

National Anti-Corruption Commission BRIEF LG – Inspector Inquiry – Robodebt Referrals

SB24-000034

Inspector’s Inquiry into the Commission’s decision not to Investigate the referrals from the Robodebt Royal Commission (RRC).

Background into the Scheme

- The Royal Commission into the Robodebt Scheme was established by Letters Patent on 18 August 2022 under the *Royal Commissions Act 1902* (Cth) to inquire into the Robodebt Scheme (the Scheme). Catherine Holmes AC SC was appointed Royal Commissioner.
- The Scheme was a proposal developed by the Department of Human Services (DHS). It was designed to recover overpayments from welfare recipients in the financial year 2010-11 and relied on a process known as “income averaging” to assess income and entitlement to benefit.
- The RRC inquired into how, by whom and why the scheme was established, designed, implemented; how risks and concerns in relation to it were dealt with and how complaints and challenges were managed by the Government; the use of third-party debt collectors; and the effects of the scheme – human and economic.
- The Royal Commissioner was asked to provide a report of the results of her inquiry and recommendations by no later than 18 April 2023 but having regard to the number of issues which emerged, the extent of the evidence requiring consideration and delays in the production of that evidence, that date was extended to 30 June 2023.
- It was then extended again until 7 July 2023, to allow for a referral of 6 individuals to the Commission.

Chronology of the Robodebt Inquiry

Date	Key decision, meeting or activity
6 July 2023	The Commission took receipt of the referrals from the Robodebt Royal Commission (Royal Commission), including the Confidential Chapter and directions not to publish certain material.
10 August 2023	The Commission’s Legal team provided advice in relation to whether the conduct described in the Confidential Chapter could be captured by the definition of corrupt conduct in s 8 of the NACC Act.
19 October 2023	The referrals were considered at the NACC Senior Assessment Panel (NSAP)
28 March 2024	A Deputy Commissioner provided an updated memorandum delving into one individual referred to the Commission.
16 April 2024	A decision was recorded by the delegated Deputy Commissioner to take no further action pursuant to s 41(6) of the NACC Act.
6 June 2024	The Commission released a public statement regarding the decision not to investigate the Robodebt Royal Commission referrals.
12 June 2024	The Inspector of the NACC advised that she had received around 900 complaints about the decision not to investigate.
13 June 2024	The Inspector issued the following media release:

	<p><i>The Inspector of the National Anti-Corruption Commission, Ms Gail Furness SC, has received nearly 900 individual complaints about the decision by the National Anti-Corruption Commission not to commence a corruption investigation into the referrals concerning six public officials from the Royal Commission into the Robodebt Scheme.</i></p> <p><i>Ms Furness SC said "Many of those complaints allege corrupt conduct or maladministration by the NACC in making that decision."</i></p> <p><i>"I also note that there has also been much public commentary. Accordingly, I have decided to inquire into that decision. I anticipate that I will make my findings public, in due course."</i></p> <p><i>"Information about my role, including the powers I have and how I can deal with complaints, is available on my website."</i></p>
14 June 2024	The Inspector sought documents from the Commission to assist in her Inquiry. The inspector advised that the number of complaints had increased to more than 1200.
27 June 2024	The Inspector provided the terms of reference of her Inquiry.
19 July 2024	The Commission provided the Inspector material in response to her request.
13 August 2024	The Commission provided the Inspector with the first set of submissions.
15 August 2024	The Inspector provided the Commission with the 1200+ complaints her office received.
21 August 2024	The Commission provided the Inspector with further material in response to her request.
13 September 2024	The APSC released the findings of the Centralised Code of Conduct Inquiry Taskforce into Robodebt.
26 September 2024	<p>The Inspector issued the following media release:</p> <p><i>The Inspector has received many inquiries as to the progress of her inquiry from the media and the public.</i></p> <p><i>The Inspector is conducting an investigation under section 184(1)(e) of the National Anti-Corruption Commission Act 2022 into the decision by the National Anti-Corruption Commission not to investigate the referrals from the Robodebt Royal Commission.</i></p> <p><i>Between June and August 2024, the National Anti-Corruption Commission provided the Inspector with documents the Inspector had requested. On 3 September 2024, the Inspector asked the National Anti-Corruption Commission to provide submissions on a range of specified matters.</i></p> <p><i>The National Anti-Corruption Commission has advised that it anticipates that it will provide those submissions by 21 October 2024.</i></p>

	<p><i>When the Inspector completes her investigation, she will prepare a report as provided for in Part 10, Division 4, Subdivision B of the National Anti-Corruption Commission Act 2022.</i></p>
8 October 2024	The Commission provided the Inspector’s office with the first tranche of further submissions.
11 October 2024	The Inspector made a request for further information arising from the first tranche of further submissions.
17 October 2024	The Commission provided a response to the Inspector’s request for further information.
21 October 2024	The Commission provided the Inspector’s office with the second and finale tranche of further submissions.
30 October 2024	<p>The Inspector publishes her report “Report into the National Anti-Corruption Commission’s decision not to investigate referrals from the Royal Commission into the Robodebt Scheme”, prefaced with the following:</p> <p><i>The Inspector of the National Anti-Corruption Commission has concluded her investigation into agency maladministration or officer misconduct in relation to the decision of the National Anti-Corruption Commission not to investigate the referrals of six persons from the Royal Commission into the Robodebt Scheme. The main issue which emerged from the material gathered during the investigation, was the actions taken by the NACC Commissioner following his declaration of a conflict of interest in relation to one of the referred persons.</i></p>
30 October 2024	The Commission issues a media release saying that it has decided to have an independent eminent person reconsider its decision not to investigate the Robodebt referrals (Attachment A).
30 October 2024	<p>The Attorney General published the following statement:</p> <p><i>The Inspector of the National Anti-Corruption Commission, Ms Gail Furness SC, has published the Report of her investigation into the National Anti-Corruption Commission’s (NACC) decision not to investigate referrals from the Royal Commission into the Robodebt Scheme. The Inspector made one recommendation in her report. The NACC has accepted the recommendation and will have the decision remade by an appropriate person. The Government legislated the NACC to be strong and independent with a broad jurisdiction to investigate corruption of public officials. By design the NACC is subject to robust and independent oversight, including through the establishment of the Inspector of the NACC. I thank the Inspector for her report. The Government will continue to support the NACC as it undertakes its important work to deter, detect and prevent corrupt conduct across the Commonwealth public sector.</i></p>

Engagement of Australian Government Solicitor (AGS)

- The Commission engaged the AGS to provide assistance with our response to the Inspector.
- Direct Engagement with Counsel (comprising of AGS and private bar):
 - Senior Counsel – 5 July 2024
 - Junior Counsel (Private Bar) – 4 July 2024
 - Junior Counsel – 10 July 2024
- Briefing AGS as Instructors – 9 September 2024

FOI

- As at 1 November 2024, the Commission has received 11 FOIs relating to the Inspector's Inquiry and the Robodebt referrals.

Re-consideration of referral decision

- The Commission has decided to have an independent reconsideration of its decision relating to the Robodebt referrals (see **Attachment A**).
- To ensure public confidence in the process, the Commission is appointing an eminent person to carry out an independent assessment about whether, or how, to deal with the Robodebt Royal Commission referrals.
- In these circumstances, it is not appropriate for the Commission to comment on the original decision.

Lessons Learnt

- In addition to the reconsideration decision, the Commission is continuing to focus, through our investigation, inquiry and corruption prevention and education functions, on addressing the integrity issues raised by the Royal Commission.
- The Commissioner has spoken regularly on the lessons learnt from Robodebt at public events since he began his term.¹
- Informed by the Robodebt Royal Commission, one of the Commission's three corruption prevention and education priorities for this year is ethical decision making, focussed on senior decision-makers. As a result, the Commission developed an ethical decision-making workshop held in July 2024. The Commission invited speakers with diverse and relevant backgrounds to facilitate discussion around ethical decisions and practices relevant to the Australian Public Service (APS). Topics explored included recordkeeping; tone at the top and responsiveness to Ministers and

¹ ACT Government Lawyers' conference on 11 August 2023; At 'The Mandarin' Conference on 22 February 2024; Law Council of Australia address on 23 February 2024, Clayton Utz address on 29 February 2024.
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central agencies; embedding a culture of legality and seeking legal advice; and artificial intelligence (AI) and automated decision making.

- Additionally, two of the Commission’s six strategic corruption priorities (the areas to which priority of effort is given in investigations) include senior executive decision-making, and corruption affecting vulnerable people.

Cleared by: s 22 - irrelevant information	Cleared date: 5/11/2024	Action officer: s 22 - irrelevant information
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Wednesday, 30 October 2024

NACC to reconsider decision not to investigate Robodebt referrals

The National Anti-Corruption Commission has decided to have an independent eminent person reconsider its decision not to investigate the Robodebt Royal Commission referrals.

With the release today of the Report of the Inspector, the Commission can now announce that it is appointing an independent person, who will decide whether or not the Commission should investigate the Robodebt referrals.

In the course of the Inspector's investigation of the Commission's decision, the Inspector provided to the Commission an opinion of a retired judge who found there had been a mistake of law or fact in the process by which its original decision was made.

The mistake involved a misapprehension by the Commissioner of the extent to which a perceived conflict of interest required him to be isolated from the decision-making process. The opinion was to the effect that the Commissioner's participation in some parts of the process meant the decision was affected by apprehended bias.

Apprehended bias means that a reasonable observer *might* think that the Commission's decision *might* not be impartial. In other words, the Commissioner's participation in some steps in the process meant that a reasonable observer could possibly think that the Commission's decision could possibly not be impartial.

The Commission decided, without waiting for the conclusion of the Inspector's investigation, that that possibility required in the public interest that its decision be independently reconsidered, as the Inspector had foreshadowed recommending. The Commission is in the process of engaging such a person.

The Inspector's Report contains no suggestion of actual bias and no finding of intentional wrongdoing or other impropriety. It expressly makes no criticism of the Deputy Commissioner who made the decision under delegation.

Under the NACC Act, any mistake of law or fact falls within the definition of 'officer misconduct'. The definition captures a very wide scope of conduct, including some which would not usually be called 'misconduct'. In this case, the finding of 'officer misconduct' is not a finding of wrongdoing, it is a finding of 'conduct that is not unlawful but arose from a mistake of law or fact', which the Inspector describes as 'an error of judgment'.

The Robodebt Royal Commission referrals were received in the first week of the Commission's existence, while it was establishing processes, policies and procedures for its work generally. The referrals required the Commission to consider several legal questions for the first time, including the scope of its jurisdiction and in particular the meaning of 'corrupt conduct' under the NACC Act. These were matters for which the Commissioner had ultimate responsibility.

The Commissioner declared, immediately and repeatedly, that he had a perceived (not actual) conflict of interest, arising from a prior professional, not personal, relationship with one of the referred persons. The Commissioner and that individual have never socialised other than at official functions, nor visited each other's homes.

There was a fine balance to be struck between the Commissioner's responsibility for, and involvement in, managing the affairs of the Commission and issues that would have lasting implications for it on the one hand, and on the other, avoiding the perception that a prior professional relationship with one of the referred persons might influence the decision.

The Commissioner considered that having regard to the nature of the relationship, the decision to be made (which was whether to open an investigation, not whether to make a finding of corrupt conduct), and the status of the delegate (who was given no direction as to the outcome and whose employment could not be affected by the Commissioner), an appropriate balance could be achieved by delegating the decision to an experienced Deputy Commissioner, and by excusing himself from the meeting when the decision was to be made so that it could be reached freely in his absence.

The Commissioner accepts that his judgment in this respect has been found to be mistaken and takes sole responsibility for the mistake. He said:

Mistakes of law or fact are a professional inevitability for judges, tribunal members and administrative decision-makers. Throughout my judicial career I

was, like every other judge, from time to time reversed on appeal for a mistake of law or fact. As an appellate judge, I often found that judges of unquestioned competence, skill and integrity had made a mistake of law or fact. Our system requires that we accept such findings, even when we don't entirely agree with them. This is no different. Mistakes are always regrettable, but the most important thing is that they be put right. This mistake will be rectified by having the decision reconsidered by an independent eminent person. Meanwhile, the Commission is focused on its 29 current corruption investigations and 31 preliminary investigations.

The Commission will provide further information when the appointment of the independent eminent person has been finalised.