

AUSTRALIAN GOVERNMENT PROCUREMENT SERIES 2023

PART 3: INNOVATIVE PROCUREMENT – ECI/ MARKET LED PROPOSALS/ NEGOTIATING WITH TENDERERS

PRESENTED BY
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Acknowledgement of Country

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

THE 2023 PROCUREMENT SEMINAR SERIES

Part 1: Planning for a Perfect Procurement... Setting Up For Success – Wednesday, 09 August 2023

Part 2: Probity in Procurement – Wednesday, 23 August 2023

Part 3: Current Issues and Updates in procurement – NACC, Unsolicited Proposals and ECI Processes– Wednesday 6 September 2023

Part 4: Key Learnings from the ANAO Reports – Tuesday 19 September 2023

Part 5: Legal Issues and Updates in Procurement – GPJR and the Process Contract – Wednesday 4 October 2023

Part 6: The Art of Tender Assessment and Achieving VFM – 17 October 2023

Part 7: Managing your Procurement – 1 November 2023

Part 8: Prickly Issues in Procurement – 15 November 2023

Part 9: The Cth Contracting Suite and Cth Procurement Policies – 29 November 2023

To find out more about the additional seminars in our Procurement Seminar Series, and to register to attend, please contact Katarina Szivek on kszivek@hwle.com.au

OVERVIEW

Collaboration and ECI

Market Led Proposals

Negotiation with Tenderers

WHY DO WE NEED TO COLLABORATE

Traditional Procurement

Traditional Contracting

Standard Form Contracts

- Adversarial
- Age
- Amendments

HOW DOES IT DIFFER FROM A TRADITIONAL CONTRACT?

Traditional Contracts

- Price Driven or Market Oriented
- Arms-length, Autonomous Relationships
- Often Inflexible and have Standardised Processes and Contracts
- Adversarial Approach to Contract Administration

Collaborative Contracts

- 'Good Faith' Commitment
- Early Warning Mechanisms
- Early Involvement
- Governance Arrangements - Collective Problem Solving
- Incentive Payments
- Mutual Goals and Best for Project
- Early Dispute Resolution
- No Dispute Clauses
- Prudent Risk Taking
- Fair and Transparent
- Common Sense

INTRODUCTORY COMMENTS

What is ECI?

- A form of Procurement
- Not a Delivery Model
- Not a Contract
- Sometimes called:
 - Competitive Dialogue
 - Early Tenderer Involvement
 - Alliancing for the Faint Hearted
- Has been compared to Managing Contractor Model

COMPARING DIFFERENT CONTRACT MODELS – RELATIONSHIP AND PERFORMANCE BASED MODEL (ECI)

Early Contractor Involvement (ECI)

- Process – EOI – Stage 1 Contract – Stage 2 Contract
- Lots of interaction
- Project owner and contractor develop design and match project objectives together
- Relationship embedded into process and contracts – ‘Collaborative Contracting’
- Stage 2 Contract for D&C or Construct Only

WHAT IS ECI?

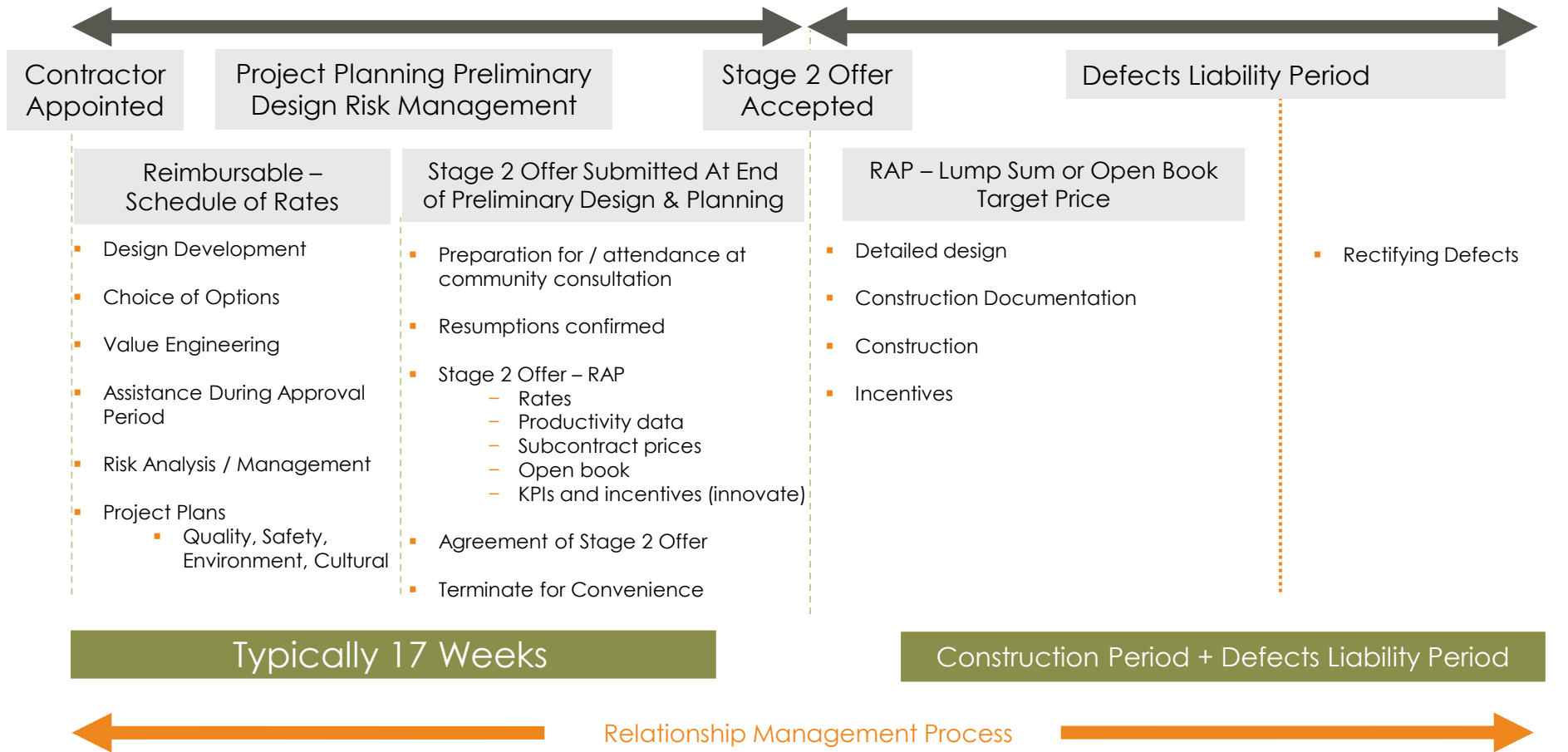
- The Process

- Starts with an EOI of some kind

- Rates / Margins
 - Similar Project Experience
 - Key Personnel
 - Understanding of Issues
 - Understanding of and Commitment to Process
 - Availability
 - Experience in and ability to work in relationship environment

- Selection

ECI – THE CONTRACTUAL MODEL



CONTRACTS

Stage 1 – Design Services Contract

- IP
- Payment
- Sunset
- Good faith negotiation of Stage 2 Contract – Price and Terms

Stage 2 – Construction Contract

WHEN TO USE ECI

Need to
Fast Track

Design is
Complex

Many
Unknowns

Significant
Risks

Hard Dollar
is Needed

Government
Funded

DOES IT COMPLY WITH THE CPRS AND CURRENT USE

- CPRs: ‘multi-stage procurement’– initial approach to market followed by subsequent approaches
 - CPR 7.15 – initial approach **must** include, for every stage, the criteria to be used at every stage and if the number of suppliers to be approached for later stages will be limited
 - CPR 9.8 – ‘Open Tender’ includes multi stage procurements, provided the initial stage is an open approach to market
 - CPR 10.25 – each approach **must** comply with time limits (see 10.22-10.24)
- CPRs allow for Limited Tendering
 - CPR 9.12 – procurement from a standing offer
 - CPR 10.3
 - c. – ‘exceptionally advantageous conditions that arise only in the short term...’

DEFENCE TEMPLATE

- Defence Estate Quality Management System (DEQMS)
- Early Contractor Involvement Head Contract
 - Standard terms – useful as a framework
 - Provides for ECI in the design, planning, programming and cost planning of the works
 - By a 'design consultant'

DEFENCE – WHY ECI

- Inconsistent outcomes in the quality of design documentation as prepared by outsourced consultants and contractors;
- Consequent impacts on project delivery including contractual claims, delay while design errors are rectified and potential issues concerning the overall fitness for purpose of the works;
- Capturing opportunities for securing innovation, cost and time savings and better outcomes for personnel; and
- The need to improve the quality of service and decision making being provided by outsourced contract administrators to minimise adverse effects for Defence in terms of project outcomes.

DEFENCE – ELEMENTS OF ECI

- Early involvement of the Head contractor as a “consultant” in the Design Phase;
- The development of a high quality design solution, which is fully consulted, coordinated, properly documented and progressively endorsed at each milestone in accordance with the Master Milestone Program by key parties involved in the design process;
- A targeted focus on securing improved productivity, buildability, quality, constructability, maintainability and operability outcomes for the Works;
- Under the leadership of the Design Consultant, achieving effective integration between the ECI Team Members and other Project Stakeholders, including by adopting a one-team approach;
- Flexibility to accommodate digital engineering solutions where appropriate; and
- A prioritised commitment to a culture of integrated and interpersonal collaboration, communication and coordination.

DEFENCE – HOW

- Early involvement of the Head Contractor as a “consultant” in the Design Phase;
- The development of a high quality design solution, which is fully consulted, coordinated, properly documented and progressively endorsed at each milestone in accordance with the Master Milestone Program by key parties involved in the design process;
- A targeted focus on securing improved productivity, buildability, quality, constructability, maintainability and operability outcomes for the Works;
- Under the leadership of the Design Consultant, achieving effective integration between the ECI Team Members and other Project Stakeholders, including by adopting a one-team approach;
- Flexibility to accommodate digital engineering solutions where appropriate; and
- A prioritised commitment to a culture of integrated and interpersonal collaboration, communication and coordination.

DEFENCE – ELEMENTS OF ECI

- Under this delivery model, Defence enters into separate contractual arrangements during the Design Phase with the ECI Team Members, being:
 - The Design Service Contract with the Design Consultant; and
 - The Design Phase Contract with the Contractor.
 - The ECI Team Members may in turn engage key subcontractors and subconsultants to further advance early contractor involvement input into the preparation and finalisation of the design.
- The Design Phase Contract is the first phase of the Contractor's engagement in the Project. The Contractor may, subject to the terms of the Design Phase Contract, be separately engaged for the Construction Phase under the Construction Phase Contract.

BENEFITS OF ECI

Reduced overall pre-tender costs

Shortened delivery times

Team approach and true collaboration

Innovation – deals with complex projects well

Integration of construction methods

Sustainability

Early procurement

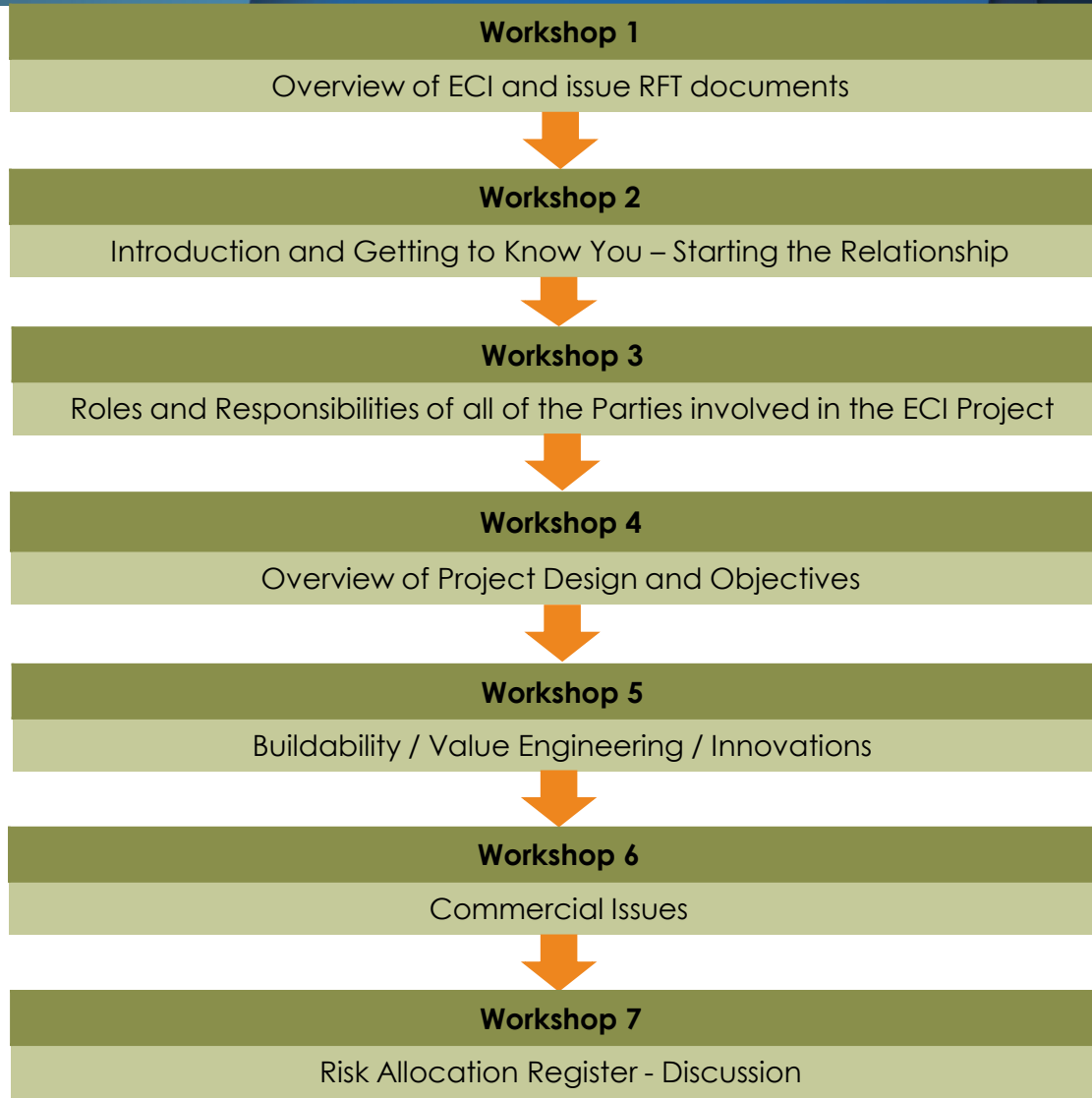
Fewer variations

Bankable

PROBLEMS WITH ECI

- Resource Intensive (During Procurement and Contract - Project Management Team and Project Leadership Team)
- Relationship management is essential
- Less tender price competition
- Principal can end up negotiating with a single contractor
- Probity
- Requires principal to be flexible in design
- Requires a change in mindset to procurement
- May not get a bid – Fidelity / Commitment Deed
- Can be pressure to proceed
- Potential to leave relationship behind in Stage 2

POSSIBLE WORKSHOPS



ECI SELECTION MATRIX

QUESTION	SELECTION SCORE
<ul style="list-style-type: none"> ▪ Is the project expected to involve high risks during construction? 	Score 5 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Is the project time critical? 	Score 3 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Is there scope for innovation in design? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Does the Principal require involvement in design? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Does the Principal have the resources/expertise to support Stage 1 activities? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Does the Principal have the resources/expertise to support Stage 2 activities? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Does the Principal need a fixed cost for the project? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Is a high performing team available to carry out the project? 	Score 3 for yes, 0 for no
<ul style="list-style-type: none"> ▪ Is there a need to reduce cost and duration of tendering? 	Score 2 for yes, 0 for no
TOTAL SCORE	
SCORE EVALUATION	
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;">Score 0-9. Project not suitable for ECI.</div> <div style="width: 45%;"> Score 10-16. Project suitable for ECI. Score 17-23. Project highly suitable for ECI. </div> </div>	

ECI, PROJECT ALLIANCING, TRADITIONAL

ECI	ALLIANCE	TRADITIONAL
High potential for innovation during stage 1	High potential for innovation	Little potential for innovation
Risks identified and negotiated in stage 1 – allocated for stage 2	Risks shared and jointly managed	Risks allocated from outset (not necessarily optimally)
Benchmarked (can be competitive if DECI)	Benchmarked	Competitive
Final \$ certainty	Final \$ varies	Final \$ certainty
Client resource – High in stage 1, Low in stage 2	High client resource	Low client resource
Client design input	Client design input	Low client design input
Low tender costs and resources	Low tender costs and resources	High tender costs and resources
Relationship management is essential	Relationship management is essential	Relationship and collaboration not a feature
Probity an issue	Probity an issue	Probity compliant

UNSOLICITED PROPOSALS

The Philosophy

The CPRs

Guidance ?

Issues

UNSOLICITED PROPOSALS

- The Philosophy
 - Tension
 - Government should market test all 'substantial' projects / expenditure / opportunities
- versus*
- Market testing unique ideas of private sector is not appropriate and may lead to such ideas not coming forward

UNSOLICITED PROPOSALS

CPRs

- CPR 9.10 – Limited Tender can only be conducted under 10.3 or where exempt under Appendix A
- CPR 10.3(c) – Limited Tender – ‘for procurement made under *exceptionally advantageous conditions* that arise in the very short term, such as from *unsolicited innovative proposals*’
- CPR 10.3(d) – goods/ services can be supplied only by a particular business, eg to protect exclusive rights, or absence of competition for technical reasons

Auditor-General Report No. 15 2021-2022 – Performance Audit

- Reported on Defence’s Procurement of Six Evolved Cape Class Patrol Boats
- Recommendation – develop specific probity controls when engaging in unsolicited proposals

UNSOLICITED PROPOSALS CURRENT POSITION AND COMMON THEMES – CTH

Current Cth position

■ CPRs (cont)

- A procurement conducted by limited tender is not required to meet the rules in CPR 10.6 - 10.8 (Request documentation), 10.20 - 10.31 (Minimum time limits), or 10.35 (Awarding contracts).
- However, under CPR 10.5, a written report must be prepared that includes:
 - the value and type of goods and services procured
 - a statement indicating the circumstances and conditions that justified the use of limited tender
 - a record demonstrating how the procurement represented value for money in the circumstances

UNSOLICITED PROPOSALS

Novel approaches

- Bonus systems – open tender – but original selected if within (say) 10/15% (Chile and Korea)
- Swiss Challenge – open tender but original proponent can counter match the winner (Italy, the Philippines, Taiwan, two Indian States)
- Best and final offer – open tender but original proponent automatically qualifies to participate in the final tendering round (Argentina and South Africa)

UNSOLICITED PROPOSALS – ASSESSMENT CRITERIA

VIC	NSW	QLD
Characteristics justifying exclusive negotiation	Uniqueness	Is exclusive dealing in interests of the public
Meets a service need aligned with Govt policy objectives	Whole of Government impact	Investment alignment with Govt Policy
Value for money	Value for money	Value for money
Affordable and a relative priority for budget funding	Affordability	Investment ready (affordable)
Deliverable	Capability and Capacity	Investment ready (deliverable) Technical / legal and commercial feasibility
	Return on Investment	
	Risk Allocation	VFM (cost/ risk)

UNSOLICITED PROPOSALS

Unsuitable:

Direct Purchase of Gov Owned Property	Where Tender Commenced
Existing Contractors	Concepts or no detail
Extensions of Contracts or Leases	Grants
Development of land not owned by Gov or Proponent	Uniqueness is trivial
No Commercial Proposition	Pilot
Only Unique Quality – Skills of Workforce	Stop or suspend another Gov process eg Compulsory Acquisition
Offer to provide widely available Goods or Services	Exclusivity over a Government asset so Proponent can develop Feasibility Study
Consultancy	

UNSOLICITED PROPOSALS WHAT IF IT FAILS...



Back to Market

Position of original proponent

Intellectual Property

NEGOTIATION WITH TENDERERS

- Commonwealth is able to negotiate with tenderer(s)
- VFM is the Core Rule – CPR 4.4
- Acting ethically – treating all tenderers equitably – CPR 6.6
- Changes to ATM documents – CPR 10.14
 - When, during the course of a procurement, a relevant entity modifies the evaluation criteria or specifications set out in an approach to market or in request documentation, or amends or reissues an approach to market or request documentation, it must transmit all modifications or amended or reissued documents to all potential suppliers...

NEGOTIATION WITH TENDERERS

- Offer Definition and Improvement Activities (ODIA)
 - from Department of Defence
 - After tender responses received
 - Useful on complex or highly technical procurements
 - Clarify and define tender responses to reduce risks and maximise VFM
 - Works on sole-source limited tenders and/or multiple tenderers before selecting a preferred
 - See: [Auditor-General Report No. 15 2021-2022 – Performance Audit](#)

NEGOTIATION - TIPS

- Don't allow clarifications to become negotiations
- Don't negotiate before evaluation is complete
- Don't negotiate if terms have been accepted
- Always ensure VFM is enhanced as a result of any negotiation
- Don't be afraid to 'walk away' ('Deal Fever')
- Do Use a Negotiation Protocol setting out:
 - Points of negotiation
 - Timetable
 - Objective
 - Contacts and communication
 - Non-binding/ no commitment disclaimer

NATIONAL ANTI-CORRUPTION COMMISSION (NACC)

Highlights

Purpose

Jurisdiction

Powers

NACC - HIGHLIGHTS

- Commenced 1 July 2023
- Led by Commissioner Justice Brereton
- Reach across the federal public sector and the private sector
- Over 200 pages of legislation and 300 pages of explanatory memorandum

- In the first month of operation, received 541 referrals

NACC PURPOSE

- Independent agency headed by the National Anti-Corruption Commissioner along with up to three Deputy Commissioners.
- Legislative purpose statement:
 - To facilitate the detection of corrupt conduct;
 - To investigate serious or systemic corruption issues;
 - To refer evidence of criminal conduct for investigation by the AFP of the CDPP; and
 - To undertake education and prevention activities and provide advice on corruption risks and vulnerabilities across Government.

NACC JURISDICTION

'serious' or 'systemic' 'corrupt conduct' by 'public officials', including:

- Commonwealth ministers;
- public servants;
- statutory office holders;
- Commonwealth entities and companies;
- parliamentarians and their staff; and
- government contractors.

NACC – ‘CORRUPT CONDUCT’

- ‘corrupt conduct’- s8.
- ‘corruption issue’ - s9.
- ‘serious’.
- ‘systemic’.
- corrupt conduct that predates commencement of the Act.



NACC POWERS

- Retrospectivity.
- Ability to receive complaints and referrals from any source, including the public.
- Provision for mandatory referrals to the NACC.
- Investigate on own motion.
- Invasive investigation powers.
- Private hearings unless 'exceptional circumstances' exist and in public interest held publicly.
- Safeguards and whistleblower protections.
- Publication of reports and findings.
- Powers to refer conduct.

NACC – SUGGESTED STEPS TO TAKE

- Risk assessment and review of controls in light of assessment (noting retrospective reach of NACC).
- Raising awareness of NACC.
- Anti-corruption training.
- Review of policies and procedures and development of new policies and procedures to account for NACC processes.
- Review of anti-bribery and corruption contractual clauses.

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