



Procurement and the National Anti-Corruption Commission

Summary

Upon commencement of the National Anti-Corruption Commission (NACC), contractors will be able to be investigated by the NACC for aiding and or influencing a procurement officer to abuse their position, or to act dishonestly or not impartially.

Contracted service providers (including consultants, independent contractors, labour-hire contractors, and others providing contracted services to the government) are now considered public officials through the *NACC Act*.

The *NACC Act* was passed on 30 November 2022, and is expected to commence in July 2023. The *NACC Act* imposes a range of obligations and responsibilities on Commonwealth agencies and Industry.

What is the NACC?

The NACC will be an independent agency that will prevent, detect, investigate and report on serious or systemic corruption in the Commonwealth public sector. This includes by potentially investigating all Commonwealth contractors, consultants and outsourced service providers for their conduct in a procurement process.

The NACC will be responsible for referring evidence of criminal conduct for investigation by the appropriate bodies; undertaking activities for education and prevention purposes; and providing advice on corruption risks and vulnerabilities across Government.

Who it covers

Sections 12 and 13 of the *NACC Act* provides a number of definitions, which define staff members of a Commonwealth agency to include contracted service providers for a Commonwealth contract (which includes consultants, contractors, tenderers and subcontractors) because they are:

- a party to the contract,
- an employee of a contracted service provider who is responsible for doing something required by the Commonwealth contract,
- a subcontractor to a contracted service provider who is responsible for doing something required by the Commonwealth contract.



Examples include:

Consultants

A consulting firm is contracted to advise a Commonwealth agency on a specific issue. A number of employees of the consulting firm are responsible for preparing the advice for the agency. As the Commonwealth contract is the contract between the agency and the consulting firm, the consulting firm is therefore a contracted service provider under the *NACC Act*. The employees of the firm who are responsible for providing the advice for the agency are therefore considered staff members of the agency under the *NACC Act*, as they are employees of the contracted service provider who are responsible for providing goods or services for the Commonwealth contract.

Subcontractors

Defence contracts an ICT business to upgrade their software. That ICT business subcontracts a number of individuals as independent contractors to go into the agency and actually do the upgrades. So while the Commonwealth contract is the contract between the agency and the ICT business, the subcontractors are considered staff members of the agency under the *NACC Act*, as they are a party to a contract with the ICT business and are responsible for providing the ICT upgrades under the Commonwealth contract.

Corrupt conduct definition

Section 9 of the *NACC Act* defines a Corruption Issue as an issue of whether a person has engaged, is engaging, or will engage in corrupt conduct.

Corrupt Conduct' is defined in section 8 to include:

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

An example of corrupt conduct in a procurement includes dishonest or biased conduct that adversely affects the honesty or impartiality of a public official.

Example:

Bill is a public official and is the decision maker for a tender in his agency. Ted contacts Bill and suggests that he will submit a tender application that is inflated by \$20,000 and share the extra profit with Bill if he awards the tender to Ted. Bill agrees and awards the tender to Ted.

Bill and Ted have both engaged in corrupt conduct.



Ted has done something that caused Bill (a public official) to behave dishonestly and in a biased way. Bill has shown bias in awarding the tender to Ted and then behaved dishonestly by covering-up his actions.

Bill has also breached public trust, because he exercised his power to award the tender for an improper purpose.

This means that public officials, which includes consultants and contractors, can be investigated if they:

- adversely affect their own, or another public official's honesty or impartiality in the way they carry out their official duties;
- breach public trust;
- abuse their office as a public official; and/or
- misuse information they have gained in their capacity as a public official.

Retrospective application – PwC case example

Section 8(4) provides that conduct may be corrupt conduct even though it occurred before the commencement of the *NACC Act*. This means that any conduct carried out by a consultant can be referred to the NACC through a voluntary referral.

It will be interesting to see if any referrals/action will arise as a result of the PwC tax scandal currently plaguing the consulting firm. According to the Australian Financial Review:

PwC used the Commonwealth's confidential design and schedule of anti-tax avoidance legislation to design its own schemes for its clients to circumvent that legislation. The emails show them gloating about it, celebrating millions in new client revenue "heavily helped by the accuracy of the intelligence that [now disgraced PwC partner] Peter Collins was able to supply us".

It is alleged that up to 30 PwC staff were involved. How each of these personnel fit the definitions of a public official are yet to be determined.

Section 8(1)(d) provides that Corrupt Conduct includes 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.

The former PwC Partner would be considered a public official as he would satisfy one or more of the various definitions provided in section 12.

If the NACC were to investigate PwC for the potential corrupt conduct, then PwC would need to ensure that they fully comply as destroying documents or things carries a penalty of Imprisonment for 5 years (see s70); and giving false or misleading evidence, information or documents carries a penalty of Imprisonment for 5 years (see s71).



Probity

Probity refers to a personal 'high ethical standard', 'moral rectitude' or 'uprightness'. In the work context, probity also includes recordkeeping. The accurate and transparent documentation of an individual's relevant actions is a very important aspect of 'good probity management'. Good probity practices should facilitate a value for money outcome and the procurement of supplies that are fit for purpose by allowing collaborative and interactive engagement with potential suppliers within a practical and consistent framework.

Probity is mandated in the Commonwealth Procurement Rules at rules 6.5 – 6.7, and rule 7: Ethical behaviour & Accountability and transparency. It is also mandated in a number of other legislative and regulatory instruments including:

- *Public Service Act 1999* (Cth) including the APS Values and Code of Conduct;
- *Defence Force Discipline Act 1982* (Cth);
- *Public Governance Performance and Accountability Act 2013* (Cth) – see sections 25-29;
- *Crimes Act 1914* (Cth); and
- *Privacy Act 1988* (Cth) including the Australian Privacy Principles.

Recent ANAO audits have identified examples where entities have conducted procurements for which specific probity issues were identified, or where ethical behaviour fell short of requirements. Some relevant examples from these audits include:

- flawed processes for appointing a probity adviser or using the probity adviser's advice;
- failure to take action in response to identified probity risks or realised shortcomings;
- failure to adhere to policy requirements such as mandatory fraud training and information handling requirements;
- inappropriate use of panel arrangements; and
- decisions to extend or vary contracts where the decision was driven by convenience.

Interested in Probity Training?

EMA Advisory specialises in Commercial advice and services to Federal Government, Defence and Defence Industry. Our team can support organisations in understanding their probity obligations and we provide training to help organisations upskill their personnel to uphold probity and confidentiality principles, and to help develop robust probity processes.

**We are currently taking Expressions of Interest for our Probity Training.
To register please email: caas@emaadvisory.com.au.**

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