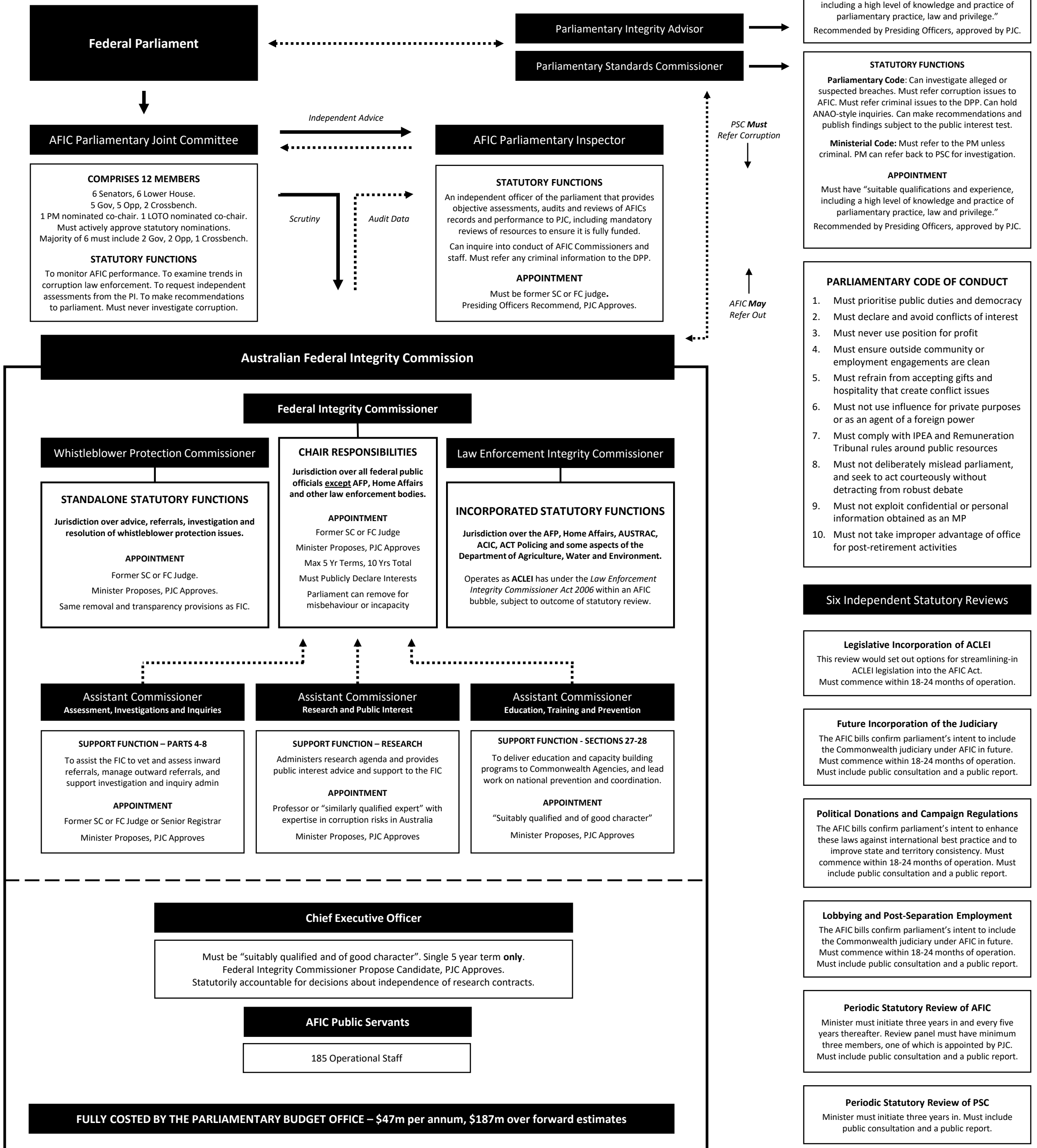


THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

PARLIAMENTARY OVERSIGHT, STATUTORY APPOINTMENTS AND REVIEWS

OFFICE OF DR HELEN HAINES MP



THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

NON-INVESTIGATORY FUNCTIONS AND MANAGING REFERRALS

OFFICE OF DR HELEN HAINES MP

PRACTICAL DEFINITION OF CORRUPT CONDUCT

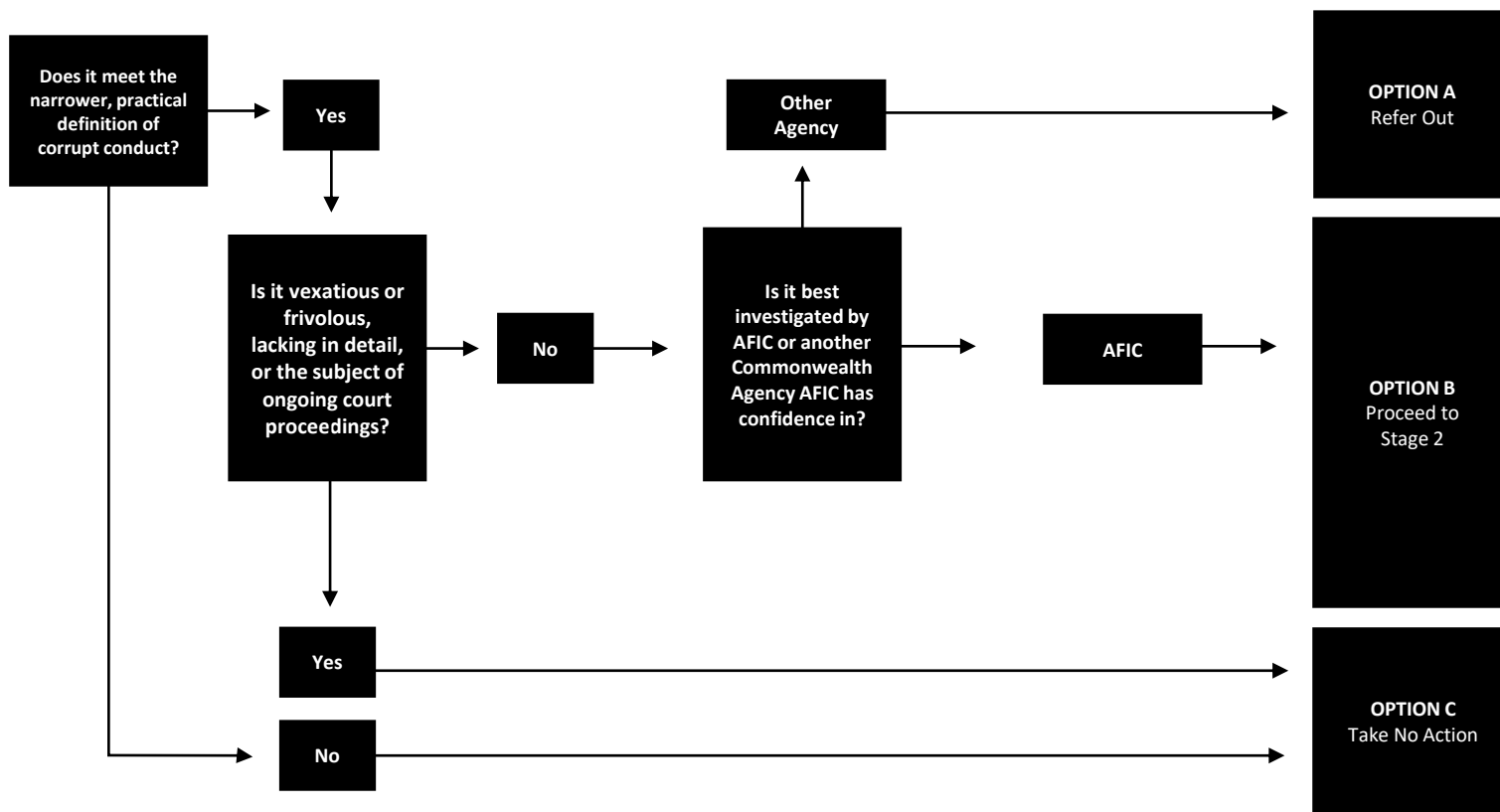
'THE INVESTIGATORY FUNCTION'

STAGE ONE – REFERRALS

Any person can refer an allegation or information to AFIC that raises a corruption or whistleblower protection issue. The referral can be anonymous, in a personal capacity or on behalf of an organisation. It can be orally or in writing in first instance. For the purpose of vetting voluminous public referrals, AFIC can also request (but not require) additional information, such as relationship to the conduct.

All public officials are obligated to refer information that raises a corruption issue to AFIC, unless they believe AFIC already knows of it.

AFIC MUST MAKE A DECISION ON ALL REFERRALS



CONSIDERATIONS AT REFERRAL STAGE

The AFIC Act would require the Federal Integrity Commissioner to consider additional contextual factors on balance when making a decision on each referral. This includes the likely significance of the matter for the relevant agency, the need to protect the identity or safety of a person involved in the matter. AFIC can also request more information from a referrer before it makes a decision, and can choose to proceed with matters jointly if prudent to do so.

The Federal Integrity Commissioner, supported by the Assistant Commissioner for Assessment, Investigations and Inquiries, must make a decision about each referrals and record reasons for its decision, which must be made available to the referrer.

REFERRING OUT

Depending on its assessment of the capacity of the agency to manage the referral, AFIC can:

- ✓ Passively monitor the agency's investigation of the issue
- ✓ Provide ongoing advice to the agency on corruption handling best practice as it investigates the issue
- ✓ Actively manage or oversee the agency's internal investigation of the issue, and refer it back to AFIC if there are major failings

WHISTLEBLOWER PROTECTION ISSUE REFERRALS

The Whistleblower Protection Commissioner (WPC) will follow the same decision tree for **whistleblower protection issues** defined:-

- *an act or omission constituting reprisal or victimisation or which causes detriment to any person, as a result of that person or any other person making a disclosure of wrongdoing*

OR

- *a failure of any person or body to fulfil whistleblower protection responsibilities in respect of a disclosure of wrongdoing, in circumstances where the failure has led, will lead or is likely to lead to detriment or harm to any person*

Should the WPC arrive at Option B, it will proceed through Stage 2 in the same manner as the Federal Integrity Commissioner.

BROAD DEFINITION OF CORRUPT CONDUCT

'THE 5 NON-INVESTIGATORY FUNCTIONS'

AGENCY ANTI-CORRUPTION PLANS

Every two years, every Commonwealth Agency must prepare a plan to "protect and enhance integrity" and prevent corruption issues for the next four years.

AFIC can request that plan at any time, publicly assess it, recommend improvements or critique the agency for failing to implement past recommendations.

EDUCATION, TRAINING AND ADVICE

Every Commonwealth Agency is required to ensure its staff are given "appropriate education and training relating to ethical conduct, corruption risk and the prevention of corrupt conduct."

AFIC must develop and spearhead a sector-wide strategy to ensure all Commonwealth Agencies have the resources and capability to deliver this.

RESEARCH AND INTELLIGENCE

AFIC must undertake or procure high quality Australia-specific research to support its work including on:

- The **promotion of integrity** and ethical conduct
- The **incidence and prevention** of corruption
- The efficacy of **detection** and intervention measures
- The **risk** of and enabling conditions for corruption
- The efficacy of **continuous improvement** measures

AFIC must develop this in consultation with the Australian Institute of Criminology and ACIC. The research can only be outsourced to apolitical providers.

AFIC should also ensure it collects comprehensive data on its internal operations, referrals, etc. as inputs

COMMONWEALTH COOPERATION

AFIC must provide leadership to other Commonwealth Agencies responsible for integrity issues, and develop a nationally streamlined approach to the prevention, detection, reduction and remediation of corruption to the highest possible standard.

AFIC must assemble a Commonwealth Coordination Committee ('CCC') which must be non-political and meet at least twice a year to progress this agenda.

NATIONAL INTEGRITY PLAN

The Minister must, in consultation with AFIC and other stakeholders, publish a NIP every four years that :

- Prioritises corruption issues and risks that the research shows are the most prominent
- Sets out the mechanisms to mitigate those risks
- Involves state and territory governments, the business sector and the wider community
- Any evidence-based policy or law reform agendas

At a minimum, the NIP must look at major procurements and grant program, conflicts of interest risks, law enforcement, the regulation of industry and commerce, border crimes and electoral integrity.

THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

INVESTIGATORY PROCESSES, POWERS AND SAFEGUARDS

OFFICE OF DR HELEN HAINES MP

PRACTICAL DEFINITION OF CORRUPT CONDUCT

'THE INVESTIGATORY FUNCTION' CONTINUED...

STAGE TWO – INVESTIGATION AND INQUIRY

INVESTIGATING A SPECIFIC CASE "IN ITS OWN RIGHT"

Once vetted, AFIC can use its powers to investigate a specific case and make corresponding recommendations. These powers are not automatic and have clear safeguards:

- ✓ **An enshrined opportunity to be heard** – If AFIC has an opinion or finding that is critical of a person or agency, that opinion or finding is **preliminary** until that person or agency until there is an opportunity to provide a written statement and appear before AFIC and make oral submissions with legal representation.
- ✓ **Opportunities for public and private hearings** – AFIC can hold hearings in public or private. It must only hold hearings in public if it meets a **public interest test**. The Federal Integrity Commissioner must consider the public interest test for each individual hearing. Thus, the opportunity for private hearings is much higher in the earlier stages of an investigation where personal reputation or prejudice risks may be higher. The **public interest test** will be stipulated in the Act as:
 1. The type of corruption issue or risk at hand is 'serious' and/or 'systemic' , **AND**
 2. That view is defensible based on objective research evidence and advice , **AND**
 3. The holding of a public hearing is, on balance, more compelling than any countervailing personal reputation or prejudice risks
- ✓ **All persons asked to appear before AFIC can request to have a private hearing, based on the public interest test above, in a private pre-hearing with the FIC**
- ✓ **Compelling specific documents or items** – The Federal Integrity Commissioner can issue signed notices that require a person or organisation to produce a specific document or item that relate to the investigation. There are criminal penalties for non-compliance, unless performance is not possible. Recipients can only claim legal professional privilege if the document or item involves legal communication related to the AFIC matter at hand. Notices to produce can be **confidential**.
- ✓ **Compelling persons to give evidence** – The Federal Integrity Commissioner can issue signed notices that require a person to attend a hearing and give evidence. That person can request to give evidence in private, and call on the Federal Integrity Commissioner to revisit the public interest test. Those compelled can only claim legal professional privilege if the evidence involves legal communication related to the AFIC matter at hand. Notices to appear can be **confidential**.
- ✓ **Witness protections** – Witnesses have the same protections afforded to witnesses in the High Court. Witnesses can also request specific persons not attend the hearing room while giving evidence. The bill also gives the example of witnesses, such as junior staff, who were wholly subordinate to a person engaged in corrupt conduct as a compelling example of a situation where risk to personal reputation is high if a public hearing were to be held.
- ✓ **Holding hearings outside of Australia** – If Australia has a bilateral agreement with that country allowing AFIC to do so.
- ✓ **Issuing search warrants and powers of arrest** - AFIC can work with AFP officers (or another suitably-qualified persons if the AFP is the subject of the investigation) to apply for search and arrest warrants from a relevant court if there is a reasonable suspicion evidence will be concealed, lost, mutilated, or destroyed in the next 72 hours. Broad criminal procedure safeguards apply to the use of this power, including limitations to the reasonable use of force to enter a property and special provisions about the handling of seized electronic materials, for example.
- ✓ **Mandatory referrals of criminality** – Conduct that could amount to a criminal offence is only one part of the working definition of corrupt conduct for the purposes of AFIC investigations and inquiries. Should AFIC comes across evidence of criminality, wrongful conviction or the proceeds of crime in an investigation or hearing, it must hand it over to the DPP or relevant prosecuting authority.

Beyond decisions to hold public hearings, these suite of powers available to the Federal Integrity Commissioner must always be used on balance, with an overall focus on dedicating its resources and attention to serious and systemic corruption issues, and obtaining the necessary information to make rigorous findings and recommendations.

INVESTIGATING SYSTEMIC ISSUES THROUGH PUBLIC INQUIRIES

AFIC can hold a broader public inquiries, including a public submissions process, into major corruption issues, risks or themes. A public inquiry may involve a specific case or number of specific cases, or may involve no specific cases and instead deal with broader systems and processes. The purpose of a public inquiry is to arrive at a set of future-facing policy or law reform recommendations that improve integrity in federal public administration.

- ✓ **AFIC can only undertake a public inquiry if it meets a public interest test**. This test will be framed in the Act as follows:
 1. The type of corruption issue/s or risk/s to be considered are 'serious' or 'systemic' , **AND**
 2. That view is defensible based on objective research evidence , **AND**
 3. Without limiting retrospectivity, the holding of the inquiry is for the purpose of reducing the likelihood of current and/or future corruption , **AND**
 4. Taking the above into account, the holding of a public hearing is, on balance, more compelling than any countervailing personal reputation or prejudice risks

Either House of Parliament can request that AFIC undertake an inquiry into a particular corruption issue. AFIC is not required to proceed, however, if it determines that it does not meet the public interest test for public inquiries.

THE AUSTRALIAN FEDERAL INTEGRITY COMMISSION BILLS

FINDINGS AND REPORTING, THE DUAL DEFINITIONS OF CORRUPT CONDUCT

OFFICE OF DR HELEN HAINES MP

PRACTICAL DEFINITION OF CORRUPT CONDUCT

'THE INVESTIGATORY FUNCTION' CONT.

STAGE THREE – FINDINGS AND REPORTING

REPORTING ON AFIC-LED INVESTIGATIONS

AFIC must prepare a report at the end of an investigation setting out:

- ✓ AFICs justification for proceeding with the investigation
- ✓ AFICs findings in relation to the corruption issue at hand
- ✓ Evidence upon which those findings are based
- ✓ Any recommended actions AFIC makes based on those findings, including:
 - Actions to mitigate the immediate impacts of the corrupt conduct
 - Adoption of new policies to prevent similar corrupt conduct in future
 - Termination of employment or performance management of specific individuals
 - Referral of information or the matter at-large to the DPP or other bodies

AFIC must again visit the **public interest test** when deciding whether to publicly disclose personal information in these reports.

REPORTING ON AFIC-LED INQUIRIES

AFIC must prepare a report at the end of the public inquiry that includes recommendations designed to limit ongoing or future issues.

AFIC must give the report to the Minister, who must table the report in Houses at the parliamentary next sitting.

REPORTING ON REFERRED-OUT INVESTIGATIONS

The Commonwealth Agency to whom AFIC referred the matter to must prepare a report, which may include recommendations.

The Commonwealth Agency is also required to give AFIC an opportunity to comment on the report before it is finalised.

Protecting Sensitive Information

*These reports must not contain "sensitive personal information" that could endanger a person's life, compromise other corruption investigations, compromise court proceedings, compromise national security, expose protected cabinet deliberations, or amount to "an **unreasonable disclosure of personal affairs** or an unreasonable disclosure of confidential commercial information".*

The interpretation of "unreasonable disclosure of personal affairs" uses the same "public interest test" for public and private hearings.

The presence of sensitive information in an investigation or inquiry should not limit AFICs ability to undertake that investigation or inquiry, and make subsequent findings. If need be, AFIC can present the Minister with a confidential Supplementary Report with sensitive information.

THE DUAL DEFINITIONS OF CORRUPT CONDUCT

THE BROAD DEFINITION: EDUCATION, TRAINING, PREVENTION, POLICY AND RESEARCH

Any conduct, by any person, that:

adversely affects the honest or impartial exercise of Parliament, a commonwealth agency, or public official/s function/s involves or is intended to induce a public official to put private interests over the public good in their official duties involves or could impair the efficacy and probity of an exercise of an official function, or public administration, by a public official

Any conduct, by any public official, that:

constitutes or involves the dishonest or impartial exercise of official functions
constitutes or involves breach of public trust
constitutes or involves abusing public office
constitutes or involves misuse of official information for private benefit – be it for themselves or another person

It includes conduct that occurred before the Act commenced.

For the avoidance of doubt, the broad definition definitely includes:

Official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition); conduct constituting an offence against section 142.2 of the Criminal Code (abuse of public office); bribery; blackmail; obtaining or offering secret commissions; fraud; theft; perverting the course of justice; embezzlement; election bribery; election funding offences; election fraud; treating; tax evasion; revenue evasion; currency violations; illegal drug dealings; illegal gambling; obtaining financial benefit by vice engaged in by others; bankruptcy and company violations; harbouring criminals; forgery; homicide or violence; collusive tendering; impropriety in government procurement; breaches of lobbying codes of conduct; and matters of the same or similar nature to the above, including any conspiracy or attempts in relation to the above.

THE PRACTICAL DEFINITION: INVESTIGATION AND INQUIRIES

Any conduct that:

1. Meets the broad definition of corrupt conduct

AND

2. Could also constitute or involve:
 - a. A criminal offence or an act giving rise to civil liability
 - b. A disciplinary offence
 - c. Reasonable grounds for dismissal or termination
 - d. A substantial breach of a code of conduct

The reference to 'criminal offence' in subsection 2(a) is not intended to replace any criminal jurisdiction. AFIC has a positive duty to hand over any information that suggests criminality, wrongful conviction or the presence of proceeds of crime to the DPP for investigation. A subsequent criminal conviction does not preclude AFIC from also finding the presence of 'corrupt conduct' under this definition for the purpose of AFICs statutory responsibility to investigate and resolve all manner of serious corrupt conduct in federal public administration.