrupt conduct that is serious or systemic.

10.195 The serious or systemic threshold applies to NACC corruption issues in the same way as it does to corruption issues. This includes the terms ‘serious’ and ‘systemic’ having their ordinary meaning, and the ongoing threshold applying at all stages of a NACC corruption investigation. Further information about this threshold is outlined at paragraphs 6.12 to 6.24.

10.196 The Inspector would also be able to reconsider whether or how to deal with a NACC corruption issue at any time. For example, if the Inspector ceases an investigation as they no longer hold the opinion that the NACC corruption issue could involve serious or systemic corrupt conduct, the Inspector could decide to deal with the corruption issue in another way under this clause, including by making a referral to the NACC or an independent investigative agency.

Dealing with NACC corruption issues together

10.197 The Inspector may decide to investigate certain NACC corruption issues together. For example, the Inspector may receive multiple referrals in relation to conduct that may suggest systemic corruption within the NACC. This would allow the Inspector to investigate these issues together and establish whether there is systemic corruption. This would also allow the Inspector to investigate multiple instances of conduct by the same staff member of the NACC together.

Taking no action in relation to a NACC corruption issue

10.198 The Inspector may also decide to take no action in relation to a NACC corruption issue. This decision would be at the full discretion of the Inspector and is not subject to additional criteria or a mandatory process. This is intended to provide the Inspector with flexibility to manage their workload, maintain their focus on serious or systemic NACC corruption issues and promptly exclude unsubstantiated or unmeritorious referrals. This is consistent with equivalent provisions for the Commissioner in dealing with corruption issues (see clause 41 and paragraph 6.28).

10.199 The Inspector would not be under a duty to consider whether to deal with a NACC corruption issue, whether they are requested to do so by the person who referred the issue or by any other person, or in any other circumstances.

10.200 Regardless of whether the Inspector deals with a NACC corruption issue, the Inspector may refer an allegation or other information to another person or body that could more appropriately deal with the matter.

Clause 211—Other matters related to dealing with NACC corruption issues

10.201 This clause would set out:

- the Inspector’s powers to conduct preliminary investigations for a NACC corruption issue;

- requirements for the NACC to stop taking action with respect to NACC corruption issues in some circumstances;
- the Inspector’s power to oversee NACC corruption investigations conducted by the NACC;
- restrictions on the Inspector conducting investigations into NACC corruption issues where another Commonwealth integrity agency has previously concluded an investigation into the same conduct; and
- the Inspector’s power to make a public statement about a NACC corruption issue if they consider it is appropriate to avoid damage to a person’s reputation.

10.202 This clause would provide that Part 6 (other than clauses 40 and 41) applies to the Inspector when dealing with a NACC corruption issue. Clauses 40 and 41 only apply to the Commissioner because they provide the Commissioner with discretion to deal with corruption issues, matters that are dealt with for the Inspector and NACC corruption issues in clauses 209 and 210.

10.203 This clause applies the remainder of Part 6—which outlines the actions that can be taken by the Commissioner in dealing with corruption issues—to the Inspector when dealing with NACC corruption issues using a table of substituted references.

10.204 These substitutions enable the Inspector to step into the shoes of the Commissioner and use the same powers conferred on the Commissioner by Part 6 in a NACC corruption investigation. The substitutions also provide that the same restrictions imposed on the Commissioner in Part 6 apply to the Inspector.

Inspector may conduct preliminary investigations into NACC corruption issues

10.205 Clause 42 would apply to the Inspector as if they were the Commissioner.

10.206 The Inspector may conduct a preliminary investigation for the purposes of:

- confirming the existence or nature of a NACC corruption issue (including whether a NACC corruption issue could involve corrupt conduct that is serious or systemic); or
- to assist the Inspector to decide whether or how to deal with a NACC corruption issue.

10.207 As is the case for the Commissioner, the preliminary investigations power would allow the Inspector to seek information to assist them to decide how to deal with a matter based on credible and sufficient information.

Inspector may exercise certain Part 7 powers for preliminary investigation

10.208 For the purpose of a preliminary investigation, the Inspector would be able to exercise the following powers available to the Commissioner in Part 7:

- the power to direct the head of a Commonwealth agency to give information, or a document or thing, to the Inspector; and
- the power to serve a notice to produce on a person requiring the person to give information, or a document or thing, to the Inspector.

10.209 However, the Inspector would not be able to issue a post-charge or a post-confiscation notice to produce to conduct a preliminary investigation into a NACC corruption issue. This is consistent with the equivalent arrangements for the Commissioner, who also may not issue a post-charge or post-confiscation notice to produce for the purposes of a preliminary investigation into a corruption issue or potential corruption issue (see paragraphs 6.33 to 6.37 regarding the Commissioner’s preliminary investigation powers).

10.210 This means that the Inspector may not require the person to give the information, document or thing if it includes:

- the subject matter of any charge, or imminent charge, against the person; or
- the subject matter of any confiscation proceeding, or imminent confiscation proceeding, against the person.

10.211 It is not appropriate or necessary for the Inspector to have access to all of the Commissioner's powers available under Part 7, including the power to issue post-charge or post-confiscation application notices. The intrusive nature of these powers means that they are not appropriate in the context of confirming the existence of or nature of a NACC corruption issue or assisting the Inspector to decide how to deal with the issue.

Inspector may direct the Commissioner about further action

10.212 Clauses 43 and 44 would apply to the Inspector as if they were the Commissioner, and to the NACC as if it were a Commonwealth agency.

10.213 This means the Inspector would be able to direct the Commissioner to stop the NACC from taking action in relation to a NACC corruption issue, unless that action was permitted by the Inspector (see paragraphs 6.40 to 6.53 regarding the operation of clauses 43 and 44).

10.214 The Inspector would only be able to give this direction if it is required to ensure the effectiveness of any action the Inspector has taken, or might take, in relation to the NACC corruption issue, or any other NACC corruption issue. A direction could direct the NACC not to take particular actions set out in the direction, or not to take action of any kind in relation to a NACC corruption issue. This power could be used to prevent the NACC from taking action that may, for example, alert a suspect to the existence of a NACC corruption investigation, or result in the loss of evidence.

10.215 Where a stop action direction is issued that has the effect of stopping an investigation under the PID Act, an investigating officer of the NACC would not be required to complete an investigation under the PID Act (see paragraph 6.48).

Previous investigations into NACC corruption issues by another Commonwealth integrity agency

10.216 Clause 45 would apply to the Inspector as if they were the Commissioner. Clause 45, as it applies to the Commissioner, provides an additional threshold to the commencement of a corruption investigation where the Commissioner is aware that a Commonwealth integrity agency has previously concluded an investigation into a matter regarding the same conduct involving a public official that the Commissioner may investigate (see paragraphs 6.54 to 6.58 regarding clause 45 as it applies to the Commissioner).

10.217 This means that if another Commonwealth integrity agency has concluded an investigation into conduct giving rise to a NACC corruption issue, the Inspector may only investigate that same conduct if they are satisfied that it is in the public interest to do so.

10.218 To avoid doubt, the NACC is not a Commonwealth integrity agency. An investigation into conduct by the NACC itself would not enliven this additional public interest test.

Inspector may make public statements about NACC corruption issues.

10.219 Clause 48 would apply to the Inspector as if they were the Commissioner. This clause allows the Commissioner to make a public statement about a corruption issue at any time, where it is appropriate, desirable or necessary in the Commissioner's opinion to avoid damage to a person's reputation (paragraphs 6.67 to 6.72 elaborate further on the operation of this clause).

10.220 This means the Inspector would be able to make public statements about a NACC corruption issue if the Inspector were satisfied that it is appropriate and practicable to do so to avoid damage to a person's reputation.

10.221 The Inspector's ability to make public statements would be limited by the limitations in clauses 230 and 231 as if the statement were a disclosure under clause 230 (see paragraphs 11.66 to 11.70) The Inspector would therefore be restricted from making a public disclosure that includes:

- an opinion or finding about whether a particular person engaged in corrupt conduct;
- section 235 certified information; and
- information that the Inspector is satisfied is sensitive information (as defined in clause 227).

10.222 The Inspector would be required to:

- consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates about whether the information is sensitive information; and
- if the public statements included an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, the NACC or any other person—give the head of the agency or entity or other person concerned a reasonable opportunity to respond to the opinion, finding or recommendation and the proposed disclosure.

Investigations conducted by the NACC

- 10.223 Division 2 of Part 6 would apply to the Inspector as if they were the Commissioner, and to the Commissioner and NACC as if they were an agency head and a Commonwealth agency. Division 2 of Part 6, as it applies to the Commissioner, allows the Commissioner to oversee investigation corruption investigations conducted by Commonwealth agencies following a referral from the Commissioner, request and comment on the agency’s reports, make additional recommendations and follow-up on the agency’s implementation of recommendations (see paragraph 6.73-6.96).

Overseeing NACC investigation

- 10.224 This means the Inspector may, if they decide to deal with a NACC corruption issue by referring it to the NACC for investigation, oversee the Commissioner’s investigation of the NACC corruption issue. The Inspector would be permitted to direct the Commissioner in relation to the investigation (see clause 51).

Progress reports and completion reports

- 10.225 As is the case for the Commissioner with Commonwealth agencies (see clause 52 and paragraph 6.79), the Inspector may require the Commissioner to provide:

- progress reports from time to time; or
- a completion report at the end of the investigation.

Comments and recommendations of the Inspector

- 10.226 The Inspector may, consistent with the equivalent provisions for the Commissioner, comment on a completion report provided by the Commissioner and may provide additional recommendations in relation to the report. The Inspector may choose to do this if they consider the Commissioner’s completion report or the recommendations they make are deficient (see clause 53 and paragraph 6.84).
- 10.227 The Inspector would have to give any person or entity (including the NACC) that is the subject of an adverse comment or recommendation the opportunity to be heard in relation to that comment or recommendation.

Follow-up action by the Inspector

- 10.228 The Inspector may also request the Commissioner to provide the details of any action the Commissioner has taken, or proposes to take, in relation to:
- a recommendation included in the report; or
 - a recommendation made by the Inspector in relation to the report.
- 10.229 The Commissioner would be required to comply with the request (clause 54). This would allow the Inspector to ensure their recommendations are being implemented satisfactorily, and if they are not, to escalate the matter to the Minister.
- 10.230 If the Inspector is not satisfied with the Commissioner’s response, the Inspector may refer the matter to the Minister. The Inspector may also provide information (other than sensitive information or section 235 certified information) about the matter to the President of the Senate and the Speaker of the House of Representatives for presentation to the Parliament.

Division 4—Investigating and reporting by Inspector

- 10.231 This Division would set out:
- the Inspector’s powers to conduct NACC corruption investigations and NACC complaint investigations; and
 - the requirements for reporting on NACC corruption investigations and NACC complaint investigations.
- 10.232 The preceding Division set out the Inspector’s discretion and powers to deal with NACC corruption issues. This Division would set out the Inspector’s powers to investigate NACC corruption issues involving serious or systemic corrupt conduct, and to investigate external complaints regarding the conduct or activities of the NACC or its staff.
- 10.233 Investigating external complaints against the NACC would be another of the Inspector’s key functions. There may be instances where, for example, the NACC or its staff may not have engaged in corrupt conduct, but may have exercised the NACC’s powers unfairly or without proper authorisation. Alternatively, witnesses may be dissatisfied with their treatment during a corruption investigation. It is appropriate to provide an avenue for external parties to bring a complaint about such conduct, and for the Inspector to have oversight over these matters, because it would ensure the Commissioner is accountable for exercising their extraordinary powers fairly, proportionately, and lawfully.
- 10.234 The Inspector would have full discretion to decide whether to deal with a complaint it receives about the NACC or its staff. While this Division would set out the Inspector’s powers to investigate a complaint, there would be no requirement for the Inspector to deal with a complaint, or to deal with them in a particular way. This would provide flexibility for the Inspector to determine the most appropriate approach to each particular complaint (including by taking no action).
- 10.235 The Inspector would be able to exercise certain powers conferred on the Commissioner under Part 7 to investigate NACC corruption issues and complaints about the conduct of the NACC or its staff members. These investigations would be referred to as NACC corruption investigations and NACC complaint investigations, respectively.
- 10.236 To undertake NACC corruption investigations, the Inspector has the power to:
- direct the Commissioner or an agency head to produce information, documents or things;
 - issue a notice to produce, including post-charge and post-confiscation application notices, to any person;
 - hold hearings, including issuing summonses and requiring witnesses to answer questions or produce information, documents or things;
 - apply for orders to hold a person in contempt of the Inspector;
 - apply for orders requiring a person to deliver up their travel documents;
 - apply for a warrant to arrest a witness; and
 - enter and search Commonwealth premises (including those of the NACC) without a warrant.
- 10.237 To undertake NACC complaint investigations, the Inspector has the power to:
- direct the Commissioner or an agency head to produce information, documents or things;
 - issue a notice to produce to any person, but not a post-charge or post-confiscation application notice;
 - hold hearings, including issuing summonses and requiring persons to answer questions or produce information, documents or things;
 - apply for orders to hold a person in contempt of the Inspector; and
 - enter and search Commonwealth premises without a warrant.

- 10.238 The Inspector would not have access to the full suite of investigation powers available to the Commissioner to conduct NACC corruption investigations and NACC complaint investigations. The Inspector would not be able to use:
- the Commissioner’s coercive search powers under Division 7 of Part 7. This means the Inspector could not apply for a warrant to enter and search any premises. However, the Inspector may enter and search certain Commonwealth premises without a warrant; and
 - the Commissioner’s covert investigation powers, for example under the TIA Act and the SD Act. The intrusive nature of these covert powers, and the risks of compromising sensitive operational information of the NACC or other Commonwealth agencies through their use, means they are not appropriate in the context of investigating corruption issues pertaining only to the NACC. They are also not appropriate to use to conduct NACC complaint investigations, because their intrusiveness is disproportionate to the seriousness of the conduct under investigation.
- 10.239 The Commonwealth Ombudsman would retain an oversight role over the NACC’s use of covert powers.
- 10.240 The Inspector would have more limited powers to conduct a NACC complaint investigation as compared to a NACC corruption investigation. In particular, the Inspector could not use the full range of coercive powers available to investigate NACC corruption issues to investigate a complaint. This would ensure the Inspector’s powers to investigate are proportionate to the seriousness of the conduct under investigation.
- 10.241 The Inspector would be required to prepare reports on all completed NACC corruption investigations and NACC complaint investigations. Both types of reports would be referred to as a **NACC investigation report**. The Inspector would be able to make findings of fact in NACC investigation reports, including findings of corrupt conduct where the report relates to a NACC corruption investigation, but not make determinations of criminal liability.
- 10.242 Arrangements for preparing, distributing and tabling reports would be consistent, regardless of whether the report was on a NACC corruption investigation or a NACC complaint investigation. The Inspector’s reporting regime would also broadly mirror the Commissioner’s reporting regime. However, a key difference between the Inspector’s and Commissioner’s reporting regime is that where a report is required to be tabled in Parliament, the Inspector is responsible for causing the report to be tabled. This means that, unlike the Commissioner’s investigation reports, the Minister has no role in causing a NACC investigation report to be tabled in Parliament. This reflects the Inspector’s role as an independent officer of the Parliament.
- 10.243 NACC investigation reports would be required to be tabled in Parliament where a public hearing is held in the course of the investigation to which the report relates. The Inspector would also be able to publish reports if satisfied it is in the public interest to do so.
- 10.244 Given the scope of the Inspector’s jurisdiction and the nature of the information contained in NACC investigation reports, safeguards would apply to protect sensitive information (as defined in clause 227) and information subject to an Attorney-General’s certificate issued under clause 235.
- 10.245 The Inspector would be required to comply with procedural fairness requirements, by ensuring individuals or agencies (including the NACC) that are to be the subject of an adverse finding, opinion or recommendation are given an opportunity to respond prior to that finding, opinion or recommendation being included in a NACC investigation report.

Subdivision A—Investigations by Inspector

Clause 212—Application of Division

- 10.246 This clause would provide that this division would apply to:

- the Inspector's investigations of NACC corruption issues that could, in the Inspector's opinion, involve corrupt conduct that is serious or systemic, whether conducted by the Inspector or jointly by the Inspector and a Commonwealth agency, the NACC or a State or Territory government entity; and
- an investigation into a complaint made in relation to the conduct or activities of the NACC or a staff member of the NACC. Such an investigation would be a NACC complaint investigation.

10.247 As outlined in paragraph 10.240, this Division would confer more limited powers on the Inspector to conduct NACC complaint investigations than NACC corruption investigations.

Clause 213—Conduct of investigations generally

10.248 This clause would provide for the Inspector to conduct NACC corruption investigations and NACC complaint investigations in such manner as they see fit. This would ensure the Inspector has independence to determine how to conduct their investigations.

Clause 214—Inspector's powers to investigate

10.249 This clause would set out the Inspector's powers in performing NACC corruption investigations and NACC complaint investigations.

10.250 This clause would set out:

- the Inspector's powers to issue directions to produce and notices to produce for the purpose of a NACC corruption investigation and a NACC complaint investigation;
- the Inspector's powers to hold hearings and summon persons to appear at hearings to conduct a NACC corruption investigation and a NACC complaint investigation;
- the Inspector's obligations regarding the use and disclosure of investigation materials;
- the Inspector's obligations regarding the retention and return of documents and things produced; and
- the Inspector's powers to enter and search certain Commonwealth premises without a warrant, including the seizure and return of documents and things from those premises.

10.251 Certain powers would only be available for the Inspector to conduct a NACC corruption investigation, and would not be available for a NACC complaint investigation. These powers are:

- the ability to issue post-charge and post-confiscation application notices to produce and summons; and
- the ability to apply for warrants requiring the delivery of travel documents or the arrest of witnesses.

10.252 These powers would not be available to the Inspector because their intrusive nature means they are disproportionate to the seriousness of the conduct under examination in a NACC complaint investigation.

10.253 A NACC complaint investigation, for example, would inquire into the conduct of staff members of the NACC in their treatment of witnesses during a corruption investigation. As an alternative example, it may inquire into the conduct of a corruption investigation where a person who made a NACC disclosure is dissatisfied with the way the matter was handled. The powers made available to the Inspector to conduct NACC complaint investigations are sufficient for this purpose. Conversely, the Inspector may exercise more coercive powers to conduct NACC corruption investigation because of the increased seriousness of the conduct under investigation – which may include criminal conduct.

10.254 This clause would apply Divisions 2 to 6 and 8 of Part 7, and clauses 117, 118, 120, and 267, to the Inspector, NACC corruption investigations and NACC complaint investigations using a table of substituted references.

10.255 These substitutions would enable the Inspector to step into the shoes of the Commissioner to exercise certain Part 7 powers in order to conduct a NACC corruption investigation or a NACC complaint investigation.

10.256 This clause would not apply the remainder of Division 7 of Part 7, except for clauses 117, 118 and 120. This is because Division 7 provides for the Commissioner's coercive search powers. As outlined above (at paragraph 10.238), the Inspector will not have access to the full suite of the Commissioner's search powers, but will have limited powers to enter and search Commonwealth premises without a warrant.

Inspector may direct the Commissioner to produce information, documents or things

10.257 Clause 57 would apply to the Inspector as if they were the Commissioner and to the Commissioner as if they were an agency head. As it applies to the Commissioner, clause 57 allows the Commissioner to obtain information, documents and things relevant to a corruption investigation from a Commonwealth agency (see paragraph 7.13 regarding the operation of clause 57).

10.258 This means the Inspector may, by writing, direct the Commissioner to produce information, documents or things if the Inspector has reasonable grounds to believe the Commissioner has information, documents or things relevant to a NACC corruption investigation or NACC complaint investigation.

10.259 The Commissioner would be required to comply with the request as soon as practicable.

Inspector may issue notices to produce

10.260 Clauses 58 to 61 would apply to the Inspector as if they were the Commissioner, and to NACC corruption investigations and NACC complaint investigations as if they were corruption investigations. These clauses, as they apply to the Commissioner, allow the Commissioner to compel a person to provide information, documents or things relevant to a corruption investigation, and specify the period in which a person must comply with the notice. The provisions also set out offences for failure to comply with a notice or providing false or misleading information in response to a notice (refer to paragraphs 7.19-7.50 regarding the operation of clauses 58 to 61).

10.261 This means the Inspector may, by writing, require a person to give the Inspector information, documents or things if the Inspector has reasonable grounds to suspect the person has information, documents or things relevant to a NACC corruption investigation or NACC complaint investigation.

10.262 Clauses 60 to 61 would apply to notices to produce issued by the Inspector. This means that it would be an offence to fail to comply with an Inspector's notice to produce, or to provide false or misleading information or documents in response to a notice to produce (see in particular paragraphs 7.35 to 7.50 for the operation of these offences).

10.263 The offence in clause 70 would also apply to the Inspector's notices to produce. This means it would be an offence to destroy evidence, information, documents or things required in an Inspector's notice to produce (see paragraph 7.98 for an explanation of this offence).

Post-charge or post-confiscation application notices not available for NACC complaint investigations

10.264 This clause would not permit the Inspector to issue a post-charge or a post-confiscation application notice for the purpose of a NACC complaint investigation. The Commissioner and Inspector may, for the purposes of corruption investigations and NACC corruption investigations, require a person to provide information, documents or things that would disclose the subject matter of any charge or confiscation proceeding against the person, or where such a charge or proceeding were imminent. These powers are necessary to ensure that corruption investigations and NACC corruption investigations are not delayed while charges or proceedings are resolved (see paragraphs 7.25 to 7.27 regarding post-charge and post-confiscation application notices, including why they are necessary to conduct these investigations).

10.265 It is not necessary for the Inspector to issue post-charge and post-confiscation application notices for a NACC complaint investigation because a NACC complaint investigation would look into, for example, the NACC's processes and procedures in conducting a corruption investigation where a complainant is dissatisfied with the way that investigation was conducted, but no corrupt conduct is alleged. A NACC complaint investigation, while potentially serious, would not be expected to have the same level of urgency as a NACC corruption investigation. The Inspector would still be able to effectively conduct a NACC complaint investigation if they needed to wait to access certain information until charges or proceedings against a person were resolved. Accordingly, the Inspector's powers to investigate are proportionate to the seriousness and urgency of the conduct under investigation.

Inspector may hold hearings

- 10.266 Clauses 62 to 81 would apply to the Inspector as if they were the Commissioner and to NACC corruption investigations and NACC complaint investigations as if they were corruption investigations. These provisions allow the Commissioner to hold hearings for the purposes of a corruption investigation, including issuing summonses and requiring information, documents or things (see paragraphs 7.57 to 7.118 regarding the operation of clauses 62 to 81).
- 10.267 This means the Inspector may hold a hearing for the purposes of a NACC corruption investigation or a NACC complaint investigation in the same way as the Commissioner could.
- 10.268 The Inspector may summon persons to attend a hearing for the purpose of a NACC corruption investigation or a NACC complaint investigation.
- 10.269 The offences in clauses 68 to 72, and clause 81, would apply to summonses and hearings issued or held by the Inspector (see, in particular, paragraphs 7.87 to 7.118 for the operation of these offences). This means that it would be an offence to:
- fail to attend a hearing if summonsed by the Inspector;
 - fail to give information, or produce documents or things, at a hearing if summonsed by the Inspector;
 - destroy documents or things if the Inspector requires those documents or things at a hearing; or
 - fail to take an oath, make an affirmation or answer a question at a hearing if the Inspector so requires.
- 10.270 *Post-charge or post-confiscation application summons not available for NACC complaint investigations*
- 10.271 This clause would not permit the Inspector to issue a summons to a person charged with an offence, the subject of confiscation proceedings, or against whom such a charge or proceeding was imminent, for the purpose of a NACC complaint investigation.
- 10.272 However, the Inspector would be permitted to issue a summons to a person charged with an offence, the subject of confiscation proceedings, or against whom such a charge or proceeding was imminent for the purposes of a NACC corruption investigation. This is necessary to ensure NACC corruption investigations are not delayed while charges or confiscation proceedings are resolved (see paragraphs 7.64 to 7.67 regarding post-charge and post-confiscation application summons powers).
- 10.273 Due to the nature of the conduct being examined in a NACC complaint investigation (see paragraphs 10.253 and 10.265), it is not necessary for the Inspector to issue post-charge and post-confiscation application summonses for this purpose. The Inspector could still effectively investigate NACC complaints if required to wait until charges or confiscation proceedings were resolved. This limitation ensures the Inspector's powers to investigate are proportionate to the seriousness of the conduct under investigation and the urgency of the circumstances.

Inspector may apply for orders to hold a person in contempt

- 10.274 Clauses 82 to 86 would apply to the Inspector as if they were the Commissioner or the NACC. Clauses 82 to 83 set out the conduct that would amount to contempt of the NACC and provide for the Commissioner to apply to a court to hold a person in contempt of the NACC. Clauses 84 to 86 provide for how the contempt proceedings may be conducted, allow the Commissioner to direct a constable or authorised officer to detain a person in contempt, and permit the Commissioner to withdraw a contempt application at any time (see paragraphs 7.164 to 7.187 regarding the provisions for contempt of the NACC).
- 10.275 This would allow the Inspector to apply for orders to hold a person in contempt of the Inspector under the same circumstances, in the same manner, and with the same consequences, as for the Commissioner under clauses 82 to 86.
- 10.276 A reference to an authorised officer in clause 85 would be taken to be a reference to an authorised officer appointed by the Inspector under clause 267, as modified by clause 214 (see paragraphs 12.109 to 12.113 regarding the operation of clause 267). As a consequence, clause 268 (concerning the identity cards of authorised officers) would apply to authorised officers of the Inspector.

NACC corruption investigations—Inspector may apply for orders requiring delivery of travel documents

- 10.277 Clauses 88 and 89 would apply to the Inspector as if they were the Commissioner, only for the purpose of a NACC corruption investigation. Clause 88 permits the Commissioner to apply to a Judge of the Federal Court for an order that a witness deliver their travel documents to the Commissioner. Clause 89 permits a Judge to make certain orders, including that a witness show cause as to why they should not have to deliver their documents, and that a witness must deliver their travel documents to the Commissioner (see paragraphs 7.193 to 7.205 regarding the operation of these clauses).
- 10.278 This means that the Inspector may apply for orders requiring a person to deliver up their travel documents under the same circumstances and in the same manner as the Commissioner under clauses 88 and 89.
- 10.279 The power for the Federal Court to order a person to deliver their travel documents to the Inspector would be a significant power. It would affect a person's freedom of movement, and has the potential to cause hardship if the person were prevented from leaving Australia. It is appropriate that the Inspector may only apply for these orders for the purpose of investigating serious or systemic corrupt conduct within or adversely affecting the NACC (which could include criminal conduct).
- 10.280 This power would not be available to the Inspector for the purpose of a NACC complaint investigation. The Inspector is able to effectively investigate conduct or activities of the NACC that do not constitute serious or systemic corrupt conduct without the ability to prevent persons from leaving Australia. This is proportionate to the seriousness and urgency of the circumstances under investigation.

NACC corruption investigations—an authorised officer may apply for a warrant to arrest a witness

- 10.281 Clauses 90 to 92 would apply to a NACC corruption investigation as if it was a corruption investigation. These clauses permit an authorised officer (appointed by the Commissioner) to apply to a superior court judge for a warrant to arrest a person who may abscond, evade service or leave Australia to avoid appearing at a hearing, and provide for the execution of the warrant and the judge's powers in relation to the person arrested (see paragraphs 7.206 to 7.221 regarding provisions for the arrest of witnesses).
- 10.282 An authorised officer appointed by the Inspector would be able to apply for a warrant to arrest a witness for a NACC corruption investigation under the same circumstances, and in the same manner, as would be the case for a corruption investigation.

- 10.283 A reference to an authorised officer would be taken to be a reference to a person appointed by the Inspector under clause 267, which provides for the Commissioner to appoint an authorised officer. Clause 214 would modify clause 267 to allow the Inspector to also appoint an authorised officer under that clause (see paragraphs 12.109 to 12.113).
- 10.284 An authorised officer would only be permitted to apply for a warrant to arrest a witness for the purpose of a NACC corruption investigation. This power would not be available for the purpose of a NACC complaint investigation because the Inspector would not be investigating serious or systemic corrupt conduct. This would ensure the Inspector's powers to investigate are proportionate to the seriousness of the conduct under investigation.

Inspector may enter certain premises without a warrant

- 10.285 Clauses 117, 118 and 120 would apply to the Inspector as if they were the Commissioner, and to NACC corruption investigations or NACC complaint investigations as if they were corruption investigations. Clauses 117 and 118, as they apply to the Commissioner, permit the Commissioner or another authorised officer of the NACC to enter and search a place occupied by a Commonwealth agency and require the Commissioner to issue receipts for items seized without a warrant. Clause 120 sets out requirements for the Commissioner to return items seized without a warrant (see paragraphs 7.434 to 7.445, and 7.452 to 7.480 regarding the operation of these provisions).
- 10.286 This clause would permit the Inspector, for the purpose of a NACC corruption investigation or a NACC complaint investigation, to exercise the power to enter places occupied by Commonwealth agencies and the NACC, and carry on an investigation without a warrant, in the same manner as the Commissioner may under clause 117. Authorised officers of the Inspector would also be permitted to exercise this power.
- 10.287 The Inspector must issue receipts for documents and things seized without a warrant in the same manner as the Commissioner must under clause 118.
- 10.288 The Inspector must comply with clause 120, regarding the use and return of documents and things seized without a warrant under clause 117, in the same manner as the Commissioner must when conducting a corruption investigation.

Subdivision B—Reporting on NACC corruption investigations and NACC complaint investigations

Clause 215—Report on NACC corruption investigation or NACC complaint investigation

- 10.289 This clause would require reports to be prepared on all completed NACC corruption investigations and NACC complaint investigations, provide that certain content must be included in those reports, and set out some of the matters on which recommendations may be made.

Inspector must prepare a NACC investigation report

- 10.290 This clause would require the Inspector to prepare a report after completing a NACC corruption investigation or a NACC complaint investigation. Both types of reports would be referred to as a NACC investigation report.
- 10.291 It would be a matter for the Inspector to determine when a NACC investigation is completed. There would be circumstances in which it is appropriate for the Inspector to defer the completion of an investigation and the subsequent preparation of the report—for example, pending the outcome of a related criminal, disciplinary or administrative process, so as to not prejudice that process.

Contents of a NACC investigation report

- 10.292 NACC investigation reports would be required to set out:
- the Inspector's findings or opinions on the NACC corruption issue or the complaint;
 - a summary of the evidence and other material on which those findings or opinions are based;
 - any recommendations that the Inspector thinks fit to make; and

- if recommendations are made—the reasons for those recommendations.

- 10.293 Clause 219 would require the Inspector to give certain persons an opportunity to respond before including any critical opinions, findings or recommendations in the report. Clause 219 may also require additional information to be included in a NACC investigation report in certain circumstances.
- 10.294 Subclauses 215(3) and (4) would apply to NACC investigation reports relating to a NACC corruption investigation.
- 10.295 In setting out the Inspector’s findings or opinions on the NACC corruption issue, if the Inspector forms the opinion that a person whose conduct has been investigated has engaged in corrupt conduct of a serious or systemic nature, the Inspector must include a statement to that effect in the NACC investigation report. This reflects the relevant ‘serious or systemic’ threshold required for the Inspector to investigate a corruption issue (see Inspector’s functions under clause 184 and at paragraph 10.59). The Inspector would therefore be required to clarify the nature of the corrupt conduct in their report.
- 10.296 For the avoidance of doubt, if the Inspector forms the opinion that a person whose conduct has been investigated has not engaged in corrupt conduct, the Inspector must set out that opinion in the report. This would balance the Inspector’s function to investigate serious or systemic corruption in, or adversely affecting, the NACC with the need to protect against undue reputational damage where a person’s conduct has been investigated and no findings of corrupt conduct have been made.
- 10.297 Subclause 215(5) would apply to NACC investigation reports relating to both NACC corruption investigations and NACC complaint investigations. This subclause would assist in safeguarding against reputational damage in circumstances where a person gives evidence at a hearing and is not the subject of any findings or opinions. The Inspector may include a statement to that effect in the NACC investigation report if the Inspector is satisfied that it is appropriate and practicable to do so to avoid damage to the person’s reputation.
- 10.298 The Inspector may include such a statement, for example, in circumstances where a person’s involvement in a NACC corruption investigation is publicly known, and their mere involvement in the investigation put their reputation at risk. This may arise in circumstances where a person has given evidence at a public hearing, or where a person’s involvement in a private hearing was reported on in the media. Such a statement would likely not be appropriate in circumstances where its inclusion would draw attention to the person’s involvement in the investigation, and their involvement would not otherwise have been publicly known.
- 10.299 The protection against reputational damage would extend to protecting the reputation of corporations and other legal persons, as well as their representatives. For example, the head (or another representative) of a corporation may give evidence at hearing in relation to the manner in which the corporation’s services were engaged by a staff member of the NACC. Where either or both of the corporation, or the head of the corporation, are not the subject of any findings or opinions in relation to the NACC corruption investigation, the Inspector may include a statement to that effect in the NACC investigation report if the Inspector is satisfied that it is appropriate and practicable to do so to avoid damage to the person’s reputation.

Recommendations that may be made

- 10.300 This clause would set out the kinds of recommendations that may be included in a NACC investigation report, without limiting the recommendations that may be made.
- 10.301 In addition to any other recommendations the Inspector sees fit to make, the Inspector could make recommendations on one or more of the following matters:
- taking action in relation to a person, in accordance with relevant procedures, with a view to improving their performance;
 - terminating the employment of a person in accordance with relevant procedures;
 - taking action to rectify or mitigate the effects of the conduct of a person;

- adopting measures to remedy deficiencies in the policy, procedures or practices that facilitated:
 - the employment or engagement of an unsuitable person;
 - a person engaging in corrupt conduct; or
 - the failure to detect corrupt conduct engaged in by a person.

Section does not limit what may be included in a NACC investigation report

- 10.302 This clause would not limit what may be included in a NACC investigation report. This provides the Inspector with the flexibility to tailor findings, opinions and recommendations in the context of the specific investigation, noting the diverse nature of NACC corruption issues that may come before the Inspector.
- 10.303 For example, paragraphs 215(6)(a) and (b) would enable the Inspector to make recommendations to take action or terminate the employment of a person ‘in accordance with relevant procedures’. This would be subject to any procedural fairness requirements that may apply under those procedures. Where the relevant procedures require that further procedural fairness steps be taken, it would be open to the Inspector to instead recommend that an agency:
- *consider* taking action or terminating the employment of a person, or
 - consider *the person’s conduct* and any appropriate action or sanction including termination.

Clause 216—Effect of findings or opinions about corrupt conduct

- 10.304 This clause would apply if a NACC investigation report includes a finding or opinion that a person has engaged, is engaging or will engage in corrupt conduct, or conduct that could constitute or involve corrupt conduct.
- 10.305 This clause would provide the finding or opinion does not constitute a finding or opinion that the person is guilty of or has committed, is committing or will commit an offence. This recognises that the Inspector would not be able to make findings of criminal guilt or liability. Such a finding would be a matter for a court to determine.

Clause 217—Excluding certain information from NACC investigation report

- 10.306 This clause would require the Inspector to exclude certain material from a NACC investigation report. Exclusion of this information would protect information that ought not to be made public, or disclosed more widely, from being disclosed in circumstances where a NACC investigation report is:
- required to be tabled or is tabled at the discretion of the Inspector or the Minister (see clause 221);
 - published by the Inspector (see clause 222); or
 - given to a person other than the Commissioner, CEO or Minister (see clause 220).
- 10.307 Any information that is excluded from a NACC investigation report must be included in a protected information report under clause 218.
- 10.308 The Inspector would be required to exclude the following types of information from a NACC investigation report:
- section 235 certified information (see clause 235); and
 - information that the Inspector is satisfied is sensitive information (as defined under clause 227).
- 10.309 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information to certain persons would be contrary to the public interest. The Inspector would be required to exclude information that is subject to such a certificate from a NACC investigation report. This would ensure certain classes of information would be protected from disclosure, without requiring the Inspector to be satisfied that the information is sensitive information.

10.310 The definition of sensitive information is explained at paragraph 11.9, including, for example, information the disclosure of which:

- could prejudice the security, defence or international relations of Australia;
- would prejudice the proper enforcement of the law or the fair trial of any person; or
- would unreasonably disclose a person's personal affairs.

10.311 In determining whether the Inspector is satisfied that information constitutes sensitive information for the purpose of its exclusion from a NACC investigation report, the Inspector must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. Where the information relates to the NACC or a staff member of the NACC, the Inspector must instead consult with the Commissioner. This ensures that the Inspector is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.

Clause 218—Protected information report

10.312 This clause would require the Inspector to prepare a protected information report, where the Inspector has excluded information from a NACC investigation report under clause 217. The preparation of the report would allow all information relevant to the corruption investigation to be provided to the Commissioner, the CEO, the Minister and certain other recipients where relevant (see clause 220), without disclosing its content to the public.

10.313 The protected information report must set out the excluded information, and the reasons for excluding the information from the NACC investigation report. The requirement to include the reasons for excluding the information from the investigation report would ensure any decision to protect information from disclosure is appropriately justified.

10.314 The requirement for certain information to be included in a protected information report would not impliedly preclude the Inspector from including other information in the protected information report. For example, the Inspector could:

- prepare a short protected information report that consists solely of the excluded information and the reasons why that information was excluded from the investigation report—which could be appropriate where there is only a small volume of excluded information;
- include contextual information that would assist a reader to understand how the information that has been excluded from the investigation report relates to or informs the matters dealt with in the investigation report; or
- prepare the protected information report in a manner that replicates the investigation report, with the addition of the excluded information and the required reasons as to why that information was excluded from the investigation report.

10.315 If a protected information report is given to a person, the person must not disclose the report, or information contained in the report, to the public or a section of the public. This would be an offence under clause 234.

Clause 219—Opportunity to respond must be given before including certain information in NACC investigation report

10.316 This clause would require the Inspector to comply with certain procedural fairness obligations before including an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, the NACC, or any other person in a NACC investigation report.

- 10.317 The Inspector would be required to provide the head of the agency, the head of the entity, the Commissioner, or the person concerned a statement setting out the opinion, finding or recommendation, and a reasonable opportunity to respond to the opinion, finding or recommendation. This would ensure that persons who are subject to findings of corrupt conduct or other critical findings, opinions or recommendations have the opportunity to respond. This requirement is intended to extend to an opinion, finding or recommendation that is critical of a corporation, noting a corporation's status as a legal person.
- 10.318 This clause would not prescribe what constitutes a reasonable opportunity to comment given this will vary depending on the circumstances—for example a reasonable opportunity to comment on a single adverse opinion in a very short report will be different to a case involving a lengthy report and multiple, inter-connected adverse findings.
- 10.319 This clause would provide the response may be given by the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head. Where the critical opinion, finding or recommendation relates to the NACC, the response may be given by the Commissioner, or a person authorised to respond by the Commissioner. Where the critical opinion, finding or recommendation relates to another person, the response may be given by the person concerned, or a person representing the person concerned, with their approval.
- 10.320 Where the opinion or finding is that a person has engaged in corrupt conduct, and the person provides a response to the finding or opinion, the Inspector must include in the NACC investigation report a summary of the substance of the response, if the person requests the Inspector to do so. The requirement limits the Inspector's summary to the substance of the person's response, noting a person's response may identify other individuals or raise information that would be inappropriate to include in a NACC investigation report.
- 10.321 The requirement is intentionally limited to circumstances where the person requests a summary of their response be included, noting a person's response may raise information they do not wish to be made public. For example, a person's response may refer to their mental health, financial circumstances, or other personal information as factors contributing to or explaining their conduct, or as factors that the Inspector should consider before finalising or publishing their report.
- 10.322 Subclause 219(4) would apply where the Inspector includes a summary of the substance of a person's response in the NACC investigation report. The requirement to publish the summary would be subject to clause 217, which would require certain information to be excluded from NACC investigation reports. The Inspector would be required to exclude section 235 certified information (see clause 235), and information that the Inspector is satisfied is sensitive information (defined under subclause 227(3)) from the summary. The Inspector would also be required to comply with the consultation requirements under clause 217, in determining whether the Inspector is satisfied that information is *sensitive information* for the purpose of excluding the information from a NACC investigation report.
- 10.323 Subclause 219(5) would apply where the Inspector includes a summary of the substance of a person's response in the NACC investigation report. The Inspector must not include any information in the summary that would identify any person who, in the opinion of the Inspector, has not engaged in corrupt conduct. This would avoid risking undue damage to the person's reputation as a result of being associated with a finding of corrupt conduct in the report.
- 10.324 However, the Inspector may include information that would identify such a person if the Inspector:
- is satisfied that it is necessary to do so in the public interest;
 - is satisfied that doing so will not cause unreasonable damage to the reputation, safety or wellbeing of the person; and
 - includes in the report a statement that, in the opinion of the Inspector, the person has not engaged in corrupt conduct.
- 10.325 This clause would not by implication limit, exclude or exhaust the requirements of procedural fairness that would apply to an investigation generally, for example in connection with the making of an adverse finding in relation to a person at a public hearing.

Clause 220—Inspector to give copies of reports to certain persons

- 10.326 This clause would require the Inspector to provide NACC investigation reports to the Commissioner, the CEO, and the Minister. If a protected information report is prepared in relation to the investigation, the Inspector must also provide the protected information report to the Commissioner, the CEO, and the Minister. Where a NACC investigation report relates to a NACC corruption investigation concerning the conduct of the Minister, the NACC investigation report and any protected information report would instead be given to the Prime Minister. This would occur in limited circumstances, for example, where the investigation concerns whether the Minister has engaged in corrupt conduct adversely affecting the honest or impartial exercise of powers of the NACC.
- 10.327 Subclause 220(3) would set out a list of additional recipients who must receive a copy of a NACC investigation report, and may receive a copy of a protected information report in certain cases. The persons are:
- for a NACC corruption investigation concerning the conduct of a current Minister—the Prime Minister;
 - for a NACC corruption investigation concerning the conduct of a staff member of a Commonwealth agency (including a parliamentary office)—the head of the agency and the relevant Minister or presiding officer, as set out in subclause 220(4);
 - for a NACC corruption investigation concerning the conduct of the head of a Commonwealth agency—the relevant Minister or presiding officer, as set out in subclause 220(4) and, where the head of the Commonwealth agency is an agency head (within the meaning of the *Public Service Act 1999*) the Australian Public Service Commissioner;
 - for a NACC corruption investigation concerning the conduct of a senator—the President of the Senate; or
 - for a NACC corruption investigation concerning the conduct of a member of the House of Representatives—the Speaker of the House of Representatives.
- 10.328 Subclause 220(4) would provide, for the purposes of subclause 220(3), the person to which the report is to be given is:
- if the Commonwealth agency is a Department of the Parliament established under the *Parliamentary Service Act 1999* (paragraph (a)):
 - for the Department of the Senate—the President of the Senate;
 - for the Department of the House of Representatives—the Speaker of the House of Representatives;
 - otherwise—both the President of the Senate and the Speaker of the House of Representatives;
 - if the Commonwealth agency is established or continued in existence by an Act and paragraph (a) does not apply—the Minister administering that Act (paragraph (b)); or
 - if the Commonwealth agency is a Commonwealth entity and neither paragraph (a) nor paragraph (b) applies—the Minister having general responsibility for the activities of the entity (paragraph (c)).
- 10.329 The effect of subclauses 220(3) and (4) is to ensure a copy of the NACC investigation report is given to other persons who have responsibility or oversight for an agency, where it is appropriate and necessary for them to receive a copy of the findings or recommended action contained in the report. In many cases, it would only be appropriate for the report to be provided to the Minister, the Commissioner and the CEO, given a report’s findings and recommendations will most often focus on the NACC and its staff members. However, there may be instances where the findings and recommended action are relevant to another Commonwealth agency, for example, where a staff member has engaged in corrupt conduct adversely affecting the honest or impartial exercise of the powers of a staff member of the NACC.

- 10.330 Recommendations contained in the report may relate to taking action in relation to the staff member of the other Commonwealth agency, or adopting measures to remedy deficiencies in the policy, procedures or practices of the Commonwealth agency. Providing a copy of the investigation report to the head of that agency and the relevant Minister would ensure findings and recommendations are brought to the attention of those responsible for the agency and able to action them.
- 10.331 In some circumstances, the Inspector may decide that it would be appropriate for the recipient of a copy of a NACC investigation report to also receive a copy of a related protected information report. For example, the Inspector may consider it appropriate for the head of a Commonwealth agency to receive a copy of a protected information report, where the information in that report relates to the functions or operations of that agency.
- 10.332 If the recipient receives a copy of the protected information report, the person must not disclose the report, or information contained in the report, to the public or a section of the public. This would be an offence under clause 234.

Exclusion of certain information from copies of reports

- 10.333 Subclause 220(5) would require the exclusion of certain material from a protected information report given to a person under subclause 220(3).
- 10.334 The Inspector must exclude section 235 certified information (see clause 235), if the disclosure of the information would *contravene* the certificate.
- 10.335 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information to certain persons would be contrary to the public interest. A certificate issued under clause 235 may allow for the disclosure of certain protected information to certain persons, including, for example, Commonwealth agency heads who may receive a copy of a protected information report under subclause 220(3).
- 10.336 Subclause 220(5) would also require the Inspector to exclude information from a protected information report if the Inspector is satisfied:
- that the information is ***sensitive information*** (defined under clause 227); and
 - it is desirable in the circumstances to exclude from the report.
- 10.337 For example, where the sensitive information relates to the functions or activities of another Commonwealth agency, and it is not necessary for the person to receive the information in order to understand and act on findings and recommendations, it would be appropriate to exclude the relevant sensitive information.
- 10.338 Subclause 220(6) would provide that, in deciding whether to exclude information from a protected information report, the Inspector must seek to achieve an appropriate balance between the person's interest in having the information included in the report, and the prejudicial consequences that might result from including the information in the report. This would ensure information regarding the outcome of investigations can be shared, within the Commonwealth, when it is appropriate in the circumstances, without resulting in prejudicial consequences.

Clause 221—Tabling of NACC investigation report in Parliament

- 10.339 This clause would require the Inspector to cause a copy of a NACC investigation report to be tabled where the report has been provided to the Commissioner, the CEO, and the Minister (or the Prime Minister) under clause 220, and one or more public hearings were held in the course of the investigation to which the NACC investigation report relates. This approach would be consistent with the proposed arrangements for the Commissioner to report on corruption investigations (see clause 155) and would ensure transparent reporting where matters dealt with in a corruption investigation are in the public domain.

- 10.340 The copy of the report would be required to be tabled in each House of the Parliament within 15 sitting days of that House after the report has been given to the Commissioner, the CEO and the Minister. This would ensure there is a permanent, public record of investigation reports where the matters considered are already in the public domain. The requirement to table the report within 15 sitting days provides for an appropriately timely tabling process.
- 10.341 Where a NACC investigation report is not required to be tabled, the Inspector and the Minister would not be restricted from seeking to table the report in each House of the Parliament under the usual Parliamentary procedures.

Clause 222—Publishing NACC investigation report in whole or in part

- 10.342 This clause would allow the Inspector to publish NACC investigation reports in certain circumstances.
- 10.343 The Inspector would be able to publish the whole or part of a NACC investigation report where the report has been given to the Commissioner under clause 220, and the Inspector is satisfied that it is in the public interest to publish the report (or part of the report).
- 10.344 This clause would allow for transparent reporting where a report is not required to be tabled under clause 221, but the Inspector is of the opinion that it is in the public interest to make the findings of the report public. This would be consistent with the objects of the NACC Bill, which include educating and providing information about corruption and the detrimental effects of corruption on public administration and the Australian community (clause 3).
- 10.345 Allowing the Inspector to publish part of a report would allow, for example, the Inspector to remove identifying information, or information that the Inspector does not consider would be in the public interest to publish.
- 10.346 This clause would be subject to additional procedural fairness requirements under clause 223, which require the Inspector to give certain persons an opportunity to respond before publishing an investigation report containing critical opinions, findings or recommendations.

Clause 223—Opportunity to respond must be given before publishing a NACC investigation report containing critical opinions etc.

- 10.347 This clause would require the Inspector to comply with further procedural fairness obligations before publishing, under clause 222, a NACC investigation report that includes an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, the NACC, or any other person.
- 10.348 This clause would recognise that NACC investigation reports may be published some time after they are first prepared—for example, where the Inspector elects to defer the publication of a report until after all criminal, disciplinary or administrative proceedings arising from the investigation are finalised. In such cases, the agency, entity or person should be afforded a further opportunity to respond to the critical opinion, finding, or recommendation, as well as the proposed publication of the investigation report. This would enable the agency, entity or person to make further representations as to whether the report should be published, and the timing of that publication. For example, if a person had suffered a bereavement, or was suffering from a serious health condition (including a mental health condition), that may weigh in favour of deferring the publication of a report.
- 10.349 The Inspector would be required to provide the head of the agency, the head of the entity, the Commissioner, or the person concerned a statement setting out the opinion, finding or recommendation, and a reasonable opportunity to respond to the opinion, finding or recommendation, and its proposed publication. This clause would not prescribe what constitutes a reasonable opportunity to comment given this will vary depending on the circumstances—for example a reasonable opportunity to comment on a single adverse opinion in a very short report will be different to a case involving a lengthy report and multiple, inter-connected adverse findings.
- 10.350 The requirement would not apply where the NACC investigation report has been tabled in Parliament and therefore already made public.

- 10.351 Equally, the requirement would not apply if the Inspector publishes whole or part of the NACC investigation report within 3 months of the report being given to the Commissioner under subclause 220(1). This recognises that the opportunity to respond under clause 219 would be sufficient where there is no substantial delay between that initial opportunity and the publishing of the NACC investigation report. A period of 3 months reflects the period within which NACC investigation reports would generally be tabled, as required by clause 221.
- 10.352 The response may be given by the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head. Where the critical opinion, finding or recommendation relates to the NACC, the response may be given by the Commissioner, or a person authorised to respond by the Commissioner. Where the critical opinion, finding or recommendation relates to another person, the response may be given by the person concerned, or, with approval, a person representing the person concerned.

Clause 224—Advising person who referred NACC corruption issue or made complaint of outcome

- 10.353 This clause would enable persons to be informed of the outcome of an investigation into a NACC corruption issue, where the corruption issue was raised by the person in a referral under:
- clause 202 (voluntary referrals to be made by any person);
 - clause 203 (mandatory referrals by the Commissioner); or
 - clause 204 (mandatory referrals by PID officers).
- 10.354 This clause would also enable persons to be informed of the outcome of a NACC complaint investigation, where the person made the relevant complaint.
- 10.355 The Inspector would be able to advise the person, or a representative nominated by the person, of the outcome of the investigation. This would ensure that information regarding the outcome of investigations can be shared when it is appropriate in the circumstances. This may include, for example, where a person made a complaint in relation to a staff member of the NACC, and the Inspector considers the person should be informed that no findings of misconduct have been made.
- 10.356 The Inspector would be able to advise the person, or the representative, of the outcome of the investigation by providing the person or representative with a copy of all or part of the NACC investigation report prepared in relation to the investigation. However, this would not be the only means of advising a person of the outcome—for example, the Inspector might choose to send a letter summarising the outcome, rather than providing a copy of the report itself.
- 10.357 The Inspector would be prohibited from disclosing certain information when advising the person of the outcome of the investigation. The Inspector would be unable to disclose information that is subject to a certificate under clause 235, if the disclosure of the information to the person would contravene the certificate. The Inspector would also be unable to disclose information if satisfied that the information was *sensitive information* (as defined under clause 227) and that it was desirable in the circumstances to exclude the information from the advice.
- 10.358 In determining whether the information constitutes *sensitive information* for the purpose of its exclusion from the advice, the Inspector must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. This ensures that the Inspector is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.

- 10.359 In practice, the Inspector could consult with the heads of relevant agencies or entities for the purpose of some or all of the consultation requirements under clauses 217, 224, 225 and 230 simultaneously, if the Inspector proposed to undertake the relevant steps set out in each of those clauses in close succession. This would allow the Inspector to consult with the head of an agency to establish whether information is sensitive information for the purpose of its exclusion from a NACC investigation report under clause 217, and for the purpose of advising persons of the outcome of an investigation under clauses 224 and 225, and for the purpose of making a public statement accompanying the publication of the report under clause 230.
- 10.360 In deciding whether to exclude sensitive information from the advice, the Inspector must seek to achieve an appropriate balance between the person's interest in having the information included in the advice, and the prejudicial consequences that might result from including the information in the advice. This would ensure information regarding the outcome of investigations can be shared when it is appropriate in the circumstances, without resulting in prejudicial consequences.

Clause 225—Advising person whose conduct is investigated of outcome of the investigation

- 10.361 This clause would enable persons whose conduct is investigated to be informed of the outcome of an investigation.
- 10.362 This clause provides that the Inspector *must* advise a person of the outcome of a NACC corruption investigation if the Inspector investigates a NACC corruption issue involving the person and makes a finding that the person has engaged in corrupt conduct.
- 10.363 It would be essential to inform a person that the Inspector has made a finding that the person has engaged in corrupt conduct given that such a finding would affect the person's standing, career prospects and reputation, as well as potential criminal liability.
- 10.364 This clause provides that the Inspector *may* advise a person of the outcome of a NACC corruption investigation if the Inspector investigates a corruption issue involving the person and forms an opinion or makes a finding about the NACC corruption issue, other than a finding that the person has engaged in corrupt conduct (for example, a finding or opinion that the person has not engaged in corrupt conduct). In these cases, the impact of the finding on the person would be less detrimental and it would be appropriate for the Inspector to have a discretion to decide whether to advise the person, with regard to the relevant circumstances.
- 10.365 This clause provides that the Inspector *may* advise a person of the outcome of a NACC complaint investigation if the Inspector investigates a complain and forms an opinion or makes a finding about the complaint (for example, a finding that in effect substantiates or dismisses the complaint). In the case of a complaint investigation, the impact of the finding on the person would be less detrimental and it would be appropriate for the Inspector to have a discretion to decide whether to advise the person, with regard to the relevant circumstances.
- 10.366 The Inspector would be able to advise the person of the outcome of the investigation by providing the person with a copy of all or part of the NACC investigation report prepared in relation to the investigation. However, this would not be the only means of advising a person of the outcome—for example, the Inspector might choose to send a letter summarising the outcome, rather than providing a copy of the report itself.
- 10.367 The Inspector would be prohibited from disclosing certain information when advising the person of the outcome of the investigation. The Inspector would be unable to disclose information that is subject to a certificate under clause 235, if the disclosure of the information to the person would contravene the certificate. The Inspector would also be unable to disclose information if satisfied that the information was *sensitive information* (as defined under clause 227) and that it was desirable in the circumstances to exclude the information from the advice.

- 10.368 In determining whether the information constitutes *sensitive information* for the purpose of its exclusion from the advice, the Inspector must consult with the head of each Commonwealth agency or State or Territory government entity to which the information relates. This ensures that the Inspector is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.
- 10.369 In practice, the Inspector could consult with the heads of relevant agencies or entities for the purpose of some or all of the consultation requirements under clauses 217, 224, 225 and 230 simultaneously, if the Inspector proposed to undertake the relevant steps set out in each of those clauses in close succession. This would allow the Inspector to consult with the head of an agency to establish whether information is sensitive information for the purpose of its exclusion from a NACC investigation report under clause 217, and for the purpose of advising persons of the outcome of an investigation under clauses 224 and 225, and for the purpose of making a public statement accompanying the publication of the report under clause 230.
- 10.370 In deciding whether to exclude sensitive information from the advice, the Inspector must seek to achieve an appropriate balance between the person's interest in having the information included in the advice, and the prejudicial consequences that might result from including the information in the advice. This would ensure information regarding the outcome of investigations can be shared when it is appropriate in the circumstances, without resulting in prejudicial consequences.

Clause 226—Follow-up on NACC investigation report

- 10.371 This clause would empower the Inspector to follow up action taken in response to recommendations directed to the NACC, or Commonwealth agencies, in NACC investigation reports. To achieve the objects of the NACC Bill to prevent corrupt conduct, the Inspector's recommendations would be expected to be actioned by the NACC or Commonwealth agencies in order to address risks and vulnerabilities that give rise to corruption or (in the case of a NACC complaint investigation) misconduct. The Inspector's ability to follow up how a recommendation has been implemented is critical to ensure recommendations are appropriately considered and addressed and the relevant corruption risk is reduced or eliminated.
- 10.372 This clause is consistent with equivalent provisions in State and Territory integrity commission legislation.
- 10.373 The Inspector would be able to request the Commissioner or the head of a Commonwealth agency, to whom a NACC investigation report is given, give the Inspector, within a specified time, details of any action that the Commissioner or the head of the Commonwealth agency has taken, or proposes to take, with respect to a recommendation included in the report. The Commissioner or the head of the Commonwealth agency would be required to comply with the request.
- 10.374 If the Inspector is not satisfied with the response of the Commissioner or the head of the Commonwealth agency, the Inspector may refer the recommendation and the reasons for the recommendation, the response, and the Inspector's reasons for not being satisfied with that response, to the relevant Minister or Presiding Officer of a House of the Parliament mentioned in subclause 226(4).
- 10.375 Subclause 226(4) would set out the relevant persons to whom the Inspector may refer the material. This would be:
- if the response was made by the Commissioner—the Minister (paragraph (a));
 - if the response was made by the head of a Commonwealth agency that is a parliamentary office (paragraph (b)):
 - for a parliamentarian who is a senator—the President of the Senate; or
 - for a parliamentarian who is a member of the House of Representatives—the Speaker of the House of Representatives; or
 - if the Commonwealth agency is a Department of the Parliament established under the *Parliamentary Service Act 1999* (paragraph (c)):

- for the Department of the Senate—the President of the Senate;
 - for the Department of the House of Representatives—the Speaker of the House of Representatives; or
 - otherwise—both the President of the Senate and the Speaker of the House of Representatives; or
 - if the Commonwealth agency is established or continued in existence by an Act and paragraph (c) does not apply—the Minister administering that Act (paragraph (d)); or
 - if the Commonwealth agency is a Commonwealth entity and neither paragraph (c) nor paragraph (d) applies—the Minister having general responsibility for the activities of the entity (paragraph (e)).
- 10.376 Where the Inspector has referred material to a person under this clause, the Inspector may also send a copy of that material to:
- the President of the Senate for presentation to the Senate; and
 - the Speaker of the House of Representatives for presentation to the House of Representatives.
- 10.377 The effect of this clause is to allow the Inspector to bring unactioned recommendations, or unsatisfactorily implemented recommendations, to the attention of other persons who have responsibility or oversight for the NACC or another agency. This allows those persons to inform or involve themselves, as they see fit, in the proper implementation of the Inspector’s recommendations and, ultimately, the proper management of corruption risks and vulnerabilities.
- 10.378 The ability for the Inspector to also send a copy of material to both Houses of Parliament would strengthen accountability for and oversight of any inadequate action, or lack of action, taken by the NACC or Commonwealth agencies in response to recommendations.
- 10.379 This clause would require the exclusion of certain material from the copy of the material given to the Presiding Officers, noting this material would be presented to each House of Parliament and therefore be made public. The Inspector must exclude section 235 certified information (see clause 235), and information that the Inspector is satisfied is *sensitive information* (as defined under clause 227).
- 10.380 This clause would further provide that in determining whether the Inspector is satisfied that information constitutes *sensitive information* for the purpose of its exclusion from the copy of material sent to the Presiding Officers, the Inspector must consult with the head of each Commonwealth agency or State or Territory government entity to which the material relates. Where the material relates to the NACC or a staff member of the NACC, the Inspector must consult with the Commissioner. This ensures that the Inspector is fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.
- 10.381 In practice, the Inspector could consult with the heads of relevant agencies or entities for the purpose of the consultation requirements under clauses 217 and 226 simultaneously, where no new information that may constitute *sensitive information* is raised in the material provided under this clause. This would allow the Inspector to consult with the head of an agency to establish whether information is sensitive information for the purpose of its exclusion from a NACC investigation report under clause 217 as well as its exclusion from the material provided to the Presiding Officers under clause 226.

PART 11 CONFIDENTIALITY, CONSULTATION AND INFORMATION SHARING

- 11.1 This Part would set out:
- the confidentiality requirements that would apply to information obtained for the purposes of the NACC Bill;
 - how information that has been obtained by the NACC and the Inspector may be recorded and disclosed; and
 - arrangements for the protection of certain information, including information provided by foreign governments and international organisations that the Australian Government has a legal obligation to protect, and information relating to the activities of intelligence agencies.

Division 1—Confidentiality requirements

- 11.2 This Division would outline the confidentiality requirements that would apply to information obtained for the purposes of the NACC Bill and the specific circumstances in which information could be disclosed under the NACC Bill. The Commissioner and the Inspector would have significant powers to obtain information, including information that would otherwise be protected by non-disclosure obligations under other Commonwealth laws. In turn, it is appropriate that information is subject to ongoing protection under the NACC Bill with disclosure of information permitted only in appropriate circumstances.
- 11.3 Generally, the NACC Bill would provide that any information obtained during an investigation or an inquiry could not be disclosed to another person. Exceptions would apply, including where that information is provided to another person:
- for the purposes of performing functions under the NACC Bill;
 - to support the functions of another agency; or
 - where it is required by another law of the Commonwealth.
- 11.4 The Commissioner and the Inspector are the only persons (*authorised disclosers*) who would be able to publicly disclose information under the NACC Bill and would only be permitted to do so in appropriate circumstances and subject to certain limitations. The disclosure of any information that included critical findings or opinions made against a person would be subject to procedural fairness requirements and other safeguards.

Clause 227—Key concepts

Authorised disclosers and entrusted persons

- 11.5 This clause would define the two categories of persons to whom the confidentiality requirements under this Part would apply: authorised disclosers and entrusted persons. Both authorised disclosers are also entrusted persons.
- 11.6 The Commissioner and the Inspector would be *authorised disclosers* for the purposes of the NACC Bill. Only an authorised discloser would be permitted to make disclosures:
- to protect life or physical safety (see clause 229); and
 - in the public interest (see clause 230).
- 11.7 An entrusted person would be:
- a staff member of the NACC (which includes the Commissioner: see clause 266);
 - the Inspector; or
 - a person assisting the Inspector (see clause 195).
- 11.8 An entrusted person or former entrusted person is subject to confidentiality requirements in relation to information they obtained as an entrusted person (see clause 228).

Sensitive information

- 11.9 This clause would also define a class of information to be known as ***sensitive information***, being information the disclosure of which:
- could prejudice the security, defence or international relations of Australia;
 - would prejudice relations between:
 - the Commonwealth Government and the Government of a State or Territory, or
 - the Government of a State or Territory and the Government of another State or Territory;
 - would involve disclosing:
 - deliberations or decisions of the Cabinet, or of any committee of the Cabinet, of the Commonwealth or of a State,
 - deliberations or advice of the Federal Executive Council or the Executive Council of a State or the Northern Territory, or
 - deliberations or decisions of the Australian Capital Territory Executive or of a committee of that Executive;
 - could reveal, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to:
 - the enforcement of the criminal law of the Commonwealth, a State or Territory or a foreign country, or
 - a NACC Act process (defined in clause 7, see paragraph 1.103);
 - could reveal, or enable a person to ascertain, the identity of a person who is, or has been, a staff member of ASIO or ASIS;
 - could reveal, or enable a person to ascertain, the identity of a person who is, or has been, an agent of ASIO, ASIS, the Australian Geospatial-Intelligence Organisation, or the Australian Signals Directorate;
 - could reveal information:
 - about the capabilities of, or information sources or operational activities or methods available to, a law enforcement agency, intelligence agency or the ADF,
 - about particular operations that have been, are being or are proposed to be undertaken by a law enforcement agency, intelligence agency or the ADF, or about proceedings relating to those operations, or
 - provided by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country, or an international organisation, where that government or organisation does not consent to the public disclosure of the information;
 - would prejudice the proper performance of the functions of the IGIS;
 - could endanger a person's life or physical safety;
 - could prejudice the protection of public safety;
 - would prejudice the fair trial of any person or the impartial adjudication of a matter;
 - would prejudice the proper enforcement of the law (including through corruption investigations, NACC corruption investigations or NACC complaint investigations);
 - would involve disclosing information whose disclosure is prohibited (absolutely or subject to qualifications) by or under another law of the Commonwealth;
 - would involve unreasonably disclosing a person's personal affairs; or
 - would involve unreasonably disclosing confidential commercial information.

- 11.10 The relevant authorised discloser would need to be *satisfied* that information fell within the definition of sensitive information for associated restrictions on the disclosure of that information to arise. Once the authorised discloser is satisfied, there would be restrictions on the disclosure of the information. For example:
- evidence at a hearing would need to be given in private if it would disclose sensitive information (see clause 74);
 - sensitive information could not be included in the Commissioner’s annual report (see clause 272); and
 - sensitive information would be required to be excluded from an investigation report (which is able to be tabled in Parliament or published) and included in a protected information report (see for example clause 152).
- 11.11 In assessing whether information is sensitive or not, the relevant authorised discloser may be required to consult with relevant officials (see, for example, clause 151 (excluding certain information from investigation report)).
- Threshold for the relevant harm*
- 11.12 There would be a lower threshold for whether information falls within the definition of sensitive information where:
- the harm resulting from disclosure could be particularly grave (for example, where the disclosure could endanger a person’s life or physical safety); or
 - the realisation of that harm would be partly dependent on the knowledge or conduct of a third party (for example, whether a third party could use the information to identify a confidential source).
- 11.13 In these circumstances, the information would fall within the definition of sensitive information if disclosure *could* result in the harm. This lower threshold would be appropriate, as it applies only to disclosures that could result in particularly serious harms, or where the discloser could not reasonably be expected to reach a greater degree of certainty about whether the specified harm would occur.
- 11.14 Where the authorised discloser, in consultation with relevant officials, would be well placed to ascertain whether the harm would arise (for example, whether the disclosure would reveal Cabinet deliberations), the information would only fall within the definition of sensitive information if its disclosure *would* result in the harm.

Clause 228—Confidentiality requirements for entrusted persons

- 11.15 This clause would make it an offence for a current or former entrusted person to make a record of, or disclose, any information that they obtained because of being an entrusted person or in the course of performing their duties as an entrusted person. This clause is subject to other provisions of the NACC Bill, particularly clauses 229 and 230, which outlines when a disclosure is authorised.
- 11.16 The inclusion of this offence would ensure that investigations and inquiries conducted by the NACC and the Inspector as well as proceedings arising from those investigations and inquiries, the operations of the NACC and the Inspector, and public confidence in the NACC and the Inspector are not prejudiced by unauthorised disclosures of information.
- 11.17 The offence would consist of the following physical elements:
- the person is or was an entrusted person;
 - the person (whether directly or indirectly and whether while or after ceasing to be an entrusted person) either:
 - makes a record of information, or
 - discloses information; and
 - the person obtained the information either:

- because of the person being an entrusted person, or
 - in the course of carrying out the person’s duties as an entrusted person.
- 11.18 The fault element for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the circumstance that the person was or is an entrusted person—recklessness is the fault element;
 - for the conduct of making a record or disclosure—intention is the fault element;
 - for the circumstance that the person acquired the information as an entrusted person—recklessness is the fault element.
- 11.19 Proof of intention or knowledge would also satisfy the fault elements for the first and third physical elements (see subsection 5.4(4) of the *Criminal Code*). A person would generally know that they were or had been an entrusted person, for the purposes of the first element of the offence—as the definition of entrusted person is limited to persons who are a staff member of the NACC, the Inspector, or a person assisting the Inspector. Similarly, a person would generally know whether they acquired particular information as an entrusted person—effectively, whether they acquired particular information at work.
- 11.20 This offence would apply to a person who obtained information because of their status as an entrusted person, and would not require proof that harm had, or could have, occurred if the information was disclosed. This is appropriate, as:
- the offences would apply to a limited number of entrusted persons voluntarily working in that capacity, who occupy positions of significant public trust and responsibility;
 - the unauthorised disclosure of information from the NACC or Inspector could reasonably be expected to cause a range of significant harms—even where the information disclosed is not inherently sensitive; and
 - it would not be possible to limit the scope of the offence to particular categories of information, without leaving certain, significant categories of harms unprotected.
- 11.21 The entrusted persons subject to the offence—the Commissioner and staff members of the NACC, and the Inspector and persons assisting the Inspector, would hold positions of significant public trust, being charged to undertake significant and sensitive investigations into allegations of serious or systemic corrupt conduct involving public officials. Entrusted persons would be vested with extraordinary powers that exceed those granted to Commonwealth Royal Commissions to undertake those investigations—including covert surveillance powers, and powers to compel persons to give information and answer questions that may be self-incriminating or protected by legal professional privilege, or that would ordinarily be amenable to a claim of public interest immunity.
- 11.22 The unauthorised disclosure of information from the NACC or Inspector could result in significant, direct harms, including the prejudice of investigations into serious or systemic corrupt conduct, damage to a person’s reputation and mental health, or the compromise of the identity of a whistleblower or confidential source—which could expose those persons to significant risks to their life, safety or wellbeing.
- 11.23 The powers that would be conferred on the Commissioner and Inspector would be exceptional. The NACC and the Inspector must be able to be trusted to carry out their functions in an effective and impartial manner, and to protect the kinds of highly sensitive information they obtain. The unauthorised disclosures of information by the Commissioner or staff members of the NACC, or the Inspector or persons assisting the Inspector—even where those disclosures do not cause one of the aforementioned harms—would risk serious damage to that trust, and therefore to the sustainability of the powers and functions vested in those offices.

- 11.24 The unauthorised disclosure of information from the NACC or Inspector could prejudice current and future operations, even where the information in question is not inherently sensitive. The Commissioner and the Inspector will depend on the trust and confidence of whistleblowers, confidential informants and other persons who may voluntarily disclose information, to detect and investigate serious or systemic corrupt conduct. Any perception that the Commissioner or Inspector are unable to safeguard information in their possession, even where that information may not be inherently sensitive, is likely to undermine that trust and confidence.
- 11.25 This harm is likely to arise notwithstanding that the Bill would contain strong protections for whistleblowers and other persons providing information to the Commissioner and Inspector (see Part 4)—it is self-evidently the case that many such persons would be less likely to provide information to the Commissioner or Inspector if they perceived there was any risk that their identity would not be protected. This would particularly be the case in significant or high-profile investigations, and investigations with any connection to organised criminal groups, where persons may reasonably be concerned about sustained public scrutiny and abuse, or criminal retaliation.
- 11.26 It would not be possible to limit the scope of the offence to apply to only particular categories of information, or to information the disclosure of which would cause particular categories of harm—such as information the disclosure of which would be likely to prejudice a particular investigation, or the security or defence of Australia. Such a limitation would risk allowing the disclosure of information that would result in a wider range of harms such as those outlined above.
- 11.27 The Bill would provide multiple avenues for information about investigations and public inquiries, and the activities of the NACC and Inspector more broadly, to be made public, including:
- the Bill would enable the Commissioner and Inspector to hold public hearings, where satisfied that exceptional circumstances justify holding the hearing in public and it would be in the public interest to do so (see clauses 73 and 214, and require their reports to be tabled in Parliament where an investigation has been conducted in public (see clauses 155 and 221);
 - the Commissioner and Inspector will have a discretion to publish their reports in all cases, in the public interest (see clauses 156 and 222);
 - the Commissioner and Inspector would have discretion to make public statements and release information to the public on public interest grounds at any time (see clauses 48 and 230), subject to appropriate safeguards against the premature disclosure of corruption findings or opinions;
 - it would be open to staff members of the NACC to make public interest disclosures under the PID Act and refer corruption issues and complaints to the Inspector, and for persons assisting the Inspector to make Public Interest Disclosures; and
 - the NACC and the Inspector would be overseen by the Parliamentary Joint Committee on the National Anti-Corruption Commission, with functions to monitor and review the performance by the Commissioner and Inspector of their functions, and to report to the parliament on any matter connected with the performance of those functions (see Division 1 of Part 10).
- 11.28 The NACC and the Inspector would also be subject to other transparency frameworks, including the *Freedom of Information Act 1982*.
- 11.29 In light of all of the above, it would be appropriate to require the publication or disclosure of information from the NACC or Inspector to be done only in an authorised manner.
- 11.30 The maximum penalty for this offence would be two years imprisonment. The penalty for this offence is appropriate given the harm that may flow from an unauthorised disclosure, and is consistent with comparable offences in section 122.4 of the *Criminal Code* and section 207 of the LEIC Act.

- 11.31 This offence would not apply if the exceptions and authorisations to record or disclose information in clauses 229 or 230 apply, for example where the person records or discloses the information for the purposes of performing a function or duty under the NACC Bill. The defendant would bear an evidential burden in relation to these defences (see subsection 13.3(3) of the *Criminal Code*). It is appropriate that the defendant bear the evidential burden for the matters in clauses 229 and 230 as they would be particularly within the knowledge of the defendant.
- 11.32 To rely on the defence, the person would only need to adduce or point to evidence suggesting a reasonable possibility that the information was recorded or disclosed for purposes connected with the exercise of the powers, or the performance of the functions or duties, of the Commissioner or the Inspector under the NACC Bill. If the person does so, and in order for the offence to apply, the prosecution would then need to discharge its legal burden to negate that possibility beyond reasonable doubt for the offence to apply.

Clause 229—Authorisations to record or disclose information

- 11.33 This clause would authorise entrusted persons to record or disclose information in appropriate circumstances, for example in the course of their duties or for the purposes of another government agency. In authorising the use and disclosure of information, this clause operates as an exception to the offence in clause 228 that requires an entrusted person to keep information confidential. Clause 229 would also provide positive authority for uses and disclosures that may otherwise be the subject of restriction under other laws (for example, the *Privacy Act 1988*).
- 11.34 This clause would—subject to appropriate additional restrictions outlined below—have effect despite any other clause in the NACC Bill. This would ensure that the permitted disclosures are not impliedly constrained by limitations on specific disclosure obligations or permissions located elsewhere in the NACC Bill.
- 11.35 This clause would allow an entrusted person to make a record or disclose information without committing an offence under clause 228. A defendant would bear an evidential burden in relation to the matters relied on in this clause. This is appropriate as the defendant would be best placed to identify whether a disclosure was authorised under this clause, for example by reference to the functions of the defendant as an entrusted person, and the purpose for which they engaged in particular conduct.

Disclosures for purposes connected with the functions, powers and duties of the entrusted person

- 11.36 An entrusted person would be able to make a record of, or disclose information, that they acquired because of being an entrusted person, or in the course of carrying out their duties as an entrusted person, for purposes connected with the exercise of the powers or the performance of the functions or duties of the Commissioner or the Inspector under the NACC Bill.
- 11.37 For example, this exception would enable a staff member of the NACC to disclose information to another Commonwealth agency or a State or Territory entity for the purposes of a joint investigation. This exception serves a different purpose to the exception at paragraph 11.40, which is directed towards disclosure of information for the *recipient* agency's functions, irrespective of whether there is a joint investigation occurring with the NACC.
- 11.38 The following additional restrictions would apply to a disclosure for purposes connected with the functions, powers and duties of an entrusted person:
- an entrusted person would not be able to disclose to the public or a section of the public, the whole or part of a protected information report, or information contained in such a report; and
 - the disclosure would need to:
 - comply with an Attorney-General's certificate issued under clause 235 unless the disclosure is made to an IGIS official;
 - be consistent with an arrangement entered into under clause 239 (which deals with intelligence information);

- be in accordance with any direction about use and disclosure of investigation material or derivative material (see clause 100); and
- comply with the additional provisions concerning the use and disclosure of that material (see Subdivision B of Division 4 of Part 7).

11.39 If the information being disclosed was subject to a clause 235 certificate and the recipient of the information was an IGIS official, the entrusted person would need to notify the Attorney-General.

Disclosures to other entities by an authorised discloser

11.40 An authorised discloser (defined in subclause 227(1) to mean the Commissioner or the Inspector) would be permitted to disclose information to the head of a Commonwealth agency, or of a State or Territory government entity, if the authorised discloser is satisfied that it is appropriate to do so. The authorised discloser would need to have regard to the functions of the person or entity concerned.

11.41 The requirement for the authorised discloser to ‘have regard to’ the functions of the person or entity concerned would not require the authorised discloser to be certain that the disclosure of the information would assist the recipient in the performance of its functions. For example, this category of disclosure would permit the following disclosures:

- disclosures of evidence to the AFP or the CDPP for the purposes of considering a further criminal investigation or whether to institute a prosecution of a Commonwealth criminal offence (see paragraphs 11.45 to 11.49);
- the referral of information relevant to an integrity agency to that agency where the information does not raise a corruption issue for the purposes of clause 41, but may raise an issue that could be within the integrity agency’s functions to consider (see paragraph 6.10).

11.42 It is appropriate that only an authorised discloser (or any delegate provided for in a delegation made under clause 276) rather than all entrusted persons, would be able to make disclosures to other agencies, for the purposes of the other agency’s functions. Such disclosures would involve the transfer or handing over of information to another for a purpose that is separate to the Commissioner or Inspector’s functions—as distinct to disclosures to assist or enable entrusted persons to perform their day-to-day functions and duties. There would be many circumstances in which such a disclosure would be appropriate—including, for example, disclosing information to the CDPP as part of a referral of a matter for prosecution. However, as these disclosures are not required for the day-to-day performance of functions or duties by most entrusted persons, it is fitting that the discretion for disclosure of this information be exercised at a higher level.

11.43 Additional restrictions would apply to a disclosure to another entity for that entity’s functions. The disclosure would need to

- comply with an Attorney-General’s certificate issued under clause 235 unless the disclosure is made to an IGIS official;
- be consistent with any arrangement entered into under clause 239 (which deals with intelligence information);
- be in accordance with any direction about use and disclosure of investigation material or derivative material (see clause 100); and
- comply with the additional provisions concerning the use and disclosure of that material (see Subdivision B of Division 4 of Part 7).

11.44 If the information being disclosed was subject to a clause 235 certificate and the recipient of the information was an IGIS official, the authorised discloser would need to notify the Attorney-General.

- 11.45 For example, this clause would permit the Commissioner to share evidence collected during an investigation or inquiry with the head of a police force or a director of public prosecutions for the purposes of considering a further criminal investigation or whether to institute a criminal prosecution. The Commissioner would also be able to share evidence with other investigative and prosecuting bodies in appropriate circumstances. The Commissioner would also be able to share evidence with a Commonwealth agency for the purposes of the agency considering whether to take disciplinary action against a staff member.
- 11.46 This is consistent with the objects of the NACC Bill. The relevant objects of the NACC Bill in clause 3 are to facilitate the timely investigation of corruption issues that involve or potentially involve corrupt conduct that is serious or systemic, and to enable, after investigation of a corruption issue, the referral of persons for criminal prosecution, civil proceedings or disciplinary action.
- 11.47 For the purposes of a further criminal investigation, a disclosure would be able to include investigation or derivative material (subject to the additional restrictions outlined in Subdivision B of Division 4 of Part 7). Where an agency, for example the AFP, has received investigation or derivative material from the NACC, directions made under that Subdivision and conditions imposed under clause 233 would outline parameters for the use and further disclosure of investigation and derivative material.
- 11.48 The relevant parameters would include the circumstances when an agency may use investigation material to obtain derivative material (clause 104), when such material could then be disclosed to a prosecutor (clause 105), and then used by a prosecutor (clause 108). Compulsorily obtained information would not be admissible in evidence against a person, except in certain circumstances (clause 113).
- 11.49 Subject to parameters of that kind, any material or other information disclosed to an entity on this basis would be able to be used by the entity for its functions and subject to confidentiality requirements imposed on that entity, for example under its enabling legislation. This would enable a law enforcement agency to use or disclose investigation material, including for the purposes of obtaining derivative material under clause 104.

Disclosures between the Commissioner and the Inspector

- 11.50 This clause would allow the Commissioner and the Inspector to disclose information to each other if the Commissioner or the Inspector (as the case may be) is satisfied that it is appropriate to do so. This is appropriate, to enable a seamless flow of information between the NACC and the Inspector to support the Inspector's oversight of the NACC and the effective investigation of NACC corruption issues.
- 11.51 The disclosure would need to:
- be consistent with any arrangement entered into under clause 239 (which deals with intelligence information);
 - be in accordance with any direction about use and disclosure of investigation material or derivative material (see clause 100); and
 - comply with the additional provisions concerning the use and disclosure of that material (see Subdivision B of Division 4 of Part 7).
- 11.52 The Commissioner and the Inspector would be permitted—unlike disclosures to Commonwealth and State and Territory government entities—to disclose information to each other that is subject to an Attorney-General's certificate under clause 235. An Attorney-General's certificate is only intended to protect the disclosure of certain information to persons who are not entrusted persons. The Commissioner and the Inspector would not be prevented from *receiving* this information where it is appropriate.

Disclosures required by another Commonwealth law

- 11.53 This clause would permit the disclosure of information if the disclosure was required under another law of the Commonwealth. This would ensure that entrusted persons would be able to comply with other legislative requirements.

- 11.54 For example, the *Freedom of Information Act* provides a legally enforceable right for an individual to request access to documents held by a Commonwealth agency, and, subject to any applicable exemptions and exceptions under the *Freedom of Information Act*, an obligation on the agency to comply with the request. A disclosure of this nature would not contravene clause 232—which provides that entrusted persons would generally not be compellable in court proceedings—as the Commissioner would likely be listed a respondent to the freedom of information request.
- 11.55 Similarly, the Commonwealth Ombudsman has a range of powers to obtain information and documents, and to inspect records, when conducting an investigation or inspection—including, for example, the power to obtain information or documents relevant to an investigation under the *Ombudsman Act 1976* (section 9 of that Act), a suite of powers to inspect records and obtain information to determine the compliance of an agency with the *Surveillance Devices Act 2004* (sections 55 to 57 of that Act), and a legal right to inspect records to determine the compliance of an agency with Part 15 of the *Telecommunications Act 1997* (section 317ZRB of that Act). A disclosure in compliance with such a power or right would not contravene clause 232, as the Commonwealth Ombudsman is a Commonwealth integrity agency (see paragraph 232(1)(b)).
- 11.56 The disclosure under this clause would need to be consistent with an arrangement entered into under clause 239, which deals with intelligence information. If an arrangement under clause 239 prevented the disclosure of information, the agency administering the relevant Commonwealth law would need to seek the intelligence information directly from the relevant intelligence agency.
- 11.57 Information subject to an Attorney-General’s certificate under clause 235 would also be able to be disclosed under this clause. It is intended that an Attorney-General’s certificate under clause 235 would only be able to limit the disclosure of information for the purposes of this Bill, and would not be able to override other legislation. While this clause would permit disclosures that are required by or under another Commonwealth law, it would not displace the operation of other secrecy provisions that may restrict the secondary disclosure of the information, or public interest immunity or other grounds on which disclosure may be resisted in appropriate circumstances.

Disclosures to protect life or physical safety

- 11.58 This clause would permit an authorised discloser (or any delegate provided for in a delegation made under clause 276) to disclose information to a particular person if the authorised discloser is satisfied that doing so would be necessary to protect that or another person’s life or physical safety. It is appropriate that additional restrictions do not apply to disclosures under this clause, and for there to be a subjective test for such disclosures, given the importance of protecting life and physical safety and the likelihood that such disclosures will be required in exigent circumstances.

Disclosures of publicly available information

- 11.59 This clause would permit a person to make a record of information, or disclose information, if the information has already been lawfully made available to the public.
- 11.60 Once information is lawfully made available to the public, for example during a public hearing, in an investigation report that has been tabled in Parliament or published, or by the Commissioner or the Inspector making a public statement, any non-disclosure requirements under the NACC Bill would cease to apply. This is because this clause would apply despite any other clause in the NACC Bill, and would apply broadly to ‘a person’ rather than a category of persons. This exception to the secrecy offence in clause 228 would affect, for example, non-disclosure notations for a notice to produce or a private hearing summons (clause 95).

Clause 230—Disclosure by authorised discloser in public interest

- 11.61 This clause would allow the Commissioner and the Inspector to publicly disclose information about the performance of their functions and the exercise of their powers, and the conduct of investigations and inquiries, in certain circumstances and subject to certain safeguards. This would enable the Commissioner and the Inspector to operate transparently, while preserving procedural fairness and appropriately protecting sensitive information obtained by the NACC and Inspector.
- 11.62 Under this clause, the Commissioner and the Inspector would be able to, if satisfied that it was in the public interest to do so, disclose information to the public or a section of the public about:

- the performance of their functions and the exercise of their powers;
- for the Commissioner:
 - a corruption investigation (see subclause 41(2)), whether conducted alone or jointly with a Commonwealth agency or a State or Territory government entity, and
 - a public inquiry (see clause 161).
- for the Inspector:
 - a NACC corruption investigation (see subclause 210(2), whether conducted alone or jointly with a Commonwealth agency, the NACC or a State or Territory government entity), and
 - a NACC complaint investigation (see subclause 212(2)).

11.63 The Commissioner and the Inspector would perform the majority of their functions and activities in private, consistent with other investigative and law enforcement agencies. However, there may be circumstances where it would be in the public interest to make certain disclosures. For example, where those disclosures would support the efficient and effective performance of functions under the NACC Bill, and ensure the community has confidence in the integrity of Australia's institutions.

11.64 The disclosure of information under this clause would be subject to a number of limitations, and the Commissioner, or the Inspector as the case may be, would also need to comply with certain pre-disclosure obligations. Aside from these limitations and pre-disclosure obligations, this clause would not be limited by any other clause in the NACC Bill. This would ensure that the Commissioner and the Inspector have the discretion to determine whether to make a disclosure in the public interest.

11.65 This clause would not be intended to impliedly limit the Commissioner or the Inspector's ability to conduct public hearings in the manner they see fit, including the ability to make disclosures in the course of such hearings.

Opinions and findings

11.66 An authorised discloser would not be permitted to disclose information that includes an opinion or finding about whether a particular person engaged in corrupt conduct, unless the information was already contained in a report prepared by the Commissioner under Part 8 of the NACC Bill, or by the Inspector under Subdivision B of Division 4 of Part 10. It would not be appropriate for the Commissioner or the Inspector to make a public finding, or express a public opinion, about whether a particular person has engaged in corrupt conduct without having undertaken the rigorous process of preparing a report and providing the person in question with an opportunity to respond to the opinion or finding, in accordance with the procedural fairness requirements set out in Part 8 and Subdivision B of Division 4 of Part 10 of the NACC Bill, as the case may be.

Clause 235 certified and sensitive information

11.67 An authorised discloser would not be able to make a public disclosure under this clause if it would contravene a certificate issued under clause 235, or if the authorised discloser was satisfied that the information was **sensitive information**. This is appropriate, to ensure that the making of a public statement by an authorised discloser does not result in harm—for example, by revealing the identity of a confidential source.

11.68 An authorised discloser would need to consult with the head of each Commonwealth agency or State or Territory government entity to which the information that is proposed to be disclosed relates, about whether the information is **sensitive information**. This consultation requirement would apply for each disclosure under this clause, not just in situations where an authorised discloser suspects the information may fall within the definition of sensitive information. This ensures that the Commissioner or the Inspector, as the case may be, are fully informed of the sensitivity of particular information based on the experience and expertise of agencies that are more familiar with the relevant context, relationships and risks associated with disclosure.

11.69 In practice, the Commissioner could consult with the heads of relevant agencies or entities for the purpose of some or all of the consultation requirements under clauses 151, 158, 159 and 230 simultaneously, if the Commissioner proposed to undertake the relevant steps set out in each of those clauses in close succession. This would allow the Commissioner to consult with the head of an agency to establish whether information is *sensitive information* for the purpose of its exclusion from an investigation report under clause 151, for the purpose of advising persons of the outcome of an investigation under clauses 158 and 159, and for the purpose of making a public statement accompanying the publication of the report under clause 230.

Other limitations on disclosure

- 11.70 A disclosure under this clause would also be limited by:
- any direction about the use or disclosure of investigation material under clause 100, and other limitations on the disclosure of such material under Subdivision B of Division 4 of Part 7;
 - the procedural fairness obligations under clause 231; and
 - any arrangement entered into under clause 239, which deals with intelligence information.

Clause 231—Opportunity to respond must be given before disclosure of critical opinions, findings and recommendations

- 11.71 This clause would require an authorised discloser to comply with certain procedural fairness obligations before disclosing an opinion, finding or recommendation that is critical (either expressly or impliedly), of a Commonwealth agency, a State or Territory government entity, the NACC, or any person, to the public under clause 230.
- 11.72 This clause would recognise that the publication of a critical opinion, finding or recommendation by an authorised discloser would have the potential to damage the reputation of the agency, entity, NACC, or person, as the case may be. In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, the Court held that reputation is an interest that may attract the protection of the rules of procedural fairness.

Opportunity to appear and make submissions

- 11.73 The authorised discloser would be required to provide the head of the agency, the head of the entity, the Commissioner or the person concerned a statement setting out the opinion, finding or recommendation and a reasonable opportunity to respond to the opinion, finding or recommendation and its proposed publication. This would ensure that persons who are subject to findings of corrupt conduct or other critical findings, opinions or recommendations have the opportunity to respond. This requirement is intended to extend to an opinion, finding or recommendation that is critical of a corporation, noting a corporation's status as a legal person.
- 11.74 The requirement would not apply where the head of the agency, the head of the entity, the Commissioner or the person concerned had already been given the opportunity to respond to the opinion, finding or recommendation, prior to the information being included in an investigation report (see clause 153). This is appropriate as it would avoid an unnecessarily duplicative consultation requirement.
- 11.75 The response may be given by:
- the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head;
 - in relation to the NACC—the Commissioner or a person authorised by the Commissioner; or
 - in relation to any other person concerned—the person concerned, or, with approval, a person representing the person concerned.
- 11.76 Where a person has provided a response to the opinion, finding or recommendation the common law rules of procedural fairness (see paragraph 11.72) would require the relevant authorised disclosure to consider the response in deciding whether and how to publicly disclose information under clause 230.

Clause 232—Entrusted persons generally not compellable in proceedings

- 11.77 This clause would provide that an entrusted person would generally not be able to be compelled to give evidence in proceedings that would involve the disclosure of information or documents obtained by that person in their capacity as an entrusted person.
- 11.78 This clause would recognise that the NACC and the Inspector would receive, and be able to obtain highly sensitive information from a variety of sources, including whistleblowers and confidential informants, Commonwealth agencies, and third parties. This would include national security information and information that would ordinarily be protected by public interest immunity. This is necessary to enable the Commissioner and Inspector to perform their functions. This clause would ensure that the Commissioner, the Inspector, and persons assisting the Commissioner and the Inspector cannot be required to disclose this information in proceedings that are unrelated to the NACC or the Inspector.
- 11.79 Similar protections appear in other Commonwealth legislation: section 211 of the LEIC Act, subsection 34(5) of the IGIS Act and section 35 of the *Ombudsman Act*.
- 11.80 A current or former entrusted person would not be compellable to disclose information or produce documents that were collected, obtained or produced under the NACC Bill, and which were acquired because of the person being, or having been, an entrusted person or in the course of carrying out the person's duties as an entrusted person.
- 11.81 This protection would apply to any proceedings of any court (whether exercising federal jurisdiction or not), tribunal, authority or person authorised to require the production of documents or the answering of questions. This includes a person who is authorised to hear, receive and examine evidence.
- 11.82 However, the protection would not prevent a Commonwealth integrity agency or a member of a Royal Commission from exercising their statutory powers to obtain documents and information from the NACC or the Inspector for the purposes of the agency or Royal Commission. This is appropriate to ensure the NACC Bill does not impede the functions of integrity agencies, including those agencies that have oversight over the functions of the NACC, for example the Commonwealth Ombudsman and the Auditor-General.
- 11.83 For the avoidance of doubt, this clause would confirm that *produce* includes permit access to, and that *production* has a corresponding meaning.
- 11.84 This clause contains a number of exceptions to this limitation, to ensure that entrusted persons can be compelled to give evidence in appropriate circumstances, being where:
- the disclosure is in proceedings before a Commonwealth integrity agency or a Royal Commission—this clause is not intended to prevent or limit the investigation of a matter by another Commonwealth integrity agency, or the conduct of a Royal Commission;
 - one or more of the following entrusted persons are a party to the proceeding (such as where they are seeking an injunction or order for contempt, or are the respondent to a challenge against an exercise of a power):
 - a NACC Commissioner,
 - a delegate of the Commissioner,
 - a person appointed or authorised by the Commissioner to exercise a power or perform a function under the NACC Bill,
 - the Inspector,
 - the CEO;
 - the proceeding is brought for the purpose of carrying into effect a provision of the NACC Bill—for example, where a staff member of the NACC is charged with an offence; or
 - the proceeding is a criminal proceeding, civil penalty proceeding or confiscation proceeding brought as a result of:

- a corruption investigation or a public inquiry;
- a NACC corruption investigation or a NACC complaint investigation;
- an investigation of a corruption issue that the Commissioner oversees; or
- a referral of a corruption issue to a Commonwealth agency or a State or Territory government entity under paragraph 41(1)(d).

11.85 This clause would not limit the power of a court to obtain information and documents under the NACC Bill in the interests of justice. That is, this clause would not limit clauses 103 (concerning the disclosure of investigation material available to courts) or 106 (the court’s powers to order a disclosure).

Clause 233—Confidentiality requirements for persons who receive information about investigations and inquiries

11.86 This clause would enable the Commissioner and Inspector to impose confidentiality requirements when an entrusted person is disclosing information to someone who is not an entrusted person. This would ensure that the Commissioner and Inspector can appropriately protect information that is disclosed, for example, as part of a joint investigation.

11.87 This clause would apply where an entrusted person (defined in subclause 227(2) to mean a staff member of the NACC, the Inspector or a person assisting the Inspector) discloses information to a person who is not an entrusted person, the information has not been lawfully made available to the public, and the information relates to:

- a preliminary investigation conducted by the Commissioner in performing the Commissioner’s function mentioned in paragraph 17(b);
- a preliminary investigation undertaken by the Inspector in performing the Inspector’s function mentioned in paragraph 184(1)(b);
- a corruption investigation;
- a NACC corruption investigation;
- a NACC complaint investigation; or
- a public inquiry.

11.88 The classes of information that may be protected under this clause would be limited to information that relates to an investigation or inquiry conducted by the NACC or Inspector. This would be a subset of information obtained or produced by the NACC and Inspector, and would not include, for example, information relating to the day-to-day administration of the NACC or Inspector.

11.89 In these circumstances, the authorised discloser (defined in subclause 227(1) to mean the Commissioner or the Inspector) would be able to, in writing, impose conditions on the making of a record of the information by the recipient or another person, and any on-disclosure of that information. The authorised discloser would be able to impose any condition they consider appropriate to:

- prevent prejudice to the investigation or inquiry, or any action taken as a result of the investigation or inquiry;
- prevent further disclosure of information contained in a protected information report; or
- protect the identity of:
 - any person of interest to the investigation or inquiry; and
 - the person who has given, or who the authorised discloser reasonably believes may give, information to the authorised discloser in connection with the investigation or inquiry (including by giving evidence at a hearing).

- 11.90 The authorised discloser would have a discretion as to whether to impose a condition on the making of a record of the information or the further disclosure of the information, and if they do decide to impose conditions, the nature of the conditions. This discretion is appropriate, as it would provide the authorised discloser with flexibility to tailor non-disclosure conditions depending on:
- the nature of the information (for example, whether the compromise of the information would prejudice an ongoing investigation or reveal the identity of a confidential source, or is of a less sensitive nature);
 - the recipient of the information (for example, whether they are a member of the public or another Government entity);
 - the statutory framework, if any, under which the recipient of the information operates (for example, whether the recipient would be legally required to protect information received from the NACC or Inspector in the performance of the recipient’s functions); and
 - the circumstances surrounding the disclosure of the information (for example, whether the information is being disclosed in the context of a joint investigation).
- 11.91 This clause would only apply if the relevant information had not already been lawfully disclosed to the public, including in a public hearing, a report that is tabled or published, or in a public statement by the Commissioner or Inspector. This will ensure that any confidentiality condition imposed by the Commissioner or Inspector will automatically be lifted, if and when the information that is covered by the condition is lawfully made public.
- 11.92 A confidentiality notice given under this clause would be able to be varied or revoked, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.
- Offence*
- 11.93 This clause would make it a criminal offence to breach a direction issued by an authorised discloser under this clause.
- 11.94 The offence would consist of the following physical elements:
- the person engages in conduct;
 - the person breaches a condition under subclause 233(2).
- 11.95 The fault elements for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the element of engaging in conduct—intention is the fault element; and
 - for the result element of the person’s conduct breaches a condition imposed by the authorised discloser—recklessness is the fault element.
- 11.96 A person could only be aware of a substantial risk that their conduct will breach a condition imposed by the Commissioner or Inspector, if they are aware of a substantial risk that the information that they are dealing with is the subject of a condition. As recklessness is the fault element for the second physical element, proof of intention (that the person means to bring about the result is aware that the result will occur in the ordinary course of events) or knowledge (if the person is aware that the result exists or will exist in the ordinary course of events) will also satisfy the fault element (see subsection 5.4(4) of the *Criminal Code*).
- 11.97 The maximum penalty for this offence would be two years imprisonment. This penalty is appropriate given the serious consequences of a breach of a direction, including prejudicing an investigation or threatening the safety of a person whose identity is protected. The penalty for this offence is the same as a similar offence under the *Criminal Code* (see subsection 122.4(2) of the *Criminal Code*). The penalty is also consistent with the offence under clause 228 of the NACC Bill, which imposes confidentiality requirements on entrusted persons.

Division 2—Protected information reports

Clause 234—Public disclosure of protected information reports prohibited

- 11.98 This clause would make it a criminal offence for a person to disclose a protected information report, or information contained in a protected information report, to the public. This would ensure that sensitive information contained in these reports is appropriately protected against unauthorised disclosure.
- 11.99 The offence would consist of the following physical elements:
- the person discloses the whole or part of a report, or information contained in a report;
 - the report is, or the information is contained in, a protected information report;
 - the disclosure is to the public, or a section of the public.
- 11.100 The fault element for the physical elements would be determined in accordance with section 5.6 of the *Criminal Code*:
- for the conduct of disclosing the whole or part of a report or information contained in a report—intention is the fault element;
 - for the circumstance that the report is, or the information is contained in, a protected information report—recklessness is the fault element. Proof of intention or knowledge would also satisfy this fault element (see subsection 5.4(4) of the *Criminal Code*). In practice, a person would know whether the report was a protected information report, or the information was contained in a protected information report, as such reports would be clearly titled and bear protective markings; and
 - for the circumstance that the disclosure was to the public, or a section of the public—recklessness is the fault element.
- 11.101 The maximum penalty for this offence would be two years imprisonment. This penalty is appropriate to ensure the protection of the kind of information subject to a protected information report, which is sensitive information (as defined in clause 227) and information subject to a certificate under clause 235 (see clauses 151 and 152). The public release of this information could have harmful ramifications, including for Australia’s national security.
- 11.102 This offence would not apply if the exceptions and permitted disclosures in subclause 229(4) or clause 230 apply (set out below).
- 11.103 A defendant would bear an evidential burden in relation to this defence (see subsection 13.3(3) of the *Criminal Code*). It is appropriate that the defendant bear the evidential burden for the matters in clauses 229 and 230 given they will be peculiarly within the knowledge of the defendant. To rely on the defence, the person would only need to adduce or point to evidence suggesting a reasonable possibility that compliance was not reasonably practicable. If the person does so, the prosecution would then need to discharge its legal burden to negate that possibility beyond reasonable doubt for the offence to apply.

Permissible disclosures of protected information reports

- 11.104 Protected information reports and information contained in a protected information report would be able to be disclosed if the disclosure was required by another Commonwealth law (see clause 229). This is appropriate, as it would preserve the operation of other Commonwealth laws and would ensure, for example, that:
- the AFP could exercise its powers to obtain information contained in a protected information report, as part of a joint investigation with the Inspector into a suspected unauthorised disclosure of information contained in a protected information report from the Commission; or
 - the Auditor-General could obtain a copy of a protected information report, as part of a performance audit relating to the NACC.

- 11.105 However, clause 229 would not displace the operation of other secrecy provisions that may restrict the secondary disclosure of the information, or public interest immunity or other grounds on which disclosure may be resisted in appropriate circumstances. Additionally, an arrangement between the Commissioner or Inspector and the head of an intelligence agency under clause 239 could prevent or regulate the further disclosure of information under clause 229.
- 11.106 Protected information reports would be prepared at a particular point in time. The Commissioner and Inspector would be required to exclude information from an investigation report and include it in a protected information report if, at the time of preparing those reports:
- the Commissioner or Inspector (as the case may be) was satisfied that the information was sensitive information; or
 - the information was subject to an Attorney-General's certificate given under clause 235.
- 11.107 After a period of time, it is possible that particular information contained in a protected information report may cease to be sensitive information, or that the Attorney-General may revoke or vary a certificate to narrow the range of information it covers. In such circumstances, it would be open to the Commissioner or Inspector (as the case may be), after consulting with the relevant agency head, to disclose that information if they thought it was in the public interest to do so (see clause 230).

Division 3—National security and related matters

- 11.108 This Division would outline the processes and arrangements for dealing with corruption issues, NACC corruption issues, and complaints made in relation to the conduct of the NACC or a staff member of the NACC, where they also relate to national security and other related matters.
- 11.109 Subdivision A would enable the Attorney-General to give two types of certificates:
- a clause 235 certificate, which would allow the Attorney-General to certify that the further disclosure of certain information and documents that have been obtained by the Commissioner or Inspector would be contrary to the public interest; and
 - an *international relations certificate*, given under clause 236, which would allow the Attorney-General to certify that disclosure of information and documents to the Commissioner or the Inspector, that are subject to a binding international agreement between Australia and another country, would be contrary to the public interest.
- 11.110 Subdivision B would set out additional processes for dealing with corruption issues that have any connection with intelligence agencies or their functions. These processes would include certain mandatory consultation requirements, and a requirement for the Commissioner and Inspector to take all reasonable steps to enter into arrangements to protect intelligence information relating to an intelligence agency.
- 11.111 This Division would not exempt or otherwise exclude intelligence agencies and the IGIS from the Commissioner's jurisdiction. Rather, these arrangements would facilitate the performance by the Commissioner and the Inspector of their functions under the NACC Bill while protecting Australia's national security.

Subdivision A—Attorney-General's certificates about release of information

Clause 235—Attorney-General's certificate in relation to particular information

- 11.112 This clause would enable the Attorney-General to certify that the further disclosure of certain information and documents that have been obtained by the Commissioner or the Inspector would be contrary to the public interest. A certificate would protect this information and mitigate against the prejudicial consequences that may arise from its disclosure.
- 11.113 The NACC will have comprehensive jurisdiction over the Commonwealth public sector, including jurisdiction to investigate serious or systemic corruption issues relating to the most sensitive or classified Australian Government programs and activities. Corruption investigations and NACC corruption investigations are inherently concerned with how and why public decisions have been made, and so involve information relevant to decision-making processes.

- 11.114 The Commissioner and the Inspector will therefore have comprehensive access to information in the course of conducting a corruption investigation or a NACC corruption investigation, including powers to obtain information from intelligence agencies and the ADF that would ordinarily be protected by public interest immunity.
- 11.115 While it is essential that the Commissioner and the Inspector have full access to information to investigate serious or systemic corruption, it is also appropriate that there are controls on the further disclosure or publication of sensitive information.
- 11.116 The Attorney-General may issue a certificate that provides that it would be contrary to the public interest on one or more specified grounds (outlined at paragraph 11.119) to:
- disclose specified information, or the contents of specified documents; or
 - provide information or documents to the Committee in relation to a specified matter.
- 11.117 Similar public interest certificate mechanisms exist in other legislation to limit the disclosure of certain information. For example, section 149 of the LEIC Act allows for the Attorney-General to issue a certificate which limits the disclosure of information by the Integrity Commissioner. Section 36 of the AAT Act allows for the Attorney-General to issue a certificate which limits the disclosure of certain information in the AAT, and section 4 of Schedule 1 to the *Intelligence Services Act 2001* allows for a responsible Minister to issue a certificate which limits the disclosure of operationally sensitive information to the Parliamentary Joint Committee on Intelligence and Security.

Grounds for issuing a certificate

- 11.118 The Attorney-General would only be able to issue a certificate if:
- the disclosure of the information or the contents of a document specified in the certificate would be contrary to the public interest on one or more of the grounds set out at paragraph 11.119; and
 - the Attorney-General is satisfied on reasonable grounds that issuing the certificate would be appropriate and is necessary to protect the public interest.
- 11.119 The grounds on which the Attorney-General could issue a certificate would be that the disclosure would:
- prejudice the security, defence or international relations of Australia;
 - involve the disclosure of communications between a Minister and a Minister of a State or Territory, or between a Minister of a State or Territory and a Minister of another State or Territory, and would prejudice:
 - relations between the Commonwealth Government and the Government of a State or Territory, or
 - relations between the Government of a State or Territory and the Government of another State or Territory;
 - involve the disclosure of deliberations or decisions of the Cabinet or of any committee of the Cabinet;
 - reveal, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to:
 - the enforcement of the criminal law of the Commonwealth, a State or Territory or a foreign country,
 - a corruption investigation,
 - a NACC corruption investigation,
 - a NACC complaint investigation, or
 - a public inquiry;

- reveal, or enable a person to ascertain, the identity of a person who is, or has been, a staff member of ASIO or ASIS;
- reveal, or enable a person to ascertain, the identity of a person who is, or has been, an agent of:
 - ASIO,
 - ASIS,
 - the Australian Geospatial-Intelligence Organisation, or
 - the Australian Signals Directorate;
- reveal information:
 - about the capabilities of, or information sources or operational activities or methods available to, a law enforcement agency, intelligence agency or the ADF,
 - about particular operations that have been, are being or are proposed to be undertaken by a law enforcement agency, intelligence agency or the ADF, or about proceedings relating to those operations, or
 - provided by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation, where that government or organisation does not consent to the public disclosure of the information;
- prejudice the proper performance of the functions of the IGIS;
- endanger a person’s life or physical safety;
- prejudice the protection of public safety;
- prejudice the fair trial of any person or the impartial adjudication of a matter; or
- prejudice the proper enforcement of the law (including through corruption investigations, NACC corruption investigations or NACC complaint investigations).

11.120 This clause would make it clear, for the avoidance of doubt, that the Attorney-General would not be able to issue a certificate if it was merely for the purposes of avoiding embarrassment or prejudice to a person’s reputation.

11.121 It is appropriate that the Attorney-General be responsible for giving certificates on behalf of the Commonwealth. The Attorney-General is the Government’s principal legal adviser and has a duty to maintain public confidence in the administration of justice and uphold the rule of law. The giving of a certificate would involve a balancing of competing public interests, in promoting transparency in relation to serious or systemic corrupt conduct and the performance by the Commissioner and the Inspector of their functions, and the protection of essential public interests including the security, defence and international relations of Australia, and the protection of the life and safety of individuals who may be endangered should particular information—including, for example, their cooperation with a corruption investigation—be revealed. The Attorney-General would be well-placed to appropriately balance these interests.

11.122 The Attorney-General would be able to seek and receive advice on whether the disclosure of particular information or the contents of a particular document would result in one or more of the listed harms and would be contrary to the public interest. This clause does not prescribe a process by which the Attorney-General must or could seek or obtain such advice. The need for the Attorney-General to consider the giving of a certificate could arise in a wide range of circumstances, requiring advice from any number and combination of Ministers, Commonwealth agencies, and other persons. Prescribing a particular process for the Attorney-General to request and receive advice would risk establishing an inflexible process that may be inefficient or ineffective in practice.

Contents of a certificate and obligations when a certificate is issued

- 11.123 If the Attorney-General issued a certificate, it would need to specify the kinds of disclosures that would be contrary to the public interest. This could include the disclosure of certain information generally, only in specific circumstances or where the disclosure is made to a specified class of person. The requirement for the Attorney-General to specify the kinds of disclosure that would be contrary to the public interest would:
- ensure that a certificate would only prohibit disclosures that would be contrary to the public interest, guarding against the risk that a certificate may be overbroad—for example, a certificate might specify that disclosing the identity of a current ASIO staff member the public or to a wide range of Commonwealth public officials would be contrary to the public interest, while continuing to permit the disclosure of that staff member’s identity in the version of the protected information report provided to Minister and the Director-General of Security, as the staff member’s agency head; and
 - in a corresponding fashion, enable the Attorney-General to appropriately tailor the controls on the disclosure of particular information.
- 11.124 A certificate could also specify that the disclosure of the existence or non-existence of particular information, documents or things is itself contrary to the public interest because it would:
- prejudice the security, defence or international relations of Australia; or
 - prejudice the proper performance of the functions of the IGIS.
- 11.125 The ability for a certificate to specify that the disclosure of the existence or non-existence of particular information, documents or things would be contrary to the public interest is appropriate, as it is limited to these narrow grounds. This would enable the Attorney-General to issue a certificate that would protect information relating to the existence or non-existence of, for example:
- a classified military capability, where confirming the existence or non-existence of a particular capability would prejudice the defence of Australia by providing foreign militaries with insight into advanced or non-public capabilities;
 - an ongoing security intelligence investigation, where confirming the existence or non-existence of the investigation would prejudice the security of Australia by providing persons engaged in activities prejudicial to security, such as espionage or politically motivated violence, with insight into whether their activities have been detected; or
 - information in the possession of the Office of the IGIS, which has unfettered access to information and documents in the possession of Australia’s intelligence agencies when investigating issues of legality and propriety in those agencies, subject to appropriate safeguards around the further disclosure or publication of that information—confirming the existence or non-existence of particular information held by the Office of the IGIS would, in particular circumstances, prejudice the proper performance of the functions of the IGIS.
- 11.126 The Attorney-General would be required to give a copy of a certificate to:
- the Commissioner;
 - the Inspector; and
 - the person who holds the relevant information or document, or where a Commonwealth agency holds the information or document, the head of the agency.
- 11.127 A certificate would not be a legislative instrument. The NACC Bill states this to assist readers, as the instrument is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Effect of a certificate and obligations under the NACC Bill

- 11.128 An Attorney-General's certificate under this clause would limit the disclosure of information by the Commissioner and the Inspector but would not prevent the Commissioner or the Inspector from receiving certified information for the purposes of, for example, a corruption investigation, a NACC corruption investigation or a NACC complaint investigation.
- 11.129 A disclosure made under the NACC Bill would contravene a certificate issued under this clause if the disclosure is contrary to the public interest according to the terms of the certificate. Accordingly, disclosures of information would be restricted or prevented if that information has been certified under this clause.
- 11.130 Table 6 lists the clauses in the NACC Bill that would prohibit or regulate the disclosure of information, documents or things covered by a certificate.

Table 6—Provisions in the NACC Bill that would give effect to a clause 235 certificate

	<i>Relevant clauses</i>	<i>Description of disclosure that would be affected by a certificate</i>
1	Clauses 154, 167 and 220	Inclusion of information in investigation and protected information reports.
2	Clauses 158 and 224	Advising a person who referred a corruption issue, a NACC corruption issue, or made a complaint in relation to which the NACC complaint investigation was conducted, of the outcome of an investigation.
3	Clauses 159 and 225	Advising a person who was the subject of a corruption investigation, a NACC corruption investigation, or a NACC complaint investigation of the outcome of the investigation.
4	Clause 181	Disclosures of information or documents to the Committee.
5	Clause 229	Disclosures in connection with the functions, powers and duties of an authorised discloser, and disclosures by an authorised discloser to a Commonwealth agency or a State or Territory government entity—unless the disclosure is to an IGIS official.
6	Clause 271	Annual report by the Commissioner.

Relationship between sensitive information under clause 227 and information subject to an Attorney-General's Certificates given under clause 235

- 11.131 The Commissioner and Inspector would be subject to a number of obligations to protect information that they are satisfied, after consulting with the relevant agency head, is **sensitive information**. A number of these obligations would mirror the obligations that could be imposed by the Attorney-General to protect information under a certificate given under clause 235. However, there are a number of differences between the two frameworks. In general terms, the Attorney-General would be able to impose greater and more targeted controls on the disclosure of a narrower range of information under a clause 235 certificate, than would apply to the disclosure of **sensitive information**.
- 11.132 It is intended that the Commissioner and Inspector would, in consultation with relevant agency heads, have primary responsibility for the protection of **sensitive information**. The clause 235 certificate framework is intended to enable the Attorney-General, on behalf of the Commonwealth, to impose additional or more specific protective requirements, in circumstances where there is a high degree of certainty that a specified disclosure *would* cause a particular prejudice or harm.
- 11.133 An Attorney-General's certificate under clause 235 would be capable of protecting a narrower range of information than could be covered by the definition of **sensitive information**. For example, to issue a certificate under clause 235, the Attorney-General would need to be satisfied that disclosure of the information *would* cause the prejudice in *each* of the listed circumstances. For sensitive information, the threshold differs between *would* and *could* causing prejudice, depending on the type of information, as set out above (see paragraphs 11.12 and 11.14).

- 11.134 Additionally, there would be two categories of *sensitive information* that could not be subject to an Attorney-General's Certificate under clause 235—information that would involve unreasonably disclosing a person's personal affairs or confidential commercial information whereas such information cannot be the subject of an Attorney-General's Certificate. The Attorney-General would not be likely to be better-placed than the Commissioner or the Inspector to determine whether information falling into these categories should be published.
- 11.135 The Commissioner and Inspector would generally be precluded from publishing *sensitive information*. However, they would generally be permitted to disclose that information to other Commonwealth, State or Territory agencies—including as part of a joint investigation, or when referring a corruption issue to them for investigation or consideration. The sensitive information framework would be primarily directed at mitigating harms that may arise from the publication of such information.
- 11.136 By comparison, the Attorney-General could provide that information covered by a clause 235 certificate cannot be disclosed to another agency (see clause 229). This would enable the Commissioner or Inspector to obtain and use particular, highly sensitive information as part of corruption investigation, while enabling the Attorney-General to mitigate harm or prejudice that would arise if that information were disclosed beyond the NACC or Inspector.

Clause 236—Attorney-General's certificate in relation to international relations

- 11.137 This clause would enable the Attorney-General to certify that the disclosure to the Commissioner or Inspector of specified information or documents communicated in confidence by a foreign government or international organisation, under a legally-binding agreement, would be contrary to the public interest. This would be appropriate, to ensure that the Australian Government complies with its international legal obligations.
- 11.138 The Australian Government, and Australia, benefit from foreign governments and international organisations sharing information with our agencies, in confidence—including, for example, highly sensitive intelligence information, and information relating to military technologies and capabilities. Such information is often shared under legally-binding agreements, that require the consent of the originating party before the information may be used for any purpose other than that for which it was originally provided. If the Australian Government breached legally-binding obligations of confidence to a foreign government or international organisations, it is likely that those—and other—governments and organisations would be less willing or unwilling to share such information with the Australian Government in the future.

Grounds for issuing a certificate

- 11.139 The Attorney-General would have the discretion to issue a certificate that provides that it would be contrary to the public interest (according to the ground outlined in paragraph 11.141) to disclose specified information or the contents of specified documents.
- 11.140 The Attorney-General would only be able to issue a certificate if they are satisfied on reasonable grounds that issuing the certificate would be appropriate and necessary to protect the public interest.
- 11.141 The Attorney-General would only be able to issue a certificate under this clause on the grounds that disclosure would be contrary to the public interest on the grounds the disclosure would harm or prejudice Australia's international relations in relation to information that was communicated in confidence, under an international agreement:
- by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; and
 - to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth.

11.142 A key consideration as to whether the Attorney-General should exercise their discretion to issue a certificate on the ground that a disclosure of information would harm or prejudice Australia's international relations, would be whether:

- the Australian Government has sought the consent of the foreign government to disclose the information to the NACC; and
- the foreign government has refused to give that consent.

11.143 The grounds on which the Attorney-General can issue a certificate under this clause would be especially limited, as the certificate would prevent the Commissioner or the Inspector from receiving or obtaining information, compared to a clause 235 certificate which restricts the disclosure of information by the Commissioner and the Inspector.

11.144 For the avoidance of doubt, this clause makes it clear that the Attorney-General would not be able to issue a certificate if it was merely for the purposes of avoiding embarrassment or prejudice to a person's reputation.

Contents of a certificate and obligations when a certificate is issued

11.145 A certificate under this clause must be given in writing, and would certify that the disclosure of information or the contents of documents specified to the certificate would be contrary to the public interest.

11.146 A certificate could also specify that the disclosure of the existence or non-existence of particular information, documents or things is itself contrary to the public interest because it would contravene the ground outlined in paragraph 11.141. This would be appropriate, to ensure that the Australian Government does not breach its international legal obligations by disclosing the existence or non-existence of a matter that it has undertaken to keep confidential.

11.147 The Attorney-General would be required to give a copy of the certificate to:

- the Commissioner;
- the Inspector; and
- the person who holds the relevant information or document, or where a Commonwealth agency holds the information or document, the head of the agency.

11.148 A certificate would not be a legislative instrument. The NACC Bill states this to assist readers, as the instrument is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Effect of a certificate and obligations under the NACC Bill

11.149 This clause is self-executing and would operate despite any other provision of the NACC Bill. A person would be prohibited from disclosing information or documents under the NACC Bill if doing so would contravene an international relations certificate issued under this clause.

Subdivision B—Arrangements relating to intelligence agencies and the IGIS

Clause 237—Person investigating or inquiring must consult—security matters

11.150 This clause would require the Commissioner and the Inspector to consult the head of ASIO, if they become aware that a corruption issue or inquiry relates in any way to a security matter.

11.151 A ***security matter*** would be defined—consistent with the definition in section 4 of the ASIO Act—as:

- espionage;
- sabotage;
- politically motivated violence;
- promotion of communal violence;

- an attack on Australia’s defence system;
 - an act of foreign interference; or
 - a serious threat to Australia’s territorial and border integrity.
- 11.152 This clause would require consultation where a corruption issue or inquiry relates ‘in any way’ to a security matter, and would impose an ongoing consultation obligation that would be triggered at any point in time at which the Commissioner or Inspector ‘become aware’ of that relationship. This would be an intentionally broad requirement, to ensure that any potential security matter is brought to ASIO’s attention—for example, where a corruption issue involves an issue of whether the misuse of classified information may have exposed that information to a foreign power.
- 11.153 If the issue or inquiry relates to the head of ASIO, the Commissioner or Inspector would be required to consult with the head of ONI instead. This would be appropriate, to avoid any risk of prejudice to a corruption investigation that might arise, if there were a mandatory requirement for the Commissioner or Inspector to consult with a person to whom a corruption issue or investigation relates.
- 11.154 It is intended that the Commissioner or Inspector would consider any advice provided by the head of ASIO or ONI, as the case may be, when considering:
- whether to commence or continue a corruption investigation or public inquiry—including, for example, where the security matter is already being investigated by ASIO and the conduct of a simultaneous corruption investigation or inquiry may be unnecessary, or may risk prejudice to security; and
 - how to conduct a corruption investigation or inquiry in a manner that mitigates any risk of prejudice to security—including, for example, whether to canvass particular issues at a public hearing, or to confine the investigation or inquiry to areas that would not intersect with the security matter.

Clause 238—Consultation before requiring information, documents or things from IGIS officials

- 11.155 This clause would outline a requirement for the Commissioner and the Inspector to consult with the head of an intelligence agency when exercising a power to require an IGIS official to give information, documents or things that originated from or were collected by an intelligence agency, or that otherwise concerns the activities of an intelligence agency.
- 11.156 The IGIS has unfettered access to information and documents held by Australia’s intelligence agencies, to ensure that the IGIS can effectively investigate complaints and provide the Government with assurances as to the legality and propriety of those agencies’ conduct. IGIS officials are subject to strict confidentiality obligations to protect this information, and are generally not compellable to produce information or documents to any court, tribunal, authority or person with powers to require the production of documents or the answering of questions.
- 11.157 Item 121 of the Consequential and Transitional Amendments Bill would amend the IGIS Act to authorise IGIS officials to provide information to the Commissioner and Inspector, including in response to notices to produce or in evidence at a private hearing. This amendment is necessary and appropriate to ensure that:
- the IGIS may provide the Commissioner with all relevant information, when referring a corruption issue that relates to an intelligence agency that the IGIS considers is likely to involve serious or systemic corrupt conduct to the Commissioner, in accordance with clause 34; and
 - relevantly to this clause, the Commissioner or Inspector can require IGIS officials to give information, documents or things when, in particular, conducting a corruption investigation or NACC corruption investigation that relates to an IGIS official.

- 11.158 This clause would require the Commissioner or Inspector to consult with the head of the relevant intelligence agency, before requiring an IGIS official to give information, documents or things that originated from or were collected by the intelligence agency, or that otherwise relate to the agency's activities. This would ensure that the head of the intelligence agency is aware that their agency's information may be obtained by the Commissioner or Inspector, and would enable the agency head to:
- provide the Commissioner or Inspector with advice as to whether it is necessary or appropriate to obtain the information, document or thing in question—for example, where the information, document or thing would be of limited investigative value to the Commissioner or Inspector, but would be highly sensitive;
 - provide the Commissioner or Inspector with advice as to protective security measures that ought to be put in place, to protect the information, document or thing while it is in the Commissioner or Inspector's possession;
 - provide the Commissioner or Inspector with broader advice about particular risks to national security that may arise in the course of the investigation; or
 - seek a new or varied arrangement under clause 239 to protect the information, document or thing.
- 11.159 In deciding whether to require the IGIS official to give the information, document or thing, the Commissioner or Inspector must consider the views of the intelligence agency, but would not be bound by them. This is appropriate to preserve the independence of the Commissioner and Inspector.
- 11.160 The Commissioner or the Inspector would not be required to consult with the head of the intelligence agency before obtaining the information, document, or thing from an IGIS official, if doing so would be likely to prejudice:
- a corruption investigation, a NACC corruption investigation or the conduct of a public inquiry; or
 - any action taken as a result of a corruption investigation, a NACC corruption investigation or a public inquiry.

Clause 239—Arrangements for obtaining and protecting intelligence information

- 11.161 This clause would require the Commissioner and the Inspector to take all reasonable steps to enter into an arrangement with the head of an intelligence agency relating to the obtaining, protection and disclosure of intelligence information relating to that agency.
- 11.162 As a non-corporate Commonwealth entity, the NACC will be subject to the Protective Security Policy Framework in accordance with the Attorney-General's *Directive on the Security of Government Business*.
- 11.163 This clause would enable the Commissioner or Inspector to agree to supplementary controls to those set out in the Protective Security Policy Framework to, for example:
- facilitate appropriate consultation with the intelligence agency to ensure that the Commissioner or Inspector have full access to intelligence information that is relevant to a particular investigation, while minimising access to intelligence information that is not relevant to the investigation;
 - enable the intelligence agency to make highly sensitive information and documents available to the NACC or Inspector for inspection at the agency or IGISs premises in the first instance;
 - ensure that the NACC and Inspector comply with any special handling requirements that may apply to certain intelligence information; or
 - put in place protective arrangements that are tailored to the NACC or Inspector's operations—such as arrangements for protecting the identity of staff members or agents of an intelligence agency when arriving and departing from a private hearing.

- 11.164 The term ‘intelligence information’ is defined in the same terms as in Schedule 1 of the *Intelligence Services Act 2001* and means any information that:
- was acquired or prepared by or on behalf of an intelligence agency in connection with its functions;
 - relates to the performance by an intelligence agency of its functions; or
 - identifies a person as being, or having been, a staff member (within the meaning of the *Intelligence Services Act 2001*) or agent of ASIO or ASIS.
- 11.165 The Commissioner would be required to take all reasonable steps to ensure that:
- at any time while the Commissioner or a staff member of the NACC are obtaining, storing, accessing, using or disclosing intelligence information relating to an intelligence agency, an arrangement is in force with the head of the intelligence agency; and
 - any obtaining, storage, accessing, use or disclosure of intelligence information relating to the agency is done in accordance with the arrangement.
- 11.166 If the Commissioner had taken all reasonable steps to ensure that an arrangement was in force with the head of the relevant intelligence agency, the fact that an arrangement is not in force would not prevent the Commissioner or a staff member of the NACC from obtaining, storing, accessing, using or disclosing intelligence information relating to the agency at that time.
- 11.167 Subclause 239(3) imposes similar obligations on the Inspector. This is appropriate to ensure that the absence of an arrangement—which would supplement the Protective Security Policy Framework—does not prevent the Commissioner and Inspector from obtaining intelligence information as part of a corruption investigation or NACC corruption investigation that relates to a staff member of an intelligence agency.
- 11.168 For the avoidance of doubt, an arrangement entered into by the Commissioner or the Inspector cannot prevent the exercise of their powers, or the performance of their functions under the NACC Bill. An arrangement would allow the Commissioner or Inspector to agree to, for example, consult before obtaining particular intelligence information or to handle particular intelligence information in accordance with particular protective requirements—but it could not prevent the Commissioner or Inspector from obtaining particular intelligence information.

Subdivision C—Arrangements relating to foreign nationals

Clause 240—Person investigating or inquiring must consult—foreign nationals

- 11.169 This clause would outline a mandatory requirement for the Commissioner and Inspector to consult the Secretary of the Foreign Affairs Department where a corruption issue, a public inquiry, or a NACC corruption issue relates a foreign official, or the conduct of a foreign national that occurred outside Australia.
- 11.170 The Australian Government has officials posted across the world, and engages in international negotiations and relations. There would be circumstances in which it would be appropriate for the Commissioner or Inspector to undertake a corruption investigation or public inquiry that relates, in some way, to a foreign official, or to the conduct of a foreign national that occurred outside Australia—for example, where an Australian public official and a foreign official have conspired to engage in serious corrupt conduct against the Commonwealth.
- 11.171 However, the investigation of conduct undertaken by a foreign official may give rise to particular risks—including issues relating to foreign state immunity, or diplomatic privileges or immunities. Similarly, investigating conduct of a foreign national that occurred entirely in a foreign country may give rise to a range of risks and sensitivities—including potential sensitivities relating to any perceived infringement of the sovereignty of the relevant foreign country. This clause would seek to ensure that the Commissioner or Inspector (as the case may be) is positioned to manage any potential international legal risks, as well as international relations risks or sensitivities that may arise in such situations.

- 11.172 This clause would require the Commissioner and the Inspector to consult the Secretary of the Foreign Affairs Department if they become aware that a corruption issue or inquiry relates in any way to an official of a foreign country, or conduct in a foreign country of a person who is not an Australian citizen or a permanent resident of Australia (see paragraph 1.124). This would be an intentionally broad requirement to ensure that any matter that could prejudice Australia's international relations is brought to the Foreign Affairs Department's attention.
- 11.173 Consistent with the requirement to consult the head of ASIO under clause 237, it is intended that the Commissioner or Inspector would consider any advice provided by the Secretary of the Foreign Affairs Department when considering:
- whether to commence or continue a corruption investigation or public inquiry; and
 - how to conduct a corruption investigation or inquiry in a manner that mitigates any risk of prejudice to Australia's international relations—including, for example, whether particular information would fall within the definition of *sensitive information*, whether to canvass particular issues at a public hearing, or to confine the investigation or inquiry to areas that would not raise international relations concerns.

PART 12 ADMINISTRATIVE PROVISIONS FOR THE NATIONAL ANTI-CORRUPTION COMMISSION

- 12.1 This Part would set out the administrative arrangements for the NACC, including the appointment and remuneration of NACC officer holders, engagement of NACC staff, immunities of NACC staff members, and annual reporting requirements.

Division 1—Appointment of the NACC Commissioners

- 12.2 This Division would provide for the appointment, tenure, remuneration and other terms and conditions for NACC Commissioners (including the Commissioner and Deputy Commissioners).

Clause 241—Appointment of the Commissioner

- 12.3 The Commissioner would be the head of the NACC and exercise a range of functions, as set out in clause 17. This clause would provide for the appointment of the Commissioner, including the appointment process, requisite qualifications, period of appointment, and basis of appointment.

Appointment

- 12.4 The Commissioner would be appointed by the Governor-General by written instrument on the recommendation of the Minister, after approval of the appointment by the Committee. Given the Commissioner would have significant powers and functions, it is appropriate that they should be appointed by the Governor-General.
- 12.5 Before the Minister makes a recommendation to the Governor-General regarding the appointment of the Commissioner, the Minister must have referred the proposed recommendation to the Committee for approval under clause 178.
- 12.6 Approval of the appointment may be obtained either by the Committee notifying the Minister that it has decided to approve the proposed recommendation, or by being taken to have approved the proposed recommendation.
- 12.7 Where the Minister refers a proposed recommendation for the appointment of the Commissioner, the Committee would be required to decide whether to approve or reject the recommendation:
- within 14 calendar days after the referral of the appointment; or
 - if, within the first 14 calendar days after the referral, the Committee notifies the Minister that it requires additional time to consider the referral—44 calendar days after the referral.
- 12.8 The Committee's decision whether to approve or reject a proposed recommendation for an appointment would need to be made by a majority. As soon as practicable after making the decision, the Committee would need to give notice in writing to the Minister and report to both Houses of the Parliament.
- 12.9 The Committee would be taken to have approved a proposed recommendation for an appointment if the Committee does not give notice within the required timeframe.
- 12.10 Requiring the appointment to be approved by the Committee would ensure that the appointment is subject to appropriate oversight, and the recommended Commissioner has the confidence of the Parliament.

Qualification for appointment

- 12.11 This clause would set out the minimum qualification requirements for a person to be appointed as the Commissioner. To be eligible for appointment, a person must be:
- a retired judge of a federal court or a court of a State or Territory; or
 - enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory, and has been enrolled for at least 5 years.

- 12.12 The role of Commissioner is a significant statutory appointment. To effectively discharge the functions of the Commissioner, a person would be required to have specialist skills and expertise in applying statutory frameworks. These skills will be possessed by a former judge of a federal, State or Territory court. Experienced legal practitioners will also have these skills, and the requirement for them to have enrolled as a legal practitioner for at least 5 years is consistent with the qualification requirements for Justices of the High Court as set out in section 7 of the *High Court of Australia Act 1979*.

Period of appointment

- 12.13 The Commissioner would hold office for a single fixed term specified in the instrument of appointment. The period must not exceed 5 years. A 5-year term is consistent with the Government's Merit and Transparency policy for statutory appointments.
- 12.14 The Commissioner would not be able to be reappointed. This ensures the independence of the Commissioner, as they would not be concerned about their reappointment when conducting investigations, with no incentive to consider the regard in which they are held by the government of the day. This also ensures there is regular renewal in leadership of the NACC.
- 12.15 The Commissioner would be required to be appointed on a full-time basis. This reflects the fact that there would be a single Commissioner who would have a range of significant functions and powers associated with their role. This is expected to amount to a full-time workload that could not be effectively performed in a part-time capacity.

Clause 242—Appointment of the Deputy Commissioners

- 12.16 Deputy Commissioners would assist the Commissioner in the performance of the Commissioner's functions. This clause would provide for the appointment of Deputy Commissioners, including the appointment process, requisite qualifications, period of appointment, and basis of appointment. Consistent with clause 18, there could be up to three Deputy Commissioners.

Appointment

- 12.17 A Deputy Commissioner would be appointed by the Governor-General by written instrument on the recommendation of the Minister, after approval of the appointment by the Committee. Given a Deputy Commissioner would have significant powers and functions, it is appropriate that they should be appointed by the Governor-General.
- 12.18 Before the Minister makes a recommendation to the Governor-General regarding the appointment of a Deputy Commissioner, the Minister must have referred the proposed recommendation to the Committee for approval under clause 178.
- 12.19 Approval of the appointment may be obtained either by the Committee notifying the Minister that it has decided to approve the proposed recommendation, or by being taken to have approved the proposed recommendation.
- 12.20 Where the Minister refers a proposed recommendation for the appointment of a Deputy Commissioner, the Committee would be required to decide whether to approve or reject the recommendation:
- within 14 calendar days after the referral of the appointment; or
 - if, within the first 14 calendar days after the referral, the Committee notifies the Minister that it requires additional time to consider the referral—44 calendar days after the referral.
- 12.21 The Committee's decision whether to approve or reject a proposed recommendation for an appointment would need to be made by a majority. As soon as practicable after making the decision, the Committee would need to give notice in writing to the Minister and report to both Houses of the Parliament.

12.22 The Committee would be taken to have approved a proposed recommendation for an appointment if the Committee does not give notice within the required timeframe.

12.23 Requiring the appointment to be approved by the Committee would ensure that the appointment is subject to appropriate oversight, and any recommended Deputy Commissioner has the confidence of the Parliament.

Qualification for appointment

12.24 This clause would set out the minimum qualification requirements for a person to be appointed as a Deputy Commissioner.

12.25 To be eligible for appointment, the Minister must be satisfied that a person has appropriate qualifications, knowledge or experience to undertake the role.

12.26 It would require at least 2 Deputy Commissioners (or if there is only one Deputy Commissioner—that Deputy Commissioner) to be:

- a retired judge of a federal court or a court of a State or Territory; or
- enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory and has been so enrolled for at least 5 years.

12.27 This is appropriate because the Commissioner would be able to delegate all of their functions, powers and duties to a Deputy Commissioner (under clause 276), including powers relating to the conduct of hearings. It is also important for Deputy Commissioners to be appropriately skilled and qualified to act in the Commissioner's position when the Commissioner necessarily takes leave. To effectively discharge the powers, duties and functions of a Deputy Commissioner, at least two of the Deputy Commissioners should have the same specialist skills and expertise in applying statutory frameworks as the Commissioner. These skills will be possessed by a former judge of a federal, State or Territory court. Experienced legal practitioners will also have these skills, and the requirement for them to have enrolled as a legal practitioner for at least 5 years is consistent with the qualification requirements for Justices of the High Court as set out in section 7 of the *High Court of Australia Act 1979*.

12.28 Allowing for the appointment of a third Deputy Commissioner who does not hold the requisite legal qualifications would enable greater diversity in candidates and expertise across Commissioners. For example, it may be appropriate for a third Deputy Commissioner to have skills and experience in education, research or corruption prevention, which may not be skills held by former judges or experienced legal practitioners. In this case, it is appropriate for a person to have appropriate qualifications, knowledge or experience to undertake the role.

12.29 This clause would prevent a person being appointed as a Deputy Commissioner where they have previously been appointed as the Commissioner. This would ensure there is regular renewal in leadership of the NACC, and preserves the independence of the Commissioner that is achieved by the fact that they cannot be appointed to another senior leadership position in the NACC, whether at the Commissioner or Deputy Commissioner level.

Period of appointment

12.30 A Deputy Commissioner would hold office for the period specified in the instrument of appointment. The period must not exceed 5 years.

12.31 A Deputy Commissioner may be reappointed on one occasion after the Deputy Commissioner's first appointment, for an additional period not exceeding 5 years. This would allow for continuity in Deputy Commissioner appointments beyond the expiry of the Commissioner's single fixed term, and avoid all NACC Commissioner appointments expiring at the same time.

12.32 A Deputy Commissioner may be appointed on a full-time or part-time basis. There will be up to three Deputy Commissioners and it therefore may be possible and appropriate for Deputy Commissioners to be appointed on a part-time basis.

Clause 243—Acting appointments

- 12.33 This clause would enable the Minister to appoint a person as a NACC Commissioner on an acting basis, by written instrument, in certain circumstances.
- 12.34 An acting appointment could be made:
- during a vacancy in the office of the NACC Commissioner (whether or not an appointment has previously been made to the office); or
 - during any or all periods when the NACC Commissioner is absent from duty or from Australia, or is unable to perform the duties of the office for any reason.
- 12.35 Over the course of a 5-year appointment, it will be essential for the Commissioner to have regular leave for rest and recreation, as well as personal leave for any periods of illness or injury. Given that appointment processes can be lengthy, and the approval of the Committee will also be needed for appointments to the position of Commissioner, it is also possible that the position could be vacant following the end of a Commissioner's appointment. This clause would ensure that the NACC has appropriate leadership and senior leadership across all of these circumstances.
- 12.36 Further rules regarding acting appointments are contained in sections 33AB and 33A of the *Acts Interpretation Act 1901*. These rules relate to the validity of things done under appointments and provide for the terms, conditions and duration of certain acting appointments.

Qualification for acting appointment

- 12.37 This clause would provide the requisite qualifications for an acting appointment. The qualification requirements for acting appointments reflect those for substantive appointments.
- 12.38 If the person is to act as the Commissioner, the person must meet the qualification requirements, as set out in paragraph 12.11 for the Commissioner (that is, they must be a former judge or experienced legal practitioner). If the person is to act as a Deputy Commissioner, the person must meet the qualification requirements, as set out in paragraphs 12.26 to 12.29 for Deputy Commissioners (that is, they must be a former judge, experienced legal practitioner, or have appropriate qualifications, knowledge or experience).

Clause 244—Remuneration

- 12.39 This clause would set out the means for determining the remuneration and allowances for a NACC Commissioner, which is defined in clause 7 to mean a Commissioner or a Deputy Commissioner.
- 12.40 A NACC Commissioner would be paid the remuneration that is determined by the Remuneration Tribunal. In the absence of a determination by the Tribunal, the NACC Commissioner would be paid the remuneration that is prescribed by the regulations.
- 12.41 It is appropriate for the remuneration for a NACC Commissioner to be determined by the Remuneration Tribunal as it is an independent statutory body that handles the remuneration of key Commonwealth offices. Given the significant responsibilities of the office of NACC Commissioner, it is desirable for the remuneration to be determined by an experienced, independent authority. Such a determination would be a disallowable instrument under the *Legislation Act 2003*. This means that the determination would be required to be tabled in both Houses of Parliament, and either House may pass a resolution disallowing the determination within 15 sittings days of the determination being tabled.
- 12.42 The ability to prescribe the remuneration in the regulations allows flexibility to ensure a NACC Commissioner can be appropriately remunerated if there is any delay in the making of a determination by the Tribunal, or if a determination is disallowed by either House of Parliament.
- 12.43 The regulations would also be able to prescribe the allowances that a NACC Commissioner would be paid.

- 12.44 The scope of the regulation-making power conferred by this clause would be subject to the *Remuneration Tribunal Act 1973*. This means that the remuneration prescribed in the regulations could only be enforced where no determination by the Tribunal is in operation.

Clause 245—Leave of absence

- 12.45 This clause would outline the leave arrangements for NACC Commissioners.
- 12.46 A NACC Commissioner appointed on a full-time basis would have the recreation leave entitlements that are determined by the Remuneration Tribunal. It is appropriate for the recreation leave entitlements for a NACC Commissioner to be determined by the Remuneration Tribunal as it is an independent statutory body that handles the remuneration and allowances of key Commonwealth offices. Given the significance of the responsibilities of the office of NACC Commissioner, it is desirable for the recreation leave entitlements to be determined by an experienced, independent authority.
- 12.47 The Minister would be able to grant NACC Commissioners appointed on a full-time basis leave of absence, other than recreation leave, on any terms and conditions that the Minister determines. This provides flexibility for the Minister to consider requests from NACC Commissioners for other types of leave—for example discretionary leave to attend a funeral where it may not be desirable for a NACC Commissioner to use their recreation leave entitlements for this purpose.
- 12.48 The Minister would also be able to grant a Deputy Commissioner appointed on a part-time basis leave of absence on the terms and conditions that the Minister determines.

Clause 246—Other paid work

- 12.49 This clause would provide that a NACC Commissioner is not permitted to engage in paid work outside their office unless they receive approval from the Minister. This would minimise the likelihood of conflicts of interests arising, and ensure their independence and performance are not compromised by outside commitments.

Clause 247—Disclosure of interests

- 12.50 This clause would require NACC Commissioners to disclose conflicts of interest to the Minister. This refers to a situation where a NACC Commissioner has, or acquires, an interest that may conflict with the performance of their functions.
- 12.51 A disclosure by a NACC Commissioner under section 29 of the PGPA Act must be made to the Minister. Section 29 of the PGPA Act provides that an official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose the details of this interest.
- 12.52 A NACC Commissioner would therefore be required to disclose any material personal interest that relates to the NACC or to an entity they are investigating. A breach of this requirement would be treated as a breach of section 29 of the PGPA Act.
- 12.53 The requirement in this clause would apply in addition to any rules made for the purposes of section 29 of the PGPA Act. For example, the PGPA Rule currently provides that a person who has disclosed an interest may not be present or vote at a meeting on the matter.

Clause 248—Other terms and conditions

- 12.54 This clause would enable the Governor-General to determine additional terms and conditions of a NACC Commissioner's appointment, to the extent those terms and conditions are not otherwise covered by the NACC Bill. This could include matters such as the location where the duties of the office are to be performed.

Clause 249—Resignation

- 12.55 This clause would allow a NACC Commissioner to resign their appointment by giving a written resignation to the Governor-General. The resignation would take effect on the day it is received by the Governor-General, unless a later day is specified in the written resignation. If a later day is specified then the resignation takes effect on that day.

Clause 250—Termination of appointment

- 12.56 This clause would set out the circumstances in which a NACC Commissioner’s appointment could be terminated by the Governor-General.
- 12.57 The Governor-General would be able to terminate the appointment of a NACC Commissioner on the grounds of misbehaviour, or if the NACC Commissioner is unable to perform their duties because of physical or mental incapacity where each House of the Parliament, in the same session of the Parliament, presents an address to the Governor-General praying for the removal of the NACC Commissioner.
- 12.58 This clause would ensure the independence of NACC Commissioners by ensuring they cannot be removed from office by the government of the day, without the agreement of the Parliament. The grounds for removal are limited, ensuring that NACC Commissioners can undertake corruption investigations without fear of removal from office due to potentially making findings of corruption against current government officials, or persons with close connections to the government of the day.
- 12.59 Requiring an address from both Houses of the Parliament before the termination of appointment of a NACC Commissioner is consistent with the arrangements for the removal of federal judges under the Constitution.
- 12.60 The Governor-General would be required to terminate the appointment of a NACC Commissioner in circumstances where they become financially compromised. This would include circumstances where a NACC Commissioner:
- becomes bankrupt;
 - applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
 - compounds with the NACC Commissioner’s creditors; or
 - makes an assignment of the NACC Commissioner’s remuneration for the benefit of the NACC Commissioner’s creditors.
- 12.61 This provision would guard against the potential for a NACC Commissioner to become financially vulnerable to corruption. These circumstances would be sufficiently objective and serious so as to warrant termination of an appointment without discretion or parliamentary consideration. This is consistent with arrangements for the Auditor-General under the *Auditor-General Act 1997*.

Division 2—The CEO, staff etc. and authorised officers

- 12.62 This Division would provide for the appointment of a CEO, the engagement of staff, consultants, counsel and other persons assisting the NACC, and the appointment of authorised officers.

Subdivision A—Appointment and functions of the CEO

Clause 251—The Chief Executive Officer

- 12.63 This clause establishes the role of a CEO of the NACC. The CEO would be the accountable authority of the NACC for the purposes of the PGPA Act. This model is consistent with the federal courts as well as State and Territory models (with the exception of Western Australia, Tasmania and the Northern Territory). Given the Commissioner would need to be a former judge or experienced legal practitioner (consistent with clause 241), it is desirable for a CEO to be appointed to manage the corporate and administrative affairs of the NACC, allowing the Commissioner to focus on the significant functions, duties and powers that would be vested in them.

Clause 252—Functions of CEO

- 12.64 This clause would provide that the functions of the CEO are to manage the affairs of the NACC, and ensure the NACC performs its functions. For example, the CEO would be responsible for managing the NACC's finances, property and assets, overseeing compliance with security requirements and ensuring corporate planning and reporting is effective and timely. This clause would also provide that the CEO has power to do all things necessary or convenient to be done for, or in connection with, the performance of the CEO's functions.

Clause 253—Commissioner may give directions to CEO

- 12.65 This clause would empower the Commissioner to give directions to the CEO about the performance of the CEO's functions. The CEO would be required to comply with any such direction. However, the CEO would not be required to comply with a direction to the extent the direction relates to the CEO's performance of functions or exercise of powers under the PGPA Act or the *Public Service Act 1999*. For example, the Commissioner would not be able to direct the CEO to govern the NACC in a way that does not promote the achievement of the NACC's purposes, which is a requirement imposed on accountable authorities by the PGPA Act.
- 12.66 A direction under this clause would not be a legislative instrument. This statement is included in the NACC Bill to assist readers, as a direction is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Clause 254—Appointment of CEO

- 12.67 This clause would provide for the appointment of the CEO, including the appointment process, requisite qualifications, period of appointment and basis of appointment.

Appointment

- 12.68 The CEO would be appointed by the Governor-General by written instrument on the recommendation of the Minister.
- 12.69 Before the Minister makes a recommendation to the Governor-General regarding the appointment of the CEO, the proposed recommendation must have been approved by the Commissioner. Requiring the Commissioner's approval would ensure the Commissioner is involved in selecting a suitable candidate, and supports their appointment. The Commissioner and CEO would need to work together closely and effectively, and this consultation would support the Minister to ensure that a candidate for CEO would be in a position to develop an effective working relationship with the Commissioner.
- 12.70 The Commissioner would not be able to delegate their duty to approve the appointment of the CEO (see clause 276).
- 12.71 The Committee would not be involved in approving the appointment of the CEO. This is appropriate given the CEO would manage the corporate and administrative affairs of the NACC and would not be involved in corruption investigations.

- 12.72 Under transitional arrangements, the first CEO would not require the Commissioner's approval. This is to ensure the NACC can be established with the Commissioner and CEO's appointments commencing on the same day.

Qualification for appointment

- 12.73 This clause would provide that a person must not be appointed as the CEO unless the Commissioner is satisfied that the person has appropriate qualifications, knowledge or experience. This requirement would ensure the person appointed as CEO holds the skillset required to effectively perform the CEO's functions, which may involve leadership and management of complex organisations, including budget and property responsibilities.

Period of appointment

- 12.74 The CEO would hold office for the period specified in the instrument of appointment. The period must not exceed 5 years. A 5-year term is consistent with the Government's Merit and Transparency policy for statutory appointments.
- 12.75 The CEO may be reappointed consistent with section 33AA of the *Acts Interpretation Act 1901*. There would be no compromise to the independence of the NACC if a CEO is reappointed, and it may be desirable to have a single occupant in the position of CEO for more than one term in order to maintain corporate knowledge on administrative matters.

Basis of appointment

- 12.76 The CEO would be required to be appointed on a full-time basis. The responsibilities of the CEO will be extensive and are expected to occupy a person on a full-time basis.

Clause 255—Acting appointments

- 12.77 This clause would enable the Commissioner to appoint a person as CEO on an acting basis, by written instrument, in certain circumstances. This ensures the CEO can take recreation or personal leave with appropriate arrangements to manage the responsibilities of the office.
- 12.78 An acting appointment could be made:
- during a vacancy in the office of the CEO (whether or not an appointment has previously been made to the office); or
 - during any or all periods when the CEO is absent from duty or from Australia, or is unable to perform the duties of the office for any reason.
- 12.79 Further rules regarding acting appointments are outlined in sections 33AB and 33A of the *Acts Interpretation Act 1901*. These rules relate to the validity of things done under appointments and provide for the terms, conditions and duration of certain acting appointments.

Clause 256—Remuneration

- 12.80 This clause would set out the means for determining the remuneration and allowances for the CEO.
- 12.81 The CEO would be paid the remuneration that is determined by the Remuneration Tribunal. In the absence of a determination by the Tribunal, the CEO would be paid the remuneration that is prescribed by the regulations.
- 12.82 It is appropriate for the remuneration for the CEO to be determined by the Remuneration Tribunal as it is an independent statutory body that handles the remuneration of key Commonwealth offices. Given the significance of the responsibilities of the CEO, it is desirable for the remuneration to be determined by an experienced, independent authority. Such a determination would be a disallowable instrument under the *Legislation Act 2003*. This means that the determination would be required to be tabled in both Houses of Parliament, and either House may pass a resolution disallowing the determination within 15 sittings days of the determination being tabled.

- 12.83 The ability to prescribe the remuneration in the regulations allows flexibility to ensure a CEO can be appropriately remunerated if there is any delay in the making or a determination by the Tribunal, or if a determination is disallowed by either House of Parliament.
- 12.84 The regulations would also be able to prescribe the allowances that the CEO would be paid.
- 12.85 The scope of the regulation-making power conferred by this clause would be subject to the *Remuneration Tribunal Act 1973*. This means that the remuneration prescribed in the regulations could only be enforced where no determination by the Tribunal is in operation.

Clause 257—Leave of absence

- 12.86 This clause would outline the leave arrangements for the CEO.
- 12.87 The CEO would have the recreation leave entitlements that are determined by the Remuneration Tribunal.
- 12.88 It is appropriate for the recreation leave entitlements for the CEO to be determined by the Remuneration Tribunal as it is an independent statutory body that handles the remuneration and allowances of key Commonwealth offices. Given the significance of the responsibilities of the office of CEO, it is desirable for the recreation leave entitlements to be determined by an experienced, independent authority.
- 12.89 The Commissioner would also be able to grant the CEO leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

Clause 258—Other paid work

- 12.90 This clause would provide that the CEO is not to engage in paid work outside the duties of the CEO's office without the Commissioner's approval. This requirement would minimise the effective performance of the role on a fulltime basis and manage the risk of conflicts of interest occurring.
- 12.91 It would be appropriate for the Commissioner to approve any outside paid work as the Commissioner would be well-placed to assess whether the work can be managed without compromising the CEO's duties and whether any conflicts of interest would arise from the additional role.

Clause 259—Other terms and conditions

- 12.92 This clause would enable the Commissioner to determine additional terms and conditions of the CEO's appointment, to the extent those terms and conditions are not otherwise covered by the NACC Bill. This could include matters such as the location where the duties of the office are to be performed.

Clause 260—Resignation

- 12.93 This clause would allow the CEO to resign their appointment by giving a written resignation to the Governor-General. The resignation would take effect on the day it is received by the Governor-General, unless a later day is specified in the written resignation. If a later day is specified then the resignation takes effect on that day.

Clause 261—Termination of appointment

- 12.94 This clause would set out the circumstances in which the CEO's appointment could be terminated by the Governor-General.
- 12.95 The Governor-General would have the discretion to terminate the appointment of the CEO on the grounds of misbehaviour, or if the CEO is unable to perform their duties because of physical or mental incapacity.
- 12.96 The Governor-General would be required to terminate the appointment of the CEO in certain circumstances. This would include circumstances where the CEO:
- becomes bankrupt;

- applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
- compounds with the CEO's creditors;
- makes an assignment of the CEO's remuneration for the benefit of the CEO's creditors;
- is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;
- engages, except with Commissioner's approval, in paid work outside the duties of the CEO's office; or
- fails, without reasonable excuse, to comply with section 29 of the PGPA Act (which deals with the duty to disclose interests) or rules made for the purposes of that section.

12.97 The circumstances outlined above would be sufficiently objective and serious so as to warrant termination of an appointment without discretion, consistent with the termination grounds for the CEOs of the federal courts.

Subdivision B—Staff and consultants etc.

Clause 262—Staff

12.98 This clause would provide that the staff of the NACC must be persons engaged under the *Public Service Act 1999*. For the purposes of that Act, the CEO would be the head of a statutory agency consisting of the CEO and the APS employees assisting the CEO. As such, the CEO would have all the rights, duties and powers conferred under that Act including, for example, upholding and promoting the APS Values and APS Employment Principles outlined in that Act.

Clause 263—Consultants

12.99 This clause would authorise the CEO to engage consultants, on behalf of the Commonwealth, to assist in the performance of the NACC's functions. This could include, for example, an IT specialist appointed to assist with an investigation.

12.100 The consultants would be engaged on the terms and conditions that the CEO determines in writing, ordinarily the written agreement providing for the engagement of the consultant.

Clause 264—Persons assisting the NACC

12.101 This clause would allow for the NACC to be assisted by officers and employees of Agencies (within the meaning of the *Public Service Act 1999*), and authorities of the Commonwealth, whose services would be made available to the NACC in connection with the performance of any of the NACC's functions.

12.102 This clause would also authorise the CEO to make arrangements for officers or employees of State or Territory governments or government authorities, or government bodies or authorities of a foreign country, to perform services for the NACC. These arrangements may provide, for example, for police personnel or officers of other oversight or integrity agencies to assist the NACC in connection with the NACC's investigation functions.

12.103 An arrangement under this clause may provide for the Commonwealth to reimburse the State or Territory, or the government of the foreign country, for the services of persons who assist the NACC under an arrangement. This means that the home agency of the person would not necessarily be disadvantaged by making a person available to assist the NACC. The NACC will be able to bear the costs of that person's salary, allowing the home agency the flexibility to backfill the position.

- 12.104 When performing services for the NACC under this clause, a person is subject to the directions of the CEO and a NACC Commissioner. This is appropriate to ensure persons assisting the NACC comply with the requirements that would apply to staff members of the NACC in relation to the appropriate exercise of functions and powers. This would be particularly critical when a person assisting the NACC is also authorised to exercise powers as an authorised officer under Part 7 (the appointment of authorised officers is explained at paragraphs 12.109 to 12.113).
- 12.105 A constable (defined in clause 7 and paragraph 1.52) assisting the NACC under this clause would be able to continue to exercise their functions, powers and duties arising from their position as a constable. This will mean, for example, a constable would be able to exercise powers of arrest, however must comply with the relevant duties of a constable while exercising such powers.

Clause 265—Counsel assisting the NACC or a NACC Commissioner

- 12.106 This clause would authorise the CEO to appoint a legal practitioner to assist the NACC or a NACC Commissioner as counsel. Counsel could be engaged generally or in relation to a particular corruption investigation. For example, the CEO may appoint a legal practitioner as Counsel Assisting the NACC for a particular hearing.

Clause 266—Meaning of staff member of the NACC

- 12.107 This clause would list the persons who are defined as a staff member of the NACC for the purposes of the NACC Bill. Those persons are:
- the Commissioner;
 - any Deputy Commissioners;
 - the CEO;
 - a member of the staff referred to in clause 262;
 - a consultant engaged under clause 263;
 - a person referred to in clause 264 whose services are made available to the NACC; and
 - a legal practitioner appointed under clause 265.
- 12.108 The persons captured by this definition would be subject to the requirements (including confidentiality requirements), protections and oversight mechanisms provided for in the NACC Bill.

Subdivision C—Authorised officers

Clause 267—Appointment of authorised officers

- 12.109 This clause would permit the Commissioner to appoint authorised officers to exercise one or more of the powers conferred on authorised officers by Part 7 (investigating corruption issues), for example the execution of search warrants. This clause seeks to ensure that authorised officers possess skills, training and experience that reflect the significant and coercive nature of their powers under the NACC Bill.
- 12.110 An authorised officer would be either a staff member of the NACC or a member of the AFP. If the officer is a staff member of the NACC, they must also be a member of the AFP or the police force or police service of a State or Territory, or the Commissioner must consider that they have suitable qualifications or experience for the appointment. The Commissioner and Deputy Commissioners are also authorised officers (see clause 7).

- 12.111 The requirement that the Commissioner must consider that a staff member of the NACC has suitable qualifications or experience would ensure that staff members have completed appropriate training, or hold suitable qualifications to exercise the powers that would be conferred on authorised officers under the Bill. This could include, for example, training on the use of reasonable and necessary force when arresting, under a warrant, a person who has absconded to avoid appearing at a hearing in response to a summons. The question of what constitutes ‘suitable’ qualifications or experience to exercise the powers of an authorised officer should be considered in light of any directions given by the Commissioner under this clause. For example, if the Commissioner had given a direction that certain powers or activities must only be exercised or undertaken by a member of the AFP or the police force of a State or Territory—such as powers to arrest or detain a person—then it would not be necessary for a staff member of the NACC to have been trained to undertake those activities before being appointed as an authorised officer. The Commissioner and Deputy Commissioners should also receive appropriate training if they were to exercise a power as an authorised officer.
- 12.112 Noting the scope of powers that may be exercised by an authorised officer, the Commissioner would only be able to appoint a member of a police force or service (including the AFP) as an authorised officer if the head of the relevant police force or service agrees to the appointment. The head of the member’s police force or service would be best placed to confirm that the member is suitably qualified and experienced to exercise such powers.
- 12.113 When exercising their powers, authorised officers would be required to comply with any directions given by the Commissioner. These directions might provide further guidance for complying with specific requirements under the NACC Bill, for example requirements when conducting a search or when using force. A direction would not be a legislative instrument. This statement is included in the NACC Bill to assist readers, as a direction is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Clause 268—Identity cards

- 12.114 This clause would require the Commissioner to issue identity cards to authorised officers. This clause is intended to ensure that authorised officers could identify themselves to persons affected by the exercise of coercive powers—for example the occupier of a premises that is being searched.
- 12.115 An identity card must be in the form approved in writing by the Minister, and must contain a recent photograph of the authorised officer.

Identity card to be carried and produced on request

- 12.116 An authorised officer would be required to carry the identity card at all times when exercising powers conferred by Part 7.
- 12.117 An authorised officer would not be entitled to exercise any powers conferred by Part 7 in relation to a person or premises if they fail to comply with a requirement by the relevant person or the occupier of the premises to produce their identity card for inspection. The *occupier* of premises is the person who appears to be in charge of the premises.

Offence

- 12.118 This clause would make it an offence for a person who ceases to be an authorised officer to fail to return their identity card. The offence would have the following physical elements:
- the person has been issued with an identity card;
 - the person ceases to be an authorised officer; and
 - the person does not return the identity card to the Commissioner within 14 days after ceasing to be an authorised officer.
- 12.119 The penalty for the offence is 60 penalty units.

- 12.120 The offence is an offence of strict liability. There are no fault elements for any of the physical elements of the offence. However, the defence of mistake of fact under section 9.2 of the *Criminal Code* would be available. Strict liability is justified by:
- the low and non-custodial penalty for the offence;
 - the need to ensure compliance and, in turn, ensure identity cards are returned when appropriate and are not able to be misused (whether by an authorised officer or another person); and
 - the fact that authorised officers can be made aware of their obligation when issued with an identity card.

Defence for lost or destroyed identity cards

- 12.121 The offence would not apply if the identity card was lost or destroyed. A defendant would bear an evidential burden in relation to the defence (see subsection 13.3(3) of the *Criminal Code*).
- 12.122 It is reasonable and necessary that the defendant bear the evidential burden for this matter as it is, by its nature, peculiarly within the knowledge of the defendant. The defendant would be best placed to provide evidence that suggests a reasonable possibility their identity card was lost or destroyed.
- 12.123 This defence would be in addition to the standard defences available under the *Criminal Code*.

Division 3—Immunities of staff members of the NACC

- 12.124 This Division would provide certain immunities for staff members of the NACC. It is important that appropriate arrangements are in place to protect staff members in the performance of their duties.

Clause 269—Immunity from civil proceedings for staff members of the NACC and persons assisting

- 12.125 This clause would outline the immunity from civil proceedings afforded to staff members of the NACC.
- 12.126 A staff member of the NACC would not be liable to civil proceedings in relation to an act or omission done in good faith during the actual or purported performance or exercise of their functions, powers or duties under the NACC Bill. This immunity would extend to any person whom the Commissioner requests in writing to assist a staff member.
- 12.127 This clause would ensure that staff members, and those assisting staff members, are able to perform their functions and duties under the NACC Bill without fear of personal liability for any actions they perform in good faith. Without immunity from civil proceedings, staff members may be exposed to civil liability in the performance of their duties. For example, staff members may be exposed in circumstances where a person wishes to bring legal action against the staff member as a result of damage to property arising from a search of premises which the person occupies. This clause would protect the staff member from such action.
- 12.128 The mere purported performance or exercise of functions, powers or duties requires more than the absence of dishonesty or malice by the relevant person. Rather, there must be a genuine attempt to perform the function correctly, having regard to the caution and diligence that is expected of an honest person of ordinary prudence.

Clause 270—Immunities from certain State and Territory laws

- 12.129 This clause would outline the immunities from certain State and Territory laws available to staff members of the NACC. A staff member of the NACC would not be required:
- to obtain or have a licence (for example, a license for a weapon in compliance with State or Territory laws) or permission for doing any act or thing in the exercise of their powers or the performance of duties; or
 - to register any vehicle, vessel, animal or article belonging to the Commonwealth.

12.130 This clause is intended to prevent staff members being restricted in the performance of their functions, powers or duties because of different State and Territory regulatory requirements.

Division 4—Annual report by Commissioner

12.131 This Division would outline the requirements for annual reporting by the Commissioner. Annual reports would be intended to provide general information on the operations of the NACC, rather than detailed information on particular corruption investigations and public inquiries. That information would be included in specific reports of those investigations and inquiries.

Clause 271—Annual report

12.132 This clause would require the Commissioner to give the Minister an annual report on the performance of the Commissioner's functions during each financial year.

12.133 Further rules regarding annual reports that will apply to the Commissioner are contained in section 34C of the *Acts Interpretation Act 1901*, such as rules relating to the timing of furnishing reports to the Minister.

12.134 Annual reports would be required to include the particulars prescribed by the regulations about:

- corruption issues referred to the Commissioner during that year;
- corruption issues dealt with by the Commissioner during that year;
- corruption investigations conducted by the Commissioner during that year;
- corruption issues that the Commissioner referred to a Commonwealth agency or State or Territory government entity for investigation during that year;
- public inquiries conducted by the Commissioner during that year; and
- certificates issued by the Attorney General under section 235 during that year; and
 - a description of the corruption investigations conducted by the Commissioner during that year that raise significant issues for, or reflect developments in, Commonwealth agencies;
 - a description of any patterns or trends, and the nature and scope, of corruption in Commonwealth agencies or by public officials that have come to the Commissioner's attention during that year;
 - any recommendations for changes to the laws of the Commonwealth or administrative practices of Commonwealth agencies that the Commissioner considers should be made;
 - the extent to which corruption investigations have resulted in the prosecution in that year of persons for offences;
 - the extent to which corruption investigations have resulted in confiscation proceedings in that year; and
- the details of the number and results of:
 - applications made to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under the ADJR Act for orders of review in respect of matters related to the Commissioner's performance of functions or exercise of powers; and
 - other court proceedings involving the Commissioner.

12.135 Annual reports would be intended to provide general information on the operations of the NACC, and an overview of the exercise of its powers and functions. The contents of the Commissioner's annual reports would also inform the Committee in its oversight of the NACC. One of the Committee's functions would include examining the information set out in annual reports and reporting to the Parliament on matters arising out of this examination (see paragraph 10.25).

- 12.136 The Minister would be required to table the annual report in each House of the Parliament within 15 sittings days of each House after receiving it. This would ensure there is a permanent, public record of inquiry reports where the matters considered in the inquiry are already in the public domain. The requirement to table the report within 15 sitting days provides for an appropriately timely tabling process, while also allowing sufficient time for the Minister to consider the report prior to tabling.
- 12.137 The CEO, as the accountable authority of the NACC, would be required to provide an annual report to the responsible Minister for tabling in the Parliament in accordance with section 46 of the PGPA Act. The PGPA Rule prescribes standard requirements for the content of annual reports by accountable authorities.
- 12.138 To avoid duplication in annual reporting between the Commissioner and the CEO, this clause would allow the Commissioner and the CEO to jointly submit an annual report to the Minister that would satisfy the requirements of clause 271 of this Bill and section 46 of the PGPA Act. This is consistent with the approach taken by the federal courts.

Clause 272—Exclusion of certain information from annual report

- 12.139 This clause would require the Commissioner to exclude certain material from annual reports prepared under this Division, noting reports would be tabled in each House of the Parliament and therefore made public (see paragraph 12.135).
- 12.140 The Commissioner would be required to exclude the following types of information from an annual report:
- section 235 certified information (see clause 235); and
 - information that the Commissioner is satisfied is *sensitive information* (as defined under clause 227).
- 12.141 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information to certain persons would be contrary to the public interest. The Commissioner would be required to exclude information that is subject to such a certificate from an annual report. This would ensure certain classes of information would be protected from disclosure, without requiring the Commissioner to be satisfied that the information is sensitive information.
- 12.142 The definition of sensitive information is explained at paragraph 11.9, including, for example, information the disclosure of which:
- could prejudice the security, defence or international relations of Australia;
 - would prejudice the proper enforcement of the law or the fair trial of any person; or
 - would unreasonably disclose a person's personal affairs.
- 12.143 In determining whether the Commissioner is satisfied that information constitutes *sensitive information* for the purpose of its exclusion from an annual report, the Commissioner would be required to consult with relevant agencies and entities at the time of preparing reports on the investigations and inquiries referred to in the annual report (see clauses 151 and 164).

Clause 273—Effect of findings or opinions about corrupt conduct

- 12.144 This clause would apply if an annual report includes or refers to a finding or opinion that a person has engaged, is engaging or will engage in corrupt conduct, or conduct that could constitute or involve corrupt conduct.
- 12.145 This clause would provide that the finding or opinion does not constitute a finding or opinion that the person is guilty of or has committed, is committing or will commit an offence. This recognises that the Commissioner would not be able to make findings of criminal guilt or liability. Such a finding would be a matter for a court to determine.

PART 13 MISCELLANEOUS

- 13.1 This Part would address a range of miscellaneous issues. These issues include:
- the NACC Bill’s interaction with parliamentary privilege;
 - delegations by the Commissioner and agency heads;
 - a statutory review of the NACC Bill’s operation after five years;
 - the creation of guidelines and regulations; and
 - the provision of financial assistance, for example to persons appearing at a hearing.

Division 1—Parliamentary privilege and other protections

Clause 274—Effect of Act on parliamentary privileges and immunities

- 13.2 This clause would provide that the NACC Bill would not generally affect the privileges and immunities of the Parliament. This clause would extend to the privileges and immunities of each House of Parliament, the members of each House and parliamentary committees.
- 13.3 The powers, privileges and immunities of the Parliament are set out in the *Parliamentary Privileges Act 1987*. Subject to that Act, the powers, privileges and immunities of the Parliament are those of the House of Commons of the United Kingdom at the time of Federation (see section 49 of the Constitution). The function of parliamentary privilege is to allow for the proper operation of the Parliament and to protect the ability of legislative Houses, their members and committees to exercise their authority and perform their duties.
- 13.4 For example, proceedings in Parliament attract the privilege of freedom of speech. A court or tribunal (including the Commissioner) may not impeach or question proceedings in Parliament.

Clause 235 and 236 certificates

- 13.5 This clause would only be subject to clause 181. That clause would provide that a person would be prohibited from providing the Committee with information, or producing a document to the Committee, if the information or document was subject to a clause 235 or clause 236 certificate, and the disclosure would contravene the terms of the certificate.
- 13.6 Clause 235 would allow the Attorney-General to certify that the disclosure of particular information, including to the Committee, would be contrary to the public interest.
- 13.7 Clause 236 certificates permit the Attorney-General to prevent the disclosure of information to the Commissioner or the Inspector from the outset, where the Australian Government has given a legally binding undertaking to a foreign government about the use and disclosure of particular information.
- 13.8 Restricting the Committee’s access to clause 235 and 236 certified information is consistent with the rationale for the certificate regime – namely, to protect the public interest in preventing the disclosure of certified information.
- 13.9 To issue either certificate, the Attorney-General would need to be satisfied, on objective reasonable grounds, that disclosure would be contrary to the public interest. The Attorney-General may not issue a certificate unilaterally, on grounds that are irrational, absurd or ridiculous, fanciful, imaginary or contrived, or merely on the grounds that disclosure would cause embarrassment or prejudice to a person’s reputation (see paragraph 11.112).
- 13.10 The effect of clause 181 is to act as a declaration for the purposes of section 49 of the Constitution. That section permits the Parliament to make laws declaring the powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House.

Clause 275—Protections relating to non-judicial functions and powers

- 13.11 This clause would enliven certain protections in sections 4AAA and 4AAB of the *Crimes Act 1914* in relation to the exercise of non-judicial functions and powers by judges, magistrates and justices of the peace. This clause would do this by clarifying that the NACC Bill would be a law of the Commonwealth relating to criminal matters.
- 13.12 Sections 4AAA and 4AAB outline the rules applicable to the situation where a Commonwealth law relating to criminal matters confers on State and Territory judges, magistrates or other court employed officers a function or power that is neither judicial nor incidental to a judicial function or power. Section 4AAA clarifies that the function or power is conferred in a personal and voluntary capacity. This is necessary for constitutional reasons. In essence, non-judicial functions or powers must be conferred in a personal capacity because judicial office holders, for example, a magistrate, must only exercise Commonwealth judicial functions in their official capacity.
- 13.13 Section 4AAB enables the Governor-General to make arrangements with the States and Territories for the performance of functions and the exercise of powers conferred under section 4AAA. The arrangements recognise the fact that the performance of functions and exercise of powers is voluntary.

Division 2—Delegations and review

Clause 276—Delegations

- 13.14 This clause would permit the Commissioner to delegate their functions, powers and duties under the NACC Bill. This would ensure the effective and efficient exercise of relevant functions, powers or duties.

General delegation down to Executive Level 2 staff

- 13.15 Generally, this clause would permit the Commissioner to delegate to the Deputy Commissioners and staff members at or above the Executive Level 2 classification (including staff acting in those positions). Conducting a corruption investigation or public inquiry is a process with a number of decision points that would need to be able to be resolved expeditiously by investigating officers. For example, in the 2020-21 year, the Integrity Commissioner:
- took action in relation to 116 corruption issues under the LEIC Act; and
 - issued 130 notices to produce under that Act.
- 13.16 The jurisdiction of the NACC will be significantly broader than that of the Integrity Commissioner. Accordingly, the number of decisions of this kind that would need to be taken could reasonably be expected to significantly increase. In these circumstances, it would be appropriate for the Commissioner to be able to delegate these functions to Executive Level 2 staff in appropriate circumstances and subject to appropriate directions.

Delegation of power to take no action

- 13.17 This clause would permit the Commissioner to delegate the power to decide to take no action in relation to a corruption issue (see paragraph 6.28) to any member of staff. In the 2020-21 financial year, the Integrity Commissioner decided to take no further action in relation to 222 referrals. It is anticipated that the NACC will receive a larger number of referrals than the Integrity Commissioner, necessitating the need to dispense with unmeritorious referrals in the most expeditious manner available. In turn, this would ensure the Commissioner can devote their resources appropriately to dealing with corrupt conduct that could be serious or systemic.

Functions that may only be delegated to Deputy Commissioners

- 13.18 There are certain functions and powers that the Commissioner would not be able to delegate beyond the Deputy Commissioners. These are the functions and powers to:
- conduct hearings and issue summonses;

- conduct searches, and apply for and execute warrants—a separate framework for the appointment of authorised officers applies to searches (see clause 267);
- finalise and disseminate reports on corruption investigations and public inquiries;
- decide to conduct a public inquiry;
- authorise a disclosure in the public interest under clause 230; and
- make arrangements with the heads of intelligence agencies (see clause 239).

13.19 These limitations reflect the significance of the relevant powers and functions, and the potential gravity of decisions for individuals.

13.20 In conducting a public inquiry, the Commissioner would be subject to the same delegation limits as when conducting a corruption investigation. For example, the Commissioner could delegate to an Executive Level 2 staff member the power to issue a notice to produce but could only delegate the power to conduct a hearing to a Deputy Commissioner.

Certain functions must not be delegated

13.21 The Commissioner must not delegate their duty to approve the appointment of the Minister’s recommended candidate as CEO under subclause 254(3). It is appropriate that this duty must not be delegated, given the significance of this approval for the NACC as a whole.

Subdelegation

13.22 A Deputy Commissioner would be permitted to subdelegate a function or power delegated to them by the Commissioner. No other delegates may subdelegate their delegated functions or powers.

Directions

13.23 This clause would also require a delegate to comply with any directions of the Commissioner. These directions would not be legislative instruments as they would direct a person who has been delegated functions, powers or duties conferred by the NACC Bill. This is appropriate to ensure the independence of the Commissioner.

Clause 277—Delegation by heads of Commonwealth agencies

13.24 This clause would permit the head of an agency to delegate their functions, powers and duties under the NACC Bill.

13.25 This clause would permit an agency head to delegate to:

- an SES employee or acting SES employee; or
- an individual who is concerned in, or takes part in, the management of the agency.

13.26 The second class of delegates is outlined for Commonwealth agencies that do not have SES employees, for example parliamentary offices and Commonwealth companies, as well as to enable delegations to statutory office holders in circumstances where an office or entity headed by that statutory office holder forms part of a separate Commonwealth agency within the meaning of the NACC Bill.

13.27 The primary duty that an agency head would be able to delegate would be their duty to refer corruption issues to the Commissioner (see clause 42).

13.28 An intelligence agency head would not be able to delegate their functions in relation to making an arrangement with the Commissioner or the Inspector under clause 239.

Directions

13.29 This clause would also require a delegate to comply with any directions of the agency head. These directions would not be legislative instruments as they would direct a person who has been delegated functions, powers or duties conferred by the NACC Bill.

Clause 278—Review of operation of Act

- 13.30 This clause would provide for a review of the NACC Bill and the Consequential Bill.
- 13.31 The Minister would be required to cause a review to be undertaken in the first five years of the operation of the NACC Bill and the amendments made by the Consequential Bill.
- 13.32 This clause would not apply if a parliamentary committee has reviewed the operation of the Bills, or started such a review, before the end of the five-year period.

Requirements for the review

- 13.33 The review would need to be undertaken by one or more persons who, in the Minister's opinion, possess appropriate qualifications to undertake the review.
- 13.34 The review would need to include an opportunity for members of the public and persons who are, or have been, public officials to make written submissions on the operation of the Bills.
- 13.35 The reviewer would need to give the Minister a written report of the review within 12 months after the end of the five-year review period.
- 13.36 An entrusted person would need to, if requested, assist the reviewer to conduct the review and prepare the written report. An entrusted person is a staff member of the NACC, the Inspector or a person assisting the Inspector (see clause 227).
- 13.37 The Minister would need to table a copy of the report of the review in each House of the Parliament as soon as practicable after they receive it.

Division 4—Instruments under the Act

- 13.38 This Division relates to the processes to issue guidelines and regulations under the NACC Bill. These non-legislative and legislative instruments would support the efficient and effective operation of the NACC Bill.

Clause 279—Guidelines

- 13.39 This clause would provide the Commissioner with the ability to make written guidelines to assist with anything in connection with the operation of the NACC Bill. These guidelines may be issued to public officials or any other person the Commissioner considers appropriate. The guidelines could be provided for the benefit of specific classes of public officials, for example parliamentarians, PID officers or agency heads.
- 13.40 Examples of matters that the guidelines could cover include (but are not limited to):
- the prevention of corrupt conduct;
 - what constitutes serious or systemic corrupt conduct;
 - the preservation of evidence relevant for the purposes of investigating a corruption issue; and
 - procedures relating to appearing before the Commissioner.
- 13.41 The guidelines would not be a legislative instrument. This statement is included in the NACC Bill to assist readers, as a guideline is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.
- 13.42 In accordance with subsection 33(3) of the *Acts Interpretation Act 1901*, the power for the Commissioner to make written guidelines under this clause would include the power to repeal, rescind, revoke, amend or vary any such guidelines.

Clause 280—Regulations

- 13.43 This clause would authorise the Governor-General to make regulations prescribing matters necessary or convenient, or required or permitted, to be prescribed for carrying out or giving effect to the NACC Bill.

Arrangements for financial assistance

- 13.44 The regulations would be able to prescribe arrangements for the Commonwealth to provide financial assistance in relation to matters arising under, or in relation to, the NACC Bill. Financial assistance that is prescribed could include financial assistance in respect of:
- a person's representation at a hearing by a legal practitioner; or
 - an application, or proposed application under the ADJR Act for an order of review in respect of a matter arising under the NACC Bill, for example when seeking judicial review of findings made in an investigation report.

Distribution of reports

- 13.45 The regulations may require that information or reports that are required to be given under prescribed provisions are also to be given to prescribed persons in specified circumstances.

Parliamentary scrutiny

- 13.46 Any regulations made under this clause would also be subject to normal parliamentary consideration and disallowance under section 42 of the *Legislation Act 2003*.

Appropriation

- 13.47 This clause would appropriate the Consolidated Revenue Fund for the purpose of making payments of financial assistance (see paragraph 13.44) to, or for the benefit of, parliamentarians.
- 13.48 For constitutional reasons, it is appropriate for financial assistance to parliamentarians to be provided by way of a statutory entitlement rather than an agreement between a parliamentarian and the Commonwealth. In these circumstances, it is appropriate that any financial assistance that is prescribed for the benefit of parliamentarians is supported by a legislated standing appropriation. This is consistent with the approach in section 55 of the *Parliamentary Business Resources Act 2017*, which appropriates the Consolidated Revenue Fund for, among other things, payments for legal assistance to Ministers under Division 2 of Part 5 of the *Parliamentary Business Resources Regulations 2017*.
- 13.49 Financial assistance to other persons under prescribed arrangements would be funded by an annual appropriation Bill, consistent with existing arrangements under the LEIC Act.

National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

PRELIMINARY

Clause 1—Short title

- 14.1 This clause provides for the short title of the Act to be enacted by the Consequential Bill to be the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022*.

Clause 2—Commencement

- 14.2 This clause would provide for the commencement of each provision in the Consequential Bill. The preliminary provisions (clauses 1 to 3) would commence on the day on which the NACC Bill receives Royal Assent.
- 14.3 The amendments are intended to commence at the same time as the National Anti-Corruption Commission Bill 2022, which would establish the NACC, which will be on a single day to be fixed by Proclamation. However, if the NACC Bills do not commence within the period of 12 months beginning on the day on which the NACC Bill receives Royal Assent, the NACC Bills would commence on the day after the end of that period.
- 14.4 A 12-month commencement period is appropriate considering the work necessary to stand-up the Commission as a new Commonwealth entity following the passage of the NACC Bill. The 12-month period extends beyond the Government's planned commencement in mid-2023 to address the risk of delay, including a delay outside the Government's control, for example relating to the Committee's approval of a Commissioner.

Clause 3—Schedules

- 14.5 This clause would provide for the amendments outlined in the Schedule to the Consequential Bill to take effect according to their terms.

SCHEDULE 1—AMENDMENTS

Part 1—Repeals

- 14.6 Item 1 of Schedule 1 would repeal the LEIC Act. That Act established ACLEI, which would transition to become part of the NACC on commencement of the NACC Bill.
- 14.7 Schedule 2 of the Consequential Bill outlines transitional arrangements that would support the transfer of ACLEI's functions and powers to the NACC on commencement.

Part 2—Consequential amendments

Overview

- 14.8 This Part would make consequential amendments to relevant Commonwealth legislation to support the establishment of the NACC. For example, references to ACLEI and the LEIC Act currently contained in legislation would be replaced with references to the NACC and the NACC Act. The effect of these amendments would be to support the transition of ACLEI to the NACC and confer powers on the NACC that are currently conferred on ACLEI. Many of these powers would be significant components of the NACC's overall investigative powers and would complement the powers conferred by the NACC Bill (in particular Part 7).
- 14.9 The arrangements for the NACC that are dealt with in this Part would generally apply to the NACC in the way they currently apply to ACLEI. Exceptions to this are:
- certain decisions made by the Commissioner from review under the ADJR Act, including decisions made under Part 6 (dealing with corruption issues) and Part 7 (investigating corruption issues) of the NACC Bill;
 - allowing the NACC to undertake integrity testing of staff members of all Commonwealth agencies under Part IABA of the *Crimes Act 1914*, in accordance with the NACC's broader jurisdiction;
 - allowing the IGIS or the staff of the IGIS to disclose information to a staff member of the NACC if the information being disclosed is relevant to the NACC's functions or powers, and the IGIS is satisfied on reasonable grounds that the NACC has satisfactory arrangements in place to protect the information;
 - enabling a disclosure for the purposes of the PID Act to be made directly to the NACC, and enabling the NACC to issue a stop action direction to 'freeze' PID Act processes;
 - authorising the Inspector-General of Taxation to make a disclosure to the NACC under the *Taxation Administration Act 1953* and enabling the NACC to disclose information received from the Inspector-General for the purposes of the NACC Bill; and
 - ensuring that the Ombudsman does not have to decide not to investigate before they can make a referral to the NACC under the *Ombudsman Act 1976*.
- 14.10 This Part would provide the NACC with a range of covert investigative powers consistent with those currently available to ACLEI and other law enforcement agencies. This would include powers to conduct controlled operations and use assumed identities under the *Crimes Act 1914*, to use surveillance devices and access data in computers under the SD Act and to obtain the content of and data relating to communications under the TIA Act.
- 14.11 Access to these powers is appropriate because:
- the Commissioner will be investigating corruption issues that could involve corrupt conduct that is serious or systemic. Some such conduct may, if proven, constitute serious criminal conduct; and
 - corruption may involve corrupt relationships and individuals with the motive and ability to conceal plans, activities and communications.

- 14.12 Access to covert investigative powers would enable the collection of information about serious or systemic corruption that would otherwise be unobtainable—for example, by enabling the listening to or recording of a conversation between two officials planning to engage in serious, criminal corruption through use of telecommunications interception or a listening device.
- 14.13 The NACC’s access to covert powers would be provided on the same basis as other law enforcement agencies. This would mean those powers may only be used to investigate criminal offending, and would be subject to thresholds concerning the seriousness of the offence and reasonableness and appropriateness of the particular power.

Administrative Decisions (Judicial Review) Act 1977 amendments

- 14.14 Item 2 would amend Schedule 1 of the ADJR Act. The amendments would exclude the following provisions of the NACC Bill from the operation of ADJR Act:
- provisions in Part 6 (dealing with corruption issues), including that Part as applied—with some modifications—to Part 10 (oversight of the NACC) by clause 211 of the NACC Bill. This would include a decision by the Commissioner to commence a corruption investigation, or a decision to refer a corruption issue to relevant Commonwealth agencies or State and Territory government entities.
 - provisions in Part 7 (investigating corruption issues), including that Part as applied to Part 9 (public inquiries) by clause 163 and to Part 10 by clause 214 of the NACC Bill. This would include a decision relating to a notice to produce and a decision to issue a summons to attend a hearing.
 - clauses 161 (the power to conduct public inquiries), 162 (the power to invite submissions to public inquiries), 209 (the Inspector may deal with NACC corruption issues), 210 (how the Inspector deals with NACC corruption issues) and 213 of the NACC Bill (how the Inspector may conduct investigations).
- 14.15 The provisions of the NACC Bill that would be excluded from the operation of the ADJR Act concern intermediate process steps necessary for the NACC to effectively undertake an investigation into a corruption issue. If a person were able to seek review of decisions made under these provisions, this could significantly impede the NACC’s ability to fulfil its statutory functions. Enabling a person to seek review of these intermediate decisions could also cause lengthy delays that could prejudice NACC Act processes. It is therefore appropriate to exclude these provisions of the NACC Bill from the operation of the ADJR Act.
- 14.16 These amendments would not limit a person’s ability to seek judicial review under the *Judiciary Act 1903* or in the High Court’s original jurisdiction.
- 14.17 Other decisions made under the NACC Bill would still be reviewable under the ADJR Act. Specifically, decisions made under Part 8, which concerns reporting on corruption investigations, including the Commissioner’s recommendations in relation to an agency taking action against a person where the Commissioner has found that the person has engaged in corrupt conduct. It is appropriate that such decisions are reviewable under the ADJR Act given the potential for decisions made under Part 8 to adversely and permanently affect a person’s reputation or privacy, in contrast to intermediate decisions made in the course of NACC Act processes under, for example, Part 7.
- 14.18 Item 3 would repeal paragraph (eaa) of Schedule 2 of the ADJR Act. Paragraph (eaa) of Schedule 2 operates to exclude certain decisions under the LEIC Act from section 13 of the ADJR Act, being decisions in connection with corruption investigations and public inquiries. With the amendments proposed under item 2, paragraph (eaa) would no longer be necessary and it is appropriate to repeal the paragraph.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 amendments

- 14.19 Items 4 to 10 would amend the AML/CTF Act, which includes powers to:
- ensure that agencies including AUSTRAC have the information required to investigate and prosecute money laundering and terrorism financing offences and other serious crimes; and
 - support cooperation and collaboration among reporting entities, AUSTRAC and other government agencies, particularly law enforcement agencies, to detect, deter and disrupt money laundering, the financing of terrorism, and other serious crimes.
- 14.20 Specifically, items 4 to 10 would amend the AML/CTF Act to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC and its establishing legislation in sections 5 (definitions), 49 (notices requiring certain information to be provided) and 121 (offence for disclosure of AUSTRAC information by entrusted persons). The effect of these amendments would be that:
- the Commissioner and staff members of the NACC are ‘entrusted investigating officials’ under the AML/CTF Act, meaning the exceptions to offences in sections 50A and 121 concerning disclosure of certain information will be available for disclosures to the Commissioner and staff members of the NACC;
 - staff members of the NACC are ‘investigating officers’ under the AML/CTF Act, meaning they may issue notices under section 49 (see further paragraphs 14.22 to 14.23) if they are carrying out an investigation arising from, or relating to the matters mentioned in, information reported to AUSTRAC CEO under sections 41, 43 or 45; and
 - the National Anti-Corruption Commissioner may issue a notice under section 49 (see further paragraphs 14.22 to 14.23)
- 14.21 It is appropriate that officials of other agencies are permitted to share certain information obtained under the AML/CTF Act with NACC officers where it is relevant to the NACC’s functions. Money laundering is a key enabler of criminal activity, including offending related to corruption. Information obtained under the AML/CTF Act should be available to assist the investigation of corruption issues involving corrupt conduct that may be serious or systemic.
- 14.22 Where a reporting entity has communicated information to the AUSTRAC CEO under section 41 (reports of suspicious matters), 43 (reports of threshold transactions) or 45 (reports of international funds transfer instructions), section 49 allows certain officers to issue notices to reporting entities and other persons requiring them to:
- give such further information as is specified in the notice, within the period and in the manner specified in the notice, to the extent to which the reporting entity or other person has that information; or
 - produce, within the period and in the manner specified in the notice, such documents as are:
 - specified in the notice;
 - relevant to the matter to which the communication under section 41, 43 or 45 relates; and
 - in the possession or control of the reporting entity or other person.
- 14.23 Items 7 and 9 will include among the persons able to issue these notices staff members of the NACC who are carrying out an investigation arising from, or relating to the matters mentioned in, information reported to AUSTRAC CEO under sections 41, 43 or 45, and the Commissioner. This is appropriate because reports under sections 41, 43 or 45 may be relevant to a corruption issue under investigation by the NACC. Section 49 as amended would allow the Commissioner, or in certain circumstances a staff member of the NACC, to obtain further information or documents relevant to such reports to further a corruption investigation.

Archives Act 1983 amendments

- 14.24 Item 11 would amend paragraph 33(1A)(ba) of the *Archives Act 1983* to replace references to the Integrity Commissioner, a staff member of ACLEI, and a special investigator (within the meaning of the LEIC Act). The amendment would provide that any confidential information provided to the Inspector, the Commissioner or to a NACC staff member would be characterised as a confidential source of information for the purposes of that Act. This would ensure that the information would be a record that is exempt from being transferred to the Archives, which would otherwise be required under the Archives Act.
- 14.25 It is appropriate that confidential information provided to the NACC or the Inspector would constitute an exempt record under the Archives Act, as the disclosure of sensitive information could reasonably be expected to prejudice the conduct of NACC Act processes and could have a substantial adverse effect on Australia's interests (including its national security and international relations) and the privacy and reputations of individuals. Further, a person may be deterred from making a disclosure to the NACC or the Inspector if they are aware that information communicated in confidence would be transferred to the Archives.
- 14.26 In addition, any confidential information that has been provided to the Integrity Commissioner, a staff member of ACLEI, or a special investigator (within the meaning of the LEIC Act) under current paragraph 33(1A)(ba) of the Archives Act would remain an exempt record under that Act. This is because any confidential information provided to those persons would be taken to have been provided to the Commissioner (as outlined in the transitional provision at item 52 in Schedule 2, see also paragraphs 14.380 to 14.381). Paragraph 33(1A)(ba) of the Archives Act would therefore continue to apply to such information.

Australian Border Force Act 2015 amendments

- 14.27 Items 12 and 13 would amend section 43 of the *Australian Border Force Act 2015* to enable an entrusted person under the NACC Bill to make a record of, or disclose, Immigration and Border Protection information (as defined in section 4 of the Australian Border Force Act) for the purposes of the NACC Bill. The amendment would replace existing references to the LEIC Act with references to the NACC Bill.
- 14.28 It is appropriate that entrusted persons are not constrained in their ability to make records of and disclose Immigration and Border Protection information where doing so is necessary to fulfil their statutory functions under the NACC Bill. Entrusted persons would be subject to a range of confidentiality requirements (see clause 228 of the NACC Bill), which would safeguard this category of information against misuse.

Australian Crime Commission Act 2002 amendments

- 14.29 Items 14, 15, 16, 17, 18 and 19 would replace references to ACLEI in the *Australian Crime Commission Act 2002* (ACC Act) with references to the NACC and its establishing legislation. These amendments would ensure that the ACIC would be able to support the NACC and its processes, including the making of disclosures and applications for integrity authorities.
- 14.30 Item 14 would amend subparagraph 7A(ca)(iii) of the Act to make it a function of the ACIC to assist the NACC in making applications for integrity authorities. This refers to applications for authority to conduct integrity testing controlled operations under Part IAB of the Crimes Act, or applications for authority to conduct integrity testing operations under Part IABA of the Crimes Act. This amendment would replace the existing reference to ACLEI in this provision.

- 14.31 Items 15, 16, 17 and 18 would amend the ACC Act to provide that a person who makes a NACC disclosure under the NACC Bill would not be committing an offence of disclosure relating to notices under the ACC Act. This would ensure that a person is not deterred from making a NACC disclosure due to fear of breaching the ACC Act. This in turn would increase the likelihood that the NACC would have access to information critical to performing its statutory functions. Relevant provisions include:
- paragraphs 21C(2)(g) and (4)(e) (concerning notations on notices to give information, or produce documents or things);
 - paragraphs 29B(2)(g) and (4)(e) (concerning notations on summonses).
- 14.32 Item 19 would amend paragraph (c) of the definition of **relevant Act** in subsection 51(4) (concerning the disclosure of protected information generally), replacing a reference to the LEIC Act with a reference to the NACC Bill.

Australian Federal Police Act 1979 amendments

- 14.33 Item 20 would amend the definition of **corrupt conduct** in subsection 4(1) of the *Australian Federal Police Act 1979* (AFP Act) to align it with the definition of corrupt conduct in the NACC Bill. Under the AFP Act, the definition of corrupt conduct is tied to the definition of **engages in corrupt conduct**, which has the same meaning as the definition contained in the LEIC Act. This amendment would not materially alter the scope of the definition. However, aligning the new definition of corrupt conduct in the AFP Act with the NACC Bill's definition would ensure the interoperability of the updated definition with other provisions of the AFP Act, where appropriate.
- 14.34 Item 22 would repeal the definition of engages in corrupt conduct in subsection 4(1) of the AFP Act. This definition would no longer be necessary because of the new definition of corrupt conduct introduced by item 20.
- 14.35 Item 23 would amend subsection 4(1) of the AFP Act by introducing a definition of **National Anti-Corruption Commissioner** that is consistent with the NACC Bill.
- 14.36 Item 25 would amend paragraphs 40TL(1)(b) and (2)(b) of the AFP Act by expanding the coverage of Subdivision D of Division 3 of Part V (professional standards and AFP conduct and practice issues) of the AFP Act to a corruption issue, per the amended definition of corruption issue in clause 9 of the NACC Bill (see item 21 of this Schedule). The effect of this amendment would be to enable the Commissioner of Police to deal with an AFP conduct issue in accordance with this Subdivision of the AFP Act where the conduct issue is also a corruption issue within the meaning of the NACC Bill. This amendment is appropriate to ensure continuity with the AFP and ACLEI's current arrangements for dealing with AFP conduct issues that also raise corruption issues.
- 14.37 Item 26 would repeal and substitute subsection 40TL(3) of the AFP Act to provide that Subdivision D of Division 3 of Part V (professional standards and AFP conduct and practice issues) of the AFP Act would apply where the Commissioner refers a corruption issue that relates to the conduct of an AFP appointee to the Commissioner of Police under paragraph 41(1)(c) of the NACC Bill (which authorises the NACC Commissioner to refer, for investigation, corruption issues to Commonwealth agencies possessing the appropriate capabilities).
- 14.38 This amendment would enable the AFP to deal with an AFP conduct issue in accordance with this Subdivision where the Commissioner has referred a corruption issue relating to the conduct of an AFP appointee to the Commissioner of the Police. The amendment is appropriate to ensure that the AFP can deal with AFP conduct issues that are also corruption issues under its own processes, for example where the Commissioner has declined to commence an investigation and forms the view that it would be more appropriate for the AFP to deal with the issue.
- 14.39 The following items would replace references to the LEIC Act and the Integrity Commissioner in the AFP Act with references to the NACC Bill and the Commissioner:
- Item 21, which would amend subsection 4(1) (definition of corruption issue);
 - Item 24, which would amend section 40RB (simplified outline of Part V);

- Item 27, which would amend subsection 40TO(7) (Commissioner must allocate issue to someone outside unit constituted under section 40RD in certain circumstances);
- Item 28, which would amend paragraph 40UB(1)(b) (Minister to inform certain persons and bodies of inquiry);
- Item 29, which would amend subsections 40UD(3) (reports of special inquiries) and 40WA(4) (record keeping);
- Item 30, which would amend subsection 40WA(4) (record keeping);
- Item 31, which would amend subsection 40WB(1) (records about corruption issues), including its note;
- Item 32, which would amend paragraph 60A(2)(d) (secrecy);
- Item 33, which would amend the definition of prescribed information in subsection 60A(3).

Australian Securities and Investment Commission Act 2001 amendments

- 14.40 Item 34 would amend section 39H of the *Australian Securities and Investment Commission Act 2001* (ASIC Act) to apply a modified version of section 3ZQU of the *Crimes Act 1914* to NACC Act processes. This section of the ASIC Act currently outlines the purposes for which documents may be used and shared for the purposes of the LEIC Act. The amendment would allow search warrant material seized under the ASIC Act to be disclosed to certain officials for the purposes of a NACC Act process (defined in clause 7 of the NACC Bill to mean a corruption investigation, a NACC complaint investigation, a NACC corruption investigation or a public inquiry). This amendment is necessary to ensure that the NACC can use all available information and evidence when conducting investigations or public inquiries.
- 14.41 An equivalent amendment would be made under the Consequential Bill to the *National Consumer Credit Protection Act 2009* (see item 123 of Schedule 1 of the Consequential Bill).

Crimes Act 1914 amendments

Definitions

- 14.42 Section 3 of the *Crimes Act 1914* contains definitions for the purposes of that Act. The following items would replace references in those definitions that relate to the LEIC Act, with relevant definitions contained in the NACC Bill:
- Items 35, 36 and 38 would repeal the definition of ‘Integrity Commissioner’ (relevant to ACLEI) and insert definitions of ‘National Anti-Corruption Commissioner’, ‘National Anti-Corruption Deputy Commissioner’, ‘Inspector of the National Anti-Corruption Commission’ and ‘person assisting the NACC Inspector’, which would have the same meaning as in the NACC Bill.
 - Item 37 would replace ‘ACLEI’ with ‘NACC’ in the definition of law enforcement officer.
 - Items 38 and 39 would repeal the definition of ‘staff member of ACLEI’ and replace it with a definition of ‘staff member’ of the NACC, which would have the same meaning as in the NACC Bill.

Use and sharing of things seized and documents produced under the Crimes Act 1914

- 14.43 Section 3ZQU of the *Crimes Act 1914* sets out the purposes for which things seized and documents produced under Part IAA of the *Crimes Act 1914* (search and information gathering powers) may be used and shared. Section 3ZZEA sets out the purposes for which things seized under Part IAAA of the *Crimes Act 1914* (delayed notification search warrants) may be used and shared. Both provisions currently include the purpose of investigating or inquiring into a corruption issue under the LEIC Act.

14.44 Items 40 and 41 would replace that purpose in sections 3ZQU and 3ZZEA with a reference to conducting a NACC Act process, which is defined in clause 7 of the NACC Bill to mean a corruption investigation, a NACC complaint investigation, a NACC corruption investigation and a public inquiry.

Controlled operations

14.45 Controlled operations under Part IAB of the *Crimes Act 1914* are covert law enforcement operations conducted for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious criminal offence. They may involve one or more persons engaging in otherwise unlawful conduct in order to obtain that evidence. For example, participants might be involved in a controlled delivery of a consignment of illicit drugs in order to obtain evidence to be used against people involved in drug trafficking. For that reason, participants are protected against criminal and civil liability for conduct authorised as part of an operation.

14.46 ACLEI is currently one of agencies able to authorise controlled operations under Part IAB of the *Crimes Act 1914*, along with the AFP and the ACIC.

14.47 Items 42 to 46, 48 to 54 and 56 to 62 would amend Part IAB to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC and its establishing legislation. These items would update such references in:

- section 15GC, which contains definitions for the purposes of Part IAB;
- section 15GF, which sets out who is an authorising officer for a controlled operation;
- section 15HG, which sets out who must be notified of certain occurrences during controlled operations;
- section 15HK, which contains offences for unauthorised disclosure of information; and
- section 15J, which requires agencies to notify the Secretary of the Immigration and Border Protection Department of authorities granted for certain controlled operations.

14.48 Along with amendments to the definitions contained in section 3 of the *Crimes Act 1914* made by items 35 to 39, the amendments made by the items outlined in paragraph 14.42 would allow:

- staff members of the NACC to apply to an appropriate authorising officer for an authority to conduct a controlled operation under section 15GH of the *Crimes Act 1914*; and
- the NACC Commissioner and SES staff members of the NACC authorised in writing by the NACC Commissioner to:
 - authorise controlled operations in accordance with section 15GI of the *Crimes Act 1914* (outlined in paragraph 14.50) where those operations relate to the conduct of a corruption investigation within the meaning of the NACC’s establishing legislation; and
 - vary and cancel operations in accordance with sections 15GO and 15GY of the *Crimes Act 1914*.

14.49 In addition, items 60 and 61 would also amend subsection 15HK(3) of the *Crimes Act 1914* so an exception to the unauthorised disclosure offences in section 15HK would apply for disclosures to the Commissioner or the Inspector about a corruption issue or a NACC corruption issue in relation to a controlled operation.

Threshold for authorising controlled operations

14.50 Under section 15GI, an authorising officer must not grant an authority to conduct a controlled operation unless they are satisfied on reasonable grounds:

- that either:
 - a serious Commonwealth offence or a serious state offence that has a federal aspect has been, is being or is likely to be committed; or
 - an integrity testing authority is in effect in relation to an offence that it is suspected has been, is being or is likely to be committed by a staff member of a target agency; and

- that restrictions on controlled operations and controlled conduct outlined in paragraphs 15GI(2)(b) to (h) apply.

14.51 The amendments outlined above would ensure that section 15GI would apply to the NACC as it currently does to ACLEI, the ACIC and the AFP.

Amendments related to integrity testing

14.52 The definition of ‘disciplinary or legal action’ in section 15GC of the *Crimes Act 1914* includes a disciplinary proceeding in relation to the staff member, within the meaning of the LEIC Act, or a report of such a proceeding. Item 46 would remove the reference to the LEIC Act given that Act will be repealed by item 1. Item 47 would insert a definition of ‘disciplinary proceeding’ that is the same as that currently in the LEIC Act so there is no change to that term. The term ‘disciplinary or legal action’ is relevant to exceptions for disclosures related to integrity testing to offences for unauthorised disclosure in section 15HK.

14.53 Item 55 would make an amendment to the definition of ‘target agency’ in section 15GC of the *Crimes Act 1914* as a consequence of amendments to the integrity testing regime in Part IABA of the *Crimes Act 1914* outlined below. Consistent with those amendments, this item would provide that a target agency includes, in addition to the ACC, AFP and Immigration and Border Protection Department, any other Commonwealth agency (within the meaning of the NACC’s establishing legislation). The definition of target agency is relevant because a controlled operation may be authorised where an integrity testing authority is in effect in relation to an offence that it is suspected has been, is being or is likely to be committed by a staff member of a target agency. This amendment will ensure that controlled operations are available to support integrity testing operations in relation to any Commonwealth agency.

Oversight of controlled operations

14.54 As is the case for existing authorising agencies, the NACC’s authorisation and conduct of controlled operations, including those undertaken for the purposes of integrity testing, would be overseen by the Commonwealth Ombudsman under Division 4 of Part IAB.

Integrity testing

14.55 Part IABA of the *Crimes Act 1914* provides a framework for operations (referred to as integrity testing operations) that are designed to test the integrity of staff members of the ACIC, the AFP and the Department of Home Affairs, using controlled or simulated situations. Operations may involve offering a staff member an opportunity to engage in conduct, whether lawful or unlawful, so as to contravene principles of behaviour required of persons occupying the position of such a staff member. For example, an integrity test could involve putting false information in a database to test whether a person suspected of unlawfully disclosing information then discloses the false information.

14.56 Integrity testing operations may currently be authorised by the agency concerned or, where a corruption issue is involved, by ACLEI.

14.57 Items 63 to 88 would amend Part IABA to:

- remove references relevant to ACLEI and the LEIC Act in sections 15JC (definitions), 15JG (authorities for integrity testing operations), 15JI (notice of authorities granted), 15JK (variation of authorities) 15JQ and 15JR (offences for unauthorised disclosures) and 15JS (annual reports) and replace them with references relevant to the NACC and its establishing legislation—items 66 to 74 and 80 to 88; and
- allow the NACC to undertake integrity testing of staff members in any Commonwealth agency (within the meaning of the NACC’s establishing legislation)—items 63, 64, 75, 76, 77, 78 and 79 amending sections 15JA (simplified outline), 15JC (definitions, specifically of target agency) 15JD (meaning of integrity testing operation) and 15JE (circumstances in which applications may be made).

- 14.58 Under these amendments, the ACIC, the AFP and the Department of Home Affairs would continue to be the only agencies permitted to conduct operations to test the integrity of staff members within their agencies in the absence of a corruption investigation. Those agencies would also continue to be able to obtain authorisations for integrity testing operations concerned with a corruption investigation in relation to staff members of their agencies (from the NACC in place of ACLEI).
- 14.59 Under the amendments, the NACC would, similarly to ACLEI, only be able to conduct integrity testing operations concerned with a corruption investigation. However, given the NACC's broader jurisdiction compared to ACLEI, the NACC would be permitted to authorise and conduct such operations in relation to staff members of any agency that is a Commonwealth agency under the NACC Bill. This is intended to have a deterrent effect—staff members should think twice before accepting a bribe if there is a chance the person offering it is a NACC officer working undercover—and to give the NACC another means of investigating suspected corrupt conduct that would constitute an offence. This power would be subject to the existing issue threshold in section 15JG (outlined below).

Threshold for authorising integrity testing operations

- 14.60 Under sections 15JC, 15JG and 15JE of the *Crimes Act 1914* as amended by items 66, 77 and 80, the Commissioner, a Deputy Commissioner or an SES employee of the NACC would only be permitted to authorise an integrity testing operation if they are satisfied that:
- there are reasonable grounds to suspect that an offence punishable on conviction by imprisonment for 12 months or more has been, is being, or is likely to be committed by a staff member of the target agency;
 - it is appropriate in all the circumstances to conduct the operation; and
 - the operation is part of a corruption investigation (within the meaning of the NACC's establishing legislation).
- 14.61 Section 15JG of the *Crimes Act* would apply to the NACC as it currently does to ACLEI, the ACIC, the AFP and the Department of Home Affairs except that the final part of the test would be slightly modified by the items in the NACC Bill: in place of being satisfied that the purpose of the operation is to investigate a corruption issue, the authorising officer must be satisfied that the operation is part of a corruption investigation. This slightly different threshold would ensure that that authorising officers of the NACC may only authorise integrity testing operations for the purposes of corruption investigations (which must concern a corruption issue that could involve corrupt conduct that is serious or systemic), not preliminary investigations (which are not limited in the same way).

Assumed identities

- 14.62 Part IAC of the *Crimes Act 1914* allows the chief officer of a law enforcement or intelligence agency to authorise a law enforcement or intelligence officer or other person to acquire and use an 'assumed identity' (a strong false identity, supported by genuine identity documents) for certain purposes, including the investigation of criminal activity. For example, an officer might use an assumed identity in an undercover operation.
- 14.63 ACLEI is currently one of five law enforcement agencies able to acquire and use assumed identities under Part IAC of the *Crimes Act 1914*.
- 14.64 Items 89 to 93 and 95 to 98 would amend Part IAC of the *Crimes Act 1914* to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC and its establishing legislation. These items will update these references in the following sections of the *Crimes Act 1914*:
- section 15K, which contains definitions for the purposes of Part IAC;
 - section 15KB, which concerns determination of applications to acquire or use an assumed identity;
 - section 15LD, which sets out the requirements for annual reports about assumed identities; and

- section 15LH, which allows chief officers to delegate their functions to senior officers of their agency.
- 14.65 Along with amendments to definitions contained in section 3 of the *Crimes Act 1914* made by items 35 to 39, the amendments made by these items would allow:
- staff members of the NACC to apply for authorities to acquire and use an assumed identity; and
 - allow the Commissioner to:
 - grant authorities to acquire and use an identity in accordance with section 15KB;
 - vary and cancel such authorities in accordance with section 15KE; and
 - request an agency that issues evidence of identity to produce evidence of an assumed identity in accordance with an authority and give the evidence to a staff member of the NACC in accordance with section 15KI.

Threshold for granting an assumed identity authority

- 14.66 A chief officer must not grant an authority to use and acquire an assumed identity under section 15KB unless they are satisfied on reasonable grounds:
- that the assumed identity is necessary for one or more listed purposes (including investigation of criminal activity and the exercise of powers and functions under the National Witness Protection Program);
 - that the risk of abuse of the assumed identity by the authorised person is minimal; and
 - if the authorised person is not an officer of a law enforcement or intelligence agency, that it would be impossible or impracticable in the circumstances for an officer to acquire or use the assumed identity for the purpose sought.
- 14.67 The amendments outlined above would ensure that section 15KB would apply to the NACC as it currently does to ACLEI and other law enforcement agencies.

Disclosures to the Inspector

- 14.68 Section 15LC of the *Crimes Act 1914* sets out offences for disclosing information about an assumed identity. Exceptions to the offences are set out in subsection 15LC(4). Item 94 would insert an additional paragraph to subsection 15LC(4) to provide an exception to the disclosure offences for disclosures made in connection with the exercise of a power, or the performance of a function or duty, of the Inspector of the National Anti-Corruption Commission or a person assisting the NACC Inspector. The Inspector may require access to such information, for example, if investigating a NACC corruption issue related to misuse of an assumed identity.

Witness identity protection for operatives

- 14.69 Part IACA of the *Crimes Act 1914* allows witness identity protection certificates to be issued to protect the identity of an ‘operative’ who is or may be required to give evidence obtained in that capacity in a proceeding. Operatives are participants in controlled operations authorised under Part IAB and persons authorised to acquire and use an assumed identity under Part IAC.
- 14.70 ACLEI is currently one of five law enforcement agencies able to use this framework under Part IACA of the *Crimes Act 1914*.
- 14.71 Items 99 and 100 would amend section 15M to remove references relevant to ACLEI and the LEIC Act in the definitions of chief officer and law enforcement agency and replace them with references relevant to the NACC and its establishing legislation.
- 14.72 Along with amendments to definitions contained in section 3 of the *Crimes Act 1914* made by items 35 to 39, the amendments made by these items would allow the Commissioner to:
- give a witness identity protection certificate for an operative in relation to a proceeding in accordance with section 15ME; and
 - cancel such a certificate in accordance with section 15MQ.

Threshold for issue of witness identity protection certificate

- 14.73 Under section 15ME, a chief officer of a law enforcement agency may give a witness identity protection certificate for an operative in relation to a proceeding if:
- the operative is, or may be required, to give evidence in the proceeding; and
 - the chief officer is satisfied on reasonable grounds that the disclosure in the proceeding of the operative's identity or where the operative lives is likely to:
 - endanger the safety of the operative or another person;
 - prejudice any current or future investigation; or
 - prejudice any current or future activity relating to security.
- 14.74 The chief officer must make all reasonable enquiries to enable the chief officer to ascertain the information required to be included in the certificate by section 15MG of the *Crimes Act 1914*; and cannot give a certificate for an operative until the chief officer has obtained a statutory declaration from the operative under section 15MF of the *Crimes Act 1914*.
- 14.75 The amendments outlined above would ensure that section 15ME of the Crimes Act would apply to the NACC as it currently does to ACLEI and other law enforcement agencies.

Spent convictions

- 14.76 Section 85ZL of the *Crimes Act 1914* sets out definitions for the purposes of Part VIIC of the *Crimes Act 1914* (which concerns pardons, quashed convictions and spent convictions).
- 14.77 Item 101 would amend the definition of 'law enforcement agency' in section 85ZL to replace the reference to ACLEI with a reference to the NACC. This would mean that Division 3 of Part VIIC, concerning spent convictions, does not apply to certain uses of information by the NACC or certain disclosures to or by the NACC (in accordance with sections 85ZZH and 85ZZJ).

Criminal Code Act 1995 amendments

- 14.78 Items 102 and 103 would amend subsection 122.5(3) of the *Criminal Code* to refer to the Commissioner or another staff member of the NACC, and the Inspector or a person assisting the Inspector, instead of equivalent terms from the LEIC Act. The effect of these amendments would be to ensure that it is a defence to certain secrecy offences for a person to communicate or deal with relevant information for the purpose of communicating it to the Commissioner or to another staff member of the NACC, or the Inspector or a person assisting the Inspector for the purposes of exercising a power, or performing a function or duty.
- 14.79 Item 104 would amend subparagraph 122.5(12)(b)(ii) of the *Criminal Code* to refer to the Commissioner or the Inspector, instead of referring to terms included in the LEIC Act. This amendment would provide that a defendant does not bear an evidential burden in relation to the certain defences in subsection 122.5 of the *Criminal Code*. This is appropriate because the NACC Bill provides that entrusted persons (defined in clause 7 to mean a staff member of the NACC, the Inspector or a person assisting the Inspector) would generally not be able to be compelled to give evidence in proceedings that would involve the disclosure of information or documents obtained by that person in their capacity as an entrusted person (see clause 232).
- 14.80 Items 105 and 106 would amend paragraphs (aa) and (ab) of the definition of Commonwealth ***law enforcement officer*** in section 146.1 of the *Criminal Code* to refer to the Commissioner or another staff member of the NACC (instead of equivalent terms under the LEIC Act). This would ensure that the Commissioner and staff members of the NACC are Commonwealth law enforcement officers, and so would be subject to additional penalties if they commit the offences of:
- causing harm to a Commonwealth public official etc. (in section 147.1 of the *Criminal Code*); and
 - threatening to cause harm to a Commonwealth public official etc. (in section 147.2 of the *Criminal Code*).

- 14.81 A related amendment, item 107 would insert a new paragraph into the definition of **law enforcement officer** in section 473.1 of the *Criminal Code*. The amendment would extend the definition of law enforcement officer to include a staff member of the NACC. This means that certain defences to the telecommunications offences in Division 474 of the *Criminal Code* will be available in relation to reasonable conduct undertaken by NACC staff members acting in good faith in the course of their duties.
- 14.82 It is appropriate that staff members of the Commissioner and the NACC are treated as law enforcement officers for the purposes of the *Criminal Code* in light of their functions under the NACC Bill (see Part 3) and the range of powers—including covert and coercive powers—to which they have access under Part 7 of the NACC Bill. This would be consistent with arrangements for State and Territory anti-corruption commissions, which are currently covered by the definition of law enforcement officer in section 473.1.

Data Availability and Transparency Act 2022 amendments

- 14.83 Items 108 and 109 would amend the definition of **excluded entity** in subsection 11(3) of the *Data Availability and Transparency Act 2022* (DAT Act). Item 108 would amend paragraph 11(3)(a) to replace the reference to ACLEI with a reference to the NACC. Similarly, item 109 would insert a new paragraph 11(3)(ab) that would provide that the Inspector of the NACC is an excluded entity for the purposes the DAT Act.
- 14.84 The DAT Act establishes a framework for the sharing of public sector data with accredited entities from all levels of government as well as industry, research and others in the private sector. These amendments would exclude the NACC and the Inspector from the DAT Act’s data sharing scheme, with the effect that data originating with, held by or received from the NACC or Inspector of the NACC would not be able to be shared under the DAT Act. This is consistent with the scheme’s intention for data held by certain agencies not be shared, for example where that data relates to national security and law enforcement.
- 14.85 Item 110 would amend paragraph 108(2)(k) to replace the reference to ACLEI with a reference to the NACC. Similarly, item 111 would insert a new paragraph 108(2)(ka) to include reference to the Inspector of the NACC. These amendments would permit the National Data Commissioner to disclose information or documents (including personal information) to the NACC or the Inspector where that disclosure would assist the NACC or the Inspector to perform any of their functions or exercise any of their powers. This amendment would also allow the National Data Commissioner to receive information or a document from the NACC or the Inspector for the purposes of assisting the Commissioner with the performance of their own functions. This would include the NACC and the Inspector alongside other integrity agencies and regulatory bodies, which are able to disclose and receive information for this purpose.

Financial Transaction Reports Act 1988 amendments

- 14.86 The *Financial Transaction Reports Act 1988* imposes an obligation on cash dealers to prepare a report and inform the AUSTRAC CEO in circumstances where the cash dealer is a party to a transaction and has reasonable grounds to suspect that any information regarding that transaction may be relevant to, among other things, the investigation of an offence against a law of the Commonwealth or of a Territory (subsections 16(1) and 16(1A)).
- 14.87 Items 112 to 116 would amend the *Financial Transaction Reports Act 1988* to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC and its establishing legislation, to give the NACC the same powers currently available to ACLEI. These items will update such references in sections 3 (definitions) and 16 (reports of suspect transactions) of the Act.

- 14.88 Item 115 would extend the definition of *investigating officer* (in subsection 16(6)) to include a staff member of the NACC, and item 116 would extend the definition of *relevant authority* to include the Commissioner. These amendments would permit the Commissioner or another staff member of the NACC (under subsection 16(4)) to require further information from a cash dealer where the dealer has provided information to the AUSTRAC CEO in accordance with subsection 16(1) or 16(1A). A staff member of the NACC may only require further information if they are carrying out an investigation arising from, or relating to the matters referred to in, the information contained in the report under subsection 16(1) or (1A).
- 14.89 These amendments would ensure, consistently with the powers available to ACLEI, that the NACC would have access to information about a financial transaction where relevant to a corruption investigation.

Inspector-General of Intelligence and Security Act 1986 amendments

- 14.90 Item 117 would amend subsection 3(1) of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to extend the definition of *integrity body* to include the National Anti-Corruption Commissioner and the Inspector of the NACC for the purposes of that Act.
- 14.91 Item 118 would amend the IGIS Act to repeal the definition of *Integrity Commissioner* for the purposes of the IGIS Act.
- 14.92 These amendments are relevant to provisions of the IGIS Act that:
- permit the IGIS to share information with integrity bodies (section 32AC); and
 - prevent the duplication of investigations (subsection 11(4A)).
- 14.93 Item 119 would repeal subparagraph 11(4A)(a)(iv) of the IGIS Act, which concerns the Inspector's ability to decide not to inquire into, or not to further inquire into, a complaint or part of a complaint received in relation to action taken by an intelligence agency. The amendment would insert two new subparagraphs 11(4A)(a)(iv) and 11(4A)(a)(iva), which would provide that the IGIS may decide not to inquire into, or further inquire into (as the case may be), a complaint in relation to an action taken by an intelligence agency if:
- the complaint has been, or could have been, made to the NACC or the Inspector of the NACC (as the case may be); and
 - the IGIS is satisfied the subject matter of the complaint could be more effectively or conveniently dealt with by the NACC or the Inspector of the NACC (as the case may be).
- 14.94 It is appropriate that the IGIS have the discretion to not inquire, or further inquire, into a matter that would be more appropriately considered by the NACC or the Inspector. It would remain open to the IGIS to still decide to inquire into a matter that may be within the NACC's jurisdiction, and for the NACC to refer the issue back to the IGIS.
- 14.95 Item 120 would remove a reference to the LEIC Act from the note to section 32AD of the IGIS Act (concerning the transfer of complaints to integrity bodies). Although the Commissioner would be an integrity body under the IGIS Act, the IGIS would not transfer complaints to the Commissioner under section 32AD. Instead, the IGIS could refer a corruption issue to the NACC voluntarily under clause 32 of the NACC Bill (voluntary referral obligations). The IGIS would also have mandatory referral obligations under clauses 34 (relating to intelligence agencies) or 35 (relating to PIDs about intelligence agencies) where the IGIS is satisfied that issue is likely to involve corrupt conduct that is serious or systemic.
- 14.96 Item 121 would insert a new provision 34AB into the IGIS Act. This amendment would permit the IGIS or the staff of the IGIS to disclose information or give documents to a staff member of the NACC or the Inspector of the NACC or a person assisting the Inspector if the information or documents being disclosed is relevant to the NACC's functions or powers, and the IGIS is satisfied on reasonable grounds that the NACC has satisfactory arrangements in place to protect the information or documents. This section would apply despite anything in the IGIS Act or any other Act. This section would also provide that a staff member of the NACC and person assisting the Inspector have the same meaning as under the NACC Bill.

- 14.97 This amendment is appropriate because it would enable the NACC to receive all relevant information about a potential serious or systemic corruption issue, while ensuring that information provided by the IGIS is appropriately protected.
- 14.98 Item 122 would insert a note under section 34B of the IGIS Act which concerns protection for persons providing information voluntarily to the IGIS. The note would explain that the immunity conferred by section 34B of the IGIS Act would apply, subject to a confidentiality direction issued by the NACC Commissioner under clauses 100 (directions about use or disclosure of investigation material) and 102 (disclosure to IGIS official and Ombudsman officials) of the NACC Bill, including instances where those clauses are applied by the Inspector under clause 214 (Inspector's powers to investigate).

National Consumer Credit Protection Act 2009 amendments

- 14.99 Item 123 would amend section 272F of the *National Consumer Credit Protection Act 2009* to apply a modified version of section 3ZQU of the *Crimes Act 1914* to NACC Act processes. This section of the National Consumer Credit Protection Act currently outlines the purposes for which documents may be used and shared for the purposes of the LEIC Act. The amendment would allow search warrant material seized under the National Consumer Credit Protection Act to be disclosed to certain officials for the purposes of a NACC Act process (defined in clause 7 to mean a corruption investigation, a NACC complaint investigation, a NACC corruption investigation or a public inquiry). This amendment is necessary to ensure that the NACC can use all available information and evidence when conducting investigations or public inquiries.
- 14.100 An equivalent amendment would be made to the *Australian Securities and Investments Commission Act 2001* (see item 34 of Schedule 1 of the Consequential Bill).

National Emergency Declaration Act 2020 amendments

- 14.101 Item 124 would amend subparagraph 15(8)(ge) of the *National Emergency Declaration Act 2020* to exclude the NACC Bill from the operation of section 15 of that Act. Section 15 permits the Minister, during a national emergency, to vary certain legislation by legislative instrument in response to circumstances relating to the emergency. This exemption would ensure that the coercive and intrusive powers contained in the NACC Bill, in addition to the Commissioner's role in addressing corruption across the Commonwealth, remain undisturbed regardless of the surrounding circumstances. This amendment is appropriate in light of the perpetual nature of the NACC as an integrity body.

Ombudsman Act 1976 amendments

- 14.102 Item 125 would remove the reference in the *Ombudsman Act 1976* to the Integrity Commissioner under the LEIC Act, and insert a new definition into the Ombudsman Act to refer to the Commissioner. This definition of the Commissioner would be aligned with the definition contained in the NACC Bill.
- 14.103 Item 126 would repeal subsection 5(3B) of the Ombudsman Act. This provision clarifies that the Ombudsman is not prevented from investigating actions taken by ACLEI office holders who are also serving judges. A serving judge could not be appointed to be a NACC office holder so this provision would no longer be required.
- 14.104 Item 127 would repeal subsections 6(16) to (19) of the Ombudsman Act, which allow the Ombudsman to refer a complaint, or information, that raise a corruption issue to ACLEI. Item 126 would insert a new section into the Ombudsman Act to replace the reference to ACLEI with a reference to the NACC, which would provide for the referral of corruption issues by the Ombudsman to the NACC or the Inspector.

- 14.105 Items 128 and 129 would amend section 6B to substitute references to the Integrity Commissioner with references to the Commissioner. This amendment would mean that if the Ombudsman forms the opinion that a complaint about the Commissioner could have been made to, and would be more conveniently or effectively dealt with by, another Commonwealth or State or Territory authority, the Ombudsman could transfer the complaint to the other, more suitable, authority. If the complaint is transferred, the Ombudsman may decide not to investigate the complaint, or investigate the complaint further.
- 14.106 Item 130 would create a new section 6G in the Ombudsman Act, providing the Ombudsman with the discretion to refer a complaint that is likely to involve corrupt conduct that is serious or systemic to the NACC, or a NACC corruption issue to the Inspector. The Ombudsman would be able to make a referral to the Commissioner under the voluntary referral provisions in clause 32 of the NACC Bill. This amendment provides the Ombudsman with the ability to continue to investigate a complaint or PID under the PID Act, following a referral of information to the NACC or Inspector. This amendment preserves the Ombudsman's ability to conduct concurrent investigations of complaints and matters once a referral to the NACC has been made. It would ensure the agency is able to continue to comply with requirements under other relevant legislation, including the Ombudsman Act and the PID Act for example. This amendment would also provide the Ombudsman with a discretion to decide not to investigate the complaint, or not to investigate it further. This would ensure that if a complaint or matter was referred to the NACC, the Ombudsman is able to decide to take no further action in relation to the matter. This would reduce duplicate investigations and inquiries into the same matter, where appropriate.
- 14.107 Subsection 6G(3) would provide that, once the Ombudsman decides to exercise their discretion to make a referral to the NACC or the Inspector under subsection 6G(2), they must refer the information as soon as reasonably practicable. They must include all relevant information to the corruption issue or the NACC corruption issue that is in their possession or control at the time, and, as soon as reasonably practicable, provide any further relevant information of which they subsequently become aware. However, the Ombudsman is not required to provide information if they have reasonable grounds to believe the Commissioner or Inspector is already aware of the information, or they have been advised by the Commissioner or Inspector the provision of information is not required (subsection 6G(4)).
- 14.108 The Ombudsman would also be required to give the complainant written notice that the complaint has been referred to the Commissioner or the Inspector as soon as reasonably practicable (new subsection 6G(3)(c)). This subsection would also require the Ombudsman to provide the complainant of their decision on whether they will continue to investigate, or continue to investigate, the complaint.
- 14.109 The Ombudsman would receive protections from liability in respect of a NACC disclosure, as provided for under clause 24 of the NACC Bill (protections for disclosers). This provision would ensure that the Ombudsman, or one of their delegates, would be protected from liability if they breach, for example, a relevant secrecy provision in making a referral of sensitive information to the NACC. This is appropriate to ensure that the Ombudsman and their delegates are not discouraged from making disclosures to the NACC, and so that the NACC is able to receive relevant information to support its statutory functions.
- 14.110 Items 131 to 135 would substitute references to the Integrity Commissioner and to ACLEI with references to the Commissioner and the NACC. These amendments would allow the Ombudsman to arrange for another Commonwealth, State or Territory authority to investigate action taken by a staff member of the NACC. The amendment to subsection 8C(3) would substitute the reference to the Integrity Commissioner with a reference to the Ombudsman to the effect that the Ombudsman can vary an arrangement struck between the Ombudsman and the head of another authority about an investigation of the Commissioner.

Secrecy provisions

- 14.111 Item 136 would permit the Attorney-General to issue a certificate preventing the Ombudsman from compelling or on-disclosing particular NACC information (see paragraph 9(3)(f)). Item 136 would substitute the reference to the Integrity Commissioner with a reference to the Commissioner. This would permit the Attorney-General to issue a certificate preventing the Ombudsman from compelling or on-disclosing particular NACC information (see paragraph 9(3)(f)). A certificate may relate to information the disclosure of which would endanger the life of a person or create a risk of serious injury to a person.
- 14.112 Items 137 to 151 would amend section 35C, subsections 20ZS(1) and 35AA(3), and paragraphs 20ZK(1)(k) of the Ombudsman Act to substitute references to the Integrity Commissioner and to ACLEI with references to the Commissioner and the NACC. These amendments would permit the Ombudsman to disclose information to the Commissioner if the information may be relevant to a corruption issue despite the secrecy provisions of the Ombudsman Act.
- 14.113 Item 143 would amend subsection 35AA(2) to permit the Ombudsman to disclose information, a statement, or a document to the Inspector (within the meaning of the NACC Bill) if it is relevant to a NACC corruption issue.

Privacy Act 1988 amendments

- 14.114 Item 152 would repeal paragraph 6(1)(aa) of the definition of **enforcement body** in the *Privacy Act 1988* which refers to the Integrity Commissioner and would substitute it with a reference to the Commissioner and add a reference to the Inspector. Additionally, item 153 would repeal the definition of Integrity Commissioner in subsection 6(1).
- 14.115 The effect of these amendments would be as follows.
- A credit reporting body would be able to disclose an individual’s credit reporting information to the NACC or the Inspector if the credit reporting body believes on reasonable grounds that the individual has committed a serious credit infringement or if the disclosure is otherwise required under a law or regulation (subsection 20E(3)(d) of the Privacy Act).
 - Under paragraph 20R(2)(c) of the Privacy Act, a credit reporting body (under paragraph 20R(2)(c)) or a credit provider (under subsection 21T(2)(c)) would not be able to give to an access seeker (within the meaning of the Privacy Act) access to credit information to the extent that it would be likely to prejudice activities conducted by the NACC or the Inspector.
 - A credit provider who holds information about an individual’s credit eligibility information would be able to disclose this information to the NACC or the Inspector if the credit provider believes on reasonable grounds that the individual has committed a serious credit infringement (paragraph 21G(3)(d) of the Privacy Act).
- The Commissioner or the Inspector would not need to report a data breach if doing so would be likely to prejudice its enforcement-related activities (see sections 26WN and 26WS of the Privacy Act). Other entities affected by the breach may also not need to report on that basis. However, the Commissioner or the Inspector could provide advice to the Information Commissioner in relation to a data breach (subparagraph 26WQ(3)(b)(i) of the Privacy Act).
- The NACC or the Inspector would not be able to be a data store administrator in relation to COVIDSafe app data (paragraph 94Z(3)(a) of the Privacy Act), noting that the Minister for Health has determined the end of the COVIDSafe app data period under section 94Y of the Privacy Act (taking effect on 16 August 2022), and this will repeal Part VIIIA of the Privacy Act 90 days after the determination takes effect.
 - The Commissioner or the Inspector would be able to collect sensitive information about an individual where it is reasonably necessary for, or directly related to, one or more of the Commissioner’s or the Inspector’s functions or activities (subparagraph 3.4(d)(ii) of Schedule 1 of the Privacy Act).

- An entity would be able to disclose personal information to the Commissioner or the Inspector for the Commissioner's or the Inspector's enforcement-related activities (paragraph 6.2(e) of Schedule 1 of the Privacy Act).
- An entity would be able to disclose biometric information or biometric templates to the Commissioner or the Inspector in accordance with guidelines made by the Information Commissioner (clause 6.3 of Schedule 1 of the Privacy Act).
- The Commissioner or the Inspector would be able to share personal information with a foreign body with law enforcement functions for the purpose of the Commissioner's or the Inspector's enforcement-related activities (paragraph 8.2(f) of Schedule 1 of the Privacy Act).
- The Commissioner or the Inspector would be able to use or disclose a government-related identifier of an individual for the purpose of the Commissioner's or the Inspector's enforcement related activities (paragraph 9.2(e) of Schedule 1 of the Privacy Act).
- A credit reporting body or credit provider would be able to deny a person access to their personal information if that access would be likely to prejudice one or more enforcement-related activities conducted by the Commissioner or the Inspector (paragraph 12.3(i) of Schedule 1 of the Privacy Act).

- 14.116 Item 154 would repeal subparagraph 7(1)(a)(iiia) which refers to the Integrity Commissioner and substitute it with a reference to the National Anti-Corruption Commissioner and add a reference to the Inspector. As both the NACC and the Inspector would become enforcement bodies under subsection 6(1) of the Privacy Act following the commencement of the NACC Bill and item 152 of the Consequential Bill, the effect of the amendment to subparagraph 7(1)(a)(iiia) would be that an act or practice of the Commissioner or the Inspector would not be subject to the Privacy Act. This is appropriate given the important role the NACC will play in ensuring effective public administration. Further, the Commissioner and Inspector will both be subject to strict confidentiality requirements (see Part 11 of the NACC Bill).
- 14.117 Item 155 would repeal paragraph 7(1)(ga) which refers to the Integrity Commissioner or a staff member of ACLEI and substitute it with a reference to the National Anti-Corruption Commissioner or another staff member of the NACC, and add a reference to the Inspector or a person assisting the Inspector. The amendment would provide that a reference in the Privacy Act to an act, or to a practice engaged in, does not include a reference to an act or to a practice engaged in, in relation to a record that has originated with, or has been received from, the Commissioner, another staff member of the NACC or the Inspector.
- 14.118 Item 156 would substitute the reference to the LEIC Act with a reference to the NACC Bill in subsection 20E(5) (note). Under subsection 20E(5), if a credit reporting body discloses credit reporting information under this section, the credit reporting body must make a written note of that disclosure. The note under that subsection of the Privacy Act states that the LEIC Act provides that this written note must not be made – this amendment is necessary to ensure that this provision would have the same operation for a disclosure to the NACC.
- 14.119 Item 157 would substitute the reference to the Integrity Commissioner in paragraph 70(2)(c) of the Privacy Act and replace it with a reference to the Commissioner and add a reference to the Inspector. The effect of this amendment would be that the Attorney-General would be able to issue a certificate preventing the Information Commissioner from compelling the production of particular information that would prejudice the proper performance of the functions of the Commissioner or the Inspector. Certificates issued under the Privacy Act are distinct from certificates issued under the NACC Bill (see clauses 235 and 236), but serve a similar purpose.

Proceeds of Crime Act 2002 amendments

- 14.120 Items 158 to 162 would amend provisions of the POC Act to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC contained in the NACC Bill. The effect of these amendments would be to give the NACC the same powers as those currently available to ACLEI. These items will update references contained in the following sections of the POC Act:

- section 15B (making freezing orders)
- section 15C (affidavit supporting freezing order application made in person)
- section 15D (applying for freezing orders by telephone or other electronic means)
- section 15P (order extending a freezing order)
- section 213 (giving notices to financial institutions), and
- section 338 (definitions).

14.121 The powers available under the POC Act are intended to prevent a person who has committed an offence from being able to enjoy the benefit, or reinvest the proceeds, of their criminal conduct. These powers act as a disincentive to possible criminal corrupt actors by minimising any profit motive. Item 162 would ensure that the Commissioner, a Deputy Commissioner, or a staff member of the NACC authorised by the Commissioner in writing, would constitute an **authorised officer** under section 338 of the POC Act.

14.122 These amendments will give authorised officers of the NACC access to certain powers under the POC Act, subject to existing thresholds, as detailed below. Other powers under the POC Act would not be available to the NACC, including those only available to a **proceeds of crime authority**. This includes powers to apply for a forfeiture order (section 47) or a preliminary unexplained wealth order (section 179B). This is consistent with how the POC Act currently applies to ACLEI.

Freezing orders

14.123 The amendments to the POC Act would allow authorised officers of the NACC to:

- apply for a freezing order (section 15B), and
- apply for an order extending a freezing order (section 15P).

14.124 A freezing order is an order that a financial institution not allow a withdrawal from an account with the institution unless in circumstances permitted by the order. A magistrate would only grant a freezing order if there are reasonable grounds to suspect that the balance of the account is, among other things, proceeds of an indictable offence.

Notices to financial institutions

14.125 Item 161 would amend section 213 of the POC Act such that the Commissioner would be empowered to issue a notice to a financial institution to provide information or documents. This power would enable the NACC to seek information about accounts held by a specified person.

Production orders

14.126 These amendments would also mean that the NACC is an **enforcement agency** for the purposes of the POC Act (see definition of that term in section 338), and an **authorised officer** of the NACC would therefore be permitted to apply for a production order under section 202 of the POC Act.

14.127 A production order is an order that a person produce particular property-tracking documents (defined in section 202(5)) to an **authorised officer**. A magistrate could only grant a production order where satisfied that a person is reasonably suspected of having possession or control of such documents. This power would assist the NACC in identifying, locating or quantifying an interest in property where relevant to a corruption investigation.

Monitoring orders

14.128 An **authorised officer** of the NACC would also be permitted to apply for a monitoring order under section 219 of the POC Act.

- 14.129 A monitoring order is an order that a financial institution provide information about transactions conducted by a particular person or made using a stored value card (defined in section 338 of the POC Act) during a particular period. A judge could only grant a monitoring order where satisfied that there are reasonable grounds to suspect the person who holds the account or stored value card is involved or is about to be involved in the commission of a serious offence (such as an offence carrying a penalty of three or more years imprisonment), or the account is being used to commit an offence against Part 10.2 of the *Criminal Code* (money laundering). This power would assist the NACC in obtaining financial information relevant to a corruption investigation.

Search warrants

- 14.130 An **authorised officer** of the NACC would be permitted to apply for a search warrant under section 225 of the POC Act (or under section 229 in an urgent case). A magistrate could only issue a search warrant if satisfied that there are reasonable grounds for suspecting that there will be tainted property or evidential material (defined in section 338 of the POC Act) at the premises within the next 72 hours (or 48 hours in the case of a section 229 application). The search warrant would authorise the executing officer or person assisting to enter premises, search premises or a person, and seize material as provided in section 228 of the POC Act. This power would assist the NACC to obtain material relevant to a corruption investigation.

Stopping and searching conveyances

- 14.131 Under section 251, an **authorised officer** of the NACC would be permitted to stop, detain and search a conveyance and any container in or on the conveyance, and seize material. The officer would only be able to do so in accordance with section 252, and if they suspect on reasonable grounds that material constituting tainted property or evidential material (defined in section 338 of the POC Act) is in or on a conveyance and it is necessary to seize that material to prevent the thing from being concealed, lost or destroyed, and without the authority of a search warrant because the circumstances are serious and urgent.

Public Interest Disclosure Act 2013 amendments

- 14.132 Items 163 to 183 would amend the PID Act. The PID Act provides a framework for public officials (within the meaning of the PID Act) to make PIDs disclosing suspected wrongdoing within the Commonwealth public sector. PIDs may relate to:
- a contravention of the law;
 - corruption;
 - perverting the course of justice;
 - maladministration;
 - an abuse of public trust;
 - falsifying scientific research;
 - wastage of public money;
 - conduct that is a danger to health, safety or the environment; or
 - conduct that involves, or is engaged in for the purpose of, corruption of any other kind.
- 14.133 The PID Act places obligations on departments, agencies and prescribed authorities (including Commonwealth companies) to investigate and take appropriate action in relation to PIDs and provides a range of protections to disclosers, including immunities from liability and protection from reprisal action, or threats of reprisal action.

- 14.134 The NACC Bill and the Consequential Bill would provide a framework to appropriately protect people who make disclosures to the NACC, and are designed to complement the PID Act scheme. There are a number of areas where the two schemes would closely interact. For example, there would be overlap between the types of disclosable conduct that can be dealt with under the PID Act and alleged corrupt conduct that can be dealt with under the NACC Bill. Under the PID Act, a public official can make an internal disclosure to their supervisor or a PID officer within the agency to which the disclosure relates (or the agency to which the public official belongs or last belonged). In certain circumstances a public official may also make an internal disclosure to the Commonwealth Ombudsman or the IGIS (for disclosures relating to intelligence agencies).
- 14.135 In some circumstances, this may mean that PID officers receiving internal disclosures within their agencies may discover corruption issues that need to be referred to the Commissioner. PID officers will be required to refer corruption issues to the Commissioner if they suspect the issue could involve corrupt conduct that is serious or systemic (see clause 35). For corruption issues that do not meet that threshold, PID officers may wish to voluntarily refer corruption issues to the Commissioner (see voluntary and mandatory referral provisions in Part 5 of the NACC Bill). This framework would ensure that corruption issues that come to the attention of a Commonwealth agency through a PID Act process are referred to the Commissioner at the earliest opportunity.
- 14.136 The amendments to the PID Act contained in the Consequential Bill would ensure that public officials within the meaning of the PID Act are able make a PID directly to the NACC (instead of or in addition to making an internal disclosure to their supervisor or a PID officer within their agency). These amendments would also extend protections contained in the PID Act to cover public officials who make a PID directly to the NACC.
- 14.137 Related measures contained in Part 4 of the NACC Bill would provide similar protections to those available to public officials under the PID Act (see paragraphs 4.22 to 4.76) to all persons, including those who are not public officials (within the meaning of the NACC Bill or the PID Act); and all information provided for the purposes of the NACC Bill, regardless of whether that information concerns disclosable conduct (within the meaning of the PID Act).
- 14.138 The amendments to the PID Act contained in the Consequential Bill would also address the impact of a stop action direction issued under clause 43 of the NACC Bill on the obligations on authorised officers and principal offers under the PID Act.

Designated publication restriction

- 14.139 Item 164 would amend the definition of ***designated publication restriction*** in section 8 of the PID Act to repeal current references to the LEIC Act and replace them with restrictions imposed by way of:
- a notation on a notice to produce or a private hearing summons (see clause 98 of the NACC Bill);
 - a direction about the use or disclosure of investigation material (see clause 101 of the NACC Bill); or
 - a confidentiality requirement (see clause 233 of the NACC Bill).
- 14.140 Under the current PID Act framework, a discloser, witness or person with functions under the PID Act are afforded the following immunities:
- section 10 provides that a person who makes a PID is not subject to any civil, criminal or administrative liability for making the PID. It also provides that no contractual or other remedy may be enforced or sanction imposed on the basis of making the PID;
 - section 57 provides that a person is not subject to any criminal or civil liability because the person gives information, produces a document, or answers a question if they are requested to do so by a person investigating under the PID Act, and the information, document or answer is relevant to the investigation;

- section 78 provides that a principal officer of an agency (or a delegate) or an authorised officer is not liable to any criminal or civil proceedings, or any disciplinary action for actions undertaken in good faith in the performance of any function or exercise of any power (or purported performance or exercise) under the PID Act.

- 14.141 However, these immunities do not apply to liability for contravening a designated publication restriction (see section 11A, and subsections 57(3) and 78(2) of the PID Act). The amendment to the definition of **designated publication restriction** would therefore mean that the immunity conferred on a disclosure, witness or person with functions under the PID Act by sections 10, 57, and 78 of the PID Act would not apply in relation to a breach of clause 98, clause 101, or clause 233 of the NACC Bill.
- 14.142 The concept of **designated publication restriction** is not included in the NACC Bill. This means that a person who makes a disclosure to the NACC in contravention of a designated publication restriction under the PID Act would continue to have immunity from civil, criminal and administrative liability arising from the contravention (see paragraphs 4.22 to 4.45). This is appropriate as it is important the NACC can receive information relevant to the exercise of its functions. The NACC Bill also includes strict confidentiality requirements to ensure such information is protected and cannot be disclosed further without authorisation (see paragraphs 11.5 to 11.97).

NACC disclosure

- 14.143 Items 163, 165, 166, 167 and 168 would collectively provide for a NACC disclosure (as defined in the NACC Bill), to be included and recognised under the PID Act as a PID in certain circumstances. These amendments would enable a PID to be made directly to the NACC and ensure that a public official within the meaning of the PID Act would obtain the protections available under the PID Act regardless of whether they make a PID internally or a NACC disclosure under the NACC Bill.
- 14.144 Item 163 would amend subsection 7(2) of the PID Act to provide that there are now 5 kinds of PIDs set out in Division 2 of Part 2 of the PID Act (rather than 4).
- 14.145 Item 165 would insert a definition of **NACC disclosure** into section 8 of the PID Act. A NACC disclosure would have the same meaning as in the NACC Bill (see paragraphs 4.16 to 4.20). A person makes a NACC disclosure if they referred, or provided information about, a corruption issue or a NACC corruption issue to the Commissioner, the IGIS, or the Inspector. A person would also make a NACC disclosure if they give evidence or information, or produce a document or thing to a NACC Commissioner, the IGIS or the Inspector in relation to:
- a corruption issue;
 - a NACC Act process, including a corruption investigation;
 - a NACC corruption issue; or
 - a complaint made in relation to the conduct or activities of the NACC or a staff member of the NACC.
- 14.146 Division 2 of Part 2 of the PID Act sets out what constitutes a PID under that Act. Item 166 and 167 would amend the simplified outline of these provisions to insert an additional category of PID where a NACC disclosure concerns disclosable conduct, as defined under the PID Act.
- 14.147 Item 168 would insert a new subsection 26(1A) into the PID Act, which would provide the substance of the new ‘NACC disclosure’ category of PID. This subsection would provide that a disclosure of information is a PID if:
- the disclosure is made by a person who is, or has been, a public official; and
 - the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct; and
 - the disclosure is a NACC disclosure.

- 14.148 These amendments would mean that public officials (within the meaning of the PID Act) would have the option of making a PID that raises a corruption issue directly to the NACC or to an authorised officer within their agency. **Public officials** are defined in section 69 of the PID Act, and include staff members of departments, executive agencies, contracted service providers and certain statutory office holders. **Disclosable conduct** is defined in section 29 of the PID Act, and includes conduct that contravenes a law of the Commonwealth, a State or a Territory, conduct that perverts the course of justice, constitutes maladministration, results in the wastage of public money, or is an abuse of public trust.
- 14.149 A direct disclosure to the NACC by a public official would constitute a NACC disclosure for the purposes of the NACC Bill and the PID Act. Where a public official makes a disclosure and their disclosure meets the requirements to constitute a valid PID under the PID Act, the public official would be afforded protections under the PID Act in addition to the protections under Part 4 of the NACC Bill.
- 14.150 In particular, the following protections would apply to the public official under the PID Act:
- immunity from any civil, criminal or administrative liability, or contractual or other remedies, for making a PID (section 10);
 - an offence to take a reprisal, or to threaten to take a reprisal, against a person because of a PID (including a proposed or a suspected PID) (section 19);
 - access to Federal Court or Federal Circuit and Family Court of Australia (Division 2) orders for civil remedies (including compensation, injunctions and reinstatement of employment) if a reprisal is taken against a person because of a PID (including a proposed or a suspected PID) (sections 14 to 16); and
 - an offence to use or disclose identifying information of an individual who makes a PID (section 20).
- 14.151 For example, if a public official makes a NACC disclosure and the conduct disclosed also constitutes disclosable conduct under the PID Act, the public official would receive the protections contained in the PID Act under these amendments. However, they would also have the option of relying on the protections contained in Part 4 of the NACC Bill for NACC disclosures, if required. As noted above at paragraphs 14.134 to 14.137, Part 4 of the NACC Bill provides similar protections to those contained in the PID Act. These protections apply to all persons who make disclosures to the NACC, including where a person was not a public official for the purposes of the PID Act, or the NACC disclosure did not contain disclosable conduct as defined by the PID Act.
- 14.152 These amendments are appropriate to ensure a public official is not disadvantaged if they bring their concerns to the NACC rather than raising it internally as a PID, where such concerns relate to disclosable conduct under the PID Act.
- 14.153 However, a NACC disclosure would not be an internal disclosure for the purposes of the PID Act. This means that the protections afforded under the PID Act would not apply in circumstances where a public official makes a disclosure to the NACC and then subsequently makes an external disclosure (for example, to the media or to another agency), without also first making an internal disclosure within their own agency (and otherwise satisfying the criteria in Item 2 of the table in paragraph 26(1)(c) of the PID Act). An external disclosure made in such circumstances would not be a valid PID for the purposes of the PID Act and therefore the protections under the PID Act would not apply. Similar protections provided under the NACC Bill would only apply to NACC disclosures, so would also not apply to disclosures to the media or another agency.
- 14.154 Persons with responsibilities under the PID Act (PID officers) who refer PIDs made by public officials within their agency to the NACC would also receive the protections available under the new ‘NACC disclosure’ category of PID.

How a PID may be made

- 14.155 Section 28 of the PID Act provides that generally a PID may be made orally or in writing, anonymously, and may be made without the discloser asserting that the disclosure is made for the purposes of the PID Act. Item 169 would insert a new subsection 28(4) into the PID Act clarifying that the section does not apply to a PID that is also a NACC disclosure. The new note to subsection 28(4) would explain that these provisions would not apply to PIDs that are also NACC disclosures as the process to make a NACC disclosure is dealt with under the NACC Bill (see paragraphs 5.4 to 5.7).

Stop action direction

- 14.156 Items 170 to 183 would insert provisions that deal with how a stop action direction issued by the Commissioner under the NACC Bill would interact with PID Act requirements. Under clause 43 of the NACC Bill, the Commissioner would be able to direct a Commonwealth agency to stop taking specific action in relation to a corruption issue that concerns the agency (see paragraphs 6.40 to 6.49). Such a direction could be issued to stop an agency from taking action in relation to a PID investigation. However, the Commissioner would only be able to give such a direction if it is required to ensure the effectiveness of any action the Commissioner has taken, or might take, in relation to the corruption issue, or any other corruption issue (see clause 43(2)). Without a stop action direction in place, the allocation or investigation of the disclosure could continue alongside the Commissioner's consideration of the corruption issue. The Commissioner must revoke the stop action direction once it is no longer required (see clause 43(3)). The ability for the Commissioner to issue a stop action direction is appropriate to prevent the possibility of parallel investigations under different frameworks that may prejudice each other.
- 14.157 The amendments contained in the Consequential Bill would clarify that a stop action direction would relieve an authorised officer or a principal officer of their obligations to allocate or investigate a disclosure under the PID Act respectively for as long as the stop action direction is in place. Item 165 would insert the definition of *stop action direction under the NACC Act* into section 8 of the PID Act. A stop action direction would constitute a direction under clause 43 of the NACC Bill (see paragraphs 6.40 to 6.49) to stop taking action in relation to a corruption issue or a NACC corruption issue.

Preventing allocation of disclosure

- 14.158 Division 1 of Part 3 of the PID Act provides a framework for allocating the handling of disclosures. Under section 43 of the PID Act, an authorised officer has obligations to allocate the handling of a disclosure to one or more agencies.
- 14.159 An authorised officer is defined in section 36 of the PID Act to be either the principal officer of the agency or a public official who belongs to the agency and is appointed as an authorised officer by the principal officer. A principal officer is defined in section 73 of the PID Act and includes people such as the Secretary of a department, the head of an executive agency, and the CEO or other relevant person of a prescribed authority.
- 14.160 Items 170 to 174 would amend the PID Act to clarify the impact of a stop action direction issued under the NACC Bill on the obligations to allocate the handling of a disclosure. In effect, these amendments would:
- provide that an authorised officer would be relieved of their obligation to allocate the handling of the disclosure while a stop action direction is in place (items 170 to 172); and
 - provide that an authorised officer must notify certain people of the impact of the stop action direction on allocation of the handling of the disclosure (Items 173 and 174).
- 14.161 Item 170 would amend the simplified outline of Division 1 of Part 3 of the PID Act to provide that a stop action direction under the NACC Bill would prevent the allocation of some or all of a disclosure to relevant agencies, as required under the PID Act.

- 14.162 Items 171 and 172 would amend section 43 of the PID Act to provide that the obligation on an authorised officer to allocate the handling of a disclosure does not arise, or is paused, if a stop action direction under the NACC Bill is in place in relation to the disclosure. If the Commissioner revokes the stop action direction, the authorised officer would then be required to allocate or continue allocating the disclosure. This is appropriate to ensure that referral to the NACC does not result in significant or unnecessary delay to the allocation and investigation of a PID within an agency. The timely allocation and investigation of PIDs is important to ensure the PID Act remains an effective mechanism to deal with disclosures of suspected wrongdoing within the Commonwealth public sector.
- 14.163 This new exception to the requirement to allocate a disclosure would be in addition to the existing exception for circumstances where the authorised officer is satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure (see subsection 43(2) of the PID Act).
- 14.164 Item 173 would amend section 43 of the PID Act to provide that, if an allocation is not made because of a stop action direction under the NACC Bill, the authorised officer must notify the Commonwealth Ombudsman of:
- the information that was disclosed;
 - the suspected disclosable conduct (if any);
 - if the discloser’s name and contact details are known to the authorised officer, and the discloser consents to the Ombudsman being informed—the discloser’s name and contact details; and
 - the stop action direction under the NACC Bill that prevents allocation of the disclosure.
- 14.165 However, if the disclosure concerns conduct relating to an intelligence agency, the IGIS, or the intelligence functions of either ACIC or the Federal Police, the authorised officer must inform the IGIS of the above matters. The purpose of this amendment would be to ensure that the bodies responsible for overseeing PID investigations are kept informed of the status of those investigations and can effectively perform their oversight role where required.
- 14.166 Item 174 amends section 44 of the PID Act to include a new subsection 44(5). Section 44 of the PID Act provides that an authorised officer must inform certain people of information regarding a disclosure and any decision regarding allocation including the principal officer of the agency to which the PID is allocated, the Commonwealth Ombudsman, the discloser, and in specific circumstances, the IGIS. This new subsection would provide that to avoid doubt, the obligations in section 44 apply despite any stop action direction under the NACC Bill. This promotes transparency in relation to PID Act processes and is appropriate to ensure that people with an interest in the allocation of the PID remain informed of its progress.
- 14.167 Preventing investigation of disclosure
- 14.168 Division 2 of Part 3 of the PID Act outlines the obligation on a principal officer to investigate a disclosure and prepare a report, within a set time and in accordance with the requirements of the Division. Items 175 to 180 would amend the PID Act to clarify the impact of a stop action direction issued under the NACC Bill on the investigation obligations under the PID Act. In effect, these amendments would:
- provide that a stop action direction would relieve a principal officer of their obligations to investigate a PID within a certain timeframe, while a stop action direction is in place (items 175 and 176);
 - provide that a principal officer must inform certain people of the impact of a stop action direction on the investigation of a PID (items 177 to 181); and
 - provide that the 90-day timeframe to complete a PID Act investigation restarts once the principal officer becomes aware that the stop action direction no longer applies (item 182).
- 14.169 Item 175 would amend the simplified outline to Division 2 of Part 3 of the PID Act to provide that a stop action direction under the NACC Bill may prevent the investigation of some or all of the disclosure.

- 14.170 Item 176 would insert a new subsection into section 47 of the PID Act. Section 47 of the PID Act requires a principal officer of an agency to investigate a disclosure that is allocated to that agency. This item would provide that the effect of section 47 is subject to any stop action direction made under the NACC Bill. This would have the effect of relieving a principal officer of their obligations to investigate, or continue investigating, a disclosure if a stop action direction issued under the NACC Bill prevents the principal officer from investigating the disclosure. This is appropriate to ensure a principal officer does not breach their obligations under a PID Act due to an existing stop action direction issued under the NACC Bill preventing their investigation of a PID.
- 14.171 Item 177 would amend subsection 50(1) of the PID Act to provide that a principal officer must inform the discloser, as soon as reasonably practicable, that they cannot investigate, or further investigate, a disclosure because of a stop action direction under the NACC Bill. This would provide the discloser with certainty and promote transparency in relation to any future investigation conducted into the matter under the PID Act.
- 14.172 Similarly, item 179 would insert a new subsection 50(4A) into the PID Act that would require the principal officer to inform the discloser if the principal officer investigates, or further investigates, a disclosure that is no longer subject to a stop action direction under the NACC Bill. Item 178 would amend subsection 50(4) of the PID Act to clarify that the principal officer cannot inform the discloser of an investigation under subsection 50(4A) in the same document that informs the discloser of an allocation decision under subsection 44(2). This is in recognition that, practically, these events would occur at different times.
- 14.173 Items 180 and 181 would insert new subsection 50A(3) of the PID Act and make an according amendment to the heading of section 50A. The amendments would require the principal officer to inform the Commonwealth Ombudsman of a stop action direction unless the stop action direction concerns conduct relating to an intelligence agency, the IGIS or the intelligence functions of either ACIC or the AFP. In those circumstances, the principal officer must inform the IGIS of the stop action direction. The purpose of this amendment would be to ensure that the bodies responsible for overseeing PID investigations are kept informed of the status of those investigations.
- 14.174 Item 182 would amend subsection 52(1) of the PID Act to provide that the 90-day statutory timeframe for a disclosure investigation to be completed is reset when the principal officer becomes aware that the stop action direction no longer applies. For example, if the NACC issues a stop action direction in relation to a PID that is already being investigated by an agency, the agency would be required to stop the investigation. Once the stop action direction is revoked, the principal officer would have 90 days to investigate the PID from the time when they became aware that the direction no longer applies. It is appropriate that the timeframe for investigation of a PID resets (rather than continues) once the stop action direction is revoked to ensure the principal officer has enough time to effectively conduct an investigation under the PID Act.

Staff members of the NACC

- 14.175 The PID Act would apply to the NACC in the same way that it applies to other Commonwealth agencies. The NACC would be a statutory agency within the definition of ***prescribed authority*** in paragraph 72(1)(2) of the PID Act. This would mean that the principal officer of the NACC would be the CEO of the NACC, or any other individual prescribed by the Public Interest Disclosure Rules 2019. The principal officer would be responsible for appointing authorised officers within the NACC who would have obligations to allocate the handling of disclosures made within the NACC. An authorised officer would deal with a PID in accordance with the PID Act, and could allocate the PID to the Ombudsman or IGIS under section 43 of the PID Act, if appropriate. If a PID raises a NACC corruption issue, the PID must be referred to the Inspector (subclause 204(1)).
- 14.176 Item 183 would amend paragraph 69(3)(c) of the PID Act to provide that the staff of the NACC for the purposes of the PID Act are the staff listed in clause 266 of the NACC Bill (see paragraph 12.107). Paragraph 69(3)(c) of the PID Act outlines the definition of a public official under the PID Act, and therefore who can access the protections provided under that Act. The table in paragraph 69(1)(b) provides that a member of the staff of a prescribed authority (including an APS employee) is a public official. Amended paragraph 69(3)(c) would then clarify (with reference to clause 266 of the NACC Bill) that the staff members of the NACC are:

- the Commissioner;
- any Deputy Commissioners;
- the CEO;
- a member of the staff referred to in clause 262 of the NACC Bill;
- a consultant engaged under clause 263 of the NACC Bill;
- a person referred to in clause 264 of the NACC Bill whose services are made available to the NACC;
- a legal practitioner appointed under clause 265 of the NACC Bill.

14.177 This amendment would ensure that if a NACC staff member makes a NACC disclosure that is also a PID, they would have access to the protections under the PID Act. The reason for this amendment is to ensure broad coverage and that NACC staff members are not disadvantaged when making a NACC disclosure that also constitutes a PID.

Radiocommunications Act 1992 amendments

- 14.178 Item 184 would amend paragraph 27(1)(baa) of the *Radiocommunications Act 1992* to omit the reference to the Integrity Commissioner and replace it with a reference to the National Anti-Corruption Commissioner. This amendment would permit the Australian Communications and Media Authority to determine that a person performing the functions and duties of Commissioner is to be exempt from certain regulations under the Act, being unlicensed radiocommunications, equipment and offences relating to radio emission.
- 14.179 It is appropriate for the Commissioner to be exempt from these parts of the Act due to their functions in relation to law enforcement. Relevantly, the AFP and other State and Territory integrity bodies are also exempt under this provision.

Royal Commissions Act 1902 amendments

- 14.180 Items 185 and 186 would amend subsection 6P(2B) of the *Royal Commissions Act 1902* to substitute references to the Integrity Commissioner with references to the National Anti-Corruption Commissioner, and adding a reference to the Inspector. These amendments would operate to authorise a Royal Commission to provide information, evidence, documents or things to the Commissioner, or to the Inspector, if the Royal Commission believes it relates to the performance or functions of the NACC or the Commissioner, or the Inspector. As both Royal Commissions and the NACC are integrity-focused bodies of inquiry, it is appropriate that Royal Commissions are empowered to share information with the Commissioner or the Inspector, especially where this would facilitate NACC Act process and avert the potential for duplicative inquiries.
- 14.181 Item 187 would amend subsection paragraph 9(3)(h) to substitute a reference to ACLEI with a reference to the NACC, and would add a reference to the Inspector. This amendment would allow the Commissioner and the Inspector to be given custody of Royal Commission records set by regulations under the Royal Commissions Act (subsection 9(2)). This would mean the Commissioner or the Inspector could use these records for the purpose of their functions and the exercise of their powers under the NACC Bill. The Commissioner or the Inspector would be able to retain possession of these records for as long as they consider it desirable to do so (subsection 9(10) of the Royal Commissions Act). This would be appropriate because the NACC is a standing body and there would be times where the Commissioner requires access to records following the period in which a Royal Commission is undertaking its inquiry.

Surveillance Devices Act 2004 amendments

- 14.182 The SD Act provides a framework for:
- the use of surveillance devices (including optical, listening data surveillance and combination devices) under a warrant issued by an eligible Judge or nominated AAT member or emergency authorisation issued internally by a senior officer;

- the use of certain surveillance devices without a warrant in limited circumstances;
 - the use of computer access powers (which involve covertly accessing data held in a computer) under a warrant issued by an eligible Judge or nominated AAT member or emergency authorisation issued internally by a senior officer;
 - data disruption warrants; and
 - network activity warrants.
- 14.183 ACLEI may currently obtain surveillance device and computer access warrants and emergency authorisations, and use certain surveillance devices without a warrant in limited circumstances, but may not obtain data disruption warrants or network activity warrants as a law enforcement agency under the SD Act.
- 14.184 Items 188, 190 to 191 and 193 to 200 would amend the SD Act to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC and its establishing legislation to give the NACC the same powers currently available to ACLEI. These items would update such references in:
- section 6 (definitions)
 - section 6A (definition of law enforcement agency, chief officer, law enforcement officer and appropriate authorising officer)
 - section 6B (authorisation of law enforcement officer)
 - section 37 (use of optical surveillance devices without warrant)
 - section 38 (use of surveillance devices without warrant for listening to or recording words in limited circumstances) and
 - section 64 (compensation for loss or injury).
- 14.185 The amendments made by these items would:
- allow NACC officers authorised by the National Anti-Corruption Commissioner as law enforcement officers to:
 - apply for surveillance device warrants, retrieval warrants (to retrieve a surveillance device) and computer access warrants under Part 2 of the SD Act;
 - apply for emergency authorisations to use a surveillance device or access data held in a computer under Part 3 of the SD Act; and
 - use of certain surveillance devices without a warrant in limited circumstances under Part 4 of the SD Act;
 - allow the National Anti-Corruption Commissioner, a Deputy Commissioner (within the meaning of the *National Anti-Corruption Commission Act 2022*) or a NACC officer who is an SES employee authorised by the Commissioner to give an emergency authorisation to use a surveillance device or access data held in a computer under Part 3 when satisfied of the relevant threshold; and
 - require the Commonwealth to pay compensation to a person who suffers loss or injury as a result of unlawful use of a surveillance device, computer, telecommunications facility operated or provided by the Commonwealth or a carrier, any other electronic equipment, or data storage device by the NACC.
- 14.186 Consistent with existing oversight arrangements under the SD Act, the NACC's use of powers under that Act would be subject to oversight by the Commonwealth Ombudsman. The Commonwealth Ombudsman is the authority to inspect (and report on) agency compliance. Oversight also includes annual reporting requirements on the use of powers.

Thresholds for surveillance device and computer access warrants

- 14.187 Surveillance device and computer access warrants may be sought and granted under the SD Act for several purposes. For the NACC, the most relevant of these will be the investigation of a relevant offence (an offence punishable by at least three years imprisonment and certain other offences) and the conduct of integrity operations (under Part IAB and IABA of the *Crimes Act 1914*).
- 14.188 Under sections 16 and 27C of the SD Act, an eligible Judge or a nominated AAT member may grant a surveillance device or computer access warrant for an offence investigation if satisfied that there are reasonable grounds for the applicant's suspicions that:
- one or more relevant offences have been, are being, are about to be, or are likely to be, committed;
 - an investigation into those offences is being, will be, or is likely to be, conducted; and
 - the use of a surveillance device, or access to data held in a computer, is necessary in the course of that investigation for the purpose of enabling evidence to be obtained of the commission of the relevant offences or the identity or location of the offenders.
- 14.189 Under sections 16 and 27C, an eligible Judge or a nominated AAT member may grant a surveillance device or computer access warrant for an integrity operation if satisfied that:
- an integrity authority is in effect authorising an integrity operation in relation to an offence that it is suspected has been, is being or is likely to be committed by a staff member of a target agency; and
 - there are reasonable grounds for the applicant's suspicion that:
 - the use of a surveillance device will assist the conduct of the integrity operation by recording or monitoring the operation and enabling evidence to be obtained relating to the commission of the offence or the integrity, location or identity of any staff member of the target agency (where a surveillance device warrant is sought); or
 - access to data held in a computer will assist the conduct of the integrity operation by enabling evidence to be obtained relating to the integrity, location or identity of any staff member of the target agency (where a computer access warrant is sought).
- 14.190 Sections 16 and 27C would apply to the NACC as they currently do to ACLEI and other law enforcement agencies.

Emergency authorisations for use of a surveillance device or computer access

- 14.191 Part 3 of the SD Act allows appropriate authorising officers to grant emergency authorisations to use surveillance devices and access data held in a computer in limited circumstances, specifically where there is a serious risk to a person or property, urgent circumstances relating to a recovery order or a risk of loss of evidence for investigations of certain offences. Part 3 of the SD Act would apply to the NACC as it currently does to ACLEI and other law enforcement agencies.

Use of certain surveillance devices without a warrant

- 14.192 Sections 37 to 39 of the SD Act set out the circumstances and purposes for which law enforcement agencies may use certain surveillance devices without obtaining a warrant.
- 14.193 Section 37 of the SD Act currently allows law enforcement officers who belong to or are seconded to ACLEI to use optical surveillance devices without a warrant where they are acting in the course of their duties for any purpose within the functions of ACLEI if the use of the device does not involve:
- entry onto premises without permission; or
 - interference without permission with any vehicle or thing.

- 14.194 Section 38 of the SD Act currently allows law enforcement officers who belong to or are seconded to ACLEI, acting in the course of their duties, to use a surveillance device without a warrant for any purpose involving listening to, or recording, words spoken by a person within the functions of ACLEI if the use of the device is confined to circumstances where:
- the law enforcement officer is the speaker of the words or is a person, or is included in a class or group of persons, by whom the speaker of the words intends, or should reasonably expect, the words to be heard; or
 - the law enforcement officer listens to or records the words with the consent, express or implied, of a person who is permitted to listen to or record the words under certain provisions.
- 14.195 Item 198 would amend sections 37 and 38 to instead apply to law enforcement officers who belong to or are seconded to the NACC, and for a purpose within the functions of the National Anti-Corruption Commissioner set out in clause 17 of the NACC Bill.
- 14.196 Section 39 of the SD Act allows law enforcement officers to use tracking devices under written authorisation of an appropriate authorising officer for certain purposes, including the investigation of a relevant offence or conduct of an integrity operation. Section 39 would apply to the NACC as it currently does to ACLEI and other law enforcement agencies.

Amendments related to integrity testing

- 14.197 The definition of ‘disciplinary or legal action’ in section 45A of the SD Act (which allows protected information to be used for purposes relating to integrity operations) includes a disciplinary proceeding in relation to the staff member, or a report of such a proceeding. The definition of ‘disciplinary proceeding’ in section 6 currently relies on the meaning of the term in the LEIC Act. Given the LEIC Act will be repealed by item 1, item 189 will insert a definition of disciplinary proceeding that is the same as that currently in the LEIC Act so there is no change to the meaning of that term.
- 14.198 Item 192 would make an amendment to the definition of target agency in section 6 of the SD Act as a consequence of amendments to the integrity testing regime in Part IABA of the *Crimes Act 1914* outlined above (see paragraph 14.55 onwards). Consistent with those amendments, this item would provide that target agency includes, in addition to the ACC, AFP and Immigration and Border Protection Department, any other Commonwealth agency (within the meaning of the *National Anti-Corruption Commission Act 2022*). The effect of these amendments, in conjunction with the amendments to the integrity testing regime in the *Crimes Act 1914*, would be to enable surveillance device and computer access powers to be used as part of an integrity testing operation conducted by the NACC in relation to any Commonwealth agency. An integrity testing operation could only be authorised by the NACC, under the *Crimes Act 1914*, where the authorising officer is satisfied that:
- there are reasonable grounds to suspect that an offence punishable on conviction by imprisonment for 12 months or more has been, is being, or is likely to be committed by a staff member of the target agency;
 - it is appropriate in all the circumstances to conduct the operation; and
 - the operation is part of a corruption investigation (within the meaning of the NACC’s establishing legislation).

Oversight of SD Act powers

- 14.199 As is the case for other law enforcement agencies, the NACC’s compliance with the SD Act would be overseen by the Commonwealth Ombudsman under Division 3 of Part 6.

Taxation Administration Act 1953 amendments

- 14.200 Item 201 would amend the table in subsection 355-65(5) in Schedule 1 of the *Taxation Administration Act 1953* to create an exception to the offence under section 355-25 of that Act, which relates to disclosure of protected information by taxation officers. The exception created by the amendment would allow a taxation officer to make a record of and disclose to the Commissioner protected information in relation to taxation matters that they have acquired in the course of performing their duties as a taxation officer. The disclosure must be for the purposes of the NACC Bill and be in relation to a corruption issue that relates to the ATO or the Inspector-General of Taxation.
- 14.201 The existing reversed evidential burden in section 355-65 would apply when relying on the new exception created by item 201, that is, the defendant bears the burden of proving they are an eligible whistleblower (within the meaning of the *Income Tax Assessment Act 1997*), the disclosure was made to an eligible recipient in relation to the entity, and they have reasonable grounds to suspect the information indicates misconduct, or an improper state of affairs or circumstances, in relation to an entity's tax affairs, or the discloser considers the information may assist the eligible recipient to perform functions or duties in relation to the tax affairs of the entity (subsection 14ZZT(2)).
- 14.202 Item 202 would replace the existing reference to ACLEI under paragraph 355-70(4)(d) with a reference to the NACC. This amendment would authorise the NACC to receive protected information from taxation officers as a listed law enforcement agency. ACLEI is currently able to receive protected information from the ATO for the purpose of investigating and enforcing serious offences, and making and enforcing proceeds of crimes orders. The amendment would preserve this existing arrangement and would ensure that the NACC is able to receive protected information that may be critical to fulfilling NACC Act processes, including investigations.
- 14.203 Item 203 would insert an exception to the offence in Section 355-155 in Schedule 1 of the *Taxation Administration Act* (on-disclosure of protected information by other people) for disclosures in relation to the NACC. Subsection (1) of this exception would permit the Inspector-General of Taxation to make a disclosure to the NACC or a staff member of the NACC if the disclosure is for the purposes of the NACC Bill and is in relation to a corruption issue that relates to the ATO or to the Inspector-General of Taxation. The Inspector-General must have acquired the protected information for the purposes of investigating or reporting under, or otherwise administering, the Inspector-General Act (including the relevant provisions of the Ombudsman Act).
- 14.204 Subsection (2) of the proposed amendment in Item 203 would also create an exception to the offence in Section 355-155 that would operate to authorise the NACC to share protected information provided to them by the Inspector-General of Taxation under subsection (1) if the record or disclosure is for the purpose of performing a function or duty of the NACC or its staff under the NACC Bill.
- 14.205 A defendant would bear an evidential burden when relying on the exceptions created by Item 203 in proceedings. For example, the Commissioner or staff member of the NACC would bear the burden of proving that they disclosed the protected information in the course of performing a function or duty under the NACC Bill.

Telecommunications Act 1997 amendments

- 14.206 Division 2 of Part 13 of the *Telecommunications Act 1997* contains offences for the unauthorised disclosure or use of certain information, such as information that relates to carriage services provided by carriers or carriage service providers. Division 3 of the same Part contains exceptions to those offences including paragraph 280(1)(a), which creates an exception for the disclosure or use of information in connection with the operation of an enforcement agency. Subsection 280(1A) then provides that, when applying the exception in paragraph 280(1)(a) to ACLEI, a reference to the operation of an enforcement agency is taken to be a reference to a performance of the functions of the Integrity Commissioner within the meaning of the LEIC Act.
- 14.207 Item 205 of Schedule 1 would repeal and replace subsection 280(1A) to replace references relevant to ACLEI and the LEIC Act with references to the NACC and the NACC Bill.

Telecommunications (Interception and Access) Act 1979 amendments

- 14.208 Items 206 to 260 would amend the TIA Act to enable the NACC to use the powers that the TIA Act confers on law enforcement bodies. These items would also enable the Inspector to receive information that has been lawfully obtained by another agency under the TIA Act and rely on that information as part of a NACC corruption investigation—but would not enable the Inspector to obtain warrants or give authorisations under the TIA Act. The TIA Act provides a legal framework for national security and law enforcement agencies to access information held by communications providers to investigate criminal offences and other activities that threaten the safety and security of Australians. The access that may be sought under the TIA Act includes access to telecommunications data and stored communications, and the interception of communications in real time.
- 14.209 Consistent with existing oversight arrangements under the TIA Act, the NACC’s use of powers under that Act would be subject to oversight by the Commonwealth Ombudsman. The Commonwealth Ombudsman is the authority to inspect (and report on) agency compliance. Oversight also includes annual reporting requirements on the use of powers.
- 14.210 Items 206 to 260 would amend the TIA Act to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC contained in the NACC Bill to give the NACC the same powers currently available to ACLEI. These items will update references in:
- section 5 (definitions)
 - section 5AC (authorisation of certifying officers)
 - section 5B (exempt proceedings)
 - section 6A (meaning of investigation of an offence)
 - section 6L (meaning of relevant proceeding)
 - section 6S (permitted purpose—integrity purposes)
 - section 39 (agency may apply for interception warrant)
 - section 63AB (dealing in general computer access intercept information)
 - section 67 (dealing for permitted purposes)
 - section 68 (chief officer may communicate intercepted information obtained by agency)
 - section 71 (dealing with information where interception suspected to be unlawful)
 - section 110A (meaning of criminal law-enforcement agency)
 - section 140 (dealing with information if access to stored communications suspected to be unlawful), and
 - Schedule 1 (international production orders).
- 14.211 Powers exercised under the TIA Act are subject to oversight by the Commonwealth Ombudsman, and this would apply to powers exercised under the TIA Act by the NACC following commencement of the NACC Bill and the Consequential Bill. Consistent with other agencies under the TIA Act, the NACC would also be subject to record-keeping obligations under the TIA Act in order to facilitate this oversight.

Interception of telecommunications

- 14.212 Items 235 to 239 would amend paragraph 39(2)(aa) of the TIA Act, which concerns applications for interception warrants. The amendments would remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC contained in the NACC Bill. This would have the effect of permitting the Commissioner, Deputy Commissioner, and staff members of the NACC authorised by the Commissioner in writing, to apply for an interception warrant in relation to:
- a telecommunications service (a telecommunications service warrant); or

- a person (a named person warrant).

- 14.213 Under sections 46 and 46A of the TIA Act, an eligible Judge or a nominated AAT member may grant an interception warrant if satisfied that, among other things, there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the relevant telecommunications service, and that the information obtained would be likely to assist in connection with the investigation of a **serious offence** (see section 5D of the TIA Act) in which the person (or a person with whom they are communicating) is involved.
- 14.214 This threshold, and the matters an eligible Judge or a nominated AAT member must consider, would apply to applications by the NACC as they currently do to ACLEI and consistently with other agencies able to apply for warrants.

Access to stored communications

- 14.215 Item 250 would amend paragraph 110A(1)(c) of the TIA Act to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC contained in the NACC Bill, to provide that the NACC would be a **criminal law-enforcement agency** under the TIA Act.
- 14.216 This amendment would permit the Commissioner, Deputy Commissioner, and staff members of the NACC authorised by the Commissioner in writing to apply for a stored communications warrant under section 110 of the TIA Act. Stored communications include communications such as email, SMS, or voice messages stored on a carrier's equipment.
- 14.217 Under section 116 of the TIA Act, an issuing authority (a Judge, magistrate, or member of the AAT, appointed by the Attorney-General under section 6DB of the TIA Act) may grant a stored communications warrant if satisfied that, among other things, there are reasonable grounds for suspecting that a particular carrier holds relevant stored communications, and that the information obtained would be likely to assist in connection with the investigation of a **serious contravention** (including a serious offence).
- 14.218 A **serious contravention** is, among other things, a contravention of an Australian law punishable for a maximum period of at least 3 years (see section 5E of the TIA Act).
- 14.219 This threshold, and the matters an eligible Judge or a nominated AAT member must consider, would apply to applications by the NACC as they currently do to ACLEI and consistently with other agencies able to apply for stored communications warrants.

Accessing telecommunications data

- 14.220 As a **criminal law-enforcement agency** under paragraph 110A(1)(c) of the TIA Act, the NACC would also be an **enforcement agency** under section 176A of that Act. As an **enforcement agency** under section 176A, the NACC would be authorised to obtain telecommunications data under Chapter 4 of the TIA Act.
- 14.221 Telecommunications data does not include the content of a telecommunications communication, but includes the source and destination of a communication, the time and duration of its connection and the location of the equipment used in connection with a communication.
- 14.222 An **authorised officer** of an **enforcement agency** can internally authorise access to historical telecommunications data if satisfied that it is reasonably necessary for, among other things, enforcing the criminal law (section 178 of the TIA Act).
- 14.223 In relation to data that comes into existence during the period of authorisation (prospective data), an **authorised officer** can only authorise access if satisfied the disclosure is reasonably necessary for the investigation of a **serious offence**, or an offence punishable by imprisonment for at least three years (section 180 of the TIA Act).
- 14.224 For the purposes of the NACC, an **authorised officer** would be the Commissioner (as the head of a **criminal law-enforcement agency**), or a person in a management position authorised by the Commissioner.

- 14.225 Where the NACC seeks telecommunications data that relates to a person who is working in a professional capacity as a journalist, or their employer, for the purpose of identifying an informant, the NACC would require a journalist information warrant under section 180T prior to making an authorisation under Chapter 4 of the TIA Act.
- 14.226 This threshold, and the matters an authorised officer must consider, would apply to the NACC as they currently do to ACLEI and consistently with other agencies able to access telecommunications data.

Amendments related to integrity testing

- 14.227 Interception agencies may only communicate or use lawfully intercepted information for a permitted purpose (section 67 of the TIA Act). Similarly, a criminal law-enforcement agency may only communicate or use lawfully accessed information (from a stored communication) for a permitted purpose (Division 2 of Part 3-4 of the TIA Act).
- 14.228 Items 230 to 234 would amend section 6S of the TIA Act. These amendments would remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC contained in the NACC Bill. This would have the effect of extending the definition of ***permitted purpose*** to include a purpose connected with the NACC's decision-making as to integrity authorities and integrity operations. This is a corollary of separate amendments to Part IABA of the *Crimes Act 1914*, which would enable integrity testing by the NACC.
- 14.229 The definition of 'disciplinary or legal action' in subsection 6S(2) of the TIA Act includes a disciplinary proceeding in relation to the staff member, within the meaning of the LEIC Act, or a report of such a proceeding. Item 232 would remove the reference to the LEIC Act given that Act will be repealed by item 1. Item 233 would insert a new definition of 'disciplinary proceeding' that is relevant to the NACC, however is the same as that currently in the LEIC Act so there is no change to that term. The term 'disciplinary or legal action' is relevant to the permitted purposes for which certain information may be disclosed (section 139A).

Other amendments related to disclosure

- 14.230 Items 244, 245, 246, and 248 would amend section 68 of the TIA Act, and insert new paragraph 68(q), in the TIA Act. The amendments would permit the communication of lawfully intercepted information to the Commissioner if the information appeared to relate to a corruption issue, a NACC corruption issue, or an integrity authority or operation, or to the Inspector if the information appeared to relate to a NACC corruption issue.
- 14.231 Item 247 would amend paragraph 68(o) of the TIA Act to remove the reference to ACLEI and replace it with a reference to the NACC. This amendment would permit the NACC to disclose information to the Secretary of the Department of Home Affairs if the information appeared to relate to an integrity authority or operation in relation to that Department.

International Production Orders

- 14.232 Items 252 to 260 would amend Schedule 1 of the TIA Act to remove references relevant to ACLEI and the LEIC Act and replace them with references relevant to the NACC contained in the NACC Bill. These amendments would ensure that the international production order (IPO) framework would apply to the NACC consistently with the way in which it applies to ACLEI.
- 14.233 This framework assists Australian law enforcement agencies to gain access to overseas communications data for law enforcement and national security purposes. This framework will be important for the NACC in circumstances where corrupt actors are accessing communications services that are supplied or operated by entities outside Australia. Rather than accessing communications data through the mutual legal assistance regime, which can be a lengthy process, the IPO framework would enable the NACC to issue orders, through a competent authority (the Australian Designated Authority), for the production of data directed to communications and technology companies in another country's jurisdiction. IPOs may only be issued where a designated international agreement is in place between Australia and the other country.
- 14.234 Items 252 to 256 would permit the Commissioner, Deputy Commissioner, or a staff member authorised by the Commissioner in writing, to apply for an IPO relating to:

- interception of communications (Division 2 of Part 2, Schedule 1)
- access to stored communications (Division 3 of Part 2, Schedule 1), and
- access to telecommunications data (Division 4 of Part 2, Schedule 1).

14.235 The thresholds for issue of each type of IPO, and the matters an issuer must consider, would apply to applications by the NACC as they currently do to ACLEI and consistently with other law enforcement agencies.

Interception IPOs

14.236 In relation to the interception of communications, clause 22 of Schedule 1 to the TIA Act enables an **interception agency** to apply for an IPO directing a designated communications provider to provide communications carried by one or more individual transmission or message/call application services during a specified period. An **interception agency** would include the NACC (section 5 of the TIA Act, as amended by item 211). An IPO may only be issued under clause 30 of Schedule 1 where the issuer is satisfied there are reasonable grounds to suspect that a particular person is using or is likely to use the service, and that the information gathered under the order would be likely to assist the detection, prevention, investigation or prosecution of a **serious category 2 offence** (including a **serious offence** under section 5D of the TIA Act).

Stored communications IPOs

14.237 In relation to access to stored communications, clause 33 of Schedule 1 to the TIA Act enables a **criminal law-enforcement agency** to apply for IPO directing a designated communications provider to provide stored communications. A **criminal law-enforcement agency** would include the NACC (section 110A of the TIA Act, as amended by item 250). An IPO may only be issued under clause 39 of Schedule 1 to the TIA Act where the issuer is satisfied there are reasonable grounds to suspect that stored communications relevant to a particular person are held by the provider, and that the information gathered under the IPO would be likely to assist the detection, prevention, investigation or prosecution of an offence that carries a penalty of at least 3 years imprisonment.

Telecommunications data IPOs

14.238 In relation to access to telecommunications data, clause 42 of Schedule 1 to the TIA Act enables an **enforcement agency** to apply for an IPO directing a designated communications provider to obtain telecommunications data. An **enforcement agency** would include the NACC (section 176A of the TIA Act, as affected by item 250). An IPO may only be issued under clause 48 of Schedule 1 to the TIA Act where the issuer is satisfied that there are reasonable grounds for suspecting that the designated communications provider holds, or is likely to hold, particular types of telecommunications data and that disclosing the data under the IPO would be likely to assist the detection, prevention, investigation or prosecution of an offence that carries a penalty of at least 3 years imprisonment.

Protected information

14.239 Item 258 would amend clause 157 of Schedule 1 to the TIA Act, to remove the reference to ACLEI and replace it with a reference to the NACC. This amendment would ensure that protected information obtained through an IPO may be used, recorded, disclosed or admitted in evidence for the purposes of an eligible purpose of the NACC. Items 259 and 260 would similarly amend clause 157 of Schedule 1 to the TIA Act to replace the reference to ACLEI with the NACC. This would ensure that an eligible purpose of the NACC includes a corruption investigation, or a report on such an investigation.

14.240 Item 257 would amend clause 153 of Schedule 1 of the TIA Act, to ensure that protected information may generally be used, recorded or disclosed, or admitted in evidence for the purpose of the performance of a function or duty, or the exercise of a power, of the Inspector.

Ombudsman oversight

- 14.241 Consistent with arrangements for other law enforcement agencies, the Commonwealth Ombudsman would inspect and report on the NACC's use of powers under the TIA Act under Part 2-7 (for interception), Chapter 4A (for access to stored communications and telecommunications data) and Part 10 of Schedule 1 to the TIA Act (for IPOs).

Witness protection Act 1994 amendments

- 14.242 Item 261 would amend paragraph 3(aa) of the *Witness Protection Act 1994*, which includes the definition of **approved authority** for the purposes of that Act. This amendment would remove the reference to the Integrity Commissioner and replace it with a reference to the Commissioner. The amendment would ensure a person who gives a statement to the Commissioner in relation to an offence is a witness who may be selected for inclusion in the National Witness Protection Program in appropriate circumstances. This amendment would complement the range of protections afforded to witnesses in the NACC Bill and would further ensure that witnesses are not deterred from providing assistance or information to the NACC due to fear of experiencing detriment on the basis of their assistance.
- 14.243 Item 262 would amend paragraphs 22(5)(c), 22A(5)(c) and 22B(3)(c) of the *Witness Protection Act* to remove the reference to a disclosure under the LEIC Act and replace it with a reference to a NACC disclosure within the meaning of the NACC Bill. The amendments would permit a person to disclose information about the National Witness Protection Program where the disclosure was for the purpose of referring a corruption issue to the Commissioner.

Part 3—Other amendments

- 14.244 This Part would amend the *Telecommunications Act 1997* to give the NACC and certain state anti-corruption and investigative commissions access to the industry assistance framework under Part 15 of the Act.

Telecommunications Act 1997 amendments

- 14.245 Items 263 to 270 would amend the *Telecommunications Act 1997* to give the NACC and certain state anti-corruption and investigative commissions access to the industry assistance framework under Part 15 of the Act.
- 14.246 Part 15 of the *Telecommunications Act 1997* provides a framework for national security and law enforcement agencies to seek assistance from the communications industry to support investigations and operations. It provides three mechanisms for certain agencies to obtain assistance from designated communications providers, specifically:
- technical assistance requests, which may ask a provider to do certain acts or things on a voluntary basis to help an agency for particular purposes, or that are directed towards ensuring that the provider is capable of giving such help;
 - technical assistance notices, which may require a provider to do certain acts or things to help an agency for particular purposes, where the provider is already capable of giving the required assistance; and
 - technical capability notices, issued by the Attorney-General with the approval of the Minister administering the *Telecommunications Act 1997*, which may require a provider to develop a new capability to ensure the provider is capable of providing certain assistance to an agency.
- 14.247 These powers are currently available to certain intelligence agencies and to 'interception agencies'. Interception agency for the purposes of Part 15 of the *Telecommunications Act 1997* is currently defined to mean the AFP, the ACIC or the police force of a State or the Northern Territory.

- 14.248 The amendments to Part 15 of the *Telecommunications Act 1997* would extend these powers to certain anti-corruption and investigative commissions, including the NACC. This would be consistent with Recommendation 1 of the Independent National Security Legislation Monitor’s *2020 Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* and public statements made by the Parliamentary Joint Committee on Intelligence and Security in February 2019. These amendments would ensure that each agency permitted to intercept communications under the TIA Act is also able to obtain the necessary assistance from providers to ensure that encrypted communications can be accessed in an intelligible form.
- 14.249 These amendments would be appropriate, as they would enable the NACC and other anti-corruption commissions to more effectively investigate serious or systemic corrupt conduct that could constitute a serious criminal offence. Corrupt conduct typically involves multiple people, and is often enabled and facilitated by electronic communication services and devices operated by private providers. Public officials and third parties who deliberately engage in corrupt conduct are more likely to take active steps to conceal their communications. The ability to obtain technical assistance from communications industry participants would greatly facilitate the work of these commissions when exercising investigative powers, including those under the SD Act and TIA Act, to investigate serious, criminal corrupt conduct.
- 14.250 Consistent with oversight arrangements for existing interception agencies under Part 15 of the *Telecommunications Act 1997*, the Commonwealth Ombudsman would be responsible for inspections and compliance reporting for the use of powers by the NACC and other anti-corruption commissions. The Commonwealth Ombudsman is the authority to inspect (and report on) agency compliance. Oversight also includes annual reporting requirements on the use of powers. These annual reports are provided to the Attorney-General and tabled in both Houses of Parliament.

Amendments

- 14.251 Section 317B of the *Telecommunications Act 1997* contains definitions for the purposes of Part 15 of that Act. Items 262 to 265 would amend the definition of interception agency and insert new definitions relevant to several state agencies:
- Items 263 and 264 would amend the definition of ***interception agency*** in section 317B of the *Telecommunications Act 1997* to list the NACC, the Independent Commission Against Corruption of New South Wales, the New South Wales Crime Commission, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Independent Commissioner Against Corruption of South Australia, and the Corruption and Crime Commission of Western Australia as interception agencies for the purposes of Part 15 of that Act. This would provide consistency with definition of ‘interception agency’ in the TIA Act.
 - Item 265 would insert a definition of ***member of the staff of the Independent Commission Against Corruption of South Australia*** into section 317B.
- 14.252 Section 317ZM sets out who is taken to be the chief officer and an officer of each interception agency for the purposes of Part 15 of the *Telecommunications Act 1997*. Items 266 and 267 would add new items to the table in section 317ZM to provide that:
- for the NACC, the National Anti-Corruption Commissioner is the chief officer and officer means a staff member of the NACC within the meaning of the *National Anti-Corruption Commission Act 2022*;
 - for the Independent Commission Against Corruption of New South Wales, the Chief Commissioner as appointed under the *Independent Commission Against Corruption Act 1988* (NSW) is the chief officer and officer means an officer of the Commission within the meaning of that Act, but it does not include a person engaged under section 104B of that Act to provide the Commission with services, information or advice;

- for the New South Wales Crime Commission, the Commissioner appointed under section 8 of the *Crime Commission Act 2012* (NSW) will be the chief officer and officer means an officer of the Commission within the meaning of that Act, but it does not include a person engaged by the Commission as a consultant under subsection 74(2) of that Act;
- for the Law Enforcement Conduct Commission of New South Wales, the Chief Commissioner appointed under section 18 of the *Law Enforcement Conduct Commission Act 2016* (NSW) will be the chief officer and officer means either the Chief Commissioner, or the Commissioner for Integrity appointed under section 18 of that Act, or an Assistant Commissioner appointed under section 20 of that Act, or a member of staff of the Commission within the meaning of section 21 of that Act;
- for the Independent Broad-based Anti-corruption Commission of Victoria, the Commissioner appointed under section 20 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) will be the chief officer and officer means a sworn IBAC Officer within the meaning of section 3 of that Act;
- for the Crime and Corruption Commission of Queensland, the chairperson within the meaning of the *Crime and Corruption Act 2001* (Qld) will be the chief officer and officer means a commission officer as defined by paragraph (a) of the definition of ‘commission officer’ in Schedule 2 to that Act. Officer does not mean a person engaged under section 256 of that Act to provide the Commission with services, information or advice;
- for the Independent Commissioner Against Corruption of South Australia, the Commissioner appointed under section 8 of the *Independent Commissioner Against Corruption Act 2012* (SA) will be the chief officer and officer means the Commissioner, or the Deputy Commissioner appointed under section 9 of that Act, or a member of the staff of the Independent Commissioner Against Corruption of South Australia within the meaning of that Act; and
- for the Corruption and Crime Commission of Western Australia, the Commissioner appointed under section 9 of the *Corruption, Crime and Misconduct Act 2003* (WA) will be the chief officer and officer means an officer of the Commission within the meaning of that Act. Officer does not mean a person engaged under section 182 of that Act to provide the Commission with services, information or advice.

14.253 Section 317ZR sets out the officers of each interception agency to whom a chief officer may delegate their functions or powers under Divisions 2 (Voluntary technical assistance), 3 (Technical assistance notices), or 6 (Unauthorised disclosure of information etc.) of Part 15 of the *Telecommunications Act 1997*. Items 268 and 269 would add new items to the table in section 317ZR to allow:

- the Commissioner to delegate those functions or powers to a Deputy Commissioner or staff member of the NACC who is an SES employee or acting SES employee;
- the Commissioner of the Independent Commission Against Corruption of New South Wales to delegate those functions or powers to a Commissioner or Assistant Commissioner within the meaning of the *Independent Commission Against Corruption Act 1988* (NSW), or an officer of the Commission within the meaning of section 3 of that Act (other than a person engaged under section 104B of that Act) who is at executive level;
- the Commissioner of the New South Wales Crime Commission to delegate those functions or powers to an officer of the Commission within the meaning of the *Crime Commission Act 2012* (NSW) (other than a person engaged under subsection 74(2) of that Act) who is at executive level;
- the Commissioner of the Law Enforcement Conduct Commission of New South Wales to delegate those functions or powers to either the Commissioner for Integrity appointed under section 18 of the *Law Enforcement Conduct Commission Act 2016* (NSW), or an Assistant Commissioner appointed under section 20 of that Act, or a member of the staff of the Commission within the meaning of section 21 of that Act who is at executive level;

- the Commissioner of the Independent Broad-based Anti-Corruption Commission of Victoria to delegate those functions or powers to either a Deputy Commissioner of the Commission appointed under section 23 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), the Chief Executive Officer of the Commission appointed under section 33 of that Act, or a sworn IBAC officer within the meaning of section 3 of that Act who is at executive level;
- the Chairperson of the Crime and Corruption Commission of Queensland to delegate those functions or powers to a senior executive officer within the meaning of the *Crime and Corruption Act 2001* (Qld);
- the Commissioner of the Independent Commissioner Against Corruption of South Australia to delegate those functions or powers to either the Deputy Commissioner or a member of staff of the Independent Commissioner Against Corruption who is at executive level; and
- the Commissioner of the Corruption and Crime Commission of Western Australia to delegate those functions or powers to an officer of the Commission within the meaning of the *Corruption, Crime and Misconduct Act 2003* (WA) other than a person engaged under section 182 of that Act, who is at executive level.

14.254 Item 270 would insert a definition of executive level into section 317ZR for the purpose of the delegation provisions that apply to the Corruption and Crime Commission of Western Australia.

14.255 The power to delegate these functions and powers is appropriate to ensure that anti-corruption and investigative commissions can exercise their powers in a timely way. For the NACC, this would be consistent with the objects of the NACC Bill. It would also be consistent with the existing powers of delegation for the AFP and ACIC under section 317ZR.

Effect of the amendments

14.256 Making the NACC and state anti-corruption and investigative commissions interception agencies would mean that the respective chief officers could:

- issue a technical assistance request asking a designated communications provider to do certain acts or things to help the relevant commission to perform a function or exercise a power relating to enforcing the criminal law (where it relates to offences carrying penalties of at least three years imprisonment), or that are directed towards ensuring that the provider is capable of giving such help;
- issue a technical assistance notice requiring a designated communications provider to do certain acts or things to help the relevant commission to perform a function or exercise a power relating to enforcing the criminal law (where it relates to offences carrying penalties of at least three years imprisonment); and
- apply to the Attorney-General for a technical capability notice requiring a designated communications provider to do something to ensure the provider is capable of providing certain assistance to the relevant commission so it can perform a function or exercise a power relating to enforcing the criminal law (where it relates to offences carrying penalties of at least three years imprisonment)—the Minister administering the *Telecommunications Act 1997* must approve any technical capability notice before it is given to a designated communications provider.

14.257 Enforcing the criminal law, in the context of the NACC and other anti-corruption commissions, would mean investigating corrupt conduct that would, if proven, constitute an offence. While the NACC and some other anti-corruption commissions would have jurisdiction to investigate corrupt conduct whether or not it is criminal, access to the industry assistance framework would only be available where the conduct under investigation is criminal. This could include, for example, conduct that would constitute an offence concerning bribery of Commonwealth public officials or abuse of office under Part 7.6 of the *Criminal Code*, or a similar offence under State law.

- 14.258 The NACC would have access to overt powers under the *Crimes Act 1914* search powers as applied under the NACC Bill and to covert powers under the SD Act and TIA Act as provided by the Consequential Bill. Access to the industry assistance framework is appropriate to allow the NACC to seek assistance from communications providers where for example it is necessary to obtain information in an intelligible (instead of encrypted) form, so that it can be used to further an investigation. Similarly, anti-corruption and investigative bodies have corresponding powers to access communications, to which assistance from communications providers might be required to process. Section 317ZH of the *Telecommunications Act 1997* makes clear that requests and notices under the framework cannot be used in place of an appropriate warrant or authorisation. Rather, these mechanisms ensure that agencies have the support required from communications providers to obtain information they have proper authority to access in an intelligible form.
- 14.259 The NACC and state anti-corruption and investigative commissions would have access to the industry assistance framework on the same basis as other interception agencies, including the same thresholds, limitations and safeguards. This would include, for example that:
- requests and notices may only be issued for the purpose of enforcing the criminal law so far as it related to Australian offences punishable by a maximum penalty of at least three years; and
 - a provider must not be requested or required to implement or build a systemic weakness, or a systemic vulnerability, into a form of electronic protection.
- 14.260 The use of the industry assistance scheme by the NACC and state anti-corruption and investigative commissions would also be overseen by the Commonwealth Ombudsman under section 317ZRB.

SCHEDULE 2—APPLICATION, SAVING AND TRANSITIONAL PROVISIONS

Part 1—Introduction

Item 1—Definitions

- 14.261 Subitem 1(1) would define the following terms for the purposes of Schedule 2.
- 14.262 **Existing inquiry** would be defined in paragraph 2(1)(b) of this Schedule to mean a public inquiry by the Integrity Commissioner under Part 8 of the LEIC Act that has been commenced but is not yet completed at the transition time (as defined in this item).
- 14.263 **Existing investigation** would be defined in paragraph 2(1)(a) of this Schedule to mean an investigation of a corruption issue by the Integrity Commissioner, whether alone or jointly with another person or persons, under Part 6 of the LEIC Act that has been commenced but is not yet completed at the transition time (as defined in this item).
- 14.264 **Instrument** would be defined to include:
- a contract, deed, undertaking, arrangement or agreement; and
 - a notice, authority, order or instruction; and
 - an instrument made under an Act or a regulation.
- 14.265 **NACC corruption issue transition notice** would be defined in item 36(4). The Inspector may, by notice in writing (the **NACC corruption issue transition notice**), determine that the new Act applies to:
- an investigation of an ACLEI corruption issue by the Integrity Commissioner under Division 3 of Part 12 of the LEIC Act; or
 - a special investigation of an ACLEI corruption issue by a special investigator under Division 4 of Part 12 of the LEIC Act.
- 14.266 The Inspector would be able to make such a determination in relation to the investigation or special investigation if the Inspector considers that:
- it would be more appropriate to deal with the investigation or special investigation under the NACC Bill; and
 - the investigation or special investigation could involve corrupt conduct that is serious or systemic.
- 14.267 **New Act** would be defined to mean the National Anti-Corruption Commission Act 2022.
- 14.268 **Old Act** would be defined to mean the Law Enforcement Integrity Commissioner Act 2006, as in force immediately before the transition time (as defined in this item).
- 14.269 **Rules** would be defined to mean the rules made under item 57, which would allow the Minister to make rules prescribing further transitional arrangements that are required or permitted by the Consequential Bill, or necessary or convenient for carrying out or giving effect to the Consequential Bill.
- 14.270 **Transition determination** would be defined to mean, in relation to an existing investigation or an existing inquiry, a determination under subitem 3(1). Under this item, the National Anti-Corruption Commissioner would be able to, by notice in writing (the **transition determination**), determine that the new Act applies to an existing investigation or an existing inquiry if the Commissioner considers that:
- it would be more appropriate to deal with the issues the subject of the existing investigation or existing inquiry under the NACC Bill; and
 - in the case of an existing investigation—the issues could involve corrupt conduct that is serious or systemic.

- 14.271 **Transition time** would be defined to mean the time clause 40 of the NACC Bill (which would give the National Anti-Corruption Commissioner the power to deal with a corruption issue) commences. Consistent with clause 2 of the NACC Bill, clause 40 would commence on a single day to be fixed by Proclamation.
- 14.272 Subitem 1(2) would provide that where the expressions used in Schedule 2 are defined for the purposes of, and used in relation to, the NACC Bill, these expressions are to be interpreted with the same meaning as they have in the NACC Bill, as opposed to any meaning these phrases may have in the LEIC Act or any other Act.
- 14.273 Subitem 1(3) would provide that where expressions used in Schedule 2 are defined for the purposes of, and used in relation to, the LEIC Act, these expressions are to be interpreted with the same meaning as they have in the LEIC Act, as opposed to any meaning these phrases may have in the NACC Bill, or any other Act.
- 14.274 The effect of subitem 1(4) would be that when, after the NACC Bill commences, an investigation is being continued under the LEIC Act, the Commissioner may exercise the powers, and perform the functions and duties, of the Integrity Commissioner set out in the LEIC Act. The Inspector under the NACC Bill may also exercise the powers, and perform the functions and duties, of a special investigator under the LEIC Act. The LEIC Act would continue to apply with such further modifications as are necessary for matters under the LEIC Act and would be managed by the NACC, or the Inspector as required. This subitem should be interpreted broadly, consistent with its purpose of facilitating the transition of existing investigations and inquiries, powers, functions and duties from the LEIC Act to the NACC Bill. It should be interpreted as including, for example, modifications to allow references to a ‘staff member’ of ACLEI in the LEIC Act to be read as a ‘staff member’ of the NACC—including in instruments made under the LEIC Act, such as in a non-disclosure notation given under section 91, or authorisations given under section 140 (Appointment of authorised officers). Further, the consequential amendments that would replace references to the LEIC Act with references to the NACC Bill would not apply and the investigation would continue to be run as if the amendments had not been made to those provisions.

Part 2— Existing investigations and inquiries

Item 2—Transitional— continuation of existing investigations and inquiries

- 14.275 The effect of subitems 2(1) and 2(2) would be that, where an investigation (under Part 6 of the LEIC Act) or a public inquiry (under Part 8 of the LEIC Act) has been commenced, but not yet completed, by ACLEI is on foot at the time the NACC Bill commences, the Commissioner may continue the investigation or public inquiry under the LEIC Act, despite its repeal. This would be the default position and would apply whether the investigation was being conducted by ACLEI alone or jointly with another entity.
- 14.276 Where this default position applies, the powers, rights and obligations that would apply to the NACC and its office holders, as well as other relevant persons such as agency heads, for the purposes of the investigation or public inquiry, would be those in the LEIC Act rather than those under the NACC Bill.
- 14.277 However, the Commissioner can make a transition determination under item 3 of this Schedule in relation to the existing investigation or public inquiry. A transition determination would mean the investigation would be dealt with under the NACC Bill, where appropriate to do so.

Item 3—Transitional—transition determinations

- 14.278 Subitem 3(1) would allow the Commissioner to determine, by notice in writing (known as a **transition determination**), that the NACC Bill is to apply to an existing investigation or public inquiry. The Commissioner could make such a determination if they consider that:
- it would be more appropriate to deal with the issues in the existing investigation or public inquiry under the NACC Bill; and
 - the issues in the existing investigation could involve conduct that is serious or systemic.

- 14.279 This would mean the default position under subitem 2(2) would not apply.
- 14.280 Subitem 3(1) would not prescribe specific factors that the Commissioner must take into consideration when making a transition determination. Factors that may be relevant to the making of such a determination may include the stage of the investigation or inquiry, or a decision on the part of the Commissioner to commence another investigation or inquiry into a related matter under the NACC Bill. It is intended that the Commissioner would give due consideration to which Act would most appropriately govern the continuation of the investigation or inquiry and make a well-reasoned determination.
- 14.281 Subitem 3(2) would provide that as soon as reasonably practicable after the Commissioner makes a transition determination, they must give a copy of the transition determination to the head of each agency to which the investigation or inquiry relates. This would provide certainty to relevant agency heads about the legislation under which the investigation or inquiry is being continued.
- 14.282 Subitem 3(3) would clarify when, after a transition determination has been made, the NACC Bill would apply to the investigation or inquiry. It would provide that this would occur, either at the time the transition determination is given to each agency to which the existing investigation or existing inquiry relates (see paragraph 3(3)(a)) or the time specified in the determination (see paragraph 3(3)(b)), whichever comes later. The Commissioner's ability to specify a time in the transition determination would allow them to select an appropriate transition point, in light of the stage of the investigation or inquiry and any hearing or other investigative activities on foot at the time the determination is made.
- 14.283 Once this occurs, the powers and obligations that would apply to the NACC and its office holders, as well as other relevant persons such as agency heads, for the purposes of the investigation or public inquiry, would be those in the NACC Bill, rather than the LEIC Act.
- 14.284 Subitem 3(4) would provide that a transition determination would not be a legislative instrument. This statement is included in the NACC Bill to assist readers, as a direction is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Item 4—Transitional—investigations managed or overseen by Integrity Commissioner

- 14.285 This item would provide that if, at the time the NACC Bill commences, the Integrity Commissioner is managing or overseeing an investigation of a corruption issue by a law enforcement agency under section 61 or 62 of the LEIC Act, the Commissioner may continue to oversee or manage the investigation in accordance with the LEIC Act, as if it had not been repealed.
- 14.286 In this situation, the reporting provisions in the LEIC Act that apply to law enforcement agencies would continue to apply during the investigation, notwithstanding the LEIC Act's repeal.

Item 5—Transitional—investigations conducted solely by law enforcement agencies

- 14.287 This item would provide that if, before the transition time (as defined in item 1 of this Schedule), the Integrity Commissioner had referred a corruption issue to a law enforcement agency for an investigation under subparagraph 26(1)(b)(iii) of the LEIC Act, and the investigation had commenced but had not been completed, then the referral would be taken to have been made by the Commissioner under paragraph 41(1)(c) of the NACC Bill.

Item 6—Transitional—investigation of corruption issues relating to conduct of secondees

- 14.288 This item would apply if, immediately before the transition time (as defined in item 1 of this Schedule), a government agency or integrity agency for a State or Territory was investigating the conduct of a secondee to a law enforcement agency under an arrangement made under subsection 30(1) of the LEIC Act. In this case, the government agency, or agency for the State or Territory would be able to continue to investigate the corruption issue as if the LEIC Act had not been repealed.

Part 3—Corruption issues previously referred or notified

Item 7—Transitional—referral and notification of corruption issues

- 14.289 This item would apply if, before the transition time (as defined in item 1 of this Schedule), a person had referred an allegation, or information, that raised a corruption issue, or had notified a corruption issue, to the Integrity Commissioner under the LEIC Act and the Integrity Commissioner had either not yet decided how to deal with the corruption issue, or had decided and not yet commenced action. In this case, the allegation, information or corruption issue would be taken to have been referred to the Commissioner under the NACC Bill after the transition time.
- 14.290 The effect of this would be that the Commissioner would be responsible for deciding how to deal with the issue as if the issue had been referred to the Commissioner under Part 5 of the NACC Bill. Any decision by the Integrity Commissioner under the LEIC Act would need to be made afresh by the Commissioner under the NACC Bill.

Item 8—Transitional—protection of persons referring or notifying corruption issues

- 14.291 This item would provide that if subitem 7(1), applies and a person has made a referral or notification to the Integrity Commissioner under the LEIC Act before transition time (as defined in item 1 of this Schedule), the person is taken, after transition time, to have made a NACC disclosure under the NACC Bill.
- 14.292 This would mean that the person who made the disclosure would receive the protections under the NACC Bill as if they have made a direct disclosure to the NACC. These protections are contained in clauses 24 and 30 of the NACC Bill.

Part 4—Facilitating investigations and inquiries

Item 9—Transitional— notices to give information or produce documents or things

- 14.293 This item would provide that if, before the transition time (as defined in item 1 of this Schedule), the Integrity Commissioner has issued a notice under subsection 75(1) of the LEIC Act to give information or to produce a document or thing, and the recipient of the notice has not yet complied with it, the notice would continue to be valid, and the recipient would need to comply with the notice in accordance with the LEIC Act as if it had not been repealed.
- 14.294 If the notice includes a notation under subsection 77A(2) of the LEIC Act prohibiting the disclosure of information about or under that notice, the notation would continue to apply to the notice, and the prohibitions with which the recipient would need to comply would be those under the LEIC Act.
- 14.295 This means that if the Commissioner is continuing the investigation under the LEIC Act, the recipient would need to comply with the notice in accordance with the relevant provisions of the LEIC Act. If the notice contains a notation, the prohibitions on disclosing information about or under the notice under the LEIC Act would continue to apply.
- 14.296 However, if the Commissioner makes a transition determination under subitem 3(1) of this Schedule, the notice would be taken to have been issued under subclause 58(2) of the NACC Bill, and the recipient would need to comply with the notice accordingly. If the notice contains a notation, the notation would be taken to have been included in the notice under subclause 95(1) of the NACC Bill, and the prohibitions on disclosing information about or under the notice in the NACC Bill would apply. Any offences in the NACC Bill for non-compliance with the notice or notation would also apply (see clause 60).
- 14.297 Under items 2 and 3 of this Schedule, the Commissioner may:
- continue to conduct existing ACLEI investigations under the LEIC Act; or
 - determine that the new Act applies to an existing investigation if they consider that:
 - it is more appropriate to deal with the issues being investigated under the new Act, and

- the issues could involve corrupt conduct that is serious or systemic.

14.298 Given the NACC would also be able to issue notices to produce, and the Commissioner could continue existing ACLEI investigations, it is appropriate that notices to produce validly issued to ACLEI but not yet complied with at the point of transition can be taken over by the NACC.

Item 10—Transitional— protection of persons who comply with notices and protection of witnesses etc.

14.299 This item would apply if any of the following were in effect at the transition time (as defined in item 1 of this Schedule):

- an arrangement under subsection 81(3) of the LEIC Act for the protection of a person who complies with a notice served on them;
- an arrangement under subsection 104A(3) of the LEIC Act for the protection of a person who gives evidence at a hearing, produces a document or thing at a hearing or makes a submission in relation to a public inquiry.

14.300 The effect of the provision would be that, after the NACC Bill commences, any such arrangements would continue in effect as if the arrangement had been made under subclause 116(2) of the NACC Bill. This clause would outline protections available to a person providing information, or producing a document or thing, in response to a direction to produce or a notice to produce, or as a witness at a hearing.

Item 11—Transitional— summons to attend hearings

14.301 This item would provide that summons to attend hearings, and notations included in such summons, issued to a person by the Integrity Commissioner under the LEIC Act would continue in effect after the transition time (as defined in item 1 of this Schedule). It would apply where:

- a summons to attend a hearing to give evidence or produce a document or thing was issued to a person by the Integrity Commissioner under subsection 83(1) of the LEIC Act before the transition time;
- a notation is included in such a summons under subsection 91(2) of the LEIC Act that prohibits the disclosure of information.

14.302 Subitem 11(2) would provide that such summons and notations would continue in effect after the transition time as if the LEIC Act was not repealed.

14.303 Under items 2 and 3 of this Schedule, the Commissioner may:

- continue to conduct existing ACLEI investigations under the LEIC Act; or
- determine that the new Act applies to an existing investigation if they consider that:
 - it is more appropriate to deal with the issues being investigated under the new Act; and
 - the issues could involve corrupt conduct that is serious or systemic.

14.304 Subitem 11(3) would provide that where the Commissioner makes a transition determination (see item 3 of this Schedule) that the existing investigation or inquiry to which the summons and any notation relates is to be dealt within under the NACC Bill, then:

- the summons is taken to have been issued by the Commissioner under subclause 63(1) of the NACC Bill;
- the notation is taken to be a non-disclosure notation included in the summons for the purposes of subclause 95(1) of the NACC Bill.

Item 12—Transitional— directions in relation to confidentiality

14.305 This item would provide for the transition of confidentiality directions given by the Integrity Commissioner under section 90 of the LEIC Act before the transition time (as defined in item 1 of this Schedule) occurred.

- 14.306 The effect of subitems 12(1) and 12(2) would be that if the Integrity Commissioner gave a confidentiality direction to a person under subsection 90(1) of the LEIC Act in relation to the use or disclosure of hearing material before the transition time occurred, the LEIC Act would continue to apply to that direction as if the LEIC Act had not been repealed. This would mean that the direction would continue to be valid, and the recipient of the direction would need to comply with the direction in accordance section 90 of the LEIC Act. It would also mean that the offence for failing to comply with the direction under subsection 90(6) of the LEIC Act would continue to apply after the transition time.
- 14.307 Under items 2 and 3 of this Schedule, the Commissioner may:
- continue to conduct existing ACLEI investigations under the LEIC Act; or
 - determine that the new Act applies to an existing investigation if they consider that:
 - it is more appropriate to deal with the issues being investigated under the new Act; and
 - the issues could involve corrupt conduct that is serious or systemic.
- 14.308 Subitem 12(3) would provide that where the Commissioner makes a transition determination (see item 3 of this Schedule) that the existing investigation or inquiry to which the hearing relates is to be dealt within under the NACC Bill, the direction is taken to be given by the Commissioner under subclause 100(1) of the NACC Bill.
- 14.309 This item is appropriate to continue to prevent the use or disclosure of hearing material that could prejudice a person’s safety, prejudice a fair trial, or lead to publication of clause 235 certified information as ACLEI transitions to the NACC.

Item 13—Transitional—applications to Court to deal with contempt

- 14.310 This item would provide for the transition of applications to deal with a person for contempt made before the transition time under section 96B of the LEIC Act, but not yet dealt with by the relevant court.
- 14.311 The LEIC Act would continue to apply in relation to such applications as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the application related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.
- 14.312 This item, in combination with item 1 of this Schedule, would allow a contempt application to be dealt with under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. This would allow a process already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC.

Item 14—Transitional—directions to detain in relation to contempt

- 14.313 This item would provide for the transition of directions to detain a person for the purpose of bringing them before the relevant court for the hearing of a contempt application given before the transition time (as defined in item 1 of this Schedule) under subsection 96D of the LEIC Act. It would only apply where the hearing of the contempt application had not occurred before the transition time.
- 14.314 The LEIC Act would continue to apply in relation to the direction to detain the person as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the application related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.
- 14.315 This item, in combination with item 1 of this Schedule, would facilitate a contempt application being dealt with under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. The person could continue to be detained in accordance with the LEIC Act, meaning:

- the Commissioner would be required to apply to the court as soon as practicable in relation to the contempt, if the Integrity Commissioner had not already done so; and
- the person would be required to be brought before the court as soon as possible.

14.316 This would allow a process already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC.

Item 15—Transitional—applications for order to deliver travel documents

14.317 This item would provide for the transition of applications for orders requiring a person to deliver travel documents made before the transition time (as defined in item 1 of this Schedule) under section 97 of the LEIC Act, but not yet dealt with by the Court.

14.318 The LEIC Act would continue to apply in relation to such applications as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the application related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.

14.319 This item, in combination with item 1 of this Schedule, would allow an application to be dealt with under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. This would allow a process already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC.

Item 16—Transitional—orders regarding delivery of travel documents

14.320 This item would provide for the transition of two types of order relating to delivery of travel documents made before the transition time (as defined in item 1 of this Schedule) under section 98 of the LEIC Act, specifically:

- orders made by a Judge under subsection 98(1) of the LEIC Act requiring a person to appear before the Federal Court to show cause why they should not be ordered to deliver a travel document to the Integrity Commissioner, where the day specified in the order for the person to appear occurs after the transition time; and
- orders made by the Federal Court under subsection 98(4) of the LEIC Act requiring a person to deliver a travel document to the Integrity Commissioner and authorising the Integrity Commissioner to retain the document, where the period specified for retention of the document in an order under subsection 98(4) or 98(5) ends after the transition time.

14.321 The LEIC Act would continue to apply in relation to such orders as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the application related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.

14.322 This item in combination with item 1 of this Schedule would allow for delivery and retention of travel documents under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. For orders under subsection 98(1), this would allow a process already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC. For orders under subsection 98(4), this would ensure the Commissioner is not required to return a travel document to a person earlier than the Integrity Commissioner would have needed to where the Court has already determined that retention of the document for a particular period was appropriate.

Item 17—Transitional—applications for revocation of order to deliver travel documents

14.323 This item would provide for the transition of applications under subsection 98(6) of the LEIC Act for revocation of orders made under subsection 98(4) for delivery and retention of a travel document made before the transition time (as defined in item 1 of this Schedule), but not yet considered by the Federal Court.

- 14.324 The LEIC Act would continue to apply in relation to such applications as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the application related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.
- 14.325 This item, in combination with item 1 of this Schedule, would allow an application to be dealt with under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. This would allow a process already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC.

Item 18—Transitional—applications for arrest warrants

- 14.326 This item would provide for the transition of applications for arrest warrants made before the transition time (as defined in item 1 of this Schedule) under section 99 of the LEIC Act, but not yet considered by a Judge.
- 14.327 The LEIC Act would continue to apply in relation to such applications as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the application related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.
- 14.328 This item, in combination with item 1 of this Schedule, would allow an arrest warrant application to be dealt with under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. This would allow a process already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC.

Item 19—Transitional—warrants not executed

- 14.329 This item would provide for the transition of two types of warrant issued under the LEIC Act before the transition time (as defined in item 1 of this Schedule), specifically:
- arrest warrants issued by a Judge under section 100 of the LEIC Act, where they had not been executed; and
 - search warrants issued by an issuing officer under section 109 of the LEIC Act, where they had not expired and not been fully executed.
- 14.330 The LEIC Act would continue to apply in relation to such warrants as if it had not been repealed by item 1 of Schedule 1. This would be the case whether or not the warrant related to an investigation or inquiry to which a transition determination made under item 3 of this Schedule applies.
- 14.331 This item, in combination with item 1 of this Schedule, would ensure warrants issued by Judges and magistrates on satisfaction of relevant thresholds can continue to be executed under the LEIC Act as if it had not been repealed, with the Commissioner stepping into the shoes of the Integrity Commissioner and the LEIC Act applying with such modifications as are necessary. This would allow processes already underway under the LEIC Act before its repeal to be completed without disruption despite ACLEI transitioning to become part of the NACC.

Part 5—Requirements or permissions etc. under other Acts

Items 20 to 35—Transitional—requirements or permissions under other Acts

- 14.332 Part 2 of Schedule 1 would replace references to ACLEI and the LEIC Act in the AML/CTF Act, *Crimes Act 1914*, *Financial Transaction Reports Act 1988*, POC Act, SD Act and TIA Act with references to the NACC and the NACC Act, to give the NACC the same powers under those Acts currently available to ACLEI.
- 14.333 Under items 2 and 3 of this Schedule, the Commissioner may:
- continue to conduct existing ACLEI investigations under the LEIC Act; or

- determine that the new Act applies to an existing investigation if they consider that:
 - it is more appropriate to deal with the issues being investigated under the new Act; and
 - the issues could involve corrupt conduct that is serious or systemic.
- 14.334 Accordingly, items 20 to 35 of this Schedule would provide for warrants and orders issued to ACLEI, and authorisations made and notices given by ACLEI under the Acts mentioned above and in effect immediately before the transition time to continue in effect as if they had been issued to, or made or given by, the NACC. Given the NACC would have the same powers as ACLEI under those Acts, and the Commissioner could continue existing ACLEI investigations, it is appropriate that warrants, orders, authorisations and notices validly issued to or by ACLEI that are still in effect at the point of transition can be taken over by the NACC.
- 14.335 The warrants, orders, authorisations and notices that would be transitioned from ACLEI to the NACC are:
- notices given by the Integrity Commissioner or an ACLEI investigating officer under section 49 of the AML/CTF Act requiring persons to provide certain information or give certain documents (item 20);
 - authorities to conduct controlled operations granted by an ACLEI authorising officer under section 15GI of the *Crimes Act 1914* (item 21);
 - authorities to conduct integrity testing operations granted by an appropriate authorising officer of ACLEI under section 15JG of the *Crimes Act 1914* (item 22);
 - authorities to acquire or use an assumed identity granted by the Integrity Commissioner under section 15KB of the *Crimes Act 1914* (item 23);
 - witness identity protection certificates given by the Integrity Commissioner under section 15ME of the *Crimes Act 1914* (item 24);
 - requests for certain information from cash dealers given by the Integrity Commissioner or an ACLEI investigating officer under subsection 16(4) of the *Financial Transaction Reports Act 1988* (item 25);
 - freezing orders issued by a magistrate under subsection 15B(1) of the POC Act on application by an authorised officer of ACLEI (item 26);
 - production orders issued by a magistrate under subsection 202(1) of the POC Act on application by an authorised officer of ACLEI (item 26);
 - notices to financial institutions given by the Integrity Commissioner under subsection 213(1) of the POC Act (item 27);
 - monitoring orders made by a judge of a court of a State or Territory under subsection 219(1) of the POC Act on application by an authorised officer of ACLEI (item 28);
 - search warrants issued by a magistrate under section 225 of the POC Act on application by an authorised officer of ACLEI (item 29);
 - surveillance device warrants issued by an eligible Judge or a nominated AAT member under subsection 16(1) of the SD Act on application by a law enforcement officer of ACLEI (item 30);
 - retrieval warrants (authorising retrieval of a surveillance device) issued by an eligible Judge or a nominated AAT member under subsection 24(1) of the SD Act on application by a law enforcement officer of ACLEI (item 30);
 - computer access warrants issued by an eligible Judge or a nominated AAT member under subsection 27C(1) of the SD Act on application by a law enforcement officer of ACLEI (item 30);
 - emergency authorisations for use of a surveillance device or access to data held in a computer given by an appropriate authorising officer of ACLEI under Part 3 of the SD Act (item 31);

- tracking device authorisations given by an appropriate authorising officer of ACLEI under section 39 of the SD Act (item 31);
- interception warrants issued to ACLEI by an eligible Judge or nominated AAT member under section 46, 46A or 48 of the TIA Act (item 32);
- stored communications warrants issued to ACLEI by an issuing authority under section 116 of the TIA Act (item 32);
- journalist information warrants issued to ACLEI by a Part 4-1 issuing authority under section 180T of the TIA Act (item 32);
- preservation notices (requiring a carrier to preserve certain stored communications) issued by ACLEI under section 107H of the TIA Act (item 33);
- telecommunications data authorisations made by an authorising officer of ACLEI under section 178, 179 or 180 of the TIA Act (item 34); and
- international production orders issued by an eligible Judge or nominated AAT member (for interception orders) or an issuing authority (for stored communications or telecommunications data orders) under Schedule 1 to the TIA Act on application by ACLEI (item 35).

14.336 Some warrants, orders and authorities, such as surveillance device warrants, freezing orders and authorities to conduct controlled operations, may be varied or extended under the relevant Act. Where that is the case, the relevant items clarify that the warrant, order or authority has effect after the transition time as it did immediately beforehand, including because of any variations or extensions made before the transition time.

Part 6—ACLEI corruption issues

Item 36—Transitional—investigations into ACLEI corruption issues

- 14.337 This item would provide for the transition of ACLEI corruption issue investigations and ACLEI corruption issue special investigations to the NACC.
- 14.338 Subitems 36(1) and 36(2) would provide that where an investigation of an ACLEI corruption issue has commenced under the LEIC Act and is on foot at the transition time (as defined in item 1 of this Schedule), the Commissioner can continue the investigation in accordance with the LEIC Act as if that Act was not repealed.
- 14.339 Subitems 36(1) and 36(3) would provide that where a special investigation of an ACLEI corruption issue has commenced under the LEIC Act and is on foot at the transition time, the special investigator can continue the investigation in accordance with the LEIC Act as if the Act was not repealed.
- 14.340 Subitems 36(4) and 36(5) would permit the Inspector to make a determination (referred to as a *NACC corruption issue transition notice*) that it is more appropriate to continue an investigation or special investigation under the NACC Bill, rather than the LEIC Act. The notice would need to be given in writing and could only be made in relation to investigations or special investigations that the Inspector considers could involve corrupt conduct that is serious or systemic. This effect of a notice would mean that the investigation or special investigation of an ACLEI corruption issue would become an investigation of a NACC corruption issue, and would require the Inspector to continue the relevant investigation under Division 3 of Part 10 of the NACC Bill. It is appropriate that the Inspector be able to make a NACC corruption issue transition notice consistent with their role in deciding how to deal with NACC corruption issues under the NACC Bill.
- 14.341 Subitem 36(6) would provide that as soon as reasonably practicable after making the determination, the Inspector must provide a copy of the NACC corruption issue transition notice to the Commissioner and, where the notice relates to an investigation by a special investigator, the special investigator. This is appropriate to ensure that the Commissioner and special investigator (where relevant) are aware that the investigation is being continued by the Inspector under the NACC Bill.

- 14.342 Subitem 36(7) would clarify when the NACC Bill would apply to an investigation after a NACC corruption issue transition notice has been issued by the Inspector. Relevantly, it would provide that the NACC Bill would apply either at the time the NACC corruption issue transition notice is given to the Commissioner (see paragraph 36(6)(a) of this Schedule); or the time specified in the notice, whichever is later. The Inspector’s ability to specify a time in the notice is appropriate as it would allow them to determine an appropriate transition time with consideration of the investigation and any hearing or other investigative activities on foot at the time the notice is given.
- 14.343 Subitem 36(8) would provide that a NACC corruption issue transition notice would not be a legislative instrument. This statement is included in the NACC Bill to assist readers as a direction is not a legislative instrument within the meaning on subsection 8(1) of the *Legislation Act 2003*.

Part 7—Information disclosure—prevention on public interest grounds

Item 37—Transitional—Attorney-General’s certificates about release of information

- 14.344 This item would provide for the transition of certificates issued by the Attorney-General under section 149 of the LEIC Act before the transition time (as defined in item 1 of this Schedule).
- 14.345 The effect of subitems 37(1) and 37(2) would be that where the Attorney-General has certified that the disclosure of information or the contents of a document would be contrary to the public interest under subsection 149(1) of the LEIC Act, and the certificate has not been revoked before the transition time, the certificate would continue in effect after the transition time as if the LEIC Act was not repealed.
- 14.346 Subitem 37(3) would provide that if the information or contents (that are the subject of a section 149 certificate under the LEIC Act) relates to an existing NACC investigation or inquiry due to a transition determination (see item 3 of this Schedule), the information or contents are taken to be clause 235 certified information under the NACC Bill.
- 14.347 This item is appropriate to ensure that controls on the further disclosure or publication of sensitive information remain in place as ACLEI transitions to the NACC, and to effectively protect sensitive information and prevent any prejudicial consequences that may arise from its disclosure.

Part 8—Reporting

Item 38—Transitional—reports on corruption investigations

- 14.348 This item would provide for the transition of reporting obligations from the Integrity Commissioner to the Commissioner in relation to corruption investigations conducted by the Integrity Commissioner under the LEIC Act.
- 14.349 The effect of this item would be that if, before the transition time (as defined in item 1 of this Schedule), the Integrity Commissioner has completed an investigation of a corruption issue, but has not yet prepared a report on the investigation under subsection 54(1) of the LEIC Act, the Commissioner would be required to prepare the report in accordance with the LEIC Act.
- 14.350 This clause is appropriate to ensure that the transparency of investigations conducted by the Integrity Commissioner is maintained by requiring the findings, evidence, action taken or proposed to be taken, recommendations and reasons for those recommendations in relation to a corruption investigation are reported on.
- 14.351 It is also appropriate to ensure that the report is prepared under the same Act under which the investigation was conducted.

Item 39—Transitional—reports on public inquiries

- 14.352 This item would provide for the transition of reporting obligations from the Integrity Commissioner to the Commissioner in relation to public inquiries conducted by the Integrity Commissioner under the LEIC Act.

- 14.353 The effect of this item would be that if, before the transition time (as defined in item 1 of this Schedule), the Integrity Commissioner has completed a public inquiry under Part 8 of the LEIC Act, but has not yet prepared a report on it under subsection 73(1) of the LEIC Act, the Commissioner would be required to prepare the report in accordance with the LEIC Act.
- 14.354 This clause is appropriate to ensure that the transparency of public inquiries conducted by the Integrity Commissioner is maintained by requiring the findings, evidence, action taken or proposed to be taken, recommendations and reasons for those recommendations in relation to the public inquiry are reported on. It is also appropriate to ensure that the report is prepared under the same Act under which the public inquiry was conducted.

Item 40—Transitional—annual reports for financial year ended before transition time

- 14.355 This item would provide for the transition of annual reporting obligations from the Integrity Commissioner to the Commissioner in circumstances where an annual report for a financial year ended has not been prepared by ACLEI when the transition time (as defined in item 1 of this Schedule) occurs. This is appropriate to ensure that the NACC meets annual reporting obligations under section 46 of the *Public Governance, Performance and Accountability Act 2013* as ACLEI transitions to become part of the NACC.
- 14.356 Subitems 40(1) and 40(2) would require the Commissioner to prepare an annual report in accordance with section 201 of the LEIC Act if:
- the transition time occurs after the end of a financial year; and
 - ACLEI had not prepared an annual report for the financial year before the transition time.
- 14.357 The Commissioner would be required to prepare the report as soon as reasonably practicable.
- 14.358 Subitem 40(3) would provide that the Parliamentary Joint Committee on the NACC may examine the annual report and report to Parliament on any matter contained in, or arising out of the report. This is appropriate given the Committee's role in overseeing the work of the NACC, and is consistent with the duties of the Parliamentary Joint Committee on ACLEI to examine annual reports prepared by the Integrity Commissioner under section 215 of the LEIC Act.

Item 41—Transitional—annual reports for financial year in which transition time occurs

- 14.359 This item would provide for the transition of annual reporting obligations from the Integrity Commissioner to the Commissioner in circumstances where the transition time (as defined in item 1 of this Schedule) occurs during a financial year.
- 14.360 The effect of this item would be that if the transition time occurs part way through a financial year, the Commissioner's first annual report would be required to cover:
- the performance of the Commissioner's functions in accordance with clause 271 of the NACC Bill; and
 - matters relating to performance of ACLEI which would have been covered by an annual report under section 201 of the LEIC Act for the part of the financial year before the transition time occurred.
- 14.361 This item is appropriate to ensure that the NACC meets annual reporting obligations set out in section 46 of the *Public Governance, Performance and Accountability Act 2013*.

Item 42—Transitional—special reports not completed

- 14.362 This item would provide for the transition of reporting obligations from the Integrity Commissioner to the Commissioner in relation to special reports under section 204 of the LEIC Act.

- 14.363 The effect of subitems 42(1) and 42(2) would be that if, before the transition time (as defined in item 1 of this Schedule), the Integrity Commissioner had started preparing a special report under section 204 of the LEIC Act, but had not completed the report, the Commissioner may complete the report under the LEIC Act as if it had not been repealed. This is appropriate to ensure that procedural fairness requirements and restrictions on the disclosure of sensitive information in relation to special reports under the LEIC Act are maintained.
- 14.364 Subitem 42(3) would provide that if the Commissioner completes a special report, the Parliamentary Joint Committee on the NACC may examine the report and report to Parliament on any matter contained in, or arising out of the report. This is appropriate given the Committee's role in overseeing the work of the NACC, and is consistent with the duties of the Parliamentary Joint Committee on ACLEI to examine special reports prepared by the Integrity Commissioner under section 215 of the LEIC Act.
- 14.365 This item is appropriate to ensure that transparency in relation to the operations and performance of the Integrity Commissioner's functions and powers is maintained as ACLEI transitions to the NACC.

Item 43—Transitional—special reports not tabled

- 14.366 This item would provide for the transition of special reports that were provided to the Minister under section 204 of the LEIC Act before the transition time (as defined in item 1 of this Schedule), but were not tabled. This item is appropriate to ensure that special reports prepared under the LEIC Act are tabled in a timely manner. It is also important to maintain transparency in relation to the operations and performance of the Integrity Commissioner's functions and powers as ACLEI transitions to the NACC.
- 14.367 This item would apply where the Integrity Commissioner has prepared and provided a special report to the Minister under section 204 of the LEIC Act, but the Minister has not tabled that report before the transition time occurs. In such cases, the LEIC Act would continue to apply to the special report as if the LEIC Act had not been repealed.

Part 9—Staffing

Item 44—Transitional—current ACLEI staff

- 14.368 This item would provide for the transition of current ACLEI staff to the NACC. The effect of subitems 44(1) and 44(2) would be that, after the transition time (as defined in item 1 of this Schedule), any current staff of ACLEI engaged under section 197 of the LEIC Act would be taken to be staff of the NACC under clause 262(1) of the NACC Bill on the same terms and conditions. Their conditions of employment would not change.
- 14.369 This means that provisions that apply to staff of the NACC, including those related to immunities, confidentiality obligations, NACC corruption issues and NACC complaints would apply to these individuals. They would be considered public officials under clause 10 of the NACC Bill, however, they would not be considered a staff member of a Commonwealth agency (subclause 12(5)). It would also engage some of the provisions relating to investigations under Part 7 of the NACC Bill, for example, enabling these individuals to receive information, documents or things under clause 57 or 58.
- 14.370 Subitem 44(3) would confirm that a person engaged under section 197 of the LEIC Act would not cease to be employed by reason of the LEIC's Act repeal.
- 14.371 While ACLEI staff would become NACC staff, any delegations made by the Integrity Commissioner to ACLEI staff under section 219 of the LEIC Act would be cancelled by the LEIC Act's repeal. New delegations would need to be made under the NACC Bill.

Item 45—Transitional—consultants to ACLEI

- 14.372 This item would provide that any current consultants to ACLEI engaged under section 198 of the LEIC Act, would, after the transition time (as defined in item 1 of this Schedule), be taken to be engaged as a consultant to the NACC under clause 263 of the NACC Bill on the same terms and conditions.

Item 46—Transitional—secondees to ACLEI

- 14.373 This item would provide that any current secondees whose services had been made available to ACLEI under section 199 of the LEIC Act, would, after the transition time (as defined in item 1 of this Schedule), continue as secondees to the NACC as if they had been engaged under clause 264 of the NACC Bill. Such secondees would continue under the same terms and conditions.

Item 47—Transitional—counsel assisting Integrity Commissioner

- 14.374 This item would provide that any person currently serving as counsel assisting the Integrity Commissioner appointed under section 200 of the LEIC Act, would, after the transition time (as defined in item 1 of this Schedule), be appointed as counsel assisting the National Anti-Corruption Commissioner under clause 265 of the NACC Bill on the same terms and conditions.

Item 48—Transitional—authorised officers of ACLEI

- 14.375 This item would provide that any person with a current authorisation under section 140 of the LEIC Act would be treated, after the transition time (as defined in item 1 of this Schedule), as if they had been appointed as an authorised officer under clause 267 of the NACC Bill.
- 14.376 Subitem 48(3) would provide that an identity card issued to the person under section 141 of the LEIC Act is taken, after the transition time, to be an identity card issued to the person under clause 268 of the NACC Bill.

Part 10—Miscellaneous transitional provisions

Item 49—Transitional—pending proceedings

- 14.377 This item would provide that if, immediately before the transition time (as defined in item 1 of this Schedule), the Integrity Commissioner appointed under the LEIC Act is a party to proceedings in any court or tribunal, the Commissioner appointed under the NACC Bill would be substituted as the relevant party to those proceedings.

Item 50—Transitional—judicial review

- 14.378 The effect of subitems 50(1) and 50(2) would be to clarify that a person who, immediately before the transition time (as defined in item 1 of this Schedule), was eligible to apply to a court for judicial review of a decision made under LEIC Act, would remain eligible to do so after the transition time.

Item 51—Transitional—transfers of records

- 14.379 This item would provide that any records or documents that were in the possession of the Integrity Commissioner, an Assistant Integrity Commissioner or ACLEI immediately before the transition time (as defined in item 1 of this Schedule), are to be transferred to the NACC after the transition time.

Item 52—Transitional—confidential information provided under old Act

- 14.380 This item would provide that any confidential information given to certain individuals under the LEIC Act prior to the transition time (as defined in item 1 of this Schedule), should, after the transition time, be taken to have been provided to the NACC.
- 14.381 The relevant individuals are listed at subitem 52(1) as follows:

- the Integrity Commissioner;
- a staff member of ACLEI; and
- if the information was provided to a special investigator for the purposes of Division 2 of Part 12 of the LEIC Act—the special investigator.

Item 53—Transitional—references to the Integrity Commissioner etc. in instruments

- 14.382 This item would provide that if an instrument was in force immediately before the transition time (as defined in item 1 of this Schedule), and the instrument refers to the Integrity Commissioner, an Assistant Integrity Commissioner or ACLEI, the instrument will have effect after the transition time.
- 14.383 Subitem 53(2) would provide that the relevant instrument would have effect after the transition time with the following substitutions, as if:
- a reference in the instrument to the Integrity Commissioner were a reference to the Commissioner;
 - a reference in the instrument to an Assistant Integrity Commissioner were a reference to a Deputy Commissioner; and
 - a reference in the instrument to ACLEI were a reference to the NACC.
- 14.384 Subitem 53(3) would clarify that the rules (see item 57 of this Schedule) could provide that the substitutions do not apply in relation to a specified instrument.
- 14.385 Subitem 53(4) would provide, for the avoidance of doubt, that item 53 does not prevent the relevant instrument from being amended or repealed after the transition time.

Part 11—Transitional application of certain provisions in new Act

Item 54—Application—protection for journalists’ informants

- 14.386 This item would provide that clause 31 of the NACC Bill would apply in relation to information given by a journalist informant, irrespective of whether the information is given before, on, or after the commencement of clause 31.
- 14.387 The effect of this item is that if information is provided to the NACC as part of a corruption investigation, and the information was obtained by a journalist prior to the commencement of the NACC Bill, the journalist would not be required to disclose the identity of their informant. This is appropriate as the informant’s identity should be protected irrespective of *when* they provided the relevant information to the journalist.

Item 55—Application—mandatory referrals

- 14.388 The effect of this item is that the mandatory referral obligations in Division 2 of Part 5 of the NACC Bill would not apply for a one-month period beginning at the transition time (as defined in item 1 of this Schedule).
- 14.389 This item would apply if, in the 28-day period beginning on the day the transition time occurs, a person becomes aware of a corruption issue and the person would, but for this item, be required to refer the corruption issue to the Commissioner or the IGIS under Division 2 of Part 5 of the NACC Bill.
- 14.390 Subitem 55(2) would provide that the person would not be required to refer the corruption issue until as soon as is reasonably practicable after the end of the period.
- 14.391 This is appropriate to allow a brief transition time for the NACC to establish its systems and processes for handling incoming referrals before it is necessary for mandatory referrals to be made.

Item 56—Application—appointment of first CEO

- 14.392 This item would provide that subclause 254(2) of the NACC Bill would not apply in relation to the appointment of the first CEO of the NACC.
- 14.393 The note to item 56 would clarify that the effect of this item is that the Commissioner is not required to approve the appointment of the first CEO.
- 14.394 This is appropriate to ensure that an appointment for the CEO position can occur immediately upon the NACC's establishment, rather than being delayed to allow for formal consultation to occur with the Commissioner, whose appointment would also only be able to commence upon the establishment of the NACC.
- 14.395 It is expected that consultation with the Commissioner-designate for the appointment of the first CEO would occur administratively.

Part 12—Transitional rules

Item 57—Transitional rules

- 14.396 Subitems 57(1) would permit the Minister to make rules prescribing further transitional arrangements that are required or permitted by the Consequential Bill, or necessary or convenient for carrying out or giving effect to the Consequential Bill. The Minister would be able to make such rules by legislative instrument.
- 14.397 Subitem 57(2) would allow the Minister to make rules prescribing transitional arrangements that relate to the enactment of the NACC Bill or provisions of the Consequential Bill which amend or repeal other legislation.
- 14.398 Subitem 57(3) would place limitations on the rules that may be made under subitem 57(1). Relevantly, it would provide that the Minister is not authorised to make rules that:
- create an offence or civil penalty;
 - provide powers of arrest or detention or powers of entry, search or seizure;
 - impose a tax;
 - set an amount to be appropriated from the Consolidated Revenue Fund; and
 - directly amend the text of the Consequential Bill or the NACC Bill.
- 14.399 These limitations are appropriate as these matters would be more appropriately dealt with in primary legislation.
- 14.400 Subitem 57(4) would clarify that nothing in Schedule 2 of the Consequential Bill would limit the Minister's ability to make rules prescribing transitional arrangements, other than the limitations set out in subclause 57(4) outlined above.