Australian Government
National Anti-Corruption Commission

Assessment of Corruption Issues Policy

Policy

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Authoriser	The Hon PLG Brereton, AM, RFD, SC, Commissioner

1. Application

1.1 This policy applies to staff members of the National Anti-Corruption Commission (the Commission).[1]

1.2 Staff members of the Commission must have regard to this policy when assessing corruption issues under delegation of the Commissioner. In this policy, except where the context otherwise indicates, a reference to the Commissioner includes a staff member of the Commission performing functions as a delegate of the Commissioner.

2. Purpose

2.1 The Commission conducts investigations into corruption issues.[2] A corruption issue is an issue of whether a person has engaged, is engaging, or will engage, in corrupt conduct.[3] The Commissioner may decide not to deal with a corruption issue, or to deal with it in one or more of several ways. Assessment is the process which informs that decision. The timely and consistent assessment of corruption issues of which the Commissioner becomes aware is fundamental to the performance of the functions of the Commission.

2.2 The purpose of this policy is to provide authoritative guidance to staff members performing functions as a delegate of the Commissioner as to the manner in which relevant decisions are to be made, in order to facilitate the timely and consistent assessment of corruption issues.

[1] Terms used in this policy are the same as terms used in the *National Anti-Corruption Commission Act 2022*. The term staff member of the NACC is defined under s 266 of that Act.

[2] *National Anti-Corruption Commission Act 2022*, sub-s 17(c).

[3] *National Anti-Corruption Commission Act 2022*, s 9.

3. Three step assessment process

Introduction

3.1 All assessment decisions are to made on a case-by-case basis, having regard to the particular features of the information and circumstances. The assessment process contained in this policy is intended to ensure that a consistent approach that has regard to relevant considerations is applied to the assessment of corruption issues.

3.2 The process for assessing information about a corruption issue involves three stages:

- first, determine whether there is a corruption issue,
- secondly, decide whether or not to deal with the corruption issue, and
- thirdly, decide how to deal with the corruption issue.

Information gathering for assessments

3.3 The Commissioner may deal with a corruption issue that has been referred, or that the Commissioner becomes aware of in any other way.[4]

3.4 In the assessment process, the Commissioner is not limited to the information provided by the person who makes a referral, or the person on whose behalf the referral was made, and the Commissioner may inform themselves as they think fit.[5]

3.5 Additional information may be gained through:

- seeking further information from the referrer,
- searching for information in the Commissioner's existing holdings, to the extent allowed by law,
- searching for information in the public domain, and
- seeking further information from third parties.

Preliminary investigations

When the Commissioner conducts preliminary investigations

3.6 To inform the assessment process, the Commissioner may conduct a preliminary investigation in order to:[6]

- confirm the existence or nature of a corruption issue (at the first stage),
- assist in deciding whether to deal with a corruption issue (at the second stage), and
- assist in deciding how to deal with a corruption issue (at the third stage).

[4] *National Anti-Corruption Commission Act 2022*, s 40.

[5] *National Anti-Corruption Commission Act 2022*, s 42(5).

[6] *National Anti-Corruption Commission Act 2022*, s 42.

3.7 A preliminary investigation begins when the Commissioner decides that it is necessary or desirable to conduct a preliminary investigation for one of the purposes listed at paragraph 3.6 above.

3.8 Generally, the Commissioner will only decide that it is necessary or desirable to conduct a preliminary investigation if it has not been possible otherwise to obtain sufficient information to make the relevant decision (including from the measures referred to in paragraph 3.5 above), and it appears likely that the additional powers of a preliminary investigation may produce information that will better enable an informed assessment.

3.9 Generally, the Commissioner will not:

- notify the referrer before conducting a preliminary investigation, or
- notify the referrer of the outcome of a preliminary investigation, unless the outcome is a decision to take no further action on the referral.

4. Deciding if there is a corruption issue

Authority to make a decision under the NACC Act

4.1 The Commissioner only has jurisdiction to deal with a "corruption issue".[7] A corruption issue is an issue of whether a person has engaged, is engaging, or will engage, in corrupt conduct.[8]

4.2 Corrupt conduct means:[9]

a. any conduct of any person that could adversely affect the honest or impartial exercise or performance of any public official's powers, duties or functions,

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, or

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.

4.3 Conduct can include doing or omitting to do something, conspiring with another person to do something and attempting to do something.[10]

4.4 A public official means a parliamentarian (of the Australian Parliament), a staff member of a Commonwealth agency, a staff member of the Commission, and any person who is acting for and on behalf of, or as a deputy or delegate of, any of those persons.[11] A staff member of a Commonwealth agency includes an individual

[7] *National Anti-Corruption Commission Act 2022*, ss 40, 41.

[8] *National Anti-Corruption Commission Act 2022*, s 9.

[9] *National Anti-Corruption Commission Act 2022*, sub-s 8(1).

[10] *National Anti-Corruption Commission Act 2022*, sub-ss 8(9) and (10).

[11] *National Anti-Corruption Commission Act 2022*, s 10.

who is employed by or engaged in assisting the agency, or a contracted service provider under a contract administered by the agency.[12]

The elements of corrupt conduct

4.5 There will be a *corruption issue* capable of investigation, only if each of the elements of one or more of the types of *corrupt conduct* defined under the NACC Act *could* be established. At the assessment stage, the question is only whether they *could* ultimately be established, not whether they *are* established. Those elements vary depending on the type of corrupt conduct.

4.6 A single referral may raise more than one type of corrupt conduct.

4.7 The elements of the type of corrupt conduct referred to at paragraph 4.2(a) above (conduct that adversely affects the honest or impartial exercise of a public official's powers) are:

- that a person engaged, is engaging or will engage in conduct
- that the conduct actually had an adverse effect (directly or indirectly) on the honest or impartial exercise of powers, functions or duties

  or

  the conduct could have an adverse effect (directly or indirectly) on the honest or impartial exercise of powers, functions or duties, and
- that those powers, duties or functions were the powers, duties or functions of a public official as a public official.

4.8 The elements of the type of corrupt conduct referred to at paragraph 4.2(b) above (breach of public trust by a public official) are:

- that a person engaged, is engaging or will engage in conduct
- that at the time of the conduct, the person held an office as a public official
- that the conduct relates to a matter of public trust, and
- that the conduct constitutes or involves a breach of that public trust.

4.9 The elements of the type of corrupt conduct referred to at paragraph 4.2(c) above (abuse of office by a public official) are:

- that a person engaged, is engaging or will engage in conduct
- that at the time of the conduct, the person held an office as a public official, and
- that the conduct constitutes or involves an abuse of that office.

4.10 The elements the type of corrupt conduct referred to at paragraph 4.2(d) above (misuse of information by a current or former public official) are:

- that a person acquired information or a document
- that at the time the person acquired the information or document, the person was a public official

[12] *National Anti-Corruption Commission Act 2022,* s 12.

- that at the time the person acquired the information or document, the information or document was acquired by the person in their capacity as a public official, and
- that the person engaged, is engaging or will engage in conduct that constitutes or involves the misuse of the information or document.

4.11 If it appears that one (or more) elements of a type of corrupt conduct *could not* be established, then there is no corruption issue to be investigated.

4.12 Further, if the conduct in question involves political activities, then there is no corruption issue to be investigated if the conduct does not involve or affect:[13]

- the exercise of a power or the performance of a function or duty, by a public official (including a parliamentarian); or
- the use of public resources.

5. Deciding whether or not to deal with a corruption issue

Authority to make a decision under the NACC Act

5.1 The Commissioner may decide to take no action in relation to a corruption issue.[14] Authority to make this decision has been delegated to staff in the Intake and Assessment Section at the level of EL2.[15]

No obligation to consider dealing with a corruption issue

5.2 The Commissioner does not have a duty to consider whether to deal with a corruption issue, whether the Commissioner is requested to do so by the referrer or by any other person, or in any other circumstances.[16]

Relevant considerations in deciding whether or not to deal with a corruption issue

5.3 When deciding whether or not to deal with a corruption issue, potentially relevant considerations include (but are not limited to):

a. *The nature of the allegation, including its inherent plausibility and objective seriousness, and relationship to NACC priorities* –

The nature of an allegation is relevant to its plausibility. Impossible or implausible allegations are less amenable to investigation and ultimately findings of fact.

The objective seriousness of a corruption issue is a highly relevant consideration; the more serious the issue, the more likely it is to require

[13] Section 8(13) of the *National Anti-Corruption Commission Act 2013*

[14] NACC Act, s 41(6).

[15] National Anti-Corruption Commission (National Anti-Corruption Commission Act 2022) Delegation 2023, CM23#1226DOC.

[16] *National Anti-Corruption Commission Act 2022*, sub-par 41(7).

investigation. The objective seriousness of an allegation will also interact with other considerations. For example, the objective seriousness of an allegation may warrant the Commission making a final and decisive determination of an issue, notwithstanding that it has already been investigated by an agency internally, whereas a less serious allegation might not.

The Commission will from time to time have priority areas of interest. An issue that falls within a priority area of interest is more likely to warrant investigation.

b. *The cogency, clarity and particularity of the allegation* –

The particularity of an allegation is relevant to the capacity of the matter to be determined. Focussed and precise allegations are more amenable to investigation and findings, than vague, imprecise or incoherent allegations.

c. *The completeness and credibility of the information provided by the referrer, informed by the referrer's capacity to provide such information* –

Allegations that are corroborated by information that is within the capacity of the referrer to provide are inherently more plausible than unsupported, bare allegations. The unexplained withholding of information that would ordinarily be within the capacity of the referrer to lawfully obtain and provide to the Commission may be relevant to the credibility of any information that the referrer provides in support of their allegation, although care must be taken to the application of this in the context of whistle-blowers.

The thoroughness and completeness of information that is contained within a referral will also inform other considerations in this list.

The Commission may give weight to the credibility and reliability of existing evidence. However, in doing so, the Commission must take care not to prejudge or prematurely close-off actionable information.

d. *The availability of investigative pathways* (including the various options open at stage 3, below) –

Where investigative pathways exist that may shed light on the truth of an allegation, it is more likely that the referral will put forward a question that can be determined, than where available investigative pathways offer a very small prospect of a conclusive outcome.

e. *The extent to which the issue has previously been investigated* (including any previous investigation, litigation or other scrutiny of the allegations) –

The history of the referral is relevant to whether further investigation of the allegation is appropriate, or likely to lead to a determination of the matter. Allegations that have not been scrutinised prior to their referral are more likely to leave questions to be investigated. Conversely, allegations that have already been fully investigated, scrutinised or litigated leading to a conclusive outcome are less likely to be appropriate for further investigation. However, in some cases a corruption investigation regarding the alleged conduct of a public official may be warranted, even if a Commonwealth integrity agency has previously concluded an investigation into that alleged conduct, having

regard to the public interest, the nature of the earlier investigation, the availability of new evidence, and other factors.

5.4 It will generally be appropriate to decide not to deal with a corruption issue and to take no further action if:

a. There appears to be no real prospect that an investigation will obtain evidence of corrupt conduct. However, sometimes it will be in the public interest to proceed to investigation, in order to clear the air; or

b. There has been a previous adequate investigation of the conduct in question. However, it is necessary to maintain an open mind to the possibility that a previous investigation has failed to uncover the truth, and that referrals which may appear querulous not infrequently have at their origin a legitimate grievance which has not been adequately addressed.

6. Deciding how to deal with a corruption issue

Authority to make a decision under the NACC Act

6.1 If the Commissioner decides to deal with a corruption issue, then the Commissioner can do so in any one or more of the following ways:[17]

- *investigate* – either alone or jointly with a Commonwealth agency or a State or Territory government entity, subject to some qualifications,[18] if the issue could involve corrupt conduct that is serious of systemic. These are called "corruption investigations";
- *refer for investigation* – to a Commonwealth agency to which the corruption issue relates, if the Commissioner is satisfied that the agency has appropriate capabilities to investigate the issue; or
- *refer for consideration* – to a Commonwealth agency or a State or Territory government entity.

6.2 Authority to make this decision has been delegated to staff in the Intake and Assessment Section at the level of EL2.[19]

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[17] *National Anti-Corruption Commission Act 2022*, sub-s 41(1).

[18] The *National Anti-Corruption Commission Act 2022* places some restrictions and qualifications on the Commissioner's ability to investigate:

- matters that have already been investigated by Commonwealth integrity agencies: s 45
- certain matters that can be dealt with, are being dealt with, or have been dealt with, by Independent Parliamentary Expenses Authority: s 46,
- certain matters that can be dealt with, are being dealt with, or have been deal with, by the Electoral Commissioner: s 47.

Those restrictions and qualifications are dealt with at paragraphs 6.13 – 6.15 below.

[19] National Anti-Corruption Commission (National Anti-Corruption Commission Act 2022) Delegation 2023, 23#1226DOC.

The Commissioner is to deal with corruption issues in the most appropriate way having regard to all the circumstances

6.3 When deciding between the options referred to at paragraph 6.1 above, the Commissioner may have regard to:

a. whether the corruption issue could involve corrupt conduct that is serious or systemic;

b. the significance of the corruption issue, including:

i. to the public,

ii. to the referrer,

iii. to the agency concerned;

c. the need to ensure that the corruption issue is appropriately investigated;

d. any need for a perception of independence in the investigation;

e. the capability and capacity (including coercive powers) of the Commission to investigate the corruption issue;

f. the capability, capacity, expertise and willingness of any other relevant agency to investigate the corruption issue;

g. the desirability of oversight, including statutory reporting requirements; and

h. any other matter the Commissioner thinks fit in the circumstances.

Deciding to conduct a corruption investigation, alone or jointly

When to investigate

6.4 The Commissioner may not investigate a corruption issue unless the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.[20][21]

Corrupt conduct that is serious

6.5 When deciding whether corrupt conduct is serious, the Commissioner will have regard to the weight or importance or significance of the conduct, and the gravity of its actual or potential consequences. Conduct is serious if it is significant or worrying, not slight or negligible, but it does not have to be "severe" or "grave".

6.6 When considering the weight or importance of corrupt conduct, regard may be had to:

a. whether the conduct constitutes or enables, or would constitute or enable, the commission of an offence; if so, the seriousness of that offence, compared to other offences, using its maximum penalty as a guide;

[20] *National Anti-Corruption Commission Act 2022*, sub-s 41(3).

[21] Refer also Standard Operating Procedure; Managing Corruption Issues, regarding serious and systemic considerations.

b. whether the conduct involves planning or coordination, and if so, the degree of planning or co-ordination;

c. the extent to which the conduct departs from accepted norms and practices;

d. the extent to which the person or persons responsible knew that they were engaging in corrupt conduct, including whether they had been warned previously;

e. whether the conduct was done covertly or involved deception; and

f. the actual or potential consequences of the conduct, including:

i. whether the conduct results, or would result, in an advantage or benefit, and if so, nature of that advantage or benefit, including who enjoys the advantage or benefit and its amount or value,

ii. whether the conduct results, or would result, in harm, loss or disadvantage, and if so, nature of that harm, loss or disadvantage, including who suffers and its amount or value,

iii. whether the conduct involves or affects, or would involve or affect, a person who is not party to the corrupt conduct; and

iv. whether and to what extent the conduct would significantly erode public faith in the individuals and institutions entrusted with the power.

6.7 The Commissioner may have regard to more specific considerations in some contexts. They do not exclude the general considerations set out above, which may exist alongside and overlap in some circumstances.

6.8 The following specific considerations may arise in cases of corrupt conduct that involves, or affects, an exercise of power:

a. the nature of the power and the circumstances surrounding its exercise, including:

i. whether the power is exercised by one person, or a limited group of people (abuse of a power entrusted only to a few may be more serious than where entrusted to many),

ii. the character of the power, including whether it is general or technical in nature (abuse of a technical power may be more serious than of a general power),

iii. whether processes leading to, or surrounding, the exercise of power are transparent (abuses of a power that are not transparent may be regarded as more serious than of those which are transparent),

iv. whether the exercise of power involves a significant imbalance between the person exercising the power and other individuals (abuse of a power where there is an imbalance may be more serious than where there is not); and

b. institutional checks on exercises of the power (which may make abuse of the power less significant), including:

i. independent oversight, and

ii. a right to review exercises of the power on the merits.

6.9 The following specific considerations may arise in cases of corrupt conduct that involves the use of Commonwealth resources:

a. whether those resources are resources that are only available to certain public officials; and

b. whether the use of resources would result in loss.

6.10 The following specific considerations may arise in cases of corrupt conduct that involve misuse of information:

a. whether the information was valuable or sensitive, and if so, the value of the information or reasons for its sensitivity;

b. whether the information was put to any use beyond mere access, and if so what use; and

c. whether the dealing involved circumvention of measures taken to secure the information, and if so, the level of sophistication involved in circumventing those measures.

Corrupt conduct that is systemic

6.11 When deciding whether corrupt conduct is systemic, regard may be had to whether the conduct:

- is other than an isolated occurrence;
- forms part of a pattern of conduct, or
- although a singular act, affects a system or organisation as a whole, such as a process undertaken by an agency, or an agency or the public service as a whole.

Deciding to investigate

6.12 Subject to paragraphs 6.15 - 6.17 below, the Commissioner will generally decide to investigate a corruption issue that could involve corrupt conduct that is serious or systemic if:

- the Commission has the capability and capacity to investigate the corruption issue, and
- there is no other agency with appropriate capabilities that is able and willing and appropriate to investigate the corruption issue.

Joint or separate investigation

6.13 The Commissioner may decide to investigate jointly with another Commonwealth agency. However, the Commissioner will not investigate jointly with an agency to which the corruption issue relates, if a joint arrangement might compromise the investigation, or be unworkable or impractical.

6.14 Generally, where there are cross-jurisdictional issues, the Commissioner will investigate jointly with a relevant State or territory government entity.

Restrictions on investigating certain parliamentary expense and electoral matters

6.15 The Commissioner must not commence a corruption investigation into a corruption issue involving conduct that has been or could be dealt with by the Independent Parliamentary Expenses Authority or the Electoral Commissioner, except on referral by the Authority or the Electoral Commissioner respectively.[22]

6.16 If a referral relates to a corruption issue that the Commissioner is prevented from investigating because the referral was not made by the Independent Parliamentary Expenses Authority or the Electoral Commissioner, then the Commissioner may:

- refer the issue (under s 41(1)(d)) for consideration by the Independent Parliamentary Expenses Authority or the Electoral Commissioner; or
- inform the referrer that the matter should be referred to the Independent Parliamentary Expenses Authority or the Electoral Commissioner, as the case may be.

Public interest test where matter already dealt with by an integrity agency

6.17 If a Commonwealth integrity agency has previously concluded an investigation into a matter regarding the conduct of a public official, then the Commissioner may only commence an investigation into a corruption issue involving the conduct if the Commissioner is satisfied that it is in the public interest to do so.[23] In making that decision, relevant considerations include, without limitation:

- the significance of the corruption issue;
- the details of the investigation undertaken by the Commonwealth integrity agency;
- any conclusions or findings of the integrity agency;
- whether the Commissioner has any new evidence;
- any unfairness to a person that may arise as a result of the Commissioner conducting a further investigation; and
- the need to ensure that the corruption issue is fully investigated.

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[22] See *National Anti-Corruption Commission Act 2022*, ss 46, 47.

[23] Refer to s 45 of the *National Anti-Corruption Commission Act 2022*. Under sub-s 45(3), when determining whether it is in the public interest to investigate, the Commissioner may have regard to any matter including:

- the significance of the corruption issue
- the details of the investigation undertaken by the Commonwealth integrity agency
- any conclusions or findings of the integrity agency
- whether the Commissioner has any new evidence in relation to the corruption issue
- any unfairness to a person that may arise as a result of the Commissioner conducting a further investigation into the corruption issue, and
- the need to ensure that the corruption issue is fully investigated.

Deciding to refer to a Commonwealth agency for investigation

When to refer to a Commonwealth agency for investigation

6.18 The Commissioner may only refer a corruption issue for investigation to a Commonwealth agency to which the issue relates if the Commissioner is satisfied that the agency has appropriate capabilities to investigate the issue.[24]

6.19 In deciding whether the Commonwealth agency to which the issue relates Commissioner has appropriate capabilities to investigate the issue, the Commissioner will take into account:

a. the nature of the corruption issue, including whether it is serious or systemic,

b. the existence, independence and expertise of investigators within the agency,

c. the investigatory powers of the agency,

d. any perceived need for independence from the agency,

e. the views of the agency head, and

f. any other matter that the Commissioner thinks fit.

6.20 The Commissioner will generally decide to refer a corruption issue to the Commonwealth agency to which the investigation relates for investigation if:

a. the Commissioner considers that the corruption issue is one which warrants investigation but is not of the opinion that it could involve corrupt conduct that is serious or systemic; or

b. the Commissioner is of the opinion that the corruption issue could involve corrupt conduct that is serious or systemic, but the agency has relevant specialist knowledge or responsibility, and has the capacity and is willing to conduct an adequate investigation.

When the Commissioner will oversee investigations

6.21 If the Commissioner deals with a corruption issue by referring it to a Commonwealth agency for investigation, then the Commissioner may decide to oversee the investigation,[25] and may give the agency directions about the planning and conduct of the investigation.

6.22 Generally, the Commissioner will undertake the type of oversight referred to at paragraph 6.21 if the Commissioner is of the opinion that the corruption issue could involve corrupt conduct that is serious or systemic.

6.23 Generally, the Commissioner will not give the agency detailed directions about the planning and conduct of the investigation.

When the Commissioner will direct final reports on investigations

6.24 If the Commissioner deals with a corruption issue by referring it to a Commonwealth agency for investigation, then the Commissioner may require the

[24] *National Anti-Corruption Commission Act 2022*, sub-par 41(1)(c).

[25] *National Anti-Corruption Commission Act 2022*, s 50.

head of the agency to provide either or both or (a) progress reports from time to time, and (b) a report on the completion of the investigation (*completion report)*.[26]

6.25 Generally, the Commissioner will require the head of the agency to provide a completion report if the Commissioner is of the opinion that the corruption issue could involve corrupt conduct that is serious or systemic.

6.26 Generally, the Commissioner will request that the completion report contains the following:

- the steps taken by the agency to investigate the corruption issue,
- the agency's conclusions or findings on the corruption issue, and
- action taken by the agency following the agency's investigation, if any.

Deciding to refer to a Commonwealth agency for consideration

6.27 Generally, the Commissioner will decide to refer a corruption issue to another agency for consideration where:

a. the other agency has the capabilities to investigate the issue, and the Commissioner considers that whether it warrants investigation is best determined by the other agency; and

b. it would not be possible, necessary or otherwise appropriate to exercise any of the Commissioner's oversight or reporting powers in respect of the other agency.

Other powers

Public comment

6.28 The Commissioner may at any time issue a public statement about a corruption issue, subject to requirements of procedural fairness.[27]

6.29 Generally, the Commissioner will only make a public statement about a corruption issue if the Commissioner is satisfied that:

a. it is appropriate and practicable to do so to avoid damage to a person's reputation, or

b. it is necessary to appeal to the public, or a section of the public, for information about the corruption issue, or

c. it is otherwise in the public interest to do so.

Reconsideration

6.30 The Commissioner may, at any time, reconsider whether or how to deal with a corruption issue.[28]

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[26] *National Anti-Corruption Commission Act 2022*, s 52.

[27] *National Anti-Corruption Commission Act,* s 48.

[28] *National Anti-Corruption Commission Act,* sub-s 41(5).

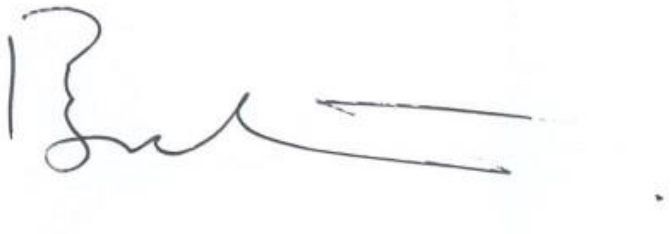
6.31 Generally, the Commissioner may reconsider whether or how to deal with a corruption issue if:

- new information warranting consideration of a different decision emerges; or
- the original decision no longer appears appropriate to the circumstances.

7. Review or variation of this policy

7.1 This policy will be reviewed every 2 years to ensure consistency with legislation, government policy, organisational changes within NACC, and change of working environment. It may also be reviewed as required, including at the request of staff.

National Anti-Corruption Commission Assessment of Corruption Issues Policy



The Hon PLG Brereton, AM, RFD, SC

Commissioner

National Anti-Corruption Commission

5/07/2023

Version history

Version	Authorised by	Revision date	Author	Description of change
1	The Hon PLG Brereton, AM, RFD, SC, Commissioner.	15 June 2023	Senior Lawyer, Director Assessments	Final Draft
2	The Hon PLG Brereton, AM, RFD, SC, Commissioner.	5 July 2023	Senior Lawyer, Director Assessments	Approved Version provided by Commissioner