



Mandatory referrals: Commonwealth agency heads

Note: The National Anti-Corruption Commission (the NACC) will begin operations on 1 July 2023.

The heads of Commonwealth agencies and parliamentarians have obligations under the *National Anti-Corruption Commission Act 2022* (the NACC Act). They must refer certain issues to the NACC for potential investigation. These obligations are called mandatory referral obligations and are separate from the ability to make voluntary referrals under the NACC Act.

This factsheet provides guidance on the mandatory referral obligations for heads of Commonwealth agencies that are not intelligence agencies.

For more information on the mandatory referral obligations for heads of intelligence agencies, see [Mandatory referrals: Intelligence agency heads](#).

For mandatory referral obligations for public officials with responsibilities under the *Public Interest Disclosure Act 2013*, see [Mandatory referrals: PID officers](#).

Who is an agency head?

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

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

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

Mandatory referral obligations

If the head of a Commonwealth agency becomes aware of a corruption issue within their agency, they must tell the NACC about it if **all of the following apply**:

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

Once the mandatory obligations come into force, the agency head must refer the corruption issue to the NACC as soon as reasonably practicable after they become aware of it.

When the agency head refers the issue to the NACC, they must explain why they suspect the corruption issue could involve conduct that is serious or systemic. They must also provide the NACC with all of the information or documents in their possession or control that relate to the issue.

See [National Anti-Corruption Commission Act 2022](#), section 33 and 38

Who is a staff member of an agency?

Many people are staff members of Commonwealth agencies under the NACC Act. This includes all of the following:

- employees of Commonwealth departments, Commonwealth companies and other statutory bodies
- directors and officers of Commonwealth companies
- agency heads
- secondees to Commonwealth agencies
- goods and service providers who have contracted with the Commonwealth to provide something to the Commonwealth or an agency, or to provide something in connection with Commonwealth activities
- staff of parliamentarians
- officers and employees of the federal courts and the High Court, excluding judges
- other people who exercise powers or perform functions under certain Commonwealth laws.

See [National Anti-Corruption Commission Act 2022](#), sections 12 and 13

What is a corruption issue?

A corruption issue is information, or an allegation, that raises a question of whether a person:

- has engaged in corrupt conduct in the past,
- is currently engaging in corrupt conduct, or
- will engage in corrupt conduct in the future.

See [National Anti-Corruption Commission Act 2022](#), section 9

What is corrupt conduct?

While corrupt conduct can take many forms, the NACC Act defines it to mean situations where a public official:

- does something that breaches the public trust,
- abuses their office as a public official, or
- misuses information they have access to in their capacity as a public official.

It also applies to any person (whether or not they are a public official) who does something, or tries to do something, that could adversely affect a public official's honesty or impartiality in their official capacity.

See [National Anti-Corruption Commission Act 2022](#), section 8

To find out more about corrupt conduct, see [What is corrupt conduct?](#)

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

An agency head must refer a corruption issue to the NACC if they suspect it could involve serious or systemic corrupt conduct. It will be up to the NACC Commissioner to decide if they think a particular allegation of corrupt conduct is serious or systemic.

The terms 'serious' and 'systemic' are not defined in the NACC Act and will take their ordinary meaning.

The agency head does not need firm evidence that the corruption issue could involve serious or systemic corrupt conduct. It is enough for the agency head to suspect that it could be serious or systemic.

However, when the agency head refers the corruption issue to the NACC they must explain why they suspect it could be serious or systemic.

Once operational, the NACC Commissioner may provide more detailed guidance on assessing what amounts to serious or systemic corrupt conduct.

The following information indicates some factors that may be relevant.

Serious corrupt conduct

Many factors could be considered when assessing whether conduct could be serious corrupt conduct. The NACC Act does not specify what an agency head should consider.

An agency head may suspect that an incident involves 'serious' corrupt conduct for many reasons. For example, they might consider if the alleged conduct could involve any of the following:

- a criminal offence and, if so, the seriousness of the offence and maximum penalty if a person is found guilty
- a financial gain or loss and, if so, the amount of money gained or lost
- another benefit or detriment and, if so, the significance of the benefit or detriment
- misuse of information and, if so, the sensitivity of the information and any potential harm from an improper disclosure or misuse of that information

- a person who holds a senior or trusted role and, if so, the seniority of the person; the level of trust or influence they exercise in their role; and whether the person should have understood their responsibilities and duties in that role
- a person trying to cause a public official to act dishonestly or in a biased way and, if so, the significance if the public official did behave dishonestly or did not act impartially.

Agency heads could also consider whether the conduct:

- involved deception or was done secretly
- was planned or deliberate, or
- occurred over a prolonged period of time.

Systemic corrupt conduct

‘Systemic’ means something that relates to a system, or affects a system (including an organisation) as a whole. Corrupt conduct could also be systemic if it formed part of a pattern. For example, a pattern of similar kinds of conduct in the agency.

What information must be provided to the NACC?

The agency head must include the following information when making a mandatory referral to the NACC:

- all information relevant to the corruption issue in their possession or control when they make the referral, and
- the reason why they suspect the issue could involve corrupt conduct that is serious or systemic.

Information relevant to a corruption issue may include (but is not limited to):

- the names of any public official who the agency head suspects have engaged in serious or systemic corrupt conduct
- the names of any private individuals or entities involved
- a description of the conduct
- the dates and timeframes of when the alleged corrupt conduct occurred or may occur
- how and when the agency head became aware of the issue
- any supporting documents or evidence
- any other relevant information.

Agency heads must make a referral as soon as practicable after become aware of a relevant issue.

If the agency head becomes aware of new information after making a referral, they must provide it to the NACC as soon as reasonably practicable.

When do the mandatory referral obligations start?

After 28 July, agency heads must start to make mandatory referrals of anything they become aware of from 1 July 2023 onwards. They can still voluntarily refer a corruption issue to the NACC within the first 28 days.

If an agency head becomes aware of a corruption issue they suspect could be serious or systemic after the 28-day grace period, they must refer it to the NACC as soon as reasonably practicable.

What about historical conduct?

After 1 July 2023, if the agency head becomes aware of a corruption issue that happened before the NACC commences, the mandatory referral obligations apply with the 28-day grace period. The agency head must refer the issue to the NACC as soon as reasonably practicable after 28 July, or later if the NACC Commissioner allows it.

After 28 July 2023, if the agency head becomes aware of a corruption issue that occurred before 1 July 2023, the mandatory referrals apply without the 28-day grace period. This means the agency head must refer the issue to the NACC as soon as reasonably practicable.

This obligation applies regardless of when the relevant conduct occurred, including before:

- the agency head joined the agency
- they became the agency head
- the NACC commenced operations.

If the agency head was already aware of a corruption issue prior to 1 July 2023, they are not obligated to refer it to the NACC. However, they can still do so voluntarily.

Exceptions to mandatory referral obligations

An agency head is **not required** to refer a corruption issue to the NACC if:

- they believe on reasonable grounds that the NACC Commissioner is already aware of the corruption issue, or
- the NACC Commissioner decides a referral is not required.

What if sharing information would breach a secrecy obligation?

The NACC Act requires agency heads to comply with their mandatory referral obligations, even if doing so would breach a secrecy obligation under another law.

However, there are some exceptions to this rule. If one of the following secrecy obligations (known as 'exempt secrecy provisions') applies to information about a corruption issue, the agency head is not required to provide that information in a referral to the NACC:

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

It is important to note that the mandatory referral obligation continues to apply in these circumstances. However, the agency head is not required to include the information subject to an exempt secrecy provision in their referral.

See [National Anti-Corruption Commission Act 2022](#), section 36

What happens after making a mandatory referral?

If the NACC Commissioner is satisfied that the referral raises a corruption issue, they may deal with it in one or more of the following ways:

- commence a preliminary investigation
- investigate the issue alone or with the relevant Commonwealth agency or a state or territory government entity
- refer the issue back to the Commonwealth agency for them to investigate
- refer the issue to another Commonwealth agency or a state or territory government entity for consideration
- take no action.

The NACC Commissioner is not required to consider every referral they receive and may decide not to take any action in relation to a referral. The NACC Commissioner can only commence a NACC investigation if they are of the opinion that the issue could involve corrupt conduct that is serious or systemic.

Preliminary investigations

The NACC Commissioner may conduct a preliminary investigation if they are unsure:

- whether a referral raises a corruption issue
- about the nature of a corruption issue
- whether a corruption issue is serious or systemic.

A preliminary investigation helps the NACC Commissioner find out more information about the referral. They can then decide whether or how to deal with it. The NACC Commissioner can use some of their investigatory powers under the NACC Act to conduct a preliminary investigation, such as compelling persons to provide certain information, documents or things.

What if the agency is already doing something about the corruption issue when it is referred to the NACC?

Referring a corruption issue to the NACC does not prevent an agency from taking action, such as conducting an internal investigation. If an agency has an obligation to handle a corruption issue under any other law, it is still required to meet this obligation unless the NACC Commissioner directs it to stop.

What is a stop action direction?

The NACC Commissioner can direct a Commonwealth agency to stop taking action in relation to a corruption issue, after consulting with the agency head. This is called a stop action direction. A stop action direction can prevent an agency from taking particular action in relation to the issue or from taking any action at all.

The NACC Commissioner can only direct an agency to stop taking action where the direction is required to ensure the effectiveness of any action the NACC Commissioner has taken, or might take, in relation to the corruption issue. For example, to avoid prejudicing the NACC's corruption investigation. The NACC Commissioner must withdraw the direction as soon as it is no longer required.

See [National Anti-Corruption Commission Act 2022](#), section 43

Example: a stop action direction

An agency has initiated an investigation into a suspected breach of the APS Code of Conduct. In the course of the investigation, the agency head becomes aware of suspected corrupt conduct that they consider serious given the alleged significant financial loss to the agency.

The agency head refers the issue to the NACC. The NACC Commissioner decides it raises a corruption issue that could involve serious or systemic corrupt conduct and that the NACC will investigate the matter.

The NACC Commissioner issues a stop action direction in relation to the agency's Code of Conduct investigation to avoid any prejudice to the NACC's investigation. The agency is unable to continue its Code of Conduct investigation for as long as the stop action direction remains in place.

What if an agency receives a Public Interest Disclosure (PID) about corruption?

It is possible for an internal disclosure made under the *Public Interest Disclosure Act 2013* to also raise a corruption issue under the NACC Act. This may engage a separate mandatory referral obligation.

If a Public Interest Disclosure (PID) authorised officer in an agency receives a PID that they suspect could involve serious or systemic corrupt conduct, the authorised officer must refer the corruption issue to the NACC.

For more information on mandatory referral obligations for PID authorised officers, see [Mandatory referrals: PID officers](#).

Learn more

For more information and resources, please visit [National Anti-Corruption Commission | Attorney-General's Department \(ag.gov.au\)](#).