

# CREATING A FEDERAL ANTI-CORRUPTION COMMISSION: WHAT DOES IT MEAN FOR AUSTRALIAN BUSINESS?

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Legal Briefings

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Promised by the new Labor government to be “powerful, transparent and independent” with extraordinarily wide powers granted to royal commissions, what impact will the federal Anti-Corruption Commission have on business?

## KEY TAKEAWAYS

Labor is hoping the Commission will be up and running by mid-2023.

The Commission will have:

- a broad jurisdiction to investigate matters before or after its establishment; and
- the power to hold public hearings and make findings of fact, including a finding of corrupt conduct.

For businesses involved with the Commonwealth and its agencies, the Commission’s functions may lead to:

- staff making allegations and being compelled to give evidence and provide documents;
- company premises being searched;
- commercially sensitive information being made public; and
- adverse findings made against a business / its staff and information gathered by the Commission being passed onto other regulators.

There are nonetheless likely to be safeguards and protections enshrined in the Commission's establishing legislation.

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## LABOR'S PLAN FOR A FEDERAL ANTI-CORRUPTION COMMISSION

Labor has won the 2022 federal election. One of Labor's election policies is to introduce a National Anti-Corruption Commission. During the election campaign, Labor promised that any Commission created would be "real", and a "powerful, transparent and independent" Commission. Labor has promised that a Commission will be established before the end of the year. Attorney-General Mark Dreyfus is setting up a taskforce to deliver on Labor's "paramount objective" and is hoping the Commission will be up and running by mid-2023.

While the Commission's jurisdiction will focus on the federal political sphere and public sector, the introduction of a Commission also will have clear implications for business and corporate Australia.

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## FOCUS ON LIKELY POWERS FOR A COMMISSION

The types of broad powers that may be given to a Commission will have wide implications. Attorney-General Mark Dreyfus has said the federal Commission will have powers of a royal commission. These may include:

- **Potential retrospective investigations**, which could be commenced at the Commissioner's discretion, including from serious and systemic corruption (including pork barrelling).

- **The ability to receive public referrals**, and for members of the public to provide information and make allegations regarding corrupt conduct.
- Invasive investigation powers, to:
  - Compel the production of information and documents;
  - Compel a person to give evidence, and to answer questions and produce documents; and
  - Issue search warrants for premises and persons. The extent to which privilege claims can be made will need to be carefully considered.
- **Public hearings** where in the public interest which may ventilate confidential or commercially sensitive information, including submissions made to those hearings (subject to potential exceptions).
- **Publication of reports and findings** of corrupt conduct, which would be publicly available.
- **Powers to refer** conduct to prosecutors or relevant regulators, increasingly the likelihood of subsequent criminal or civil penalty enforcement proceedings.

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## HOW A FEDERAL ANTI-CORRUPTION COMMISSION MAY AFFECT BUSINESS

### **Examples of State Anti-Corruption Commissions involving business**

The work of state anti-corruption commissions has shown how companies of all sizes, large and small, can be involved.

#### **From NSW ICAC:**

- An investigation into corruption at an NGO that was in receipt of public money.
- The investigation into alleged dishonestly obtained financial benefits from falsely charged security services at a university.

Both of these involved extensive records being sought from private companies.

#### **From IBAC in Victoria:**

- An investigation into a local council for alleged favouritism towards developers, involving records being sought from the developers.

While investigations and hearings will need to relate to the public sector (including companies contracting with the Commonwealth and its agencies), the Commission's inquiries will naturally extend to any private actors and businesses that are involved in alleged misconduct.

Businesses and executives need to be alert to the likely powers of a Commission and the increasing spotlight that will be on government interactions and dealings.

Examples of how a Commission may affect business include:

- **Staff can provide information and make allegations:** Where the Commonwealth engages or otherwise works or is involved in some way with a commercial entity, the staff of that company can make an allegation and provide information to the Commission.
- **Staff can be compelled to give evidence and provide documents:** Similarly, where the Commonwealth engages or otherwise works or is involved in some way with a commercial entity, the staff of that company can be compelled to appear at public hearings with no privilege or confidentiality protection.
- **Company premises and persons can be searched:** The search warrant powers may allow Commissioners to authorise the search of company premises and persons to the extent relevant to its investigation.
- **Confidential and commercially sensitive matters made public:** It is possible that commercially sensitive and confidential matters could be ventilated in public hearings and such matters be published in reports prepared by the Commission. The ability to claim privilege over materials and communications under the final model should also be carefully monitored.
- **Adverse findings / reputational risk:** A

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## MODELS FOR A FEDERAL ANTI-CORRUPTION COMMISSION

report or other disclosure by the Commission may make findings of corrupt conduct, or other adverse findings or opinions against a commercial entity and its staff.

- **Evidence provided to CDPP or regulators:** Labor has indicated that evidence obtained in the course of an investigation of an offence must be provided to the CDPP. Under the Haines model, the same applies to a contravention of a civil penalty provision, including presumably in respect of a commercial entity.

#### **Labor's design principles for a Commission - what to expect**

- Broad jurisdiction to investigate.
- Discretion to commence inquiries into serious and systemic corruption on its own initiative or in response to referrals.
- Overseen by a statutory, bipartisan Joint Standing Committee of the Parliament.
- Power to investigate allegations of serious and systemic corruption that occurred before or after its establishment.
- Power to hold public hearings where the Commission determines it is in the public interest to do so.
- Empowered to make findings of fact, including a finding of corrupt conduct, but not to make determinations of criminal liability.
- Operate with procedural fairness and its findings would be subject to judicial review.

- The Coalition's draft model will not be

adopted.

- Labor has identified seven “design principles” to guide future legislation but has no detailed draft legislation.
- The only other detailed model was proposed by independent MP Helen Haines. Labor has indicated that their bill will “share many of the features” of the Haines model.
- Legislation could be introduced relatively quickly if modelled closely on the Haines model.

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## CREATING THE FEDERAL ANTI-CORRUPTION COMMISSION

- While Labor has a majority of seats in the House of Representatives, it lacks a majority in the Senate.
- Labor will need to rely on the Greens, and either David Pocock, or the Jacqui Lambie Network, to enact legislation creating a National Anti-Corruption Commission.
- The Greens and David Pocock, have indicated a willingness to pass the Haines model, and the Greens have also stated a willingness to fast track any Labor proposal that is “able to hold public hearings, act on anonymous tip-offs and investigate historical matters.”
- The Greens have previously proposed their own model, which passed the Senate in September 2019 with the vote of Jacqui

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## POTENTIAL SAFEGUARDS AND PROTECTIONS

Balanced against these types of powers, legislation is also likely to enshrine some safeguards and protections. To the extent the Labor model is similar to / based on the Haines model, these may include:

Lambie. It is very similar to the model proposed by Helen Haines.

- **Exclusion of sensitive information:** The Commissioner likely will have discretion to exclude sensitive information, including privileged, commercially sensitive and confidential information from a report or disclosure. The Commissioner will also likely have the discretion to conduct hearings in private where appropriate to do so.
- **Opportunity to be heard:** It is likely that critical findings or opinions will not be disclosed without the affected person having the opportunity to be heard and make submissions.
- **Exoneration:** It is possible that the Commissioner will have to report that any critical finding or opinion tested in a public hearing was not made out or established.
- **Self-incrimination:** A person is unlikely to be excused from giving information or documents if doing so would tend to incriminate the person, but information or documents are likely to be inadmissible in a criminal proceeding against that person, with some exceptions.
- **No criminal liability:** Labor has indicated that the Commission will not make findings of criminal liability (although conduct can be referred for potential criminal prosecution).
- **Judicial review:** Labor has indicated that the Commission would operate with procedural fairness and its findings would be subject to judicial review.

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## CONCLUDING THOUGHTS

As the new Labor government moves to deliver on its election commitment to legislate for a federal Anti-corruption Commission before the end of 2022, there will be much scrutiny over the model and finer details of how the Commission will operate. This briefing has highlighted some areas for business to watch as details of the final model are released.

Other key areas to consider include the broader implications that a Commission will have for the integrity landscape in Australia.



The Commission's existence, and power to directly receive referrals and complaints, including from whistleblowers and members of the public, is likely to have wider ramifications for the disclosure and reporting of misconduct generally. It will send an important signal encouraging disclosure of misconduct, reinforcing the trend that has been in place since the introduction of refreshed whistleblowing laws, and provide an additional contact point and pathway for information and allegations to be disclosed to external authorities.

Businesses should also closely monitor whether the Commission is expressly given a corruption prevention or educative function.

At the state level, one of the key contributions that state integrity bodies have made has been to identify lessons from their work, and to produce and promote materials that are widely available across the public and private sectors.

These types of resources have added to the toolkits available to companies as they consider what corruption risks may be relevant in their operating context, and steps that can be taken to assist in mitigating those risks and to promote a robust commitment to anti-corruption compliance.

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