

The logo for actlaw society, with 'act' in orange, 'law' in white, and 'society' in grey, all in a sans-serif font, set against a dark blue rounded rectangle.

actlaw
society



2024 Intensive Conference

BRINGING THE BALANCE

13 – 14 MARCH 2024 | NOVOTEL CANBERRA

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Government Lawyers and the National Anti-corruption Commission

PRESENTED BY THE HON PAUL BRERETOM AM RFD SC
Commissioner



National Anti-Corruption Commission

The National Anti-Corruption Commission

The Hon Paul Brereton AM RFD SC
Commissioner

nacc.gov.au

Topics for today

- **Overview of the Commission**
 - Origins and establishment
 - Mission and organisation
 - Jurisdiction
 - Referrals and protections
 - Assessment, investigation and reports
 - Oversight
- **The first few months**
 - Some statistics
 - Emerging themes
 - Corruption prevention and education
- **Integrity in public administration**
 - The role of lawyers

Origins and establishment



Integrity

A key election issue clearly expressed by the Australian people



Mandate

A government acting on that expressed desire



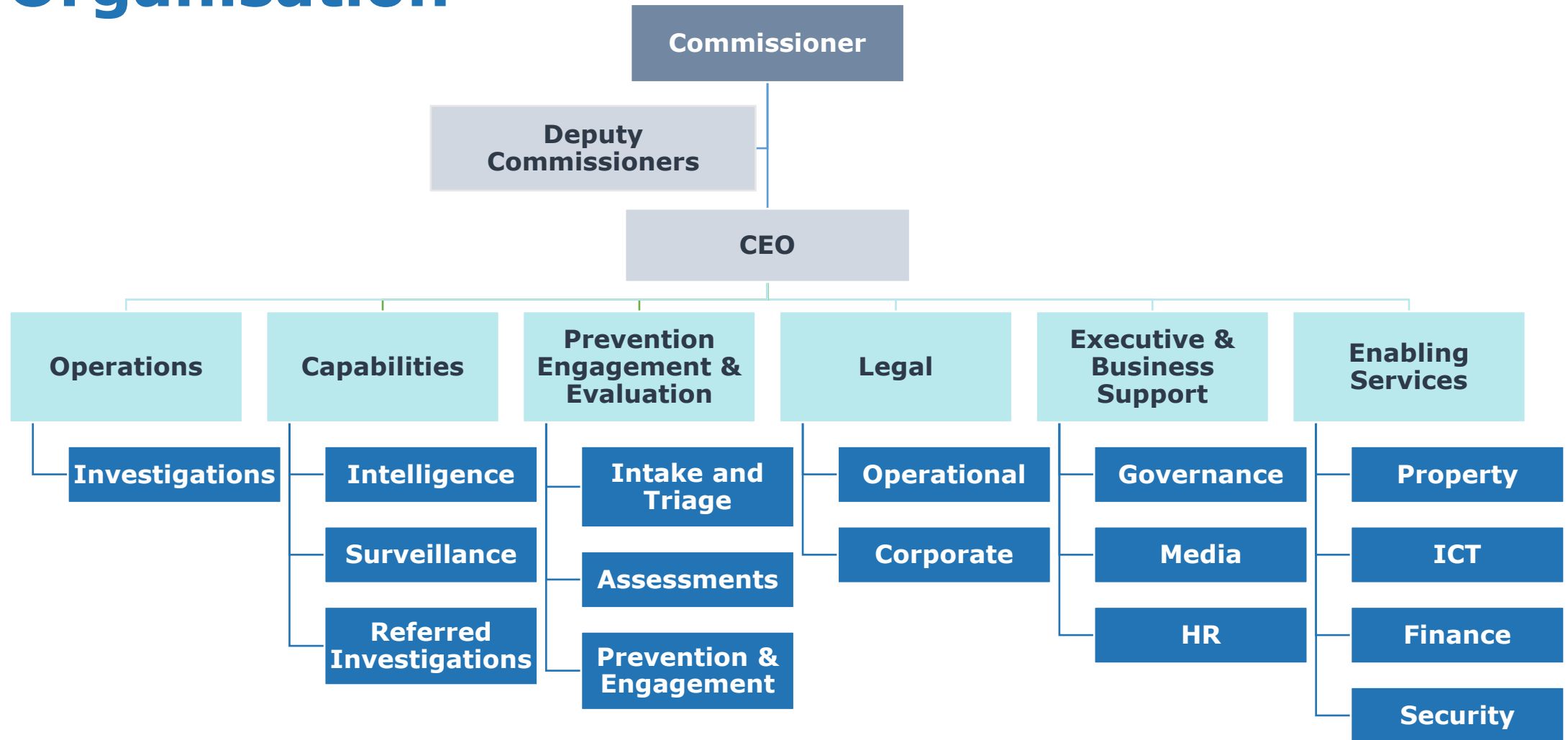
Leadership

APS leadership embedding a pro-integrity culture at all levels

Mission

To enhance integrity in the Commonwealth public sector, by **detering, detecting** and **preventing** corrupt conduct involving Commonwealth public officials, through **education, monitoring, investigation, reporting** and **referral**.

Organisation



Jurisdiction – Corruption issue: s9

The touchstone of the Commission's jurisdiction is a "corruption issue".

That is a question of whether a person has engaged, is engaging, or will engage in, corrupt conduct.

Corrupt conduct

Breach of
public trust

Abuse of office

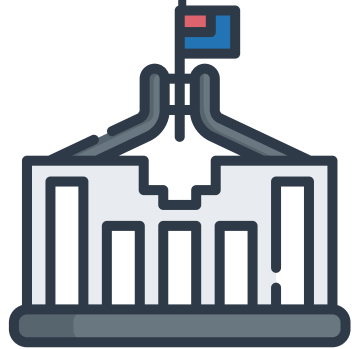
Misuse of
information or
documents

An act that leads to a public official behaving
dishonestly or without impartiality

Not mere maladministration or mistakes

Jurisdiction of the NACC

Commonwealth
public officials



Parliamentarians



Staff members
of APS agencies



Contractors and
service providers

Staff members

An official
of the entity

An individual who
is employed by or
engaged in
assisting an agency
(including
consultants)

An individual
involved in
providing services
to or for an
agency under a
Commonwealth
contract

Exclusions

Some people are statutorily incapable of engaging in corrupt conduct, including:

- a) the Governor-General
- b) a Deputy Governor-General
- c) a Justice of the High Court or a judge of a court created by the Parliament
- d) a judge of a court of a State or Territory
- e) a member of a Royal Commission
- f) the Inspector of the NACC or a person assisting the Inspector

Referrals to the NACC



Voluntary

Anyone can submit a corruption report to the Commission or provide information about a corruption issue



Mandatory

If an agency head suspects serious or systemic corruption involving a staff member, they must report it to the Commission



Own motion

The Commission can investigate a corruption issue it becomes aware of on its own motion without a referral

Making a referral



Online

nacc.gov.au



Phone

1300 489 844



Post

GPO Box 605
Canberra ACT 2601

Whistleblower protections

Protection: Not subject to civil, criminal, or administrative liability (including disciplinary action) for making disclosure

Contractual rights: No contractual or other right or remedy can be enforced against whistleblowers

Legal supremacy: These protections override all other Commonwealth laws

Reprisal action: It is a criminal offence to take reprisals against whistleblowers

Exception: Action can be taken for making false or misleading statements to the NACC

Assessment of referrals

Triage (Tier 1)

- Does the referral concern a Commonwealth public official?
- Does the referral raise a corruption issue?

Assessment (Tier 2)

- Could it be *serious* or *systemic*?
- Should the Commission deal with the issue and if so, how?
 - Investigate solely, or jointly with another agency, if serious or systemic
 - Refer to another agency for investigation or consideration
 - Take no further action
- Preliminary investigation?

Serious or systemic

Serious

Something that is significant and involves something more than 'negligible' or 'trivial', but it does not have to be 'severe' or 'grave'

Systemic

Something that is more than an isolated case and involves a pattern of behaviour, or something that affects or is embedded in a system

Evaluation of referrals

Prospects

Scale and gravity

Systemic

Public interest

Will a NACC
investigation add value?

Will an inquiry
'clear the air'?

Investigatory powers



Require the production of documents and information



Search premises, people, intercept communications and use surveillance devices under warrant



Summon witnesses for examination at hearings

Investigation conclusion and reporting

- **Commission's role:** At the conclusion of an investigation, the Commission provides a report to the Attorney-General
- **Findings:** The report may include a finding that a person has engaged in 'corrupt conduct'. This is an administrative finding, not a finding of criminal guilt
- **Recommendations:** The Commission can also make recommendations, including to terminate the employment of an APS employee, under section 15(2) of the *Public Service Regulations 2023*

Oversight

- Inspector
 - NACC corruption issues
 - Agency maladministration
 - Officer misconduct
- Parliamentary Joint Committee
 - Appointments
 - Monitor and review performance
 - Review and report on budget and finances

Statistics

2,561
referrals

13
corruption
investigations

13
preliminary
investigations

7
investigations
from ACLEI

More than
75
presentations

Nearly
90%
of matters not
publicised in media

Emerging themes in public sector corruption

Procurement

Preferring family,
friends and
associates

Recruitment and promotion

Use of insider
information

Prevention is better than cure



Recognise
and resist



Report
corrupt
conduct



Build
awareness

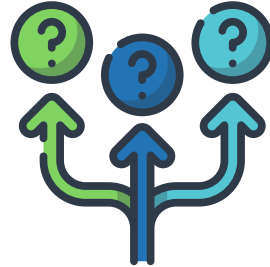


Conduct
public
inquiries

Corruption prevention priorities



Conflicts
of interest



Ethical
decision
making



Electoral
process

Domestic and international engagement

- The Commission aspires to prominent position in developing and influencing domestic and international anti-corruption policy and efforts
- Anti-corruption efforts are an aspect of Australia's defence and security
 - Domestically: Harden institutions against influence of malign foreign actors
 - Internationally: Assist neighbours to resist influence of foreign powers

The Pacific

- **International**

- CCPCJ

- CoSP10

- **The Pacific**

- Staff exchanges

- Information exchange

- MoU

- **APSACC Darwin - 29-31 July 2024**

Integrity in the public administration

The Robodebt Royal Commission

“The first is that weak government lawyers averted their eyes as their agencies inflicted unlawful practices on vulnerable people.

The second factor is just as bad: the systems aimed at holding government legal services to an acceptable standard simply did not work.”

Chris Merritt, *The Australian*, July 2023

Integrity in the public administration

The IGADF Afghanistan Inquiry

The Inquiry observed that legal officers played a role in reviewing and shaping operational reporting before it was submitted to headquarters.

This enabled such significant embellishment that reports did not provide an accurate record, and more importantly higher headquarters did not ask questions which might otherwise have been asked.

Government lawyers

Your role is to assist your client to understand what the law is, to advise and to warn, to deliver legal services competently and rigorously, all while maintaining your **professional independence** and an **independent mindset**.

An ethical framework

Your client is the
Government and
the **people of**
Australia

Give advice and
make decisions
based on
evidence

Be frank and
fearless

Report
accurately
and **honestly**

Take
responsibility
for your
mistakes

Keep **your**
duty in mind
not your
career

Model these
behaviours
and create a
pro-integrity
culture

Two corrosive practices

Risk-based legal advice

Advice based on assessing the 'legal risk' associated with a proposed action, rather than solely determining its legality

Draft advice

Seeking and obtaining draft advice which, if undesired by the client, is never finalised



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