

Report to the Inspector of National Anti-Corruption Commission on the decision by the National Anti-Corruption Commissioner to take no action on the referrals from the Royal Commission into the Robodebt Scheme Royal Commissioner

Report by the Hon Alan Robertson SC

Introduction

1. On 6 July 2023, the National Anti-Corruption Commission (**NACC**) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (**RRC**) pursuant to section 6P(2B) of the *Royal Commissions Act 1902* (Cth).
2. By a media statement dated 6 June 2024, the Commission stated that it, the Commission, had decided not to commence a corruption investigation essentially because it would not add value in the public interest.
3. The same media statement said that “In order to avoid any possible perception of a conflict of interest, the Commissioner delegated the decision in this matter to a Deputy Commissioner.”
4. The Inspector of the NACC (**Inspector**), Ms Gail Furness SC, announced on 13 June 2024 that she had decided to inquire into that decision.
5. I am engaged as a consultant under section 194(3) of the *National Anti-Corruption Commission Act 2022* (Cth) to assist in the performance of the functions of the Inspector in respect of that inquiry by the Inspector.
6. Specifically, I am engaged to review the material provided to the Inspector by the NACC, including the NACC’s submissions to the Inspector dated 13 August 2024, and to prepare a Report of my findings of fact in relation to the following:
 - i. In light of the Commissioner’s declared conflict of interest, was the management option chosen appropriate and consistent with law?
 - ii. Were the steps thereafter taken by the Commissioner consistent with the chosen management option and with law?

7. I am also engaged to advise the Inspector of my opinion as to whether the conduct I find to have occurred amounted to “officer misconduct” as defined in section 184(3) of the *National Anti-Corruption Commission Act*.
8. I am not engaged to review the merits of the decision not to commence a corruption investigation.

The statutory provisions

9. The NACC is established by the *National Anti-Corruption Commission Act*.
10. The Inspector’s functions are set out in section 184:

184 Functions of the Inspector

- (1) The Inspector has the following functions:
 - (a) to detect corrupt conduct within, and relating to, the NACC;
 - (b) to undertake preliminary investigations into NACC corruption issues or possible NACC corruption issues;
 - (c) to conduct NACC corruption investigations into NACC corruption issues that could involve corrupt conduct that is serious or systemic;
 - (d) to refer NACC corruption issues to the NACC, Commonwealth agencies and State or Territory government entities;
 - (e) to investigate complaints of agency maladministration or officer misconduct made in relation to the conduct or activities of:
 - (i) the NACC; or
 - (ii) a staff member of the NACC;
 - (f) to audit the operations of the NACC for the purpose of:
 - (i) monitoring compliance with the laws of the Commonwealth; and
 - (ii) detecting agency maladministration and officer misconduct;
 - (g) to make recommendations to the NACC on the outcomes of such audits;
 - (h) to provide relevant information and documents to the Committee;
 - (j) to receive public interest disclosures (within the meaning of the Public Interest Disclosure Act 2013) and to deal with those disclosures;
 - (k) to report, and make recommendations, to both Houses of the Parliament on the results of performing the functions mentioned in paragraphs (a) to (j).
- (2) The Inspector also has such other functions conferred on the Inspector by this Act or by any other Act.
- (3) For the purposes of this section:

agency maladministration means an act or omission engaged in by the NACC that:

- (a) is unlawful conduct; or
- (b) is not unlawful, but:
 - (i) is corrupt conduct; or
 - (ii) is unreasonable, unjust, oppressive or improperly discriminatory in its effect; or
 - (iii) arises, wholly or in part, from improper motives; or
 - (iv) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration; or
 - (v) arises, wholly or in part, from a mistake of law or fact; or
 - (vi) is conduct of a kind for which reasons should have, but have not, been given; or
- (c) is in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

officer misconduct means conduct engaged in by a staff member of the NACC, which, if engaged in by the NACC, would amount to agency maladministration.

- 11. By section 16 there is a National Anti-Corruption Commissioner.
- 12. By section 18 there are up to 3 National Anti-Corruption Deputy Commissioners.
- 13. The functions of a Deputy Commissioner are, by section 19(1):
 - (a) to assist the Commissioner in performing the Commissioner's functions; and
 - (b) any other function conferred on a Deputy Commissioner by this Act or another Act.
- 14. By section 19(2), in performing those functions, a Deputy Commissioner must comply with any directions of the Commissioner.
- 15. By section 17, the Commissioner's functions include: (a) to detect corrupt conduct; (b) to conduct preliminary investigations into corruption issues or possible corruption issues; (c) to conduct corruption investigations into corruption issues that could involve corrupt conduct that is serious or systemic; (d) to report on corruption investigations and public inquiries.
- 16. By section 41(6), the Commissioner may decide to take no action in relation to a corruption issue.
- 17. By section 276, the Commissioner may delegate all or any of the Commissioner's functions, powers or duties to, amongst others, a Deputy Commissioner.

18. By section 276(5), a delegation under section 276 must be in writing and signed by the Commissioner.
19. By section 276(6) in performing or exercising a function, power or duty delegated under subsection (1), the delegate must comply with any directions of the Commissioner.
20. Section 41 is in the following terms:

41 How Commissioner deals with corruption issues

- (1) The Commissioner may deal with a corruption issue in any one or more of the following ways:
 - (a) by investigating the corruption issue;
 - (b) by investigating the corruption issue jointly with a Commonwealth agency or a State or Territory government entity;
 - (c) by referring, for investigation, the corruption issue to a Commonwealth agency to which the corruption issue relates (if the Commissioner is satisfied that the agency has appropriate capabilities to investigate the issue);
 - (d) by referring, for consideration, the corruption issue to a Commonwealth agency or a State or Territory government entity.
- (2) An investigation mentioned in paragraph (1)(a) or (b) is a ***corruption investigation***.
Corruption investigation threshold—serious or systemic corrupt conduct
- (3) The Commissioner may conduct, or continue to conduct, a corruption investigation only if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.

General matters

- (4) Corruption issues may be investigated together.
- (5) The Commissioner may, at any time, reconsider whether or how to deal with a corruption issue.

Commissioner may decide to take no action

- (6) The Commissioner may decide to take no action in relation to a corruption issue.

Commissioner under no duty to consider whether to deal with corruption issue

- (7) The Commissioner does not have a duty to consider whether to deal with a corruption issue under this section, whether the Commissioner is requested to do so by the person who referred the issue or by any other person, or in any other circumstances.

21. By section 266, staff member of the NACC means each of the following:
- (a) the Commissioner;
 - (b) any Deputy Commissioners;
 - (c) the CEO;
 - (d) a member of the staff referred to in section 262;
 - (e) a consultant engaged under section 263;
 - (f) a person referred to in section 264 whose services are made available to the NACC;
 - (g) a legal practitioner appointed under section 265.
22. Section 247 provides:
- 247 Disclosure of interests**
- (1) A disclosure by a NACC Commissioner under section 29 of the PGPA Act (which deals with the duty to disclose interests) must be made to the Minister.
 - (2) Subsection (1) applies in addition to any rules made for the purposes of that section.
 - (3) For the purposes of this Act and the PGPA Act, a NACC Commissioner is taken not to have complied with section 29 of that Act if the NACC Commissioner does not comply with subsection (1) of this section.
23. Section 29 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) provides:
- Duty to disclose interests**
- (1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.
 - (2) The rules may do the following:
 - (a) prescribe circumstances in which subsection (1) does not apply;
 - (b) prescribe how and when an interest must be disclosed;
 - (c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).
24. By section 20 of the *National Anti-Corruption Commission Act* for the purposes of the finance law the NACC is a listed entity. It is therefore a Commonwealth entity by virtue of section 10 of the *PGPA Act*. Thus the Commissioner is an official of a Commonwealth entity within section 29 of the *PGPA Act*.
25. As I set out below, the Commissioner made a disclosure under section 29 of the *PGPA Act* to the Minister, the Attorney-General.

26. In terms of the *PGPA Rules*, relevantly only Rule 16 applies to the Commissioner. The chain of reasoning is as follows. By section 266 of the *National Anti-Corruption Commission Act*, the Commissioner is a staff member of the NACC. He is therefore, by section 10 of the *National Anti-Corruption Commission Act*, a public official. He is not however the “accountable authority”, which by section 20(2)(b) is the CEO of the NACC, nor a member of the accountable authority nor an official who is a member of the accountable authority. Thus Rules 13, 14 and 15 of the *PGPA Rules* do not impose explicit obligations on the Commissioner for the purposes of section 29(2) of the PGPA Act.
27. However, Rule 16 of the *PGPA Rules* applies and provides:

16 Officials who are not the accountable authority or a member of the accountable authority

An official of a Commonwealth entity who:

- (a) is not the accountable authority, or a member of the accountable authority, of the entity; and
- (b) has a material personal interest that relates to the affairs of the entity; must disclose that interest in accordance with any instructions given by the accountable authority of the entity.

The NACC’s policy on conflict of interest

28. The Policies which are next referred to perform the function of setting out the further context specific to the NACC in which that branch of natural justice which concerns conflict of interest operate.
29. The NACC Integrity Policy dated 18 July 2023 and signed by the NACC CEO, Mr Reed, stated, relevantly:

4. Integrity at the NACC

- 4.1 Maintaining high standards of integrity is core to the NACC’s identity and culture, and one way the NACC protects our people, information, assets, and organisational integrity. As a NACC staff member, regardless of your role, you are expected to have a high level of personal integrity and awareness of the critical importance of protecting the NACC’s organisational integrity.

...

5. Integrity risk management

- 5.13 Once the integrity risk report has been assessed, appropriate action to mitigate the risk must be agreed, implemented, and monitored. A record of the agreed outcome must be recorded against the report by the Integrity Officer, even if it

was agreed that no specific action should be taken. Where reasonable action can be taken to mitigate the risk, the staff member must attempt to do so and be supported where appropriate and practicable by their manager.

5.14 Strategies to mitigate or manage risks may include:

- continuing to monitor the risk;
- where appropriate having regard to an employee's duties, delegating or re-assigning work to limit the risk;
- removing the employee from related decision-making processes;
- limiting exposure to the relevant information; and
- reminding the employee of support available, including through the NACC's Employee Assistance Program (<https://www.convergeinternational.com.au/>).

5.15 It is not possible to completely avoid all risks in their entirety. However, all reasonable action must be taken to mitigate the likelihood and impact of integrity risks. Where you can take reasonable action to avoid a risk arising, then you should do so.

30. The NACC's Private Interest, Declarable Association, and Contact Reporting Policy also dated 18 July 2023 states:

1.2 A conflict of interest occurs where there is the possibility a personal interest could influence a staff member while carrying out their duties as an officer of the Commission, and includes:

- Actual conflicts where a direct, material interest exists between duties and personal interests.
- Perceived conflicts where a third party could form the view a conflict exists between duties and personal interests.
- Potential where a staff member has a private interest that could, or may foreseeably, come into conflict with their duties.

...

Declarable Associations

3.6 A declarable association is any association which creates or may give rise to a perceived or real conflict of interest between your private relationships, associations or acquaintances and your position with the NACC.

3.7 There is no standard list of declarable associations. It is your responsibility as a NACC employee to consider relationships that may affect, or be perceived as affecting, the NACC or your role as a staff member of the NACC.

The Commissioner's declarations

31. The Commissioner made four declarations of conflict of interest.

32. The first was recorded in the minutes of the NACC Statutory Office Holders meeting on 3 July 2023.

2.2.4 Robodebt

It was highly possible [the Commissioner] could be conflicted as he knows [Referred Person 1] well. If [ss 46(b) & 47E(d)] is the subject of a referral, then he would not be involved in decision-making concerning [ss 46(b) & 47E(d)].

33. The second was in writing, to the statutory officeholders and [Sections 47F & 47E(c)], by email of 7 July 2023:

Colleagues,

As I have already indicated to most of you, I also have a conflict, relating to one of the six individuals the subject of referrals, namely [Referred Person 1], who is well known to me.

For that reason, DC Rose will be the lead Commissioner on these referrals. I will not be involved in any decisions concerning [Referred Person 1]. However, I will retain an overall interest in the policy questions that arise concerning these referrals generally, because those questions – particular the scope of “corrupt conduct” – will necessarily have ongoing ramifications for us.

34. The third was to the Attorney-General, copied to the other statutory officeholders and the Commission’s Governance Team, on 11 August 2023 declaring material personal interests under s 29 of the *PGPA Act* and section 247 of the *National Anti-Corruption Commission Act*. Relevantly, the letter advised:

As I declared at a meeting of the Statutory Officers of the Commission on 3 July 2023, should a matter potentially affecting the interests of an individual with whom I have had or have a close association, or a unit or agency with which I have an affiliation, come before the Commission, I would recuse myself from decision-making in respect of that matter, and allocate the matter to a Deputy Commissioner, to whom my relevant powers have been delegated.

Relationship with [Referred Person 1]

In particular, as I also declared at the meeting of the Statutory Officers of the Commission on 3 July 2023 (prior to the publication of the report of the Robodebt Royal Commission report), [Referred Person 1] is one of those with whom I have had a close association..., and if [ss 46(b) & 47E(d)] were to be the subject of a referral to the Commission, I would recuse myself from decision-making concerning [ss 46(b) & 47E(d)] and allocate the matter to a Deputy Commissioner.

35. The fourth declaration was at the NACC Senior Assessment Panel (NSAP) on 19 October 2023. The minutes of that meeting were circulated, but never finalised. Notes were also taken. They record that the Commissioner prefaced his discussion of the five public

servants with “discuss others and leave to NR [Deputy Commissioner Rose] to make call”, and concluded it by saying: “I will listen to discussion and then leave”.

36. Under the heading Conflicts of Interest the following is recorded in the minutes (which were draft but which were revised by the Commissioner by deleting what is shown below as struck through and buadding what is underlined):

In relation to CASE2023429 Commissioner the Hon Paul Brereton notified the Panel of a previously disclosed conflict relating to [Referred Person 1]. The Commissioner stated that he would not be the decision maker for the matters, Deputy Commissioner ROSE would be the ultimate decision maker; ~~and that he would make~~ some general observations about the matters generally and then leave while the decision is considered ~~comments as the matter was discussed.~~ This was NOTED by the Panel.

37. During that discussion, the minutes contained the following:

The Commissioner suggested the Panel park the ~~Sections 46(b) & 47E(d)~~ matter for the moment and go to talk the other matters that he believed could all be considered together as they are about others. I think they can be dealt with together as they are within the same category.

The Commissioner referred to paragraph 11 of the internal Legal advice which stated that the basis for including this conduct in the scope of corrupt conduct is not free from doubt. The Commissioner stated that if there was a finding of corrupt conduct by the Commission, it would likely be the subject of a legal challenge.

The Commissioner stated that the Commission might find there was not misconduct where RC found there was. The Commission could to an extent rely on evidence to RC but would still have to allow the POIs to adduce evidence, possibly to cross-examine, and to make submissions. give the right of response to the public servants. The Commissioner stated there was the real possibility the Commission could reach different conclusions on the facts and that it was not in the public interest that the RC made findings on facts and the Commission make ~~de~~ different findings.

The Commissioner stated ~~that having another~~ a second inquiry into the same matters ~~was not~~ would not appear to add value in the public interest and would be unlikely to expose further instances of misconduct, noting ~~and noted~~ the RC had been thorough.

The Commissioner stated that a corruption inquiry is usually a precursor to some kind of remedy elsewhere and the Commission cannot provide a remedy ~~in this case~~ itself. The conduct itself has already been exposed by the RC and ~~that~~ a remedy can ~~either~~ be provided through a criminal prosecution or APSC code of conduct proceedings. The Commissioner stated that all the Commission could do was make a finding that there was corrupt conduct and that he could not see where the Commission could add value.

The Commissioner stated that he understood that one party... is also the subject of ~~Sections 46(b) & 47E(d)~~ ~~proceedings~~, in addition to the APSC action, and reiterated that he could not see how the Commission would add value.

The Commissioner stated that if it took no further action, the Commission would need to make some a public statement and that it would might be difficult to say explain that we were focusing proceeding with Sections 46(b) & 47E(d) [sic] but not the public servants. The Commissioner noted however that there is a justifiable distinction in that Sections 46(b) & 47E(d) cannot be impacted dealt with by the APSC.

38. A note or draft note by Sections 47F & 47E(c), but not the draft minutes either at all or as revised by the Commissioner record:

I think they're the issues I wanted to address. I will listen to discussion and then leave.

39. There was then a discussion on the issues raised by the Commissioner.

40. After the Commissioner left the meeting, the notes record Deputy Commissioner Rose saying:

NSAP members appear to agree, not hearing dissenting voice. Agree to recommendation for all of the public service referrals.

41. The notes also record Mr Reed (CEO) saying the Commissioner clearly had power to reconsider the matter at any time, and a decision to take no further action would not prevent this.

42. The draft minutes to which I have referred record:

Ms ROSE noted that the Panel agreed that the same recommendation would be appropriate for all of the public service referrals but that there was still some uncertainty as to whether it would be appropriate to quote section 41(6) as the reason for taking no further action.

Ms ROSE stated that when drafting the correspondence, the Commission should clarify the key legal points and consider the public impact. She highlighted that it was important to consider how the Commission framed the correspondence.

Ms ROSE stated that when considering whether we make the referral pursuant to section 41 we should frame it in terms of we are taking no further action because of the belief that there is little public value in the Commission progressing the matters [sic].

Further discussion followed.

43. The draft minutes to which I have referred say that after the Commissioner rejoined the meeting, Deputy Commissioner Rose stated that the NSAP had made a decision but that a discussion was required regarding how best to express that decision.

44. The notes record Deputy Commissioner Rose saying: “we’ve made decision, overly cautious, need [to] have discussion re specifying the section as to why we are taking NFA, get draft letter”.
45. The decision was recorded in the notes as: “NFA at this stage, with further discussion to take place around communication with the APSC and avenues of referral/ oversight mechanisms within the Act.”
46. The draft minutes also record: “In concluding the meeting, the Commissioner noted that today’s decision may be controversial but that as a matter of fairness and public interest this is the right decision and he thanked the Panel for their consideration”.
47. The draft minutes circulated by Sections 47F & 47E(c) record that the Commissioner noted that he will write a report commenting on what we have done and what our reasons were.
48. The conclusion of the draft minutes as revised by the Commissioner state:

DECISION: TO BE FINALISED FOLLOWING FURTHER INPUT.

The facts

49. There was a written delegation by the Commissioner dated 3 July 2023 in the following terms, so far as relevant:
- I, the Hon. Paul Brereton AM RFD SC, National Anti-Corruption Commissioner (the Commissioner), make the following delegations under the *National Anti-Corruption Commission Act 2022* (Cth) (the Act).
- (1) Under subsection 276(1) of the Act, I delegate all of my functions, powers and duties under the Act, other than my functions, powers and duties under section 254 of the Act (appointment of CEO), to:
- a) each National Anti-Corruption Deputy Commissioner.
50. On 10 July 2023, Sections 47F & 47E(c) emailed ss 47F & 47E(c) Sections 47F & 47E(c): “Do you recall the (I think it was) six things that the Commissioner wanted us to address when considering these referrals?”
51. On 11 July 2023, the Commissioner sent an email stating that he would like to have the first NSAP meeting on 13 July 2023, and envisaged that the agenda would include:
- For information: a summary of the cases currently under triage or assessment, indicating general themes and issues being raised, particularly in sensitive matters (Robodebt...)” and “For discussion: our approach to the Robodebt RC referrals.”

52. On 13 July 2023, the Commissioner requested an opinion as follows:

Background

1. The Commissioner has received from the Robodebt Royal Commission (RRC) six referrals, each relating to an individual the subject of adverse comment in the RRC's report. The specific relevant findings concerning each of those six individuals are contained in a suppressed chapter of the report. The relevant part of the chapter relating to referrals to the Commission has been provided to the Commission.
2. The referrals have been made pursuant to s 6P(2B) of the *Royal Commissions Act 1902*, which provides that if, in the course of inquiry into a matter, a Royal Commission obtains information, takes evidence, or receives a document or thing that, in the opinion of the Royal Commission, relates or may relate to the performance of the functions of the NACC, the Royal Commission may, if in its opinion it is appropriate to do so, communicate the information or furnish the evidence, document or thing, to the NACC.

Issues

3. From the Commission's perspective, the referrals do not have any special legal status. The Commission can conduct a corruption investigation only if satisfied that the issue(s) the subject of the referrals could involve *corrupt conduct* that is serious or systemic: NACC Act, s 41(3). If that test is satisfied, then the Commission will have to decide whether conducting a corruption investigation would add value, given that the RRC has already exposed the facts and the conduct in issue, and given that a finding of corrupt conduct would provide no additional remedy (whereas criminal prosecutions and disciplinary proceedings could). However, if the corrupt conduct requirement is not satisfied, the Commission has no jurisdiction.
4. If the Commission decided to conduct a corruption investigation, it could use evidence obtained by the Royal Commission, but it would ultimately have to make its own findings of fact, and conclude whether they amounted to corrupt conduct. The referrals do not of themselves involve or raise any presumption or prima facie case that "corrupt conduct" is involved; at the highest they involve an opinion of the Royal Commissioner that the information referred may relate to the performance of the functions of the NACC. It does not appear that the Royal Commission has given consideration to the definition of "corrupt conduct", and whether the conduct it found against each of the six individuals could meet that definition.
5. It seems that each of the six individuals is a Commonwealth public official. Thus the key question for the Commission at this stage is whether the conduct in question could involve *corrupt conduct*. (If so, there would be little doubt that it could be "systemic", given that it involved multiple individuals and the Robodebt "scheme", if not "serious").
6. At first sight, the conduct in question does not appear to involve an "abuse of office". Thus the question seems to reduce to whether it could be a "breach of public trust". In that respect, there does not appear to be any suggestion of use of a public power for a private purpose. There was no *exercise of a power* in the usual

sense, but the *provision of advice*, that was at best incomplete or at worst misleading. The complaint is that advice was given and decisions made which at best did not reflect and at worst deliberately concealed that the proposed course of action was unlawful. The motive appears to have been, not private benefit, but implementing the perceived will of the Government of the day. Whether this type of conduct by public officials attracts the definition of “corrupt conduct” may be novel.

Question for opinion

7. Although the ultimate question for the Commission is whether the issue(s) *could* involve corrupt conduct, for present purposes it should be assumed that the conduct as found in the suppressed chapter could be established, which removes any factual element. Thus the legal question for consideration is:

Assuming that the conduct described in the suppressed chapter of the RRC Report is established, would it be within the concept of “corrupt conduct” as defined in the NACC Act?

(Original italics.)

53. On the same date, Deputy Commissioner Rose emailed Sections 47F & 47E(c) and Ben Gauntlett saying, relevantly, “please find the Commissioner’s instructions attached.... Once you have had a chance to review with the team, perhaps you can indicate what you think might be an achievable timeframe for a draft advice.”
54. The suppressed chapter of the RRC Report included the conduct of [Referred Person 1].
55. Legal Advice dated 10 August 2023 stated at [3]:

Your request for advice notes that the most relevant form of corrupt conduct under the *National Anti-Corruption Commission Act 2022* (the Act) is “breach of public trust” contained within s 8(1)(c). However, a concern is raised that there was no exercise of power by the relevant public officials in the usual sense, but rather, the provision of incomplete or misleading advice. In particular, the advice provided obscured or concealed the proposed course of action was unlawful. The suggested motive was to implement the will of the Government of the day.
56. Paragraphs [9] to [11] of the Legal Advice, were cited by the Commissioner in what he said at the 19 October 2023 meeting. They were as follows:

Assuming the conduct in the Suppressed Chapter is established against [Referred Person 1]. . . in our view it *would* come within the concept of “corrupt conduct” for the purposes of the Act. . . .

The legal position on each of these issues is not free from doubt. To the extent that the characterisation of some corrupt conduct relies on an interpretation of the Act that is less certain (in particular, pure omission-based corrupt conduct and breaches of trust absent an improper purpose), the NSAP may take this uncertainty into account in

deciding how to deal with this matter. An issue for consideration is whether these referrals are an appropriate vehicle to test the interpretation of the Act in this way.

Finally, the RRC makes lengthy and detailed findings of fact to the ‘*Briginshaw* standard’, often on an inferential basis over the objection of parties involved. Consistently with our instructions, we have not attempted to weigh the underlying evidence: [13]. Nonetheless, having spent some time with the Report and Suppressed Chapter, we observe some of the RRC’s findings are stronger than others, and there is a real possibility that this Commission could reach different conclusions. This also appears to be a relevant consideration in deciding how to deal with this matter. (Footnote omitted.)

57. Paragraph 14 of the Legal Advice sets out a summary of Referred Person 1’s referral.
58. Paragraphs [44] to [74] of the Legal Advice are a detailed consideration of the RRC’s findings in relation to Referred Person 1.

59. On 15 August 2023 Deputy Commissioner Rose emailed the Commissioner, ss 47F & 47E(c) Sections 47F & 47E(c) and ss 47F & 47E(c) Sections 47F & 47E(c) in response to the Commissioner’s email of 15 August 2023 at 1.47pm:

...

To clarify the next steps re Robodebt –

Is the internal legal advice still under consideration or are you content with it as drafted?

If you are happy with the advice, do the six referrals need to come back to an Assessment Committee Meeting for progression to investigation (or other)?

If they do need to come back to the NSAP would you like this done out of session this week or wait until the next meeting Thursday week?

Can we assume you are comfortable participating in the consideration of the 5 referrals you do not have a conflict with?

Apologies if this has been clarified elsewhere.

60. On 16 August 2023, the Commissioner emailed Deputy Commissioner Rose, ss 47F & 47E(c) and Sections 47F & 47E(c):

Hi Nicole,

To confirm our discussion, and in response to your below questions:

The legal advice is to be considered finalised, and provided to Assessments to inform the assessment process. [For future reference, legal advice from Legal branch is not subject to approval/clearance by me, and should come from Legal finalised and signed. If I ask for advice, it is because I want the genuine opinion of Legal. If I disagree with it, I may say so, but that will be on me – I won’t be asking Legal to change their advice – though if I wanted another perspective or issue considered, or

thought something had been overlooked, I might ask for supplementary advice.] In this case, I think the advice is a terrific piece of work, which will be of enduring significance for the Commission, not just in this case.

The Assessment process now needs to be finalised. That will include consideration not only of the legal advice, but also the other relevant issues – eg will a corruption investigation add value in the public interest (given what the RC has done, what the APSC can do, and that we would not provide any remedy other than a corruption finding); against that, the public interest in the Robodebt matter generally; but also the considerations raised in the legal advice (esp at [10] and [11]).

It will be relevant to know, if at all possible, whether the APSC is considering any/all of the same individuals who have been referred to us.

The matter should come to NSAP in the ordinary way when it is ready.

I will not be the decision-maker in respect of any of the Robodebt matters. However, because it is of obvious important to the Commission, I think it is important and appropriate that I be aware of what is happening. I do not think it is necessary to redact any material – it is perfectly normal to receive and read evidence and then not take it into account because it is not admissible etc

If the ultimate NSAP decision is NFA in respect of all matters, there will need to be a publishable report which explains why that course has been taken.

If any of the matters proceeds to investigation, there will need to be a discussion as to how. It will be necessary to review the RC evidence, to see whether it supports the potential adverse findings. It would probably not be necessary to seek further evidence by investigation. However, as previously discussed, any POI would have to be given an opportunity to provide further evidence; possibly, to cross-examine witnesses who had given evidence to the RC; and definitely, to make submissions. In other words, there might not be the usual investigatory stage (because that has largely already been done by the RC), and it might be appropriate to proceed almost directly to hearings, without an earlier “investigation” phase.

Very happy to discuss, if anyone has any concerns about this approach.

61. I have set out above the consideration of the Referred Person 1 matter on 19 October 2023. Later on 19 October 2023, Deputy Commissioner Rose emailed Deputy Commissioner Gauntlett and Sections 47F & 47E(c) saying: “I am currently proposing the Decision for all 6 subjects be the same. That being – Take no further action noting there is little public value in the NACC commencing a corruption investigation in addition to the completed

Royal Commission and the ongoing investigation by the APSC, pursuant to s 41 (6) of the Act”.

62. On 23 October 2023 Sections 47F & 47E(c) wrote:

Please see below guidance from DC Rose about what needs to be included in the Robodebt Report re our reasons for not investigating. Completing this report is a high priority piece of work ... ss 47F & 47E(c) – can you please send through the extract of the NSAP minutes for Robodebt to assist with preparing the report.

The Commissioner advised this morning that the report should not go into detail in relation to the legal advice. I think it should include:

Background of receipt of the referrals,
the nature of the referrals,

the conflicts of interest declared and how they were managed (Jaala excused herself from matter, Commissioner was not involved in the decision making and DC Rose was the decision maker),

careful assessments were completed and the DC formed the view that in relation to all referrals they could involve corrupt conduct that is serious or systemic, and the decision was made to take no further action because investigations would not add any public value. Thanks,

63. On 26 October 2023 the Commissioner provided his proposed edits to the NSAP minutes from the meeting of 19 October 2023 (see above).

64. On 1 November 2023, Deputy Commissioner Rose emailed Sections 47F & 47E(c) to say that she had discussed the draft minutes of the 19 October 2023 NSAP meeting with the Commissioner and attached a version in which she had started to make changes.

65. On 23 November 2023, a NSAP meeting was held. During the meeting, the Commissioner provided an update on the Robodebt issue, noting that Dr Gauntlett was reviewing evidence available from the Royal Commission to identify any gaps, particularly in so far as Sections 46(b) and 47E(d) was concerned. The Commissioner noted that the APS Commissioner’s proceedings will continue their course with the suspicion, at this stage, that the NACC won’t proceed further.

66. On 26 November 2023, the Commissioner sent an email to Deputy Commissioner Rose and others saying that he thought the NACC should tell the people referred that the NACC has decided not to proceed to investigate.

67. On 29 March 2024, the Commissioner emailed to Deputy Commissioners Gauntlett, Rose and Kilgour a revised draft public statement. He said, relevantly:

...

Attached is a slightly revised draft letter and public statement. The main change is that rather than just listing relevant considerations (which I think does not really disclose the reasoning process), I've structured them in a way that shows which were more important and prevailed. I'm very happy to receive any further suggestions or comments.

Given my association with [Referred Person 1], I think it is best, for more abundant caution, if all these go out over someone else's signature, as delegated decision-maker.

68. Throughout April and May 2024, the NACC finalised its proposed public statement, including incorporating feedback provided by the Commissioner.
69. On 11 April 2024 the Commissioner emailed Deputy Commissioner Rose in a continuation of the email sent by Sections 47F & 47E(c) at 7.28pm:

Hi Nicole,

I've read ss 47F & 47E(c) recent email, but at this stage at least I'll limit my comments to you, though feel free to share them with ss 47F & 47E(c).

I wouldn't get too hung up on whether there is a corruption issue. We certainly don't want to say so in the letters or public statement. Sections 47F & 47E(c) question arises because s 48 refers to a statement about a corruption issue, but I think we can take the view that a statement that there is no corruption issue is a statement about a corruption issue. In any event, even if s 48 is not engaged, we can make a statement under s 231(1)(a), which does not depend on there being a corruption issue.

I'm content with including the public statement as an Annexure to the letters.

I completely agree with Sections 47F & 47E(c) suggestions that:

- the public statement should include that an investigation would not provide any benefit to the vulnerable welfare recipients who suffered due to the Robodebt scheme.
- Rather than speaking of implementation of the RRC recommendations, we should say something along the lines that the Commission will focus, through its corruption prevention, education and investigation functions, on the integrity issues raised in the report, particularly in relation to ethical decision making.

I also agree with Sections 47F & 47E(c) advice as to the other statutory conditions.

Best regards

70. On 12 April 2024, Deputy Commissioner Rose forwarded the Commissioner's email of 11 April 2024 to Sections 47F & 47E(c), copying in the Commissioner saying in part:

Re the Public Statement - your suggestions are supported.

I think we could make reference to victims in perhaps two places, to match those we are making about the individuals under investigation. The first at the beginning of the fourth para, something like -

The Commission is conscious of the significance of the issue, having regard to the impact of the scheme on individuals and the public, the seniority of the officials involved; and of the need to ensure that any corruption issue is fully investigated.

And the fifth paragraph - perhaps we finish with the Commissioner's words -

In the absence of a real likelihood of a further investigation producing significant new evidence, it is undesirable for a number of reasons (including the risk of inconsistent outcomes, and the unfairness of subjecting individuals to repeated investigations) to conduct multiple investigations into the same matter. This is particularly so in respect of the five officials who have also been referred to the APSC. Moreover, beyond making a finding that the conduct in question amounted to corrupt conduct within the meaning of the Act, the Commission could impose no sanction nor grant any remedy or make any recommendation that could not have been made by the Robodebt Royal Commission or could not be imposed by the APSC. Importantly, it would not provide any benefit to the vulnerable welfare recipients who suffered due to the Robodebt scheme.

Re the last para and the Report Recommendations - I think the Commissioner's suggested words work -

However, the Commission will focus, through its corruption prevention, education and investigation functions, on the integrity issues raised in the report, particularly in relation to ethical decision making.

(Emphasis in original)

71. The NACC says that the decision was made on 16 April 2024 when Deputy Commissioner Nicole Rose, as the delegate of the Commissioner, decided to take no action with respect to each of the Robodebt referrals under section 41(6) of the *NACC Act*. There is in the papers a document signed by Deputy Commissioner Rose and dated 16 April 2024 in the following terms:

SUBSECTION 41(6)
DECISION TO TAKE NO ACTION

1. On 7 July 2023, the Royal Commission into the Robodebt Scheme (the RRC) made six referrals (the Referrals) to the National Anti-Corruption Commission (the Commission).
2. The Referrals related to the following persons (Referred Persons):
 - Sections 46(b) & 47E(d)
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
3. I am the decision maker in the matter pursuant to a delegation signed by the National Anti-Corruption Commissioner (the Commissioner) dated 3 July 2023. Following receipt of the Referrals, I was asked by the Commissioner to be the decision maker in the matter given a declaration of a conflict of interest by him in relation to ss 46(b) & 47E(d).
4. On 10 August 2023 advice was provided by the Commission's Legal Branch in relation to the matter. I have considered the advice and agree with the analysis and conclusions expressed therein.
5. The matter came before the Commission's National Senior Assessment Panel on 19 October 2023. I am assisted in my decision making by the papers prepared by the Commission's Assessment Team, their consideration of the Referrals against the requirements of the *National Anti-Corruption Act 2022* (Cth) (the Act) and the Assessment of Corruption Issues Policy (CM 23#22972DOC), and views expressed by members of the Panel.
6. On 28 March 2024, I was provided with a Memorandum by Deputy Commissioner Ben Gauntlett in relation to the referral of ss 46(b) & 47E(d). I have also been assisted in my decision making by this memorandum.
7. I am satisfied that each of the Referred Persons, at the time the conduct referred by the RRC was engaged in, were public officials for the purposes of section 10 of the Act. The meaning of public official in section 10 includes parliamentarians and staff members of a Commonwealth agency.
8. In accordance with the advice provided by the Commission's Legal Branch, I am satisfied that the Referrals raise a corruption issue in relation to each of the Referred Persons.
9. However, I am of the view that there is no public value in the Commission commencing an investigation into the conduct of any of the Referred Persons. The investigation undertaken by the RRC was extensive with significant resources relied upon. The issuing of Notices to Produce and Notices to Give Information meant over 958,000 documents were produced to the RRC. It is unlikely that the Commission would obtain significant new evidence that was not available to the RRC.

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10. The conduct of the Referred Persons has been fully exposed in the RRC's final report and referrals were made by the RRC to the Australian Public Service Commission.
11. In this context, there is risk of inconsistent outcomes between the findings of the RRC and the Commission and unfairness concerning the Referred Persons from being subject to multiple investigations.
12. Importantly, an investigation by the Commission would not provide an individual remedy or redress to the recipients of government payments or their families who suffered due to the Robodebt Scheme.
13. As a result, my decision in the matter is that no further action should be taken for the Referrals pursuant to subsection 41(6) of the Act.



72. On 16 April 2024, the Commissioner wrote in relation to the public statement:

Thanks – I’m happy with that modification – I was thinking of inserting “practical” but I think “individual” works well. I think we could perhaps also add “The Commission is conscious. Importantly, an investigation by the Commission would not provide any individual remedy or redress to the recipients of government payments or their families who suffered due to the Robodebt Scheme.

I think we might also add, as we did for Pelican, “The Commission will not be making further comment on this matter”. I appreciate your views about the intent of a video message. However, my thinking is:

- We are going to be issuing a few public statements saying “no further action” in the near future. I don’t think we want to promote these as major media events, although they will obviously attract interest. And I don’t want to set a precedent for delivering them via video.

- In this particular case, even if we did a video, it could not be me – to avoid any perception of COI – and I wouldn’t ask anyone else to bear the brunt of being the Commission’s public face for delivering this decision.

On which topic, for answers to potential media queries, we need one along the lines:

In order to avoid any perception of a conflict of interest arising from the Commissioner’s past professional association with a senior official involved in the Robodebt scheme, decision-making in this matter was delegated to and undertaken by one of the Deputy Commissioners.

I recall we did have some talking points on this last year, and I think one of our media releases or responses referred to it (it may have been in response to a query by [a website] or something like that?

73. This 16 April 2024 decision was communicated to the six referred persons on 22 April 2024.

74. The persons the subject of the RRC referral were given the opportunity to comment on the NACC’s proposed public statement. On 1 May 2024, a lawyer, on behalf of [Referred Person 1], provided a letter and proposed amendments to the draft public statement, as follows:

On 6 July 2023, the National Anti-Corruption Commission (Commission) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (Robodebt Royal Commission) pursuant to section 6P(2B) of the *Royal Commissions Act 1902* (Cth).

The Commission has carefully considered each referral and reviewed the evidentiary material provided by the Robodebt Royal Commission, including its final report, and the Confidential Chapter.

Five of the six public officials were also the subject of referrals to the Australian Public Service Commission (APSC).

The Commission is conscious of the impact of the Robodebt Scheme on individuals and the public, the seniority of the officials involved, and the need to ensure that any corruption issue is fully investigated.

However, the matter has already been extensively investigated by the Robodebt Royal Commission, and the conduct has been fully ~~exposed~~ canvassed in that Commission's final report. After close consideration of the evidence that was available to the Royal Commission, the Commission has concluded that it is unlikely it would obtain significant new evidence beyond that available to the Robodebt Royal Commission.

In the absence of a real likelihood of a further investigation producing significant new evidence, it is undesirable for a number of reasons to conduct multiple investigations into the same matter. This includes the risk of inconsistent outcomes, and the oppression involved in subjecting individuals to repeated investigations of the same matter.

In deciding whether to commence a corruption investigation, the Commission takes into account a range of factors. A significant consideration is whether a corruption investigation would add value in the public interest, and that is particularly relevant where there are or have been other investigations into the same matter. There is not value in duplicating work that has been or is being done by others, in this case with the investigatory powers of the Royal Commission, and the remedial powers of the APSC.

Beyond ~~considering making a finding that the~~ whether the conduct in question amounted to corrupt conduct within the meaning of the Act and, if satisfied, making such a finding, the Commission cannot grant a remedy or impose a sanction (as the APSC can). Nor could it make any recommendation that could not have been made by the Robodebt Royal Commission. An investigation by the Commission would not provide any individual remedy or redress for the recipients of government payments or their families who suffered due to the Robodebt Scheme.

The Commission has therefore decided not to commence a corruption investigation as it would not add value in the public interest. The Commission will continue through its corruption prevention, education functions and investigation functions, on the integrity issues raised in the final report, particularly in relation to ethical decision making.

In order to avoid any possible perception of a conflict of interest, the Commissioner delegated the decision in this matter to a Deputy Commissioner who has no historical connection with any of the individuals involved.

The Commission will not be making further comment.

75. The Commissioner accepted the changes suggested in the final statement, which are underlined in the final version below.
76. On 4 June 2024, there was a Robodebt Meeting called by the Commissioner by email to Deputy Commissioners Rose and Gauntlett, amongst others.

77. On 5 June 2024, the Commissioner sent an email about the final version of the public statement: “This is fine and CLEARED BY ME.”

78. The NACC’s media statement said:

National Anti-Corruption Commission decides not to pursue Robodebt Royal Commission referrals but focus on ensuring lessons learnt

On 6 July 2023, the National Anti-Corruption Commission (Commission) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (Robodebt Royal Commission) pursuant to section 6P(2B) of the *Royal Commissions Act 1902* (Cth).

The Commission has carefully considered each referral and reviewed the extensive material provided by the Robodebt Royal Commission, including its final report, and the Confidential Chapter.

The Commission has become aware that five of the six public officials were also the subject of referrals to the Australian Public Service Commission (APSC).

The Commission is conscious of the impact of the Robodebt Scheme on individuals and the public, the seniority of the officials involved, and the need to ensure that any corruption issue is fully investigated.

However, the conduct of the six public officials in connection with the Robodebt Scheme has already been fully explored by the Robodebt Royal Commission and extensively discussed in its final report. After close consideration of the evidence that was available to the Royal Commission, the Commission has concluded that it is unlikely it would obtain significant new evidence.

In the absence of a real likelihood of a further investigation producing significant new evidence, it is undesirable for a number of reasons to conduct multiple investigations into the same matter. This includes the risk of inconsistent outcomes, and the oppression involved in subjecting individuals to repeated investigations.

In deciding whether to commence a corruption investigation, the Commission takes into account a range of factors. A significant consideration is whether a corruption investigation would add value in the public interest, and that is particularly relevant where there are or have been other investigations into the same matter. There is not value in duplicating work that has been or is being done by others, in this case with the investigatory powers of the Royal Commission, and the remedial powers of the APSC.

Beyond considering whether the conduct in question amounted to corrupt conduct within the meaning of the Act and, if satisfied, making such a finding, the Commission cannot grant a remedy or impose a sanction (as the APSC can). Nor could it make any recommendation that could not have been made by the Robodebt Royal Commission. An investigation by the Commission would not provide any individual remedy or redress for the recipients of government payments or their families who suffered due to the Robodebt Scheme.

The Commission has therefore decided not to commence a corruption investigation as it would not add value in the public interest. However, the Commission considers that the outcomes of the Robodebt Royal Commission contain lessons of great importance for enhancing integrity in the Commonwealth public sector and the accountability of public officials. The Commission will continue through its investigation, inquiry, and corruption prevention and education functions, to address the integrity issues raised in the final report, particularly in relation to ethical decision making, to ensure that those lessons are learnt, and to hold public officials to account.

In order to avoid any possible perception of a conflict of interest, the Commissioner delegated the decision in this matter to a Deputy Commissioner.

The Commission will not be making further comment.

Consideration

79. The primary facts are not controversial. The issue is what natural justice required in light of the Commissioner's conflict of interest.
80. That conflict of interest was "managed" by the Commissioner designating a delegate, Deputy Commissioner Rose, as the decision-maker under section 41 and by absenting himself from the formal, albeit provisional, making of the decision on 19 October 2023.
81. The question is whether that step was legally sufficient. The alternative "management" of the conflict was for the Commissioner to stay away from all aspects of the decision-making under section 41 in relation to Referred Person 1.
82. There is an issue as to when the decision was made. Formally it was made on 16 April 2024 although the reasons were substantially the same as on 19 October 2023. It was provisional in light of what was then said: Deputy Commissioner Rose said: "we've made decision, overly cautious, need [to] have discussion re specifying the section as to why we are taking NFA, get draft letter". The decision was recorded in the notes as: "NFA at this stage, with further discussion to take place around communication with the APSC and avenues of referral/ oversight mechanisms within the Act." This issue does not affect the analysis.
83. In relation to these referrals, the period between 19 October 2023 and 16 April 2024 was largely taken up, in relation to this matter, with formulating the reasons and the media statement. The Commissioner had an ongoing involvement in these steps.

84. What was actually done on 19 October 2023 by the Commissioner is significant because declarations 1-3 required a different approach.
85. It will be recalled that in the first declaration the Commissioner had said that if Referred Person 1 was the subject of a referral, then he would not be involved in decision-making concerning [Redacted]. He said he “knows [Referred Person 1] well”.
86. In the second declaration the Commissioner said “I will not be involved in any decisions concerning [Referred Person 1].” He said [Referred Person 1] “is well known to me”.
87. In the third declaration the Commissioner said “I would recuse myself from decision-making concerning [Redacted]. He said [Referred Person 1] was “one of those with whom I have had a close association”.
88. These statements provide the basis for the apprehension of the third party fair-minded observer. The conflict existed in the terms it was disclosed, rather than in the terms of the gloss in [47b] of the NACC’s submission to the Inspector dated 13 August 2024 which refers to “The perceived conflict arose from a prior professional association, and not a close personal relationship.”
89. The fourth declaration, on 19 October 2023 showed a different approach: The Commissioner stated that *he would not be the decision-maker* for the matters, Deputy Commissioner Rose would be the ultimate decision-maker; and that he, the Commissioner, would make some general observations about the matters generally and then leave while the decision is considered.
90. In the second declaration the Commissioner said he would retain an overall interest in the policy questions that arise concerning these referrals generally, because those questions – in particular the scope of “corrupt conduct” – will necessarily have ongoing ramifications for us. This approach could not be criticised although it is necessary to bear in mind that policy questions may not arise in the abstract and often have a double character both as a policy question and as a question involving facts and views specific to an individual. This was the case here.
91. The main question is whether not being the decision-maker in formal terms is sufficient to address the conflict based on perception. There is a real difference between saying that a person will not be the decision-maker and the person will not be *involved in decision*

making about an individual. The issue is one of substance rather than form, consistent with the objective nature of the question through the eyes of the third party observer.

92. The factors are as follows.
93. Here, the logical connection between the nature of the interest and the possibility of departure from impartial decision-making is clear: see *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63 at [8]. The declarations of conflict were made because it was apparent that the Commissioner, in having had a close working relationship with [Referred Person 1], would have formed, or would apparently have formed, a view about ss 46(b) & 47E(d) character.
94. The category is reasonable apprehension of partiality: see Deane J in *Webb & Hay v R* [1994] HCA 30 at [12]: an association which may give rise to a perceived or real conflict of interest between private relationships, associations or acquaintances and the exercise of the statutory power.
95. The question arises in a statutory context: an exercise of public power. What may be appropriate in the case of a meeting of a club or other contractual settings, such as attending but not voting, is not the starting point.
96. The nature and functions of the body are significant. As the NACC CEO Mr Reed wrote in the NACC Integrity Policy dated 18 July 2023: “ Maintaining high standards of integrity is core to the NACC’s identity and culture, and one way the NACC protects our people, information, assets, and organisational integrity. As a NACC staff member, regardless of your role, you are expected to have a high level of personal integrity and awareness of the critical importance of protecting the NACC’s organisational integrity.”
97. The delegate in this case was a Deputy Commissioner. As set out above, by section 19, the functions of a Deputy Commissioner are to assist the Commissioner in performing the Commissioner’s functions; and any other function conferred on a Deputy Commissioner by this Act or another Act. In performing those functions, a Deputy Commissioner must comply with any directions of the Commissioner.
98. By section 276(6) in performing or exercising a function, power or duty delegated under subsection (1) or paragraph (2)(b), the delegate must comply with any directions of the

Commissioner. It is not to the point when considering the position of a delegate that there were no such directions in this case.

99. Similarly, by section 34AB of the *Acts Interpretation Act 1901*, a delegation by the Commissioner does not prevent the performance or exercise of a function, duty or power by the Commissioner. It is not to the point that in form the Commissioner was not the decision-maker here.
100. The present point is made at [45] of the NACC's submission to the Inspector dated 13 August 2024, referring to the Commissioner having primary responsibility for carrying out the Commission's functions and the primacy of the Commissioner's role. This makes it more important for the Commissioner to avoid involvement in a case where he has a conflict.
101. The Commissioner's involvement in the decision-making under section 41 was comprehensive, before, during and after the 19 October 2023 meeting at which the substantive decision was made.
102. The views the Commissioner expressed at the meeting on 19 October 2023 were not limited to policy questions concerning the referrals generally as the policy questions had a strong factual element specific to, amongst others, Referred Person 1. The discussion was framed by the issues raised by the Commissioner. The Commissioner settled the minutes of the 19 October 2023 meeting.
103. A further factor is that after the 19 October 2023 meeting the Commissioner was involved in formulating the reasons for decision and also the terms of the media statement.
104. The reasons of the Deputy Commissioner on 16 April 2024 were closely related to what the Commissioner had said at the meeting on 19 October 2023.
105. Material sent to the Commissioner relevant to this issue was not redacted on the basis that the Commissioner had said it was perfectly normal to receive and read evidence and then not take it into account. This was not the appropriate analysis in the context of the apprehension by a third party of administrative decision making: see *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40 per Allsop J.
106. For those reasons, from the standpoint of the third party fair-minded observer, that observer might reasonably apprehend that the Commissioner's involvement might have impinged

on the impartiality of the decision-making of the Deputy Commissioner. No doubt she was fully aware of the Commissioner's conflict of interest but she was also fully aware of his views on the exercise of the statutory power in the case of, amongst others, Referred Person 1.

107. Contrary to the NACC's submissions to the Inspector dated 13 August 2024 at [34]-[35], it is not an answer to say that the delegate was an experienced public servant with a background in regulatory, intelligence and law enforcement and each was a senior position requiring the exercise of independent judgment in the context of complex and controversial decision making. So to reason adopts the wrong perspective, the correct perspective being the apprehension of the third party fair-minded observer.
108. The strategy to manage the risk should have been not only to designate a delegate but to remove the Commissioner from related decision-making processes and limit his exposure to the relevant factual information. This was not done, including in the request for legal advice because the request for the advice, the advice itself and the deployment of that advice by the Commissioner in the 19 October 2023 meeting was fact heavy and included the position of, amongst others, Referred Person 1.
109. Contrary to the NACC's submissions to the Inspector dated 13 August 2024 at [46], to say that the Commissioner had an advisory role in this matter is not a sufficient description of his involvement, but if it was sufficient it would give added point to, rather than allay, the apprehension of the third party fair-minded observer.
110. Similarly, to say that the Commissioner was not present when the decision was made is insufficient to allay the perception in the mind of the third party fair-minded observer. As Spigelman CJ said in *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209 at [27], in a different factual context, in a conflict of interest case an adverse conclusion of what an independent observer might believe would more readily be drawn.
111. To conclude otherwise would be to substitute form for substance. The focus is on the overall integrity of the decision-making process: *Isbester v Knox City Council* [2015] HCA 20 at [58] per Gageler J.
112. I turn lastly to the issues for this Report.

113. In terms of issue (i) in [6] above, I find that the steps taken by the Commissioner were not consistent with the management option chosen in his first three declarations, that is, not to be involved in decision-making concerning Referred Person 1. That management option was consistent with law. The option acted on, for the Commissioner to absent himself only from the formal step of deciding, either on 19 October 2023 or 16 April 2024, was not so consistent.
114. In terms of issue (ii) in [6] above, I find that in light of the Commissioner’s declared conflict of interest, the management option chosen, in the sense that it was the option acted on, was not appropriate nor consistent with law.
115. I turn to the issue in [7] above, my opinion as to whether the conduct I find to have occurred amounted to officer misconduct as defined in section 184(3) of the National Anti-Corruption Commission Act. What follows are my opinions.
116. I have found that the steps taken by the Commissioner to manage his conflict of interest, that conduct, arose from a mistake of law, as natural justice required the Commissioner not to participate in the decision-making with respect to Referred Person 1. The Commissioner’s conduct, if engaged in by the NACC, would have been agency maladministration as defined in section 184(3), being conduct that is not unlawful but arose from a mistake of law. As I have said, the mistake of law was as to what the law required to be the action taken in consequence of the Commissioner disclosing his interest. On this analysis, there has been “officer misconduct” as defined in section 184(3) of the *NACC Act*.
117. Alternatively, if the question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, as held in *Isbester v Knox City Council* [2015] HCA 20 at [20], then here the conclusion of “officer misconduct” would be the same as amounting to agency maladministration, being conduct that arose from a mistake of fact.



ALAN ROBERTSON SC

30 August 2024

Ref: 24/667

Submissions (Part 1) to the Inspector of the National Anti-Corruption Commission

Introduction and summary

1. This is Part 1 of the response of the National Anti-Corruption Commissioner (**Commissioner**) under s 219(2)(b) of the *National Anti-Corruption Commission Act 2022* (Cth) (the **Act**) to the Inspector's request for submissions about the Inspector's *Draft Report: NACC complaint investigation – Decision not to investigate referrals from the Royal Commission into the Robodebt Scheme* dated 3 September 2024 (the **Draft Report**), which the Commission requests be taken into account prior to finalisation of the Inspector's Report (the **Final Report**). It addresses:
 - a. some preliminary matters, relating to the identification by name of the Deputy Commissioner who made the decision in question and other Commission staff (the **delegated Deputy Commissioner**);
 - b. the matters characterised in the Draft Report as the "principal issue" and discussed in section [7] of the Draft Report and a report by the Hon Alan Robertson SC dated 30 August 2024 (the **Robertson Report**) concerning the Commissioner's handling of a conflict of interest which the Commissioner had declared in relation to Referred Person 1, and some preliminary observations concerning the proposed recommendation; and
 - c. the matters characterised in the Draft Report as "ancillary issues" Sections 47C, 47E(d)
Sections 47C, 47E(d)
2. The publication and redaction of the Inspector's Report (including of the Commission's submissions, which it is understood the Inspector intends to attach to the Final Report), and further detail concerning the proposed recommendation, will be addressed in Part 2 of the Commission's submissions, to be provided at a later date but no later than 21 October 2024.

Preliminary matters

3. For reasons elaborated below, the Commission submits that the Final Report should not identify the delegated Deputy Commissioner, on the basis that it is "sensitive information" within s 227(3)(i) of the Act, and in any event, the concerns outlined below weigh against identification of the delegated Deputy Commissioner when exercising the discretion under s 222 of the Act, particularly given that no adverse findings are proposed against the delegated Deputy Commissioner. It is a necessary corollary that the other Deputy Commissioners are not identified, as identifying them will enable identification of the delegated Deputy Commissioner. Again, this is in the context that no adverse findings are proposed against them. It is also requested that references to staff members who are not statutory office holders be at a greater level of generality, in order to avoid their identification from publicly available information.

The main issue and the proposed recommendation

4. The Robertson Report and the Draft Report contain opinions and findings that are critical of the Commissioner's handling of the conflict of interest issue. In particular, they conclude that the Commissioner's management of his declared conflict of interest involved conduct which was "not unlawful but arose from a mistake of law" as to what the principles of natural justice required (or alternatively from a mistake of fact as to whether a fair-minded lay observer might reasonably apprehend a lack of impartiality on the part of the decision-maker). As explained below, the Commission accepts the conclusion in the Robertson Report that the Commissioner's management of his declared conflict of interest involved a mistake of the kind suggested. Having regard to the very wide definitions of "agency maladministration" and "officer misconduct" in s 184(3) of the Act, it necessarily follows that this mistake falls within the definition of "officer misconduct".
5. To avoid potential confusion, and as a matter of fairness and balance, and to ensure that the nature of the error made is properly understood in context, it is requested that the Final Report:
 - a. makes clear that the statutory concepts of "agency maladministration" and "officer misconduct" apply in this instance as a result of an error of law or fact, which are commonly made by judicial officers, tribunal members and decision-makers, and do not imply any other form of wrongdoing or misconduct;

- b. also makes clear that apprehended bias does not imply actual bias, and that whether circumstances are such as to give rise to a reasonable apprehension of bias is a question of judgment on which minds can and often do reasonably differ, and that while the Commission accepts that the conclusion in the Robertson Report is open, and proposes to act on it, this does not mean that there was intentional impropriety;
 - c. draws attention to the steps that were taken to ensure that the decision was made by a senior and independent decision-maker;
 - d. explains that (as acknowledged in the Robertson Report) there were proper reasons for the Commissioner to seek to have some level of involvement in broader legal, policy and resourcing questions bearing upon the early stages of the work and operation of the Commission; and
 - e. avoids expressing any view about the merits of the decision as distinct from the process.
6. The Draft Report contemplates a recommendation that the Commissioner consider delegating to an appropriate person the function under s 41(5) of the Act to reconsider whether or how to deal with the corruption issues in relation to the Robodebt Royal Commission referrals (**Robodebt referrals**). As the Commission accepts the conclusion that there was procedural error in relation to the initial decision, and as it is important that there be public confidence in the process, the Commission is minded to agree that this is an appropriate course, if the recommendation is able to be practically implemented without raising the same concerns about apprehended bias that are identified in the Robertson Report. The Commission is examining ways and means by which this could be done, which are not straightforward, and will address this in further submissions, to be provided by 21 October 2024.

The ancillary issues

7. Sections 47C, 47E(d) [REDACTED]
- [REDACTED]

■ Sections 47C, 47E(d)
[Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted], the Commission accepts that its public statement contained a regrettable but unintentional mistake, in suggesting that the APSC had the ability to impose sanctions in respect of the Referred Persons, when it should have correctly outlined the APSC’s powers in relation to former APS staff, namely, to conduct an investigation for breaches of the APS Code of Conduct with the potential for any breach finding to affect future employment in the APS or engagement as a contractor by a Commonwealth Government Agency. The Commission notes that the delegated Deputy Commissioner’s decision record and reasons of 16 April 2024 did not contain this mistake.

- Sections 47C, 47E(d)
[Redacted]
- [Redacted]

Preliminary Matters

Identification of the delegate

8. Under s 222 of the Act, the Inspector has a *discretion* to publish a NACC investigation report in whole or part, if satisfied it is in the public interest to do so. Section 217 of the Act provides that information that the Inspector is satisfied is “sensitive” information must be excluded from a NACC investigation report (and dealt with in accordance with s 218). Under s 227(3)(i), “sensitive information” includes information that could endanger a person’s life or physical safety. It is submitted that:
 - a. the identity of the delegated Deputy Commissioner is “sensitive information”;
 - b. in any event, the concerns outlined below weigh against identification of the delegated Deputy Commissioner when exercising the discretion under s 222 of the Act, particularly given that no adverse findings are proposed against the delegated Deputy Commissioner;
 - c. it is a necessary corollary that the other Deputy Commissioners are not identified, as identifying them will enable identification of the delegated Deputy Commissioner. Again, this is in the context that no adverse findings are proposed against them.
9. The Commission’s public statement did not identify which Deputy Commissioner made the decision in relation to the Robodebt referrals. The reason for not doing so was concern that publication of their identity as the decision-maker would provide a focal point for what would be a viscerally unpopular decision, which could result in endangerment of their well-being and physical safety, and potentially that of their family. Particularly where no criticism is made of the delegated Deputy Commissioner, the identity of the particular Deputy Commissioner is not important. What is important

and what the Commission disclosed, is that the decision was made by a Deputy Commissioner, lawfully delegated by the Commissioner.

10. The Commission's concern has unfortunately been borne out by social media posts and calls made to the Commission's Intake and Triage Team since release of the public statement. The Commission's Media and Communications Team have identified approximately 2,000 social media posts that included personal attacks on staff members of the Commission, including the Commissioner and senior staff. For example, they have identified posts stating that members of the Commission should kill themselves or be killed, posts labelling the Commission as murderers, and that the Commission has blood on their hands due to the Robodebt decision. The Commission's Intake and Triage Team have been subject to threatening calls. Sections 47C, 47E(d)

[REDACTED]

[REDACTED]

Identification of other staff

11. The Inspector's covering letter of 3 September 2024 explains the approach adopted in the Draft Report of referring to Commission staff (other than statutory office holders) by position title rather than by name. The Commission requests that consideration be given to referring to these staff as a "Commission staff member" or a "Commission senior staff member", as publicly available information or professional associations may allow for these staff to be easily identified by position title. This request is also made in the context of no adverse findings having been made against these staff members.
12. The above approach has been adopted in these submissions where they refer to relevant individuals.

The Principal Issue: the Conflict of Interest

The proposed finding

13. The Robertson Report concludes that a fair-minded lay observer might reasonably apprehend that, on account of the Commissioner's past professional association with Referred Person 1, the Commissioner's involvement in the decision-making process might have impinged on the impartiality of the Deputy Commissioner's decision.¹ For

¹ Robertson Report, [106].

the Commissioner to consider otherwise was to engage in conduct which, though not unlawful, arose from a mistake of law as to what the principles of natural justice required in the circumstances, or alternatively from a mistake of fact as to whether a fair-minded lay observer might reasonably apprehend a lack of impartiality on the part of the decision-maker in the circumstances. It was thus 'officer misconduct', according to the wide definition of that term in the Act.

14. The Commission accepts the Robertson Report's conclusion that, in the decision-making process for the Robodebt referrals, the Commissioner made a mistake of law or fact when applying the principles of apprehended bias through association. The Commission prefers the view that it is better characterised in the alternative way expressed in the Robertson Report, that is as a mistake of fact as to whether a fair-minded lay observer *might* apprehend that the decision-maker *might* not be impartial,² but this does not affect the ultimate conclusion.
15. There are some aspects of the reasoning in the Robertson Report that the Commission does not altogether share. However, as the Commission accepts that the ultimate conclusion is open, and that in those circumstances it is preferable that its decision be independently reconsidered, the Commission does not consider that it would be constructive to engage in debate about them. Rather, the Commission makes the following points to ensure that the conclusions in the Robertson Report are properly understood and contextualised.
16. **First**, the terms "agency maladministration" and "officer misconduct", as defined in s 184(3), are labels which apply to a very broad variety of circumstances, including many which would not ordinarily attract the epithet of "misconduct". They apply in the present case simply because of a legal or factual mistake regarding apprehended bias. This is a form of error which has occurred in relation to many judicial decisions, including by eminent judges, and many administrative decisions, including by senior tribunal members and decision-makers. Such an error does not require, and typically does not

² The view that whether circumstances are such as to give rise to a reasonable apprehension that a decision-maker might not be impartial is a question of fact is supported by *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20] (Kiefel, Bell, Keane and Nettle JJ), referred to in the Robertson Report at [117]; and also by the discussion in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294-300 (Mason, Murphy, Brennan, Deane and Dawson JJ).

involve, any form of deliberate wrongdoing or misconduct. In particular, it does not involve any conclusion at all that there was actual bias.

17. There is no suggestion in the Robertson Report of any actual bias, or of any deliberate wrongdoing or misconduct other than this kind of mistake. It would be unfortunate, and unfair, if the statutory labels were to be used in a way that suggested otherwise. Accordingly, the Commission respectfully submits that it would be appropriate for the Final Report to record specifically that the "officer misconduct" found arose solely from a mistake of law or fact in the application of the principles of apprehended bias, and that there is no broader suggestion of any actual bias, or any other impropriety, in the management of the Commissioner's conflict of interest. It would be fair to explain that whether circumstances are such as to give rise to a reasonable apprehension of bias is a question of judgment on which minds can and often do reasonably differ,³ and that the fact that an appellate court concludes that, on account of apprehended bias, a trial judge ought not have sat "*does not involve any personal criticism of the judge at first instance, or any assessment of [their] qualities or [their] ability to have dealt with the case ... fairly and without pre-judgement or bias*".⁴ Thus while the Commission accepts that the conclusion in the Robertson Report is open, and proposes to act on it, this does not mean that there was intentional impropriety.
18. In this respect, it is important not to lose sight of those aspects of the decision-making process which were supportive and indicative of an independent decision being made by the delegated Deputy Commissioner. The Robertson Report focusses on those aspects of the process in which the Commissioner had involvement: given the nature of the issue being examined this is understandable, and no criticism is made of the report on that account.⁵ However, read alone, the summary of the evidence in that report tends to obscure other relevant aspects of the decision-making process in which

³ For illustrations of this, see the differing views of the Court of Appeal and the High Court in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, and again in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; [2011] HCA 48.

⁴ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294-5 [8].

⁵ Unfortunately, however, at [60], where the Commissioner's email of 16 August 2023 is set out, the bolding and italicisation of the "***IF***" which appears at the commencement of the third last paragraph and was intended to emphasise to recipients that this was a hypothetical possibility and not any expression of an opinion as to what the decision should be, has not been reproduced.

the Commissioner had no involvement, or which supported the independence and impartiality of the delegated Deputy Commissioner. As a matter of fairness, it would be appropriate to ensure that the Final Report reflects a balanced picture of the decision-making process as a whole, while nonetheless accepting that it was affected by the mistake identified. That process is outlined in detail in the Commission's initial submissions (the **August submissions**) at [36]-[97]. It suffices to note the following matters here:

- a. The Commissioner delegated the power under s 41 of the Act to decide whether, and if so how, to deal with the Robodebt referrals to a Deputy Commissioner. The delegated Deputy Commissioner was an experienced senior official with significant experience in independent decision-making in relation to complex and controversial matters.
 - b. A recommendation was prepared and presented by a senior Commission staff member, recommending that no further action be taken in relation to any of the 5 referred public servants. That was prepared independently of any involvement of the Commissioner and was provided to the delegated Deputy Commissioner prior to the 19 October 2023 NSAP meeting.
 - c. The delegated Deputy Commissioner's provisional decision, recorded directly after the 19 October 2023 NSAP meeting, was in line with the recommendation provided prior to the meeting so far as concerned the public servants; it differed only in relation to the recommendation that there be a preliminary investigation in relation to Referred Person 6.
 - d. Following further and detailed consideration in relation to the decision to be taken in relation to Referred Person 6, the delegated Deputy Commissioner proceeded to make decisions that aligned with the provisional decision outlined on 19 October 2023.
 - e. While the Commissioner did express views on a range of matters at different points in the process, he did not direct or request the delegated Deputy Commissioner or any other Commission staff member, including the Commission's legal team, to achieve a particular outcome. Nor did he ever express any personal views or opinion, positive or negative, about Referred Person 1.
19. The Commission considers it appropriate to provide some further detail about the nature of the association between the Commissioner and Referred Person 1. The Commissioner

declared a conflict of interest arising from a professional association with Referred Person 1, on four separate occasions. This association was limited to professional, not personal dealings, and they were not close personal friends. Sections 47C, 47E(d)

The declaration of a perceived conflict and delegation of decision-making was made in those circumstances for more abundant caution.

20. The above is not to deny that the involvement of the Commissioner at different points in the decision-making process was such as to give rise to apprehended bias in the manner outlined in the Robertson Report. But it does locate the Commissioner's mistake as having arisen in a process in which an experienced decision-maker did in fact make a decision which aligned with the recommendation made to them independently of the views of the Commissioner, and in which the actual decision-maker made a decision free of actual bias.
21. **Secondly**, to ensure a complete picture, it is also important to explain why the Commissioner was involved to the degree he was. Prior to the 19 October 2023 NSAP meeting, the Commissioner had involvement in internal discussions and processes related to the decision because he considered that the legal, policy and resourcing considerations that were involved would have ongoing ramifications for the Commission, and he advised the delegated Deputy Commissioner and other senior staff of this when he declared his perceived conflict on 7 July 2023. His observations at the 19 October 2023 NSAP meeting were directed to ensuring that relevant considerations were taken into account, not to achieving a particular outcome. The referrals were received in the first week of the Commission's existence, while it was just establishing views and processes relevant to its work more generally, not just in relation to the Robodebt referrals. These were matters with which the Commissioner would, absent any potential conflict, have been very closely involved. The fact that they fell to be considered at a very early stage in a matter in which the Commissioner did have a perceived conflict of interest was unfortunate, and significantly complicated the position.
22. The same considerations apply, even more strongly, after the provisional decision had been made by the delegated Deputy Commissioner on 19 October 2023. The outstanding issue concerned Referred Person 6, in respect of whom the Commissioner had no conflict. The manner in which the decision made by the delegated Deputy Commissioner would be represented in public could have a significant and material

effect on the reputation of the Commission and was the subject of legitimate involvement by the Commissioner *after* the decision had been made.

23. The Robertson Report appropriately recognises that the Commissioner could legitimately have an ongoing interest in the decision-making at this level.⁶ However, the Robertson Report also concludes that the Commissioner made a mistake in remaining involved in so far as the policy questions bore a double character, raising both policy and factual matters. Without denying this conclusion, it remains important as a matter of fairness to reflect that there were in play important issues for the Commissioner and that his involvement was directed at these matters, not an attempt to influence the delegate by reference to his association with Referred Person 1.
24. **Finally**, the Robertson Report and the Draft Report (at least in this respect) are concerned with a question of process, not the merits of the decision in relation to the Robodebt referrals. The decision whether to take any action in relation to those referrals was one that involved a broad discretion and a wide array of factors, as explained in the documents evidencing the decision-making process and in the Commission's August submissions (e.g. at [8]-[15], [27]-[32], [104]-[105]). It is (quite properly, with respect) not suggested in the Robertson Report or the Draft Report that the actual decision made by the delegated Deputy Commissioner was not a decision that was reasonably open to them.
25. In circumstances where the Commission is minded to agree to an independent reconsideration of its decision, if possible (discussed in more detail below), it is respectfully submitted that it is important that the Final Report make clear that the Inspector has not sought to reach or express a view about the merits of the decision actually made by the delegated Deputy Commissioner, or to be made by any new delegate.

Reconsideration

26. The Commission is minded to agree that the appropriate way forward is for the question of whether, and if so how, to deal with the Robodebt referrals to be reconsidered by an appropriate independent person. The concerns raised in the Draft Report and the Robertson Report emphasise the importance of ensuring a heightened degree of

⁶ Robertson Report, [90].

transparency and independence in the reconsideration process, and the Commission has begun the process of seeking to identify an appropriate independent eminent person to undertake the task.

27. In circumstances where, under s 276(1) of the Act, the Commissioner’s power of delegation is limited to Deputy Commissioners and certain employees of the Commission, the Commission is considering how best this reconsideration could be undertaken without raising the same concerns about apprehended bias that are identified in the Robertson Report, in particular those at [97], [98], [99] and [106]. The Commission is exploring the practical issues involved in implementing the recommendation including the appointment of an appropriate person as a temporary staff member, or alternatively their retainer as a consultant (which also is not free from difficulty, as it would not be permissible for a decision-maker to agree in advance to be bound by a view expressed by a consultant).
28. Any reconsideration will also need to have regard to s 45 of the Act, which provides that, in circumstances where a public official’s conduct has previously been investigated by a Commonwealth integrity agency, the Commissioner may commence a corruption investigation into such conduct only if satisfied that another investigation is in the public interest. On 13 September 2024, the Australian Public Service Commissioner made a public statement about the outcome of Code of Conduct inquiries conducted by the APSC in relation to Robodebt matters. **Sections 47C, 47E(d)**
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] new decision-maker would have to be satisfied for the purposes of s 45 that another investigation of the same conduct is in the public interest.
29. These matters remain under consideration by the Commission and will be addressed further in the next tranche of submissions, to be provided by 21 October 2024.

The Ancillary Issues

Sections 47C, 47E(d)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

[REDACTED]

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)
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Availability of Sanctions

- 67. The Report states ss 47C, 47E(d) that the public statement contained a 'misleading reason' which did not apply to any of the Referred persons.
- 68. Shortly after the referrals were made, the Commission received information that two of the five public servants remained employed in the APS ss 47C, 47E(d). As is noted in the Draft Report, the assessment papers, which were considered in October 2023, stated that all of the public servants had left the APS. However, this was incorrect, and

in fact, one of the referred persons remained employed by the APS until May 2024, after the delegated Deputy Commissioner made their decision. However, by the time the Commission made its public statement, in June 2024, no sanctions were available to the APSC against any of the Referred Persons.

- 69. In those circumstances, the Commission agrees that the public statement should not have suggested that the APSC had the ability to impose sanctions in respect of the Referred Persons. Rather, it should have correctly outlined the APSC’s powers in relation to former APS staff, namely, to conduct an investigation for breaches of the APS Code of Conduct with the potential for any breach finding to affect future employment in the APS or engagement as a contractor by a Commonwealth Government Agency.
- 70. This was a regrettable but unintentional mistake.
- 71. The delegated Deputy Commissioner’s decision and reasons of 16 April 2024 did not contain, and are not affected by, this mistake.

Sections 47C, 47E(d)

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[REDACTED]

█ [REDACTED]

Sections 47C, 47E(d)



Conclusion

- 77. The Commission respectfully requests that the above submissions be taken into account for the purposes of the Final Report.
- 78. The Commission would be pleased to provide any explanation, clarification or supplementation that the Inspector might request.

Section 47F



The Hon PLG Brereton AM RFD SC
Commissioner
8 October 2024

ss 46(b), 47C, 47E(d), 47F

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

■ ss 46(b), 47C, 47E(d), 47F

■ [Redacted]

Ref: 24/667

Submissions (Part 2) to the Inspector of the National Anti-Corruption Commission

Introduction and summary

1. This is Part 2 of the response of the Commissioner to the Inspector's request for submissions about the Draft Report dated 3 September 2024. It is intended to be read with, and uses terms defined in, Part 1 of the response provided on 8 October 2024 (the **Part 1 Submissions**). It addresses:
 - a. further detail concerning the proposed recommendation in the Draft Report; and
 - b. Sections 47C, 47E(d)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The proposed recommendation

2. As foreshadowed in the Part 1 Submissions, the Commission has now decided, without awaiting finalisation of the Inspector's investigation, to have its decision under s 41 to take no further action in respect of the Robodebt Royal Commission referrals reconsidered under s 41(5) of the *National Anti-Corruption Commission Act 2022* (Cth) (**the Act**) by an appropriate independent person.
3. The preferred and likely mechanism for this involves the appointment of an appropriate independent person as a temporary staff member at the SES level to exercise delegated decision-making power under s 41(5), pursuant to s 276(1)(b) of the Act. The appointment would be on terms that the Commissioner did not propose to give any direction under s 276(6).
4. The Commission is in the course of sourcing an appropriate eminent independent person who is prepared to be engaged as a temporary SES staff member to undertake this

function, of seeking the approval of the Australian Public Service Commissioner (whose approval is necessary for the engagement of a temporary SES officer) to this course, and of making the necessary resourcing arrangements to support the independent appointment.

5. If the course of appointing an independent person to act as a delegate proves to be impossible, then the Commission will engage such a person as a consultant, under s 263. This course is not preferred, but is an alternative means by which reconsideration by an eminent independent person could be procured, if delegation proves impractical.
6. The Commission will inform the Inspector when the arrangements referred to above have been put into place.

Sections 47C, 47E(d)

■ [REDACTED]

[REDACTED]

■ [REDACTED]

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■ Sections 47C, 47E(d) [Redacted]
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Sections
47C, 47E(d)

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

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Sections 47C, 47E(d)

Sections 47C, 47E(d)

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21 October 2024

Sections 47C, 47E(d)

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Outline of Submissions to the Inspector of the National Anti- Corruption Commission (13 August 2024)

Introduction

1. By letters dated 6 July 2023, the Royal Commission into the Robodebt Scheme (**the Royal Commission**) wrote to the National Anti-Corruption Commissioner (**the Commissioner**) to communicate information and furnish evidence about 6 individuals' possible engagement in corrupt conduct within the meaning of s 8 of the *National Anti-Corruption Commission Act 2022* (Cth) (**the Act**). The referrals relate to five public servants who are referred to by number (e.g. 'Referred Person 1') and a sixth person, who is not a public servant and who is referred to as 'Referred Person 6'.¹
2. Each of the 6 letters foreshadowed the publication, on 7 July 2023, of the Royal Commission's report, and enclosed: an encrypted USB device containing the referred evidence and information; a sealed copy of part of a Confidential Chapter of the Royal Commission's report (**the Confidential Chapter**); an index of referred evidence and information (together, **the Robodebt referrals**); copies of s 6P of the *Royal Commissions Act 1902* (Cth) and a series of non-publication directions.
3. On 16 April 2024, after having considered each of the Robodebt referrals, a delegate of the Commissioner (the **delegated Deputy Commissioner**), decided to take no action with respect to each under subs 41(6) of the Act. This decision was communicated to the 6 referred persons on 22 April 2024.

¹ For convenience, 'public servant' is used in this submission to differentiate these individuals from the position of Referred Person 6

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4. On 6 June 2024, the National Anti-Corruption Commission (**the Commission**) made a public statement about its decision.
5. You are investigating complaints of agency maladministration by the Commission, under subs 184(e) of the Act, in relation to the delegated Deputy Commissioner's decision to take no action in response to the Robodebt referrals.
6. In an effort to assist you further in considering that material, we now provide the following submissions addressing:
 - a. the legislative, policy and operational context in which the Commission's decision was made; and
 - b. each of the themes you have advised are raised by the complaints.
7. We understand that you intend to afford the Commission a further opportunity to make submissions prior to you making findings.

Decision-Making Context

Legislative context

8. The Commission's decision must be viewed in the context of the nature of the function it was performing under its governing legislation, the Act. Here, the Commission was deciding, under s 41 of the Act, whether and if so, how, to deal with a corruption issue. That is no more than a preliminary decision whether or not to open an investigation, which does not of itself affect rights.
9. Any person may refer a corruption issue or provide other information about a corruption issue to the Commissioner.² Section 41 of the Act confers on the Commissioner (or delegate) a very broad discretion to decide whether or not to take action in respect of a corruption issue, and what form of action to take. This is underscored by the fact that subs 41(7) expressly provides that the Commissioner has no duty to consider whether to deal with any particular referral, in any circumstances.

² *National Anti-Corruption Commission Act 2022 (Cth)*, s 32.

10. Section 41 provides that the Commissioner may deal with a corruption issue: by conducting a 'corruption investigation'³ into it, either alone or jointly with another agency⁴ (but only if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic)⁵; by referring it to the agency to which it relates to investigate;⁶ by referring it to another agency for consideration;⁷ or by deciding to take no action in relation to it.⁸
11. Notably, there is no duty even to consider whether to deal with a corruption issue, regardless of by whom it is referred, in any circumstances. Sub-section 41(7) provides:

The Commissioner does not have a duty to consider whether to deal with a corruption issue under this section, whether the Commissioner is requested to do so by the person who referred the issue or by any other person, or in any other circumstances.
12. In this case, the Royal Commission provided information to the Commission under subs 6P(2B) of the *Royal Commissions Act 1902* (Cth), which permits a Royal Commission, if in its opinion it is appropriate to do so, to communicate information or furnish documents, evidence, or things to the Commissioner that, in the opinion of the Royal Commission, relate or may relate to the performance of the functions of the Commissioner. That does not give referrals made by Royal Commissions any status that is different to other types of referrals, including those made by heads of Commonwealth agencies.

³ See *National Anti-Corruption Commission Act 2022* (Cth), subs 41(2).

⁴ *National Anti-Corruption Commission Act 2022* (Cth), subs 41(1)(a), (b)

⁵ *National Anti-Corruption Commission Act 2022* (Cth), subs 41(3).

⁶ *National Anti-Corruption Commission Act 2022* (Cth), subs 41(1)(c).

⁷ *National Anti-Corruption Commission Act 2022* (Cth), subs 41(1)(d).

⁸ *National Anti-Corruption Commission Act 2022* (Cth), subs 41(6).

13. The Act does not expressly prescribe or limit the matters which the Commissioner may consider in exercising the broad discretion under s 41. The matters which the Commissioner may consider can include, for example:
- a. the public interest in, or likely utility of, a corruption investigation, including:
 - i. the adequacy of any prior investigation into the corrupt conduct (for example, by the employer of a public official);
 - ii. the likelihood that the investigation will unearth (new) evidence of corrupt conduct;
 - iii. if corrupt conduct is found, the likely efficacy of the Commission's processes – including reporting and referral powers, and education functions – in remedying it or preventing similar conduct in the future;
 - b. the resources that may be required to complete a corruption investigation, and the opportunity cost of depriving other ongoing or potential investigations of these resources.⁹
14. This is consistent with the approach Parliament has required the Commissioner to take in the analogous situation where a public official's conduct has previously been investigated by a Commonwealth integrity agency. Section 45 provides that the Commissioner may commence a corruption investigation into such conduct only if satisfied that another investigation is in the public interest.¹⁰ In considering that question, the Commissioner is expressly permitted to consider (without limitation) the details of the previous investigation, its findings (however expressed), whether the Commissioner has fresh evidence, and any unfairness that may result from a further investigation.¹¹ The Revised Explanatory Memorandum to the NACC Bill also identifies limitations in the jurisdiction, expertise or powers of the other agency as a relevant

⁹ These are all matters referred to in the Commission's Assessment of Corruption Issues Policy. See further and by analogy, *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [108] (Keane J).

¹⁰ *National Anti-Corruption Commission Act 2022* (Cth), subs 45(2).

¹¹ *National Anti-Corruption Commission Act 2022* (Cth), subparas 45(3)(b)-(e), (4).

consideration.¹² Although s 45 did not apply directly to the Robodebt referrals,¹³ it provides a useful indication of the kinds of considerations Parliament considered may be relevant to a decision whether the Commission should reinvestigate a matter.

15. This is also consistent with orthodox approaches to the construction of statutory provisions conferring broad discretions to consider matters with a public interest dimension¹⁴ and the well-recognised breadth of discretions as to whether, when and how to investigate breaches of the law.¹⁵

Policy context

16. The Commissioner may delegate all or any of their functions, powers or duties to a Deputy Commissioner, including to make a decision under subs 41(6).¹⁶
17. On 3 July 2023, the Commissioner signed an instrument delegating decision-making functions generally to each Deputy Commissioner and (subject to irrelevant exceptions) staff at the SES classification. The instrument further delegates the power to take no action under subs 41(6) to the Intake and Triage Team and Assessments Team staff members holding or acting at the EL2 classification (that is, a Director of those teams).
18. On 18 July 2023, the CEO signed the Commission's Integrity Policy and its Private Interest, Declarable Association, and Contact Reporting Policy (**Declarable Association Policy**). The Declarable Association Policy refers to general obligations to

¹² Revised Explanatory Memorandum to the *National Anti-Corruption Commission Bill 2022*, para 6.57.

¹³ Royal Commissions are not among the Commonwealth integrity agencies listed under s 15 of the Act. Although the APSC is a Commonwealth integrity agency, at the time the decisions were made, it had not concluded its processes with respect to each of the referred persons.

¹⁴ See, e.g., *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 527; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216.

¹⁵ See *Hinchcliffe v Commissioner of the AFP* (2001) 118 FCR 308 at [33]-[35]; *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118 at 136 (Denning MR).

¹⁶ *National Anti-Corruption Commission Act 2022* (Cth), subparas 276(1)(a), (2)(b).

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manage conflicts of interest under the *Public Governance, Performance and Accountability Act 2013* (Cth) and provides that (emphasis added):

A declarable association is any association which creates or may give rise to a perceived or real conflict of interest between your private relationships, associations or acquaintances and your position with the NACC.

There is no standard list of declarable associations. It is your responsibility as a NACC employee to consider relationships that may affect, or be perceived as affecting, the NACC or your role as a staff member of the NACC.

The types of relationships or contact that may constitute a declarable association include relationships with [most relevantly ...] persons that you know or suspect are being of interest to or investigated by the NACC (Section 5.14 of the NACC Integrity Policy outlines required actions in these circumstances).

19. Paragraph 5.14 of the Integrity Policy, referred to in the text extracted above, lists strategies that may be taken to mitigate risks associated with a conflict of interest, including continued monitoring, delegation or reassignment of duties, removal from decision-making processes, limiting exposure to information and employee support.
20. On 6 July 2023, the Commission's General Manager Corruption Prevention, Education and Evaluation issued the Management of Corruption Issue Referrals Standard Operating Procedure. Although it allows for some flexibility,¹⁷ it broadly provides:
 - Staff in the Commission's Intake and Triage team should assess referrals and may seek further information in order to consider whether the referral appears to raise a corruption issue within the Commission's jurisdiction (a **Tier 1 assessment**). If the referral does not raise such an issue, that team's Director can decide to take no action.¹⁸

¹⁷ See [2.2] (which allows escalation from Tier 1 assessment), [2.10] (which allows Tier 2 assessments to be made out of order), [2.18] (which allows the NSAP to bring in resources from elsewhere in the Commission) of the Management of Corruption Issue Referrals Standard Operating Procedure.

¹⁸ Ibid [2.1]-[2.4].

OFFICIAL

- Otherwise, staff in the Commission's Assessments team will then consider referrals to confirm they are within jurisdiction and develop an assessment and recommendation as to how it should be dealt with (a **Tier 2 assessment**). The recommendation is considered by the team's Director in the first instance.¹⁹
 - Tier 2 assessments recommending Commission action are provided to the National Anti-Corruption Commission Senior Assessment Panel (**NSAP**) for consideration and decision. The Director Assessments may also decide that no further action should be taken in relation to a referral, and a list of such decisions is provided to NSAP for information.²⁰
21. After consideration by NSAP, in practice, decisions following Tier 2 assessment are either made by the Commissioner personally or, as here, by a Deputy Commissioner as delegate.
22. The functions and constitution of NSAP are set out in its Terms of Reference, which were signed by the Commissioner on 12 July 2023. The NSAP is comprised of the Commissioner, Deputy Commissioners and relevant General Managers and its role is:
- ... to consider recommendations from the Director Assessments ..., and to support the Commissioner to decide:
- whether there is a corruption issue,
 - whether or not to deal with the corruption issue, and
 - how to deal with the corruption issue.
23. In relation to conflicts of interest, NSAP's Terms of Reference provide:
- Members must declare any perceived or actual conflict of interest in relation to matters to be considered. Potential conflicts may be identified by NSAP members upon receipt and review of recommendations from Director Assessments and on occasion, prior to assessment.

¹⁹ Ibid [2.9]-[2.12], [2.15].

²⁰ Ibid [2.16]-[2.18].

OFFICIAL

While individual situations will differ, at a minimum the following relationships must be declared:

- If an NSAP member, partner or relative has at any time been a work colleague of a person whose interests might be affected by a corruption investigation in relation to the matter,
- If an NSAP member, partner or relative has in the last 5 years had any social engagement or association with a person whose interests might be affected by a corruption investigation in relation to the matter,
- ...
- If there are any other circumstances which could give an appearance that the member had a financial or personal interest in relation to the matter.

Conflicts must be recorded using a prescribed form and provided to the Director Assessments and the Commissioner to enable the effective management of any risk associated with the potential or actual conflict.

24. The requirement to complete a prescribed form was based upon the approach previously taken at the Australian Commission for Law Enforcement Integrity (ACLEI). It was not invariably followed and the “doubling up” between the form and declarations recorded in the meeting minutes was raised with the Commissioner and other senior members of staff in an email dated 27 October 2023. The relevant senior staff expressed the view that a declaration in the meeting would suffice. NSAP progressively departed from completion of the prescribed form, in favour of having conflicts declared at the meeting and recorded in the minutes. This is now standard procedure, and this change will be incorporated into revised Terms of Reference which are currently being developed by the Evaluations Branch. This approach is favoured because it ensures that there is a formal procedure of declaring the conflict in the presence of all other participants, who are thus aware of it.
25. In this case, the Commissioner did not complete the prescribed form, in circumstances where he had already made declarations:
 - a. as recorded in the minutes of the Statutory Office Holders meeting on 3 July 2023;

- b. in writing, to the statutory officeholders and General Manager Legal and General Manager Corruption Prevention, Education and Evaluation, by email of 7 July 2023;
 - c. in writing to the Attorney-General, copied to the other statutory officeholders and the Commission's Governance Team, on 11 August 2023;
 - d. orally, at NSAP on 19 October 2023.
26. The Management of Corruption Issues Policy refers to a complementary policy, the Assessment of Corruption Issues Policy, which was issued by the Commissioner on 5 July 2023. Relevantly, when deciding whether or not to deal with a corruption issue:
- All assessment decisions are to be made on a case-by-case basis, having regard to the particular features of the information and circumstances (para 3.1).
 - Decision-makers may have regard to the availability of investigative pathways (para 5.3(d)):

Where investigative pathways exist that may shed light on the truth of an allegation, it is more likely that the referral will put forward a question that can be determined, than where available investigative pathways offer a very small prospect of a conclusive outcome.

- Decision-makers may have regard to the extent to which the corruption issue has previously been investigated (para 5.3(e)):

Allegations that have not been scrutinised prior to their referral are more likely to leave questions to be investigated. Conversely, allegations that have already been fully investigated, scrutinised or litigated leading to a conclusive outcome are less likely to be appropriate for further investigation. However, in some cases a corruption investigation regarding the alleged conduct of a public official may be warranted, even if a Commonwealth integrity agency has previously concluded an investigation into that alleged conduct, having regard to the public interest, the nature of the earlier investigation, the availability of new evidence, and other factors.

OFFICIAL

- It will generally be appropriate to take no action if (para 5.4):
 - a. There appears to be no real prospect that an investigation will obtain evidence of corrupt conduct. However, sometimes it will be in the public interest to proceed to investigation, in order to clear the air; or
 - b. There has been a previous adequate investigation of the conduct in question. However, it is necessary to maintain an open mind to the possibility that a previous investigation has failed to uncover the truth, and that referrals which may appear querulous not infrequently have at their origin a legitimate grievance which has not been adequately addressed.

Operating context

27. The Commission received a large number of referrals in the weeks and months after it commenced operations.
28. The parts of the Act that enable the Commission to function commenced on Saturday 1 July 2023. That weekend, the Commission received 124 web form and email submissions, largely from members of the public. By the end of its first week, on 7 July 2023, the Commission had received 300 web form and email submissions. Although those numbers plateaued in the following weeks, between 8 July 2023 and 19 October 2023 (when the Robodebt referrals were considered by NSAP), the Commission was receiving up to 116 referrals each week, which generated anywhere up to 42 Tier 2 assessments each week (after referrals that were out of jurisdiction had been triaged out together with duplicate referrals).
29. As was to be expected, the Commission initially received duplicate referrals on topics of public notoriety. In its first month, Robodebt was the fourth most-referred matter to the Commission.
30. Of the total number of referrals received during that period, at least 47 were submitted by heads of Commonwealth agencies who had become aware of corruption issues involving staff members within their agencies which they suspected could involve corrupt conduct that is serious or systemic.
31. The sheer volume of referrals generated competing priorities which affected the speed with which the Robodebt referrals could be progressed. The volume of referrals was also relevant to the decision about how to deal with these specific referrals: allocation

of Commission resources to their further investigation would inevitably come at the expense of other matters that had not been previously investigated as thoroughly as the Robodebt matters (if at all). That could potentially result in evidence of corruption in other potential matters not being unearthed.

32. The pressure on Commission resources has been ongoing and informs the context for decision-making. The Commission received 3,189 referrals in its first year to 30 June 2024. Of these referrals, 2,443 were excluded at the triage stage, 159 referrals await triage, 318 referrals are under assessment and 269 referrals were assessed.

The delegate

33. It was contemplated from the outset that the delegated Deputy Commissioner would exercise decision-making authority concerning how to deal with the Robodebt referrals. That is in fact what occurred.
34. The delegated Deputy Commissioner is an experienced public servant and has held several senior positions.
35. Each of the positions held by the delegate involved the exercise of independent judgment in the context of complex and controversial decision making.

The Decision-Making Process

36. This section of the submissions addresses aspects of the decision-making process the Commission understands may be relevant to the complaints made to the Inspector. You have advised they raise the following themes:
- how the perceived conflict of interest of the Commissioner was dealt with
 - the time the Commission took to make its decision
 - the sufficiency of the Commission's reasons for its decision
 - the failure by the Commission to investigate as a 'breach of public trust'.
37. Each of these themes is addressed below.

Identification, declaration and management of the Commissioner's perceived conflict of interest

38. The Commissioner declared his perceived conflict on the day the Commission commenced operations, being 3 July 2023, in a meeting of statutory officeholders.²¹ He suggested that the delegated Deputy Commissioner might take carriage of the Robodebt matter once material had been received from the Robodebt Royal Commission. The Commissioner explained it was "highly possible that he could be conflicted as he knows [Referred Person 1] well" and if they were "the subject of a referral, then he would not be involved in decision-making concerning" that person. The Commissioner's perceived conflict was then referred to in emails to a wider audience of senior managers on 6 and 7 July.

39. On 7 July 2023, the Commissioner outlined his proposed approach to managing his conflict in an email to the Deputy Commissioners and others. He wrote:

As I have already indicated to most of you, I also have a conflict, relating to one of the six individuals the subject of referrals, namely [Referred Person 1], who is well known to me.

For that reason, [the delegated Deputy Commissioner] will be the lead Commissioner on these referrals. I will not be involved in any decisions concerning [Referred Person 1]. However, I will retain an overall interest in the policy questions that arise concerning these referrals generally, because those questions – particular the scope of "corrupt conduct" – will necessarily have ongoing ramifications for us.

40. The Commissioner informed the Attorney-General of the nature of his relationship with [Referred Person 1]. In a letter dated 11 August 2023, he wrote:

Relationship with [Referred Person 1]

... [Referred Person 1] is one of those with whom I have had a close association in [name of organisation], and if [they] were to be the subject of a referral to the Commission, I would recuse myself from decision-making concerning [them] and allocate the matter to a Deputy Commissioner.

²¹ At this time, the statutory officeholders were Commissioner Paul Brereton, Deputy Commissioner Nicole Rose, Deputy Commissioner Ben Gauntlett and Deputy Commissioner Jaala Hinchliffe.

OFFICIAL

41. That letter was sent by email to the Attorney-General's Department and the other statutory officeholders, and to the Commission's Governance team.
42. On 15 August 2023, the delegated Deputy Commissioner sought to confirm that the Commissioner was "comfortable participating in the consideration of the 5 referrals [he did] not have a conflict with". On 16 August 2023, the Commissioner replied:

I will not be the decision-maker in respect of any of the Robodebt matters. However, because it is of obvious important [sic] to the Commission, I think it is important and appropriate that I be aware of what is happening. I do not think it is necessary to redact any material – it is perfectly normal to receive and read evidence and then not take it into account because it is not admissible etc.
43. The Commissioner retained visibility of significant steps taken in relation to the Robodebt referrals. He contributed his own views when requested or when he considered appropriate.
44. At the NSAP meeting on 19 October 2023, the Commissioner again made a declaration of the perceived conflict. After contributing to the initial discussion of the issues, he left the meeting when the time came to consider the decision to be made.
45. The Commissioner had a legitimate and important interest in the legal, policy, systems and resourcing issues raised by the Robodebt referrals. The scheme of the Act makes clear that the Commissioner has primary responsibility for carrying out the Commission's functions, including the detection and investigation of corrupt conduct. It was consistent with the primacy of his role for the Commissioner to retain an interest in questions affecting the scope and performance of those functions. This was especially so given this was in many respects the first time the Commission had confronted those questions. The Commissioner also had a legitimate and important interest in the form that the public statement of the decision would take, thus his involvement in the formulation of the statement, after the decision had been made.
46. That said, as the Commissioner has at all times acknowledged, there was a perceived conflict of interest concerning one of the referrals. It was therefore necessary to manage the conflict, so as to ensure that the decision was and was seen to be unaffected by the perceived conflict. He and the Commission took appropriate steps to do so, fundamentally by assigning the matter to the delegated Deputy Commissioner, who had no conflict. The Commissioner's involvement in an advisory role did not impinge on

OFFICIAL

the delegate's independent decision-making. The delegate was fully aware of the Commissioner's perceived conflict, and unconstrained and uninfluenced by it.

47. Those steps were an appropriate way to manage the Commissioner's perceived conflict of interest in the context of an investigative (rather than curial) role, and in circumstances where:
 - a. The decision was a preliminary decision whether or not to commence an investigation, which did not directly affect the rights of any person;
 - b. The Commissioner had no actual personal 'interest' (in the relevant sense) in the decision, inconsistent with his duty. The perceived conflict arose from a prior professional association, and not a close personal relationship or pecuniary interest giving rise to a more acute conflict of interest and duty;
 - c. The Commissioner promptly, explicitly and repeatedly declared the conflict, so it was known to, (and could be taken into account by,) all others within the Commission involved in dealing with the referrals;
 - d. The decision was delegated to a senior public official with extensive experience making independent decisions, whose freedom and independence of decision was unconstrained in any way.
48. Other panellists submitted conflict of interest declaration forms.
49. The Commission's senior staff did what was required under their Integrity Policy, and what they would expect any other agency to do: identify potential conflicts of interest and manage them in a way that is appropriate in the circumstances, including through declaration, and different degrees of removal from the decision-making process, according to the nature of the conflict and the nature of the decision.

Time taken to make a decision

50. The Commission announced its decision on the Robodebt referrals on 6 June 2024, 11 months after it received them from the Royal Commission. The Commission submits

OFFICIAL

that the time taken was not “unreasonable, unjust, oppressive or improperly discriminatory in its effect”.²²

51. The decision was supported by a large amount of work undertaken across the Commission’s branches and at senior levels. The chronology provided to you on 19 July 2024 sets this work out in detail. That work was undertaken alongside other duties, in circumstances where the Commission was also deciding how to deal with more than a thousand other referrals received in its first months of operation, as well as onboarding new staff, developing and testing new policies and procedures, introducing new statutory officeholders and senior executives to staff who had been transferred from ACLEI, and learning the Commission’s new case management system. The following paragraphs provide an overview of that work.

Ingestion of the Robodebt referrals into the Commission’s case management system

52. Between about 6 and 11 July 2023, the USB device containing the referrals was copied into the Commission’s case management system, Argus. Access to the referrals was restricted to a small number of Commission staff.
53. The time taken to ingest the referrals reflects, in part, that staff were still learning how to use the Commission’s computer systems, which had been in operation for only a few days at that point. It also reflects care being taken to preserve the confidentiality of the of the information referred by the Royal Commission. Such a cautious approach is appropriate. In any event, it did not lead to substantial delay.

Preparation of legal advice on the Commission’s jurisdiction

54. The Commission was required to consider a number of legal questions for the first time in considering the Robodebt referrals relating to its jurisdiction.
55. Accordingly, on 13 July 2023, the Commissioner formulated and sent a request for legal advice.
56. Staff within the Legal Branch worked on the draft legal advice with the assistance of a Deputy Commissioner.

²² *National Anti-Corruption Commission Act 2022* (Cth), subpara 184(3)(b)(ii).

57. On 21 July 2023, the Legal Branch wrote to the delegated Deputy Commissioner and another Deputy Commissioner to arrange a discussion about the Branch's preliminary views.
58. On 10 August 2023, the finalised legal advice was sent to the Commissioner and Deputy Commissioners.
59. The advice was completed in under a month, alongside other legal work undertaken during that period. This was reasonable given the issues it addressed.

Preparation of assessment summaries

60. On 16 August 2023, an assessment officer was allocated to assess all six matters. That officer was given access to the referral information and legal advice.
61. On 29 September 2023, an assessment officer completed drafts of assessment summaries. Those drafts included recommendations that each referral result in a corruption investigation except for the referral in relation to Referred Person 6, in respect of which a preliminary investigation was recommended.
62. Between 5 and 12 October 2023, each of the draft assessments was reviewed.
63. After reviewing the draft assessment summaries, a senior staff member provided final assessments to the NSAP on 17 October 2023, in which that staff member recommended that the Commissioner take no further action in relation to the 5 referred public servants, in each case referring to:²³
 - a. para 5.4 of the Assessment of Corruption Issues Policy;
 - b. the Royal Commission's inquiry and findings, which were 'likely to limit available investigative pathways'; and
 - c. the APSC's ongoing investigations, noting the APSC would refer any information identified to the Commission as required.

²³ Ibid.

OFFICIAL

64. On 17 October 2023, the senior staff member circulated these amended assessment papers to NSAP panellists. In their email, they drew attention to their disagreement with the assessment officer and the consequential change in the recommendations.
65. The Commission considers the time taken to prepare the assessment summaries to be reasonable. This involved review and careful consideration of material referred by the Royal Commission in relation to each individual referral in order to assess whether it raised a corruption issue the Commission could investigate. That assessment was also subject to two levels of review, in accordance with the Commission's standard operating procedures.
66. Admittedly, there was some initial confusion about the respective roles of the Legal, Intake and Triage, and Assessments teams, including as to whether an assessment officer ought to have been appointed before 16 August 2023. This arose because, in a departure from the Commission's then new policies and procedures, legal advice was sought first. However, standard procedures apply to ordinary cases, and this was not. In this case, the legal advice was a necessary pre-requisite to any assessment, and a departure from the standard process to meet the requirements of the individual case was appropriate. It did not cause any delay in any event.

Consideration by the NSAP

67. On 19 October 2023, the NSAP met to consider all 6 referrals from the Royal Commission. No other assessment papers were put forward for consideration that day.
68. Two contemporaneous records of the meeting were created on 19 October 2023: the notes taken by a staff member who was present, as emailed to their Director at 1:48pm, and the first draft of the formal minutes of the meeting created by an Executive Assistant to a senior manager. The minutes of the NSAP meeting of 19 October 2023 were circulated, but never finalised. This was unfortunate, and the Commission recognises that it would have been preferable for the minutes to have been finalised; NSAP minutes are now reviewed and settled more promptly.
69. At 2:44pm on 19 October 2023, the delegated Deputy Commissioner sent an email to other senior managers summarising their thinking:

I am currently proposing the Decision for all 6 subjects be the same. That being - Take no further action noting there is little public value in the NACC commencing a corruption investigation in addition to the completed Royal

OFFICIAL

Commission and the ongoing investigation by the APSC, pursuant to s41(6) of the Act.

70. That proposed course of action essentially accorded with the recommendations contained in the assessment summaries that were provided to NSAP in relation to the 5 public servants. However, it differed from the recommendation concerning Referred Person 6, which was that a preliminary investigation be undertaken “to examine what evidence the RRC obtained and whether there are identifiable gaps which could be pursued”.
71. The nature of the evidence supplied by the Royal Commission concerning Referred Person 6 therefore became a key focus in finalising the referrals. Additional work was needed concerning the referral.

Preparation of a supplementary memorandum relating to Referred Person 6

72. On 14 November 2023, the Commissioner met with the delegated Deputy Commissioner and another Deputy Commissioner to discuss possible options for the referral relating to Referred Person 6. The other Deputy Commissioner agreed to prepare a separate memorandum. On 23 November 2023, the Commissioner noted in an NSAP meeting that the other Deputy Commissioner was reviewing the Royal Commission’s evidence supplied in relation to Referred Person 6.
73. On 7 December 2023, the delegated Deputy Commissioner and the Deputy Commissioner undertaking the review of material in relation to Referred Person 6 met with a former senior staff member from the Royal Commission. The discussion confirmed the Commission’s understanding that there were no obvious gaps in the evidence gathered by the Royal Commission. The staff member confirmed that the greatest challenges were the lack of formal paperwork around decisions and recollection of events, and that Royal Commission staff worked hard to obtain as much evidence as possible.
74. On 18 January 2024, the Deputy Commissioner who had been tasked with reviewing material in relation to Referred Person 6 circulated a first draft of a memorandum concerning Referred Person 6 for legal review and comment. On 19 February 2024, the Legal Branch provided comments on the memorandum.
75. On 28 March 2024, the Deputy Commissioner provided a further draft of the memorandum concerning Referred Person 6 to the Commissioner, the other Deputy

OFFICIAL

Commissioners, the CEO and staff within the Commission's Legal Branch for their review and refinement. The memorandum concluded, relevantly, that:

- a. "[t]here would be significant practical and logistical issues in commencing a corruption investigation into [Referred Person 6]"
 - b. it was "questionable whether the presently available evidence supports an investigation given the potential resources involved and lack of direct evidence of deliberate wrongdoing"
 - c. there was "no new evidence available to the Commissioner" in relation to [Referred Person 6] "that Commission staff are aware of"
 - d. although the Commission had broader powers to acquire documents protected by legal professional privilege, "the practical effect of this issue is insignificant".
76. These conclusions tended to confirm the proposed approach that the delegated Deputy Commissioner had foreshadowed on 19 October 2023.
77. The memorandum in respect of Referred Person 6 was completed in under 5 months. This reflects a number of factors. As the memorandum itself demonstrates, it involved a detailed review of a large body of primary evidence received from the Royal Commission, along with its report, and a careful evaluation of the strength of the Royal Commission's findings. The Deputy Commissioner also sought input from the Legal Branch and consulted a former senior staff member of the Royal Commission. Particularly given that this work was completed alongside other substantial duties, the time it took was not unreasonable.
78. An additional matter that came into consideration when drafting the memorandum was the linkage between the allegations concerning Referred Person 6 and the allegations that were the subject of the APSC investigations.
79. It was also reasonable for the delegated Deputy Commissioner to await the outcome of the review of the referral relating to Referred Person 6 before making a final decision concerning the remaining referrals. All referrals had been handled as a single cohort and raised a number of common issues, including issues ultimately addressed in the memorandum regarding Referred Person 6. Chief among those issues was whether there were identifiable gaps in the evidence provided to the Royal Commission, which was raised directly with a former senior staff member of that Commission as part of

OFFICIAL

this work. As the same decision had been proposed and was ultimately reached in respect of all referrals, it was also appropriate for a consistent approach to be developed and taken to notifying referred persons and a public statement.

Preparing letters to referred persons and a public statement

80. Thereafter, steps were taken to finalise and give effect to the decisions to take no further action with respect to all 6 of the Robodebt referrals.
81. On 13 March 2024, the delegated Deputy Commissioner asked the Commission staff if draft outcome letters had been prepared, and advised these were to be finalised now that the review of material concerning Referred Person 6 had been "all but finalised". Further discussion ensued, in which the delegated Deputy Commissioner noted that the Commissioner was "comfortable sending something out to [those involved] to alleviate their concern about the [Commission] involvement, especially as APSC inquiries look to be taking another few months". After some further discussion, on 14 March 2024, it was decided that a Deputy Commissioner would prepare a draft letter to Referred Person 6, which could inform letters for other referred persons.
82. The final draft memorandum concerning Referred Person 6, dated 28 March 2024, attached a draft letter to Referred Person 6 and public statement. The memorandum suggested that Referred Person 6 may need to be given a reasonable opportunity to respond to any critical finding or recommendation in the statement. The draft letter notified Referred Person 6 that the Commission would not commence a corruption investigation and invited them to advise of any concerns regarding the proposed public statement.
83. On 29 March 2024, the Commissioner revised the proposed letter to Referred Person 6 and accompanying public statement.
84. On 2 April 2024, the delegated Deputy Commissioner asked the Commission's Legal Branch to prepare draft letters for each referred person.
85. On 11 April 2024, the Legal Branch provided draft letters to the delegated Deputy Commissioner. Legal advice was requested and given about a discrete issue.
86. On 12 April 2024 at the statutory officeholders meeting, the draft letters and statement were discussed. The same day, the delegated Deputy Commissioner provided further

OFFICIAL

input into the draft letters and statement, and provided drafts to the Commission's Media and Communications team.

Preparing and finalising a decision record

87. On 14 April 2024, a first draft decision record was provided to the delegated Deputy Commissioner. Other staff provided feedback on the decision record the next day.
88. On 16 April 2024, the delegated Deputy Commissioner confirmed they had read and agreed with the decision record and approved their electronic signature being attached to that document.

Finalising the letters to affected persons and public statement

89. Between 15 and 21 April 2024, the Commissioner and staff conferred about the language of the draft public statement.
90. On 22 April 2024, the proposed public statement was finalised. Letters were sent to each of the referred persons:
 - a. notifying them of the Commission's decision;
 - b. providing a copy of the Commission's proposed public statement; and
 - c. inviting them to comment on the proposed statement within 14 days.
91. The Commission received responses to the letters between 1 and 9 May 2024. On 13 May 2024, these responses were compiled and circulated for discussion.
92. Between 13 and 16 May 2024, the Commissioner, Deputy Commissioners and a senior manager discussed further updates to the public statement to accommodate the responses received.
93. By 27 May 2024, following a meeting the previous week between the delegated Deputy Commissioner and staff of the Commission, the Commission had landed on a possible release date of Thursday 6 June 2024.
94. On 3 June 2024, the Commissioner proposed further amendments to the public statement. Further changes to the public statement were discussed on 4 June 2024 and cleared by the Commissioner on 5 June 2024.

95. The public statement was published on the Commission's website on 6 June 2024.
96. It was appropriate for the Commission to forewarn the referred persons about the proposed public statement, and to afford them an opportunity to comment on the proposed media release, even if this was not required by the Act. The Commission was aware of welfare concerns in relation to one of the referred persons. As it transpired, representatives of those persons made suggestions which prompted the Commission to reconsider aspects of its proposed statement.
97. Although the Commission's public statement was substantially settled by 16 May 2024, it was not published until 6 June 2024 in accordance with a considered media release strategy. The Commission was conscious that this was its first major public announcement. In any event, the Commission does not consider this delay in announcing its decision publicly to be unreasonable, unjust or oppressive, particularly in circumstances where the referred persons had already been notified of its decision.

Sufficiency of the Commission's reasons

98. The Commissioner (or delegate) is not required to give reasons for a decision not to take any further action under s 41(6) of the Act. The Act does not impose any such obligation.²⁴ Nor does s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as that Act does not apply to a decision under s 41.²⁵ There is also no general common law duty to give reasons.²⁶ This is consistent with the position that the Commissioner is not under any duty to consider dealing with a corruption issue referred to it, regardless of by whom it is asked to do so, under any circumstances.
99. Nevertheless, the Commission considered it appropriate as a matter of good administration:

²⁴ Cf subs 149(2) of the Act, which requires a report on a corruption investigation to set out the Commissioner's findings and a summary of the evidence on which they are based.

²⁵ See subs 3(zi) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Section 41 appears in Part 6 of the Act.

²⁶ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

- a. to include a brief statement of the delegated Deputy Commissioner's reasons for their decision in the decision record dated 16 April 2024; and
 - b. to issue a public statement explaining why it had decided to take no further action.
100. Despite its brevity, the decision record provides an accurate summary of the reasons for the delegated Deputy Commissioner's decision: as discussed above, they read and agreed with that record. The summary identifies the written material and primary considerations on which the deputy relied in making a decision. It was not necessary to go further in an internal document such as this, which was intended to serve as a record of the Commission's decision rather than a comprehensive account of its reasoning. It is common for decision records to capture the key reasons for a decision without going to the same lengths as reasons provided pursuant to a statutory obligation to prepare them.
101. Likewise, the Commission's public statement provided an appropriate explanation of its reasons for the audience to which it was directed. This document was intended for public consumption by a range of lay persons. It provided a concise but accurate summary of the delegate's decision and the basis for it and is consistent with the decision record. Like other recent public statements, it ended with a statement that the Commission would be making no further comment.²⁷ It is common practice for such Commissions not to engage in post-decision elaboration or supplementation. Furthermore, the Commission needed to ensure the statement complied with subs 230(4) of the Act and did not include any opinion or finding about whether a person engaged in corrupt conduct.

The Commission's decision as a breach of public trust

102. We do not propose to address in detail why the Commission's decision does not amount to a 'breach of public trust' and therefore 'corrupt conduct' as defined in s 8 of the Act.

²⁷ For example, NSW ICAC (17 February 2023) 'Statement regarding the Transport Asset Holding Entity', NSW ICAC (6 March 2023) 'Statement regarding the appointment of John Barilaro', NSW ICAC (18 March 2024) 'Statement regarding allegations concerning Ms Katie Joyner', NSW ICAC (10 April 2024) 'Statement regarding Mr Timothy Crakanthorp MP'.

103. It suffices for present purposes to observe that the essence of a breach of public trust is the exercise of a public power, or performance of a public function, in bad faith or for an improper purpose.²⁸ It is submitted that on any reading of the extensive documentary material, not only is there no evidence of bad faith or improper purpose, but the absence of bad faith and improper purpose is very clear.
104. The Royal Commission made detailed findings on matters of enormous public importance. By providing to the Commission the information that it did, the Royal Commission left the door open to the Commission to build on its work by investigating and potentially making corruption findings. Corruption findings can have meaning, though to what extent may be influenced by what has already been exposed. When the Commission decided not to investigate, it chose not to build on the Royal Commission's work *in a specific way*. Many Australians felt disappointed by its choice, understandably given the angst and harm caused by the Robodebt Scheme to vulnerable Australians. The Commission acknowledges and appreciates this disappointment, which is reflected in the complaints received by your office.
105. However, the Commission submits that upon inspection, you will find its decision involved a good faith exercise of discretion. At the core of that discretion are questions about how best to apply the Commission's resources and prioritise its efforts. Ultimately, the Commission chose to build on the work of the Royal Commission through the types of corruption that it elects to target, and through its corruption prevention and education activities. The decision was not taken lightly, but was considered, principled and ultimately made in what it considered to be the public interest based on the information available at the time. Public disappointment in a decision of the Commission, whilst regrettable, is also sometimes inevitable, but is not a breach of public trust.

²⁸ See, e.g., Revised Explanatory Memorandum to the National Anti-Corruption Commission Bill 2022 (Cth) at [2.34]ff, citing *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 165 (Mahoney JA); *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [76]-[78] (Basten JA).

Outline of Further Submissions to the Inspector of the National Anti- Corruption Commission (8 October 2024)

Introduction and Summary

1. This is Part 1 of the response of the National Anti-Corruption Commissioner (**Commissioner**) under s 219(2)(b) of the *National Anti-Corruption Commission Act 2022* (Cth) (the **Act**) to the Inspector's request for submissions about the Inspector's *Draft Report: NACC complaint investigation – Decision not to investigate referrals from the Royal Commission into the Robodebt Scheme* dated 3 September 2024 (the **Draft Report**), which the Commission requests be taken into account prior to finalisation of the Inspector's Report (the **Final Report**). It addresses:
 - a. some preliminary matters, relating to the identification by name of the Deputy Commissioner who made the decision in question and other Commission staff (the **delegated Deputy Commissioner**);
 - b. the matters characterised in the Draft Report as the "principal issue" and discussed in section [7] of the Draft Report and a report by the Hon Alan Robertson SC dated 30 August 2024 (the **Robertson Report**) concerning the Commissioner's handling of a conflict of interest which the Commissioner had declared in relation to Referred Person 1, and some preliminary observations concerning the proposed recommendation; and
 - c. the matters characterised in the Draft Report as "ancillary issues" ss 47E(d) & 47C
Sections 47E(d) and 47C
2. The publication and redaction of the Inspector's Report (including of the Commission's submissions, which it is understood the Inspector intends to attach to the Final Report), and further detail concerning the proposed recommendation, will be addressed in Part 2 of the Commission's submissions, to be provided at a later date but no later than 21 October 2024.

Preliminary matters

3. For reasons elaborated below, the Commission submits that the Final Report should not identify the delegated Deputy Commissioner, on the basis that it is “sensitive information” within s 227(3)(i) of the Act, and in any event, the concerns outlined below weigh against identification of the delegated Deputy Commissioner when exercising the discretion under s 222 of the Act, particularly given that no adverse findings are proposed against the delegated Deputy Commissioner. It is a necessary corollary that the other Deputy Commissioners are not identified, as identifying them will enable identification of the delegated Deputy Commissioner. Again, this is in the context that no adverse findings are proposed against them. It is also requested that references to staff members who are not statutory office holders be at a greater level of generality, in order to avoid their identification from publicly available information.

The main issue and the proposed recommendation

4. The Robertson Report and the Draft Report contain opinions and findings that are critical of the Commissioner’s handling of the conflict of interest issue. In particular, they conclude that the Commissioner’s management of his declared conflict of interest involved conduct which was “not unlawful but arose from a mistake of law” as to what the principles of natural justice required (or alternatively from a mistake of fact as to whether a fair-minded lay observer might reasonably apprehend a lack of impartiality on the part of the decision-maker). As explained below, the Commission accepts the conclusion in the Robertson Report that the Commissioner’s management of his declared conflict of interest involved a mistake of the kind suggested. Having regard to the very wide definitions of “agency maladministration” and “officer misconduct” in s 184(3) of the Act, it necessarily follows that this mistake falls within the definition of “officer misconduct”.
5. To avoid potential confusion, and as a matter of fairness and balance, and to ensure that the nature of the error made is properly understood in context, it is requested that the Final Report:
 - a. makes clear that the statutory concepts of “agency maladministration” and “officer misconduct” apply in this instance as a result of an error of law or fact, which are commonly made by judicial officers, tribunal members and decision-makers, and do not imply any other form of wrongdoing or misconduct;

- b. also makes clear that apprehended bias does not imply actual bias, and that whether circumstances are such as to give rise to a reasonable apprehension of bias is a question of judgment on which minds can and often do reasonably differ, and that while the Commission accepts that the conclusion in the Robertson Report is open, and proposes to act on it, this does not mean that there was intentional impropriety;
 - c. draws attention to the steps that were taken to ensure that the decision was made by a senior and independent decision-maker;
 - d. explains that (as acknowledged in the Robertson Report) there were proper reasons for the Commissioner to seek to have some level of involvement in broader legal, policy and resourcing questions bearing upon the early stages of the work and operation of the Commission; and
 - e. avoids expressing any view about the merits of the decision as distinct from the process.
6. The Draft Report contemplates a recommendation that the Commissioner consider delegating to an appropriate person the function under s 41(5) of the Act to reconsider whether or how to deal with the corruption issues in relation to the Robodebt Royal Commission referrals (**Robodebt referrals**). As the Commission accepts the conclusion that there was procedural error in relation to the initial decision, and as it is important that there be public confidence in the process, the Commission is minded to agree that this is an appropriate course, if the recommendation is able to be practically implemented without raising the same concerns about apprehended bias that are identified in the Robertson Report. The Commission is examining ways and means by which this could be done, which are not straightforward, and will address this in further submissions, to be provided by 21 October 2024.

The ancillary issues

■ Sections 47E(d) and 47C [Redacted]

■ [Redacted]
[Redacted]
[Redacted]

■ Sections 47E(d) and 47C
[Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted], the Commission accepts that its public statement contained a regrettable but unintentional mistake, in suggesting that the APSC had the ability to impose sanctions in respect of the Referred Persons, when it should have correctly outlined the APSC’s powers in relation to former APS staff, namely, to conduct an investigation for breaches of the APS Code of Conduct with the potential for any breach finding to affect future employment in the APS or engagement as a contractor by a Commonwealth Government Agency. The Commission notes that the delegated Deputy Commissioner’s decision record and reasons of 16 April 2024 did not contain this mistake.

■ Sections 47E(d) and 47C
[Redacted]
[Redacted]
[Redacted]

■ [Redacted]
[Redacted]
[Redacted]
[Redacted]

Preliminary Matters

Identification of the delegate

- 8. Under s 222 of the Act, the Inspector has a *discretion* to publish a NACC investigation report in whole or part, if satisfied it is in the public interest to do so. Section 217 of the Act provides that information that the Inspector is satisfied is “sensitive” information must be excluded from a NACC investigation report (and dealt with in accordance with s 218). Under s 227(3)(i), “sensitive information” includes information that could endanger a person’s life or physical safety. It is submitted that:
 - a. the identity of the delegated Deputy Commissioner is “sensitive information”;
 - b. in any event, the concerns outlined below weigh against identification of the delegated Deputy Commissioner when exercising the discretion under s 222 of the Act, particularly given that no adverse findings are proposed against the delegated Deputy Commissioner;
 - c. it is a necessary corollary that the other Deputy Commissioners are not identified, as identifying them will enable identification of the delegated Deputy Commissioner. Again, this is in the context that no adverse findings are proposed against them.

- 9. The Commission’s public statement did not identify which Deputy Commissioner made the decision in relation to the Robodebt referrals. The reason for not doing so was concern that publication of their identity as the decision-maker would provide a focal point for what would be a viscerally unpopular decision, which could result in endangerment of their well-being and physical safety, and potentially that of their family. Particularly where no criticism is made of the delegated Deputy Commissioner, the identity of the particular Deputy Commissioner is not important. What is important

and what the Commission disclosed, is that the decision was made by a Deputy Commissioner, lawfully delegated by the Commissioner.

10. The Commission's concern has unfortunately been borne out by social media posts and calls made to the Commission's Intake and Triage Team since release of the public statement. The Commission's Media and Communications Team have identified approximately 2,000 social media posts that included personal attacks on staff members of the Commission, including the Commissioner and senior staff. For example, they have identified posts stating that members of the Commission should kill themselves or be killed, posts labelling the Commission as murderers, and that the Commission has blood on their hands due to the Robodebt decision. The Commission's Intake and Triage Team have been subject to threatening calls, details of which are provided separately.

Identification of other staff

11. The Inspector's covering letter of 3 September 2024 explains the approach adopted in the Draft Report of referring to Commission staff (other than statutory office holders) by position title rather than by name. The Commission requests that consideration be given to referring to these staff as a "Commission staff member" or a "Commission senior staff member", as publicly available information or professional associations may allow for these staff to be easily identified by position title. This request is also made in the context of no adverse findings having been made against these staff members.
12. The above approach has been adopted in these submissions where they refer to relevant individuals.

The Principal Issue: the Conflict of Interest

The proposed finding

13. The Robertson Report concludes that a fair-minded lay observer might reasonably apprehend that, on account of the Commissioner's past professional association with Referred Person 1, the Commissioner's involvement in the decision-making process might have impinged on the impartiality of the Deputy Commissioner's decision.¹ For the Commissioner to consider otherwise was to engage in conduct which, though not

¹ Robertson Report, [106].

unlawful, arose from a mistake of law as to what the principles of natural justice required in the circumstances, or alternatively from a mistake of fact as to whether a fair-minded lay observer might reasonably apprehend a lack of impartiality on the part of the decision-maker in the circumstances. It was thus 'officer misconduct', according to the wide definition of that term in the Act.

14. The Commission accepts the Robertson Report's conclusion that, in the decision-making process for the Robodebt referrals, the Commissioner made a mistake of law or fact when applying the principles of apprehended bias through association. The Commission prefers the view that it is better characterised in the alternative way expressed in the Robertson Report, that is as a mistake of fact as to whether a fair-minded lay observer *might* apprehend that the decision-maker *might* not be impartial,² but this does not affect the ultimate conclusion.
15. There are some aspects of the reasoning in the Robertson Report that the Commission does not altogether share. However, as the Commission accepts that the ultimate conclusion is open, and that in those circumstances it is preferable that its decision be independently reconsidered, the Commission does not consider that it would be constructive to engage in debate about them. Rather, the Commission makes the following points to ensure that the conclusions in the Robertson Report are properly understood and contextualised.
16. **First**, the terms "agency maladministration" and "officer misconduct", as defined in s 184(3), are labels which apply to a very broad variety of circumstances, including many which would not ordinarily attract the epithet of "misconduct". They apply in the present case simply because of a legal or factual mistake regarding apprehended bias. This is a form of error which has occurred in relation to many judicial decisions, including by eminent judges, and many administrative decisions, including by senior tribunal members and decision-makers. Such an error does not require, and typically does not

² The view that whether circumstances are such as to give rise to a reasonable apprehension that a decision-maker might not be impartial is a question of fact is supported by *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20] (Kiefel, Bell, Keane and Nettle JJ), referred to in the Robertson Report at [117]; and also by the discussion in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294-300 (Mason, Murphy, Brennan, Deane and Dawson JJ).

involve, any form of deliberate wrongdoing or misconduct. In particular, it does not involve any conclusion at all that there was actual bias.

17. There is no suggestion in the Robertson Report of any actual bias, or of any deliberate wrongdoing or misconduct other than this kind of mistake. It would be unfortunate, and unfair, if the statutory labels were to be used in a way that suggested otherwise. Accordingly, the Commission respectfully submits that it would be appropriate for the Final Report to record specifically that the "officer misconduct" found arose solely from a mistake of law or fact in the application of the principles of apprehended bias, and that there is no broader suggestion of any actual bias, or any other impropriety, in the management of the Commissioner's conflict of interest. It would be fair to explain that whether circumstances are such as to give rise to a reasonable apprehension of bias is a question of judgment on which minds can and often do reasonably differ,³ and that the fact that an appellate court concludes that, on account of apprehended bias, a trial judge ought not have sat "*does not involve any personal criticism of the judge at first instance, or any assessment of [their] qualities or [their] ability to have dealt with the case ... fairly and without pre-judgement or bias*".⁴ Thus while the Commission accepts that the conclusion in the Robertson Report is open, and proposes to act on it, this does not mean that there was intentional impropriety.
18. In this respect, it is important not to lose sight of those aspects of the decision-making process which were supportive and indicative of an independent decision being made by the delegated Deputy Commissioner. The Robertson Report focusses on those aspects of the process in which the Commissioner had involvement: given the nature of the issue being examined this is understandable, and no criticism is made of the report on that account.⁵ However, read alone, the summary of the evidence in that report tends to obscure other relevant aspects of the decision-making process in which

³ For illustrations of this, see the differing views of the Court of Appeal and the High Court in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, and again in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; [2011] HCA 48.

⁴ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294-5 [8].

⁵ Unfortunately, however, at [60], where the Commissioner's email of 16 August 2023 is set out, the bolding and italicisation of the "***IF***" which appears at the commencement of the third last paragraph and was intended to emphasise to recipients that this was a hypothetical possibility and not any expression of an opinion as to what the decision should be, has not been reproduced.

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the Commissioner had no involvement, or which supported the independence and impartiality of the delegated Deputy Commissioner. As a matter of fairness, it would be appropriate to ensure that the Final Report reflects a balanced picture of the decision-making process as a whole, while nonetheless accepting that it was affected by the mistake identified. That process is outlined in detail in the Commission's initial submissions (the **August submissions**) at [36]-[97]. It suffices to note the following matters here:

- a. The Commissioner delegated the power under s 41 of the Act to decide whether, and if so how, to deal with the Robodebt referrals to a Deputy Commissioner. The delegated Deputy Commissioner was an experienced senior official with significant experience in independent decision-making in relation to complex and controversial matters.
 - b. A recommendation was prepared and presented by a senior Commission staff member, recommending that no further action be taken in relation to any of the 5 referred public servants. That was prepared independently of any involvement of the Commissioner and was provided to the delegated Deputy Commissioner prior to the 19 October 2023 NSAP meeting.
 - c. The delegated Deputy Commissioner's provisional decision, recorded directly after the 19 October 2023 NSAP meeting, was in line with the recommendation provided prior to the meeting so far as concerned the public servants; it differed only in relation to the recommendation that there be a preliminary investigation in relation to Referred Person 6.
 - d. Following further and detailed consideration in relation to the decision to be taken in relation to Referred Person 6, the delegated Deputy Commissioner proceeded to make decisions that aligned with the provisional decision outlined on 19 October 2023.
 - e. While the Commissioner did express views on a range of matters at different points in the process, he did not direct or request the delegated Deputy Commissioner or any other Commission staff member, including the Commission's legal team, to achieve a particular outcome. Nor did he ever express any personal views or opinion, positive or negative, about Referred Person 1.
19. The Commission considers it appropriate to provide some further detail about the nature of the association between the Commissioner and Referred Person 1. The Commissioner

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declared a conflict of interest arising from a professional association with Referred Person 1, on four separate occasions. This association was limited to professional, not personal dealings, and they were not close personal friends. The declaration of a perceived conflict and delegation of decision-making was made in those circumstances for more abundant caution.

20. The above is not to deny that the involvement of the Commissioner at different points in the decision-making process was such as to give rise to apprehended bias in the manner outlined in the Robertson Report. But it does locate the Commissioner's mistake as having arisen in a process in which an experienced decision-maker did in fact make a decision which aligned with the recommendation made to them independently of the views of the Commissioner, and in which the actual decision-maker made a decision free of actual bias.
21. **Secondly**, to ensure a complete picture, it is also important to explain why the Commissioner was involved to the degree he was. Prior to the 19 October 2023 NSAP meeting, the Commissioner had involvement in internal discussions and processes related to the decision because he considered that the legal, policy and resourcing considerations that were involved would have ongoing ramifications for the Commission, and he advised the delegated Deputy Commissioner and other senior staff of this when he declared his perceived conflict on 7 July 2023. His observations at the 19 October 2023 NSAP meeting were directed to ensuring that relevant considerations were taken into account, not to achieving a particular outcome. The referrals were received in the first week of the Commission's existence, while it was just establishing views and processes relevant to its work more generally, not just in relation to the Robodebt referrals. These were matters with which the Commissioner would, absent any potential conflict, have been very closely involved. The fact that they fell to be considered at a very early stage in a matter in which the Commissioner did have a perceived conflict of interest was unfortunate, and significantly complicated the position.
22. The same considerations apply, even more strongly, after the provisional decision had been made by the delegated Deputy Commissioner on 19 October 2023. The outstanding issue concerned Referred Person 6, in respect of whom the Commissioner had no conflict. The manner in which the decision made by the delegated Deputy Commissioner would be represented in public could have a significant and material effect on the reputation of the Commission and was the subject of legitimate involvement by the Commissioner *after* the decision had been made.

23. The Robertson Report appropriately recognises that the Commissioner could legitimately have an ongoing interest in the decision-making at this level.⁶ However, the Robertson Report also concludes that the Commissioner made a mistake in remaining involved in so far as the policy questions bore a double character, raising both policy and factual matters. Without denying this conclusion, it remains important as a matter of fairness to reflect that there were in play important issues for the Commissioner and that his involvement was directed at these matters, not an attempt to influence the delegate by reference to his association with Referred Person 1.
24. **Finally**, the Robertson Report and the Draft Report (at least in this respect) are concerned with a question of process, not the merits of the decision in relation to the Robodebt referrals. The decision whether to take any action in relation to those referrals was one that involved a broad discretion and a wide array of factors, as explained in the documents evidencing the decision-making process and in the Commission's August submissions (e.g. at [8]-[15], [27]-[32], [104]-[105]). It is (quite properly, with respect) not suggested in the Robertson Report or the Draft Report that the actual decision made by the delegated Deputy Commissioner was not a decision that was reasonably open to them.
25. In circumstances where the Commission is minded to agree to an independent reconsideration of its decision, if possible (discussed in more detail below), it is respectfully submitted that it is important that the Final Report make clear that the Inspector has not sought to reach or express a view about the merits of the decision actually made by the delegated Deputy Commissioner, or to be made by any new delegate.

Reconsideration

26. The Commission is minded to agree that the appropriate way forward is for the question of whether, and if so how, to deal with the Robodebt referrals to be reconsidered by an appropriate independent person. The concerns raised in the Draft Report and the Robertson Report emphasise the importance of ensuring a heightened degree of transparency and independence in the reconsideration process, and the Commission

⁶ Robertson Report, [90].

has begun the process of seeking to identify an appropriate independent eminent person to undertake the task.

27. In circumstances where, under s 276(1) of the Act, the Commissioner's power of delegation is limited to Deputy Commissioners and certain employees of the Commission, the Commission is considering how best this reconsideration could be undertaken without raising the same concerns about apprehended bias that are identified in the Robertson Report, in particular those at [97], [98], [99] and [106]. The Commission is exploring the practical issues involved in implementing the recommendation including the appointment of an appropriate person as a temporary staff member, or alternatively their retainer as a consultant (which also is not free from difficulty, as it would not be permissible for a decision-maker to agree in advance to be bound by a view expressed by a consultant).
28. Any reconsideration will also need to have regard to s 45 of the Act, which provides that, in circumstances where a public official's conduct has previously been investigated by a Commonwealth integrity agency, the Commissioner may commence a corruption investigation into such conduct only if satisfied that another investigation is in the public interest. On 13 September 2024, the Australian Public Service Commissioner made a public statement about the outcome of Code of Conduct inquiries conducted by the APSC in relation to Robodebt matters. To the extent that the conduct investigated by the APSC overlaps with the conduct referred to the Commission, any new decision-maker would have to be satisfied for the purposes of s 45 that another investigation of the same conduct is in the public interest.
29. These matters remain under consideration by the Commission and will be addressed further in the next tranche of submissions.

The Ancillary Issues

Sections 47E(d) and 47C

[REDACTED]

Sections 47E(d) and 47C

[Redacted]

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

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Sections 47E(d) and 47C
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Sections 47E(d) and 47C

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Sections 47E(d) and 47C
[Redacted text block]

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Sections 47E(d) and 47C

[Redacted]

[Redacted]

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Sections 47E(d) and 47C

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Sections
47E(2)
and 47G

[Redacted]

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Sections 47E(d) and 47C

[Redacted]

[Redacted]

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[Redacted]

[Redacted]

[Redacted]

Sections 47E(d) and 47C

Availability of sanctions

- 67. The Report states ss 47E(d) & 47C that the public statement contained a 'misleading reason' which did not apply to any of the Referred persons.
- 68. Shortly after the referrals were made, the Commission received information that two of the five public servants remained employed in the APS. As is noted in the Draft Report, the assessment papers, which were considered in October 2023, stated that all of the public servants had left the APS. However, this was incorrect, and in fact, one of the referred persons remained employed by the APS until May 2024, after the delegated Deputy Commissioner made their decision. However, by the time the Commission made its public statement, in June 2024, no sanctions were available to the APSC against any of the Referred Persons.
- 69. In those circumstances, the Commission agrees that the public statement should not have suggested that the APSC had the ability to impose sanctions in respect of the Referred Persons. Rather, it should have correctly outlined the APSC's powers in relation to former APS staff, namely, to conduct an investigation for breaches of the APS Code of Conduct with the potential for any breach finding to affect future employment in the APS or engagement as a contractor by a Commonwealth Government Agency.
- 70. This was a regrettable but unintentional mistake.
- 71. The delegated Deputy Commissioner's decision and reasons of 16 April 2024 did not contain, and are not affected by, this mistake.

Sections 47E(d) and 47C

Sections 47E(d) and 47C
[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Conclusion

77. The Commission respectfully requests that the above submissions be taken into account for the purposes of the Final Report.

78. The Commission would be pleased to provide any explanation, clarification or supplementation that the Inspector might request.

The Hon PLG Brereton AM RFD SC

Commissioner

8 October 2024

Outline of Submissions to the Inspector of the National Anti- Corruption Commission (21 October 2024)

Introduction and summary

1. This is Part 2 of the response of the Commissioner to the Inspector's request for submissions about the Draft Report dated 3 September 2024. It is intended to be read with, and uses terms defined in, Part 1 of the response provided on 8 October 2024 (the **Part 1 Submissions**). It addresses further detail concerning the proposed recommendation in the Draft Report. Further submissions about publication of the Final Report and its proposed attachments are provided separately.

The proposed recommendation

2. As foreshadowed in the Part 1 Submissions, the Commission has now decided, without awaiting finalisation of the Inspector's investigation, to have its decision under s 41 to take no further action in respect of the Robodebt Royal Commission referrals reconsidered under s 41(5) of the *National Anti-Corruption Act 2022* (Cth) (**the Act**) by an appropriate independent person.
3. The preferred and likely mechanism for this involves the appointment of an appropriate independent person as a temporary staff member at the SES level to exercise delegated decision-making power under s 41(5), pursuant to s 276(1)(b) of the Act. The appointment would be on terms that the Commissioner did not propose to give any direction under s 276(6).
4. The Commission is in the course of sourcing an appropriate eminent independent person who is prepared to be engaged as a temporary SES staff member to undertake this function, of seeking the approval of the Australian Public Service Commissioner (whose approval is necessary for the engagement of a temporary SES officer) to this course, and of making the necessary resourcing arrangements to support the independent appointment.

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5. If the course of appointing an independent person to act as a delegate proves to be impossible, then the Commission will engage such a person as a consultant, under s 263. This course is not preferred, but is an alternative means by which reconsideration by an eminent independent person could be procured, if delegation proves impractical.
6. The Commission will inform the Inspector when the arrangements referred to above have been put into place.

Report to the Inspector of National Anti-Corruption Commission on the decision by the National Anti-Corruption Commissioner to take no action on the referrals from the Royal Commission into the Robodebt Scheme Royal Commissioner

Report by the Hon Alan Robertson SC

Introduction

1. On 6 July 2023, the National Anti-Corruption Commission (**NACC**) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (**RRC**) pursuant to section 6P(2B) of the *Royal Commissions Act 1902* (Cth).
2. By a media statement dated 6 June 2024, the Commission stated that it, the Commission, had decided not to commence a corruption investigation essentially because it would not add value in the public interest.
3. The same media statement said that “In order to avoid any possible perception of a conflict of interest, the Commissioner delegated the decision in this matter to a Deputy Commissioner.”
4. The Inspector of the NACC (**Inspector**), Ms Gail Furness SC, announced on 13 June 2024 that she had decided to inquire into that decision.
5. I am engaged as a consultant under section 194(3) of the *National Anti-Corruption Commission Act 2022* (Cth) to assist in the performance of the functions of the Inspector in respect of that inquiry by the Inspector.
6. Specifically, I am engaged to review the material provided to the Inspector by the NACC, including the NACC’s submissions to the Inspector dated 13 August 2024, and to prepare a Report of my findings of fact in relation to the following:
 - i. In light of the Commissioner’s declared conflict of interest, was the management option chosen appropriate and consistent with law?
 - ii. Were the steps thereafter taken by the Commissioner consistent with the chosen management option and with law?
7. I am also engaged to advise the Inspector of my opinion as to whether the conduct I find to have occurred amounted to “officer misconduct” as defined in section 184(3) of the

National Anti-Corruption Commission Act.

8. I am not engaged to review the merits of the decision not to commence a corruption investigation.

The statutory provisions

9. The NACC is established by the *National Anti-Corruption Commission Act*.
10. The Inspector's functions are set out in section 184:

184 Functions of the Inspector

- (1) The Inspector has the following functions:
- (a) to detect corrupt conduct within, and relating to, the NACC;
 - (b) to undertake preliminary investigations into NACC corruption issues or possible NACC corruption issues;
 - (c) to conduct NACC corruption investigations into NACC corruption issues that could involve corrupt conduct that is serious or systemic;
 - (d) to refer NACC corruption issues to the NACC, Commonwealth agencies and State or Territory government entities;
 - (e) to investigate complaints of agency maladministration or officer misconduct made in relation to the conduct or activities of:
 - (i) the NACC; or
 - (ii) a staff member of the NACC;
 - (f) to audit the operations of the NACC for the purpose of:
 - (i) monitoring compliance with the laws of the Commonwealth; and
 - (ii) detecting agency maladministration and officer misconduct;
 - (g) to make recommendations to the NACC on the outcomes of such audits;
 - (h) to provide relevant information and documents to the Committee;
 - (j) to receive public interest disclosures (within the meaning of the Public Interest Disclosure Act 2013) and to deal with those disclosures;
 - (k) to report, and make recommendations, to both Houses of the Parliament on the results of performing the functions mentioned in paragraphs (a) to (j).
- (2) The Inspector also has such other functions conferred on the Inspector by this Act or by any other Act.
- (3) For the purposes of this section:
agency maladministration means an act or omission engaged in by the NACC that:
- (a) is unlawful conduct; or
 - (b) is not unlawful, but:
 - (i) is corrupt conduct; or
 - (ii) is unreasonable, unjust, oppressive or improperly

- discriminatory in its effect; or
- (iii) arises, wholly or in part, from improper motives; or
- (iv) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration; or
- (v) arises, wholly or in part, from a mistake of law or fact; or
- (vi) is conduct of a kind for which reasons should have, but have not, been given; or
- (c) is in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

officer misconduct means conduct engaged in by a staff member of the NACC, which, if engaged in by the NACC, would amount to agency maladministration.

11. By section 16 there is a National Anti-Corruption Commissioner.
12. By section 18 there are up to 3 National Anti-Corruption Deputy Commissioners.
13. The functions of a Deputy Commissioner are, by section 19(1):
 - (a) to assist the Commissioner in performing the Commissioner's functions; and
 - (b) any other function conferred on a Deputy Commissioner by this Act or another Act.
14. By section 19(2), in performing those functions, a Deputy Commissioner must comply with any directions of the Commissioner.
15. By section 17, the Commissioner's functions include: (a) to detect corrupt conduct; (b) to conduct preliminary investigations into corruption issues or possible corruption issues; (c) to conduct corruption investigations into corruption issues that could involve corrupt conduct that is serious or systemic; (d) to report on corruption investigations and public inquiries.
16. By section 41(6), the Commissioner may decide to take no action in relation to a corruption issue.
17. By section 276, the Commissioner may delegate all or any of the Commissioner's functions, powers or duties to, amongst others, a Deputy Commissioner.

18. By section 276(5), a delegation under section 276 must be in writing and signed by the Commissioner.
19. By section 276(6) in performing or exercising a function, power or duty delegated under subsection (1), the delegate must comply with any directions of the Commissioner.
20. Section 41 is in the following terms:

41 How Commissioner deals with corruption issues

- (1) The Commissioner may deal with a corruption issue in any one or more of the following ways:
 - (a) by investigating the corruption issue;
 - (b) by investigating the corruption issue jointly with a Commonwealth agency or a State or Territory government entity;
 - (c) by referring, for investigation, the corruption issue to a Commonwealth agency to which the corruption issue relates (if the Commissioner is satisfied that the agency has appropriate capabilities to investigate the issue);
 - (d) by referring, for consideration, the corruption issue to a Commonwealth agency or a State or Territory government entity.
- (2) An investigation mentioned in paragraph (1)(a) or (b) is a ***corruption investigation***.
Corruption investigation threshold—serious or systemic corrupt conduct
- (3) The Commissioner may conduct, or continue to conduct, a corruption investigation only if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.

General matters

- (4) Corruption issues may be investigated together.
- (5) The Commissioner may, at any time, reconsider whether or how to deal with a corruption issue.

Commissioner may decide to take no action

- (6) The Commissioner may decide to take no action in relation to a corruption issue.

Commissioner under no duty to consider whether to deal with corruption issue

- (7) The Commissioner does not have a duty to consider whether to deal with a corruption issue under this section, whether the Commissioner is requested to do so by the person who referred the issue or by any other person, or in any other circumstances.

21. By section 266, staff member of the NACC means each of the following:
- (a) the Commissioner;
 - (b) any Deputy Commissioners;
 - (c) the CEO;
 - (d) a member of the staff referred to in section 262;
 - (e) a consultant engaged under section 263;
 - (f) a person referred to in section 264 whose services are made available to the NACC;
 - (g) a legal practitioner appointed under section 265.
22. Section 247 provides:
- 247 Disclosure of interests**
- (1) A disclosure by a NACC Commissioner under section 29 of the PGPA Act (which deals with the duty to disclose interests) must be made to the Minister.
 - (2) Subsection (1) applies in addition to any rules made for the purposes of that section.
 - (3) For the purposes of this Act and the PGPA Act, a NACC Commissioner is taken not to have complied with section 29 of that Act if the NACC Commissioner does not comply with subsection (1) of this section.
23. Section 29 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) provides:
- Duty to disclose interests**
- (1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.
 - (2) The rules may do the following:
 - (a) prescribe circumstances in which subsection (1) does not apply;
 - (b) prescribe how and when an interest must be disclosed;
 - (c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).
24. By section 20 of the *National Anti-Corruption Commission Act* for the purposes of the finance law the NACC is a listed entity. It is therefore a Commonwealth entity by virtue of section 10 of the *PGPA Act*. Thus, the Commissioner is an official of a Commonwealth entity within section 29 of the *PGPA Act*.
25. As I set out below, the Commissioner made a disclosure under section 29 of the *PGPA Act* to the Minister, the Attorney-General.

26. In terms of the *PGPA Rules*, relevantly only Rule 16 applies to the Commissioner. The chain of reasoning is as follows. By section 266 of the *National Anti-Corruption Commission Act*, the Commissioner is a staff member of the NACC. He is therefore, by section 10 of the *National Anti-Corruption Commission Act*, a public official. He is not however the “accountable authority”, which by section 20(2)(b) is the CEO of the NACC, nor a member of the accountable authority nor an official who is a member of the accountable authority. Thus Rules 13, 14 and 15 of the *PGPA Rules* do not impose explicit obligations on the Commissioner for the purposes of section 29(2) of the PGPA Act.
27. However, Rule 16 of the *PGPA Rules* applies and provides:

16 Officials who are not the accountable authority or a member of the accountable authority

An official of a Commonwealth entity who:

- (a) is not the accountable authority, or a member of the accountable authority, of the entity; and
- (b) has a material personal interest that relates to the affairs of the entity; must disclose that interest in accordance with any instructions given by the accountable authority of the entity.

The NACC’s policy on conflict of interest

28. The Policies which are next referred to perform the function of setting out the further context specific to the NACC in which that branch of natural justice which concerns conflict of interest operate.
29. The NACC Integrity Policy dated 18 July 2023 and signed by the NACC CEO, Mr Reed, stated, relevantly:

4. Integrity at the NACC

- 4.1 Maintaining high standards of integrity is core to the NACC’s identity and culture, and one way the NACC protects our people, information, assets, and organisational integrity. As a NACC staff member, regardless of your role, you are expected to have a high level of personal integrity and awareness of the critical importance of protecting the NACC’s organisational integrity.

...

5. Integrity risk management

- 5.13 Once the integrity risk report has been assessed, appropriate action to mitigate the risk must be agreed, implemented, and monitored. A record of the agreed outcome must be recorded against the report by the Integrity Officer, even if it

was agreed that no specific action should be taken. Where reasonable action can be taken to mitigate the risk, the staff member must attempt to do so and be supported where appropriate and practicable by their manager.

5.14 Strategies to mitigate or manage risks may include:

- continuing to monitor the risk;
- where appropriate having regard to an employee's duties, delegating or re-assigning work to limit the risk;
- removing the employee from related decision-making processes;
- limiting exposure to the relevant information; and
- reminding the employee of support available, including through the NACC's Employee Assistance Program (<https://www.convergeinternational.com.au/>).

5.15 It is not possible to completely avoid all risks in their entirety. However, all reasonable action must be taken to mitigate the likelihood and impact of integrity risks. Where you can take reasonable action to avoid a risk arising, then you should do so.

30. The NACC's Private Interest, Declarable Association, and Contact Reporting Policy also dated 18 July 2023 states:

1.2 A conflict of interest occurs where there is the possibility a personal interest could influence a staff member while carrying out their duties as an officer of the Commission, and includes:

- Actual conflicts where a direct, material interest exists between duties and personal interests.
- Perceived conflicts where a third party could form the view a conflict exists between duties and personal interests.
- Potential where a staff member has a private interest that could, or may foreseeably, come into conflict with their duties.

...

Declarable Associations

3.6 A declarable association is any association which creates or may give rise to a perceived or real conflict of interest between your private relationships, associations or acquaintances and your position with the NACC.

3.7 There is no standard list of declarable associations. It is your responsibility as a NACC employee to consider relationships that may affect, or be perceived as affecting, the NACC or your role as a staff member of the NACC.

The Commissioner's declarations

31. The Commissioner made four declarations of conflict of interest.

32. The first was recorded in the minutes of the NACC Statutory Office Holders meeting on 3 July 2023.

2.2.4 Robodebt

It was highly possible [the Commissioner] could be conflicted as he knows [Referred Person 1] well. If [redacted] is the subject of a referral, then he would not be involved in decision-making concerning [redacted].

The second was in writing, to the statutory officeholders and [redacted], by email of 7 July 2023:

Colleagues,

As I have already indicated to most of you, I also have a conflict, relating to one of the six individuals the subject of referrals, namely [Referred Person 1], who is well known to me.

For that reason, **DC Rose** will be the lead Commissioner on these referrals. I will not be involved in any decisions concerning [Referred Person 1]. However, I will retain an overall interest in the policy questions that arise concerning these referrals generally, because those questions – particular the scope of “corrupt conduct” – will necessarily have ongoing ramifications for us.

33. The third was to the Attorney-General, copied to the other statutory officeholders and the Commission’s Governance Team, on 11 August 2023 declaring material personal interests under s 29 of the *PGPA Act* and section 247 of the *National Anti-Corruption Commission Act*. Relevantly, the letter advised:

As I declared at a meeting of the Statutory Officers of the Commission on 3 July 2023, should a matter potentially affecting the interests of an individual with whom I have had or have a close association, or a unit or agency with which I have an affiliation, come before the Commission, I would recuse myself from decision-making in respect of that matter, and allocate the matter to a Deputy Commissioner, to whom my relevant powers have been delegated.

Relationship with [Referred Person 1]

In particular, as I also declared at the meeting of the Statutory Officers of the Commission on 3 July 2023 (prior to the publication of the report of the Robodebt Royal Commission report), [Referred Person 1] is one of those with whom I have had a close association..., and if [redacted] were to be the subject of a referral to the Commission, I would recuse myself from decision-making concerning [redacted] and allocate the matter to a Deputy Commissioner.

34. The fourth declaration was at the NACC Senior Assessment Panel (**NSAP**) on 19 October 2023. The minutes of that meeting were circulated, but never finalised. Notes were also taken. They record that the Commissioner prefaced his discussion of the five public

servants with “discuss others and leave to NR [Deputy Commissioner Rose] to make call”, and concluded it by saying: “I will listen to discussion and then leave”.

35. Under the heading Conflicts of Interest the following is recorded in the minutes (which were draft but which were revised by the Commissioner by deleting what is shown below as struck through and buadding what is underlined):

In relation to CASE2023429 Commissioner the Hon Paul Brereton notified the Panel of a previously disclosed conflict relating to [Referred Person 1]. The Commissioner stated that he would not be the decision maker for the matters, Deputy Commissioner ROSE would be the ultimate decision maker; ~~and that he would make some general observations about the matters generally and then leave while the decision is considered comments as the matter was discussed.~~ This was NOTED by the Panel.

36. During that discussion, the minutes contained the following:

The Commissioner suggested the Panel park the ~~ss 46(b) & 47E(d)~~ matter for the moment and go to talk the other matters that he believed could all be considered together as they are about others. I think they can be dealt with together as they are within the same category.

The Commissioner referred to paragraph 11 of the internal Legal advice which stated that the basis for including this conduct in the scope of corrupt conduct is not free from doubt. The Commissioner stated that if there was a finding of corrupt conduct by the Commission, it would likely be the subject of a legal challenge.

The Commissioner stated that the Commission might find there was not misconduct where RC found there was. The Commission could to an extent rely on evidence to RC but would still have to allow the POIs to adduce evidence, possibly to cross-examine, and to make submissions. ~~give the right of response to the public servants.~~ The Commissioner stated there was the real possibility the Commission could reach different conclusions on the facts and that it was not in the public interest that the RC made findings on facts and the Commission make different findings.

The Commissioner stated ~~that having another~~ a second inquiry into the same matters ~~was not~~ would not appear to add value in the public interest and would be unlikely to expose further instances of misconduct, noting ~~and noted~~ the RC had been thorough.

The Commissioner stated that a corruption inquiry is usually a precursor to some kind of remedy elsewhere and the Commission cannot provide a remedy ~~in this case itself~~. The conduct itself has already been exposed by the RC and ~~that~~ a remedy can ~~either~~ be provided through a criminal prosecution or APSC code of conduct proceedings. The Commissioner stated that all the Commission could do was make a finding that there was corrupt conduct and that he could not see where the Commission could add value.

The Commissioner stated that he understood that one party... is also the subject of ~~Sections 47E(d) and 47C~~ ~~proceedings~~, in addition to the APSC action, and reiterated that he could not see how the Commission would add value.

The Commissioner stated that if it took no further action, the Commission would need to make some a public statement and that it would might be difficult to say explain that we were focusing proceeding within ss 46(b) & 47E(d) [sic] but and not the public servants. The Commissioner noted however that there is a justifiable distinction in that ss 46(b) & 47E(d) cannot be impacted dealt with by the APSC.

37. A note or draft note by ss 47F and 47E(c) but not the draft minutes either at all or as revised by the Commissioner record:

I think they're the issues I wanted to address. I will listen to discussion and then leave.

38. There was then a discussion on the issues raised by the Commissioner.

39. After the Commissioner left the meeting, the notes record Deputy Commissioner Rose saying:

NSAP members appear to agree, not hearing dissenting voice. Agree to recommendation for all of the public service referrals.

40. The notes also record Mr Reed (CEO) saying the Commissioner clearly had power to reconsider the matter at any time, and a decision to take no further action would not prevent this.

41. The draft minutes to which I have referred record:

Ms ROSE noted that the Panel agreed that the same recommendation would be appropriate for all of the public service referrals but that there was still some uncertainty as to whether it would be appropriate to quote section 41(6) as the reason for taking no further action.

Ms ROSE stated that when drafting the correspondence, the Commission should clarify the key legal points and consider the public impact. She highlighted that it was important to consider how the Commission framed the correspondence.

Ms ROSE stated that when considering whether we make the referral pursuant to section 41 we should frame it in terms of we are taking no further action because of the belief that there is little public value in the Commission progressing the matters [sic].

Further discussion followed.

42. The draft minutes to which I have referred say that after the Commissioner rejoined the meeting, Deputy Commissioner Rose stated that the NSAP had made a decision but that a discussion was required regarding how best to express that decision.

43. The notes record Deputy Commissioner Rose saying: “we’ve made decision, overly cautious, need [to] have discussion re specifying the section as to why we are taking NFA, get draft letter”.
44. The decision was recorded in the notes as: “NFA at this stage, with further discussion to take place around communication with the APSC and avenues of referral/ oversight mechanisms within the Act.”
45. The draft minutes also record: “In concluding the meeting, the Commissioner noted that today’s decision may be controversial but that as a matter of fairness and public interest this is the right decision and he thanked the Panel for their consideration”.
46. The draft minutes circulated by ss 47F and 47E(c) record that the Commissioner noted that he will write a report commenting on what we have done and what our reasons were.
47. The conclusion of the draft minutes as revised by the Commissioner state:

DECISION: TO BE FINALISED FOLLOWING FURTHER INPUT.

The facts

48. There was a written delegation by the Commissioner dated 3 July 2023 in the following terms, so far as relevant:
- I, the Hon. Paul Brereton AM RFD SC, National Anti-Corruption Commissioner (the Commissioner), make the following delegations under the *National Anti-Corruption Commission Act 2022* (Cth) (the Act).
- (1) Under subsection 276(1) of the Act, I delegate all of my functions, powers and duties under the Act, other than my functions, powers and duties under section 254 of the Act (appointment of CEO), to:
- a) each National Anti-Corruption Deputy Commissioner.
49. On 10 July 2023, ss 47F and 47E(c) emailed ss 47F & 47E(c) ss 47F and 47E(c) “Do you recall the (I think it was) six things that the Commissioner wanted us to address when considering these referrals?”
50. On 11 July 2023, the Commissioner sent an email stating that he would like to have the first NSAP meeting on 13 July 2023, and envisaged that the agenda would include:

For information: a summary of the cases currently under triage or assessment, indicating general themes and issues being raised, particularly in sensitive matters (Robodebt...)” and “For discussion: our approach to the Robodebt RC referrals.”

51. On 13 July 2023, the Commissioner requested an opinion as follows:

Background

1. The Commissioner has received from the Robodebt Royal Commission (RRC) six referrals, each relating to an individual the subject of adverse comment in the RRC's report. The specific relevant findings concerning each of those six individuals are contained in a suppressed chapter of the report. The relevant part of the chapter relating to referrals to the Commission has been provided to the Commission.
2. The referrals have been made pursuant to s 6P(2B) of the *Royal Commissions Act 1902*, which provides that if, in the course of inquiry into a matter, a Royal Commission obtains information, takes evidence, or receives a document or thing that, in the opinion of the Royal Commission, relates or may relate to the performance of the functions of the NACC, the Royal Commission may, if in its opinion it is appropriate to do so, communicate the information or furnish the evidence, document or thing, to the NACC.

Issues

3. From the Commission's perspective, the referrals do not have any special legal status. The Commission can conduct a corruption investigation only if satisfied that the issue(s) the subject of the referrals could involve *corrupt conduct* that is serious or systemic: NACC Act, s 41(3). If that test is satisfied, then the Commission will have to decide whether conducting a corruption investigation would add value, given that the RRC has already exposed the facts and the conduct in issue, and given that a finding of corrupt conduct would provide no additional remedy (whereas criminal prosecutions and disciplinary proceedings could). However, if the corrupt conduct requirement is not satisfied, the Commission has no jurisdiction.
4. If the Commission decided to conduct a corruption investigation, it could use evidence obtained by the Royal Commission, but it would ultimately have to make its own findings of fact, and conclude whether they amounted to corrupt conduct. The referrals do not of themselves involve or raise any presumption or prima facie case that "corrupt conduct" is involved; at the highest they involve an opinion of the Royal Commissioner that the information referred may relate to the performance of the functions of the NACC. It does not appear that the Royal Commission has given consideration to the definition of "corrupt conduct", and whether the conduct it found against each of the six individuals could meet that definition.
5. It seems that each of the six individuals is a Commonwealth public official. Thus the key question for the Commission at this stage is whether the conduct in question could involve *corrupt conduct*. (If so, there would be little doubt that it could be "systemic", given that it involved multiple individuals and the Robodebt "scheme", if not "serious").
6. At first sight, the conduct in question does not appear to involve an "abuse of office". Thus the question seems to reduce to whether it could be a "breach of public trust". In that respect, there does not appear to be any suggestion of use of a public power for a private purpose. There was no *exercise of a power* in the usual

sense, but the *provision of advice*, that was at best incomplete or at worst misleading. The complaint is that advice was given and decisions made which at best did not reflect and at worst deliberately concealed that the proposed course of action was unlawful. The motive appears to have been, not private benefit, but implementing the perceived will of the Government of the day. Whether this type of conduct by public officials attracts the definition of “corrupt conduct” may be novel.

Question for opinion

7. Although the ultimate question for the Commission is whether the issue(s) *could* involve corrupt conduct, for present purposes it should be assumed that the conduct as found in the suppressed chapter could be established, which removes any factual element. Thus the legal question for consideration is:

Assuming that the conduct described in the suppressed chapter of the RRC Report is established, would it be within the concept of “corrupt conduct” as defined in the NACC Act?

(Original italics.)

52. On the same date, Deputy Commissioner Rose emailed ss 47F and 47E(c) and Ben Gauntlett saying, relevantly, “please find the Commissioner’s instructions attached.... Once you have had a chance to review with the team, perhaps you can indicate what you think might be an achievable timeframe for a draft advice.”

53. The suppressed chapter of the RRC Report included the conduct of [Referred Person 1].

54. Legal Advice dated 10 August 2023 stated at [3]:

Your request for advice notes that the most relevant form of corrupt conduct under the *National Anti-Corruption Commission Act 2022* (the Act) is “breach of public trust” contained within s 8(1)(c). However, a concern is raised that there was no exercise of power by the relevant public officials in the usual sense, but rather, the provision of incomplete or misleading advice. In particular, the advice provided obscured or concealed the proposed course of action was unlawful. The suggested motive was to implement the will of the Government of the day.

55. Paragraphs [9] to [11] of the Legal Advice, were cited by the Commissioner in what he said at the 19 October 2023 meeting. They were as follows:

Assuming the conduct in the Suppressed Chapter is established against [Referred Person 1]. . . in our view it *would* come within the concept of “corrupt conduct” for the purposes of the Act. . . .

The legal position on each of these issues is not free from doubt. To the extent that the characterisation of some corrupt conduct relies on an interpretation of the Act that is less certain (in particular, pure omission-based corrupt conduct and breaches of trust absent an improper purpose), the NSAP may take this uncertainty into account in

deciding how to deal with this matter. An issue for consideration is whether these referrals are an appropriate vehicle to test the interpretation of the Act in this way.

Finally, the RRC makes lengthy and detailed findings of fact to the ‘*Briginshaw* standard’, often on an inferential basis over the objection of parties involved. Consistently with our instructions, we have not attempted to weigh the underlying evidence: [13]. Nonetheless, having spent some time with the Report and Suppressed Chapter, we observe some of the RRC’s findings are stronger than others, and there is a real possibility that this Commission could reach different conclusions. This also appears to be a relevant consideration in deciding how to deal with this matter. (Footnote omitted.)

56. Paragraph 14 of the Legal Advice sets out a summary of Referred Person 1’s referral.
57. Paragraphs [44] to [74] of the Legal Advice are a detailed consideration of the RRC’s findings in relation to Referred Person 1.
58. On 15 August 2023 Deputy Commissioner Rose emailed the Commissioner, [ss 47F and 47E(c)] and [ss 47F and 47E(c)] in response to the Commissioner’s email of 15 August 2023 at 1.47pm:

...

To clarify the next steps re Robodebt –

Is the internal legal advice still under consideration or are you content with it as drafted?

If you are happy with the advice, do the six referrals need to come back to an Assessment Committee Meeting for progression to investigation (or other)?

If they do need to come back to the NSAP would you like this done out of session this week or wait until the next meeting Thursday week?

Can we assume you are comfortable participating in the consideration of the 5 referrals you do not have a conflict with?

Apologies if this has been clarified elsewhere.

59. On 16 August 2023, the Commissioner emailed Deputy Commissioner Rose, [ss 47F and 47E(c)] and [ss 47F and 47E(c)]:

Hi Nicole,

To confirm our discussion, and in response to your below questions:

The legal advice is to be considered finalised, and provided to Assessments to inform the assessment process. [For future reference, legal advice from Legal branch is not subject to approval/clearance by me, and should come from Legal finalised and signed. If I ask for advice, it is because I want the genuine opinion of Legal. If I disagree with it, I may say so, but that will be on me – I won’t be asking Legal to change their advice – though if I wanted another perspective or issue considered, or

thought something had been overlooked, I might ask for supplementary advice.] In this case, I think the advice is a terrific piece of work, which will be of enduring significance for the Commission, not just in this case.

The Assessment process now needs to be finalised. That will include consideration not only of the legal advice, but also the other relevant issues – eg will a corruption investigation add value in the public interest (given what the RC has done, what the APSC can do, and that we would not provide any remedy other than a corruption finding); against that, the public interest in the Robodebt matter generally; but also the considerations raised in the legal advice (esp at [10] and [11]).

It will be relevant to know, if at all possible, whether the APSC is considering any/all of the same individuals who have been referred to us.

The matter should come to NSAP in the ordinary way when it is ready.

I will not be the decision-maker in respect of any of the Robodebt matters. However, because it is of obvious important to the Commission, I think it is important and appropriate that I be aware of what is happening. I do not think it is necessary to redact any material – it is perfectly normal to receive and read evidence and then not take it into account because it is not admissible etc

If the ultimate NSAP decision is NFA in respect of all matters, there will need to be a publishable report which explains why that course has been taken.

If any of the matters proceeds to investigation, there will need to be a discussion as to how. It will be necessary to review the RC evidence, to see whether it supports the potential adverse findings. It would probably not be necessary to seek further evidence by investigation. However, as previously discussed, any POI would have to be given an opportunity to provide further evidence; possibly, to cross-examine witnesses who had given evidence to the RC; and definitely, to make submissions. In other words, there might not be the usual investigatory stage (because that has largely already been done by the RC), and it might be appropriate to proceed almost directly to hearings, without an earlier “investigation” phase.

Very happy to discuss, if anyone has any concerns about this approach.

60. I have set out above the consideration of the Referred Person 1 matter on 19 October 2023. Later on 19 October 2023, Deputy Commissioner Rose emailed Deputy Commissioner Gauntlett and ss 47F and 47E(c) saying: “I am currently proposing the Decision for all 6 subjects be the same. That being – Take no further action noting there is little public value in the NACC commencing a corruption investigation in addition to the completed

Royal Commission and the ongoing investigation by the APSC, pursuant to s 41 (6) of the Act”.

61. On 23 October 2023 ss 47F and 47E(c) wrote:
- Please see below guidance from **DC Rose** about what needs to be included in the Robodebt Report re our reasons for not investigating. Completing this report is a high priority piece of work ... ss 47F & 47E(c) – can you please send through the extract of the NSAP minutes for Robodebt to assist with preparing the report.
- The Commissioner advised this morning that the report should not go into detail in relation to the legal advice. I think it should include:
Background of receipt of the referrals,
the nature of the referrals,
the conflicts of interest declared and how they were managed (Jaala excused herself from matter, Commissioner was not involved in the decision making and DC Rose was the decision maker),
careful assessments were completed and the DC formed the view that in relation to all referrals they could involve corrupt conduct that is serious or systemic, and
the decision was made to take no further action because investigations would not add any public value. Thanks,
62. On 26 October 2023 the Commissioner provided his proposed edits to the NSAP minutes from the meeting of 19 October 2023 (see above).
63. On 1 November 2023, **Deputy Commissioner Rose** emailed ss 47F and 47E(c) to say that **she** had discussed the draft minutes of the 19 October 2023 NSAP meeting with the Commissioner and attached a version in which **she** had started to make changes.
64. On 23 November 2023, a NSAP meeting was held. During the meeting, the Commissioner provided an update on the Robodebt issue, noting that **Dr Gauntlett** was reviewing evidence available from the Royal Commission to identify any gaps, particularly in so far as ss 46(b) & 47E(d) was concerned. The Commissioner noted that the APS Commissioner’s proceedings will continue their course with the suspicion, at this stage, that the NACC won’t proceed further.
65. On 26 November 2023, the Commissioner sent an email to **Deputy Commissioner Rose** and others saying that he thought the NACC should tell the people referred that the NACC has decided not to proceed to investigate.
66. On 29 March 2024, the Commissioner emailed to **Deputy Commissioners Gauntlett, Rose and Kilgour** a revised draft public statement. He said, relevantly:

...

Attached is a slightly revised draft letter and public statement. The main change is that rather than just listing relevant considerations (which I think does not really disclose the reasoning process), I've structured them in a way that shows which were more important and prevailed. I'm very happy to receive any further suggestions or comments.

Given my association with [Referred Person 1], I think it is best, for more abundant caution, if all these go out over someone else's signature, as delegated decision-maker.

67. Throughout April and May 2024, the NACC finalised its proposed public statement, including incorporating feedback provided by the Commissioner.
68. On 11 April 2024 the Commissioner emailed Deputy Commissioner Rose in a continuation of the email sent by ss 47F and 47E(c) at 7.28pm:

Hi Nicole,

I've read ss 47F and 47E(c) recent email, but at this stage at least I'll limit my comments to you, though feel free to share them with ss 47F and 47E(c).

I wouldn't get too hung up on whether there is a corruption issue. We certainly don't want to say so in the letters or public statement. ss 47F and 47E(c) question arises because s 48 refers to a statement about a corruption issue, but I think we can take the view that a statement that there is no corruption issue is a statement about a corruption issue. In any event, even if s 48 is not engaged, we can make a statement under s 231(1)(a), which does not depend on there being a corruption issue.

I'm content with including the public statement as an Annexure to the letters.

I completely agree with ss 47F and 47E(c) suggestions that:

- the public statement should include that an investigation would not provide any benefit to the vulnerable welfare recipients who suffered due to the Robodebt scheme.
- Rather than speaking of implementation of the RRC recommendations, we should say something along the lines that the Commission will focus, through its corruption prevention, education and investigation functions, on the integrity issues raised in the report, particularly in relation to ethical decision making.

I also agree with ss 47F and 47E(c) advice as to the other statutory conditions.

Best regards

69. On 12 April 2024, Deputy Commissioner Rose forwarded the Commissioner's email of 11 April 2024 to ss 47F and 47E(c), copying in the Commissioner saying in part:

Re the Public Statement - your suggestions are supported.

I think we could make reference to victims in perhaps two places, to match those we are making about the individuals under investigation. The first at the beginning of the fourth para, something like -

The Commission is conscious of the significance of the issue, having regard to the impact of the scheme on individuals and the public, the seniority of the officials involved; and of the need to ensure that any corruption issue is fully investigated.

And the fifth paragraph - perhaps we finish with the Commissioner's words -

In the absence of a real likelihood of a further investigation producing significant new evidence, it is undesirable for a number of reasons (including the risk of inconsistent outcomes, and the unfairness of subjecting individuals to repeated investigations) to conduct multiple investigations into the same matter. This is particularly so in respect of the five officials who have also been referred to the APSC. Moreover, beyond making a finding that the conduct in question amounted to corrupt conduct within the meaning of the Act, the Commission could impose no sanction nor grant any remedy or make any recommendation that could not have been made by the Robodebt Royal Commission or could not be imposed by the APSC. Importantly, it would not provide any benefit to the vulnerable welfare recipients who suffered due to the Robodebt scheme.

Re the last para and the Report Recommendations - I think the Commissioner's suggested words work -

However, the Commission will focus, through its corruption prevention, education and investigation functions, on the integrity issues raised in the report, particularly in relation to ethical decision making.

(Emphasis in original)

70. The NACC says that the decision was made on 16 April 2024 when **Deputy Commissioner Nicole Rose**, as the delegate of the Commissioner, decided to take no action with respect to each of the Robodebt referrals under section 41(6) of the *NACC Act*. There is in the papers a document signed by **Deputy Commissioner Rose** and dated 16 April 2024 in the following terms:

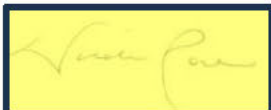
CONFIDENTIAL
DECISION TO TAKE NO ACTION

1. On 7 July 2023, the Royal Commission into the Robodebt Scheme (the RRC) made six referrals (the Referrals) to the National Anti-Corruption Commission (the Commission).
2. The Referrals related to the following persons (Referred Persons):
 - Sections 46(b) and 47E(d)
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
3. I am the decision maker in the matter pursuant to a delegation signed by the National Anti-Corruption Commissioner (the Commissioner) dated 3 July 2023. Following receipt of the Referrals, I was asked by the Commissioner to be the decision maker in the matter given a declaration of a conflict of interest by him in relation to ss 46(b) & 47E(d).
4. On 10 August 2023 advice was provided by the Commission's Legal Branch in relation to the matter. I have considered the advice and agree with the analysis and conclusions expressed therein.
5. The matter came before the Commission's National Senior Assessment Panel on 19 October 2023. I am assisted in my decision making by the papers prepared by the Commission's Assessment Team, their consideration of the Referrals against the requirements of the *National Anti-Corruption Act 2022* (Cth) (the Act) and the Assessment of Corruption Issues Policy (CM 23#22972DOC), and views expressed by members of the Panel.
6. On 28 March 2024, I was provided with a Memorandum by Deputy Commissioner Ben Gauntlett in relation to the referral of ss 46(b) & 47E(d). I have also been assisted in my decision making by this memorandum.
7. I am satisfied that each of the Referred Persons, at the time the conduct referred by the RRC was engaged in, were public officials for the purposes of section 10 of the Act. The meaning of public official in section 10 includes parliamentarians and staff members of a Commonwealth agency.
8. In accordance with the advice provided by the Commission's Legal Branch, I am satisfied that the Referrals raise a corruption issue in relation to each of the Referred Persons.
9. However, I am of the view that there is no public value in the Commission commencing an investigation into the conduct of any of the Referred Persons. The investigation undertaken by the RRC was extensive with significant resources relied upon. The issuing of Notices to Produce and Notices to Give Information meant over 958,000 documents were produced to the RRC. It is unlikely that the Commission would obtain significant new evidence that was not available to the RRC.

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10. The conduct of the Referred Persons has been fully exposed in the RRC's final report and referrals were made by the RRC to the Australian Public Service Commission.
11. In this context, there is risk of inconsistent outcomes between the findings of the RRC and the Commission and unfairness concerning the Referred Persons from being subject to multiple investigations.
12. Importantly, an investigation by the Commission would not provide an individual remedy or redress to the recipients of government payments or their families who suffered due to the Robodebt Scheme.
13. As a result, my decision in the matter is that no further action should be taken for the Referrals pursuant to subsection 41(6) of the Act.



71. On 16 April 2024, the Commissioner wrote in relation to the public statement:

Thanks – I’m happy with that modification – I was thinking of inserting “practical” but I think “individual” works well. I think we could perhaps also add “The Commission is conscious. Importantly, an investigation by the Commission would not provide any individual remedy or redress to the recipients of government payments or their families who suffered due to the Robodebt Scheme.

I think we might also add, as we did for Pelican, “The Commission will not be making further comment on this matter”. I appreciate your views about the intent of a video message. However, my thinking is:

- We are going to be issuing a few public statements saying “no further action” in the near future. I don’t think we want to promote these as major media events, although they will obviously attract interest. And I don’t want to set a precedent for delivering them via video.

- In this particular case, even if we did a video, it could not be me – to avoid any perception of COI – and I wouldn’t ask anyone else to bear the brunt of being the Commission’s public face for delivering this decision.

On which topic, for answers to potential media queries, we need one along the lines:

In order to avoid any perception of a conflict of interest arising from the Commissioner’s past professional association with a senior official involved in the Robodebt scheme, decision-making in this matter was delegated to and undertaken by one of the Deputy Commissioners.

I recall we did have some talking points on this last year, and I think one of our media releases or responses referred to it (it may have been in response to a query by [a website] or something like that?)

72. This 16 April 2024 decision was communicated to the six referred persons on 22 April 2024.

73. The persons the subject of the RRC referral were given the opportunity to comment on the NACC’s proposed public statement. On 1 May 2024, a lawyer, on behalf of [Referred Person 1], provided a letter and proposed amendments to the draft public statement, as follows:

On 6 July 2023, the National Anti-Corruption Commission (Commission) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (Robodebt Royal Commission) pursuant to section 6P(2B) of the *Royal Commissions Act 1902* (Cth).

The Commission has carefully considered each referral and reviewed the evidentiary material provided by the Robodebt Royal Commission, including its final report, and the Confidential Chapter.

Five of the six public officials were also the subject of referrals to the Australian Public Service Commission (APSC).

The Commission is conscious of the impact of the Robodebt Scheme on individuals and the public, the seniority of the officials involved, and the need to ensure that any corruption issue is fully investigated.

However, the matter has already been extensively investigated by the Robodebt Royal Commission, and the conduct has been fully ~~exposed~~ canvassed in that Commission's final report. After close consideration of the evidence that was available to the Royal Commission, the Commission has concluded that it is unlikely it would obtain significant new evidence beyond that available to the Robodebt Royal Commission.

In the absence of a real likelihood of a further investigation producing significant new evidence, it is undesirable for a number of reasons to conduct multiple investigations into the same matter. This includes the risk of inconsistent outcomes, and the oppression involved in subjecting individuals to repeated investigations of the same matter.

In deciding whether to commence a corruption investigation, the Commission takes into account a range of factors. A significant consideration is whether a corruption investigation would add value in the public interest, and that is particularly relevant where there are or have been other investigations into the same matter. There is not value in duplicating work that has been or is being done by others, in this case with the investigatory powers of the Royal Commission, and the remedial powers of the APSC.

Beyond ~~considering making a finding that the whether the~~ conduct in question amounted to corrupt conduct within the meaning of the Act and, if satisfied, making such a finding, the Commission cannot grant a remedy or impose a sanction (as the APSC can). Nor could it make any recommendation that could not have been made by the Robodebt Royal Commission. An investigation by the Commission would not provide any individual remedy or redress for the recipients of government payments or their families who suffered due to the Robodebt Scheme.

The Commission has therefore decided not to commence a corruption investigation as it would not add value in the public interest. The Commission will continue through its corruption prevention, education functions and investigation functions, on the integrity issues raised in the final report, particularly in relation to ethical decision making.

In order to avoid any possible perception of a conflict of interest, the Commissioner delegated the decision in this matter to a Deputy Commissioner who has no historical connection with any of the individuals involved.

The Commission will not be making further comment.

74. The Commissioner accepted the changes suggested in the final statement, which are underlined in the final version below.
75. On 4 June 2024, there was a Robodebt Meeting called by the Commissioner by email to Deputy Commissioners Rose and Gauntlett, amongst others.

76. On 5 June 2024, the Commissioner sent an email about the final version of the public statement: “This is fine and CLEARED BY ME.”

77. The NACC’s media statement said:

National Anti-Corruption Commission decides not to pursue Robodebt Royal Commission referrals but focus on ensuring lessons learnt

On 6 July 2023, the National Anti-Corruption Commission (Commission) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (Robodebt Royal Commission) pursuant to section 6P(2B) of the *Royal Commissions Act 1902* (Cth).

The Commission has carefully considered each referral and reviewed the extensive material provided by the Robodebt Royal Commission, including its final report, and the Confidential Chapter.

The Commission has become aware that five of the six public officials were also the subject of referrals to the Australian Public Service Commission (APSC). The Commission is conscious of the impact of the Robodebt Scheme on individuals and the public, the seniority of the officials involved, and the need to ensure that any corruption issue is fully investigated.

However, the conduct of the six public officials in connection with the Robodebt Scheme has already been fully explored by the Robodebt Royal Commission and extensively discussed in its final report. After close consideration of the evidence that was available to the Royal Commission, the Commission has concluded that it is unlikely it would obtain significant new evidence.

In the absence of a real likelihood of a further investigation producing significant new evidence, it is undesirable for a number of reasons to conduct multiple investigations into the same matter. This includes the risk of inconsistent outcomes, and the oppression involved in subjecting individuals to repeated investigations.

In deciding whether to commence a corruption investigation, the Commission takes into account a range of factors. A significant consideration is whether a corruption investigation would add value in the public interest, and that is particularly relevant where there are or have been other investigations into the same matter. There is not value in duplicating work that has been or is being done by others, in this case with the investigatory powers of the Royal Commission, and the remedial powers of the APSC.

Beyond considering whether the conduct in question amounted to corrupt conduct within the meaning of the Act and, if satisfied, making such a finding, the Commission cannot grant a remedy or impose a sanction (as the APSC can). Nor could it make any recommendation that could not have been made by the Robodebt Royal Commission. An investigation by the Commission would not provide any individual remedy or redress for the recipients of government payments or their families who suffered due to the Robodebt Scheme.

The Commission has therefore decided not to commence a corruption investigation as it would not add value in the public interest. However, the Commission considers that the outcomes of the Robodebt Royal Commission contain lessons of great importance for enhancing integrity in the Commonwealth public sector and the accountability of public officials. The Commission will continue through its investigation, inquiry, and corruption prevention and education functions, to address the integrity issues raised in the final report, particularly in relation to ethical decision making, to ensure that those lessons are learnt, and to hold public officials to account.

In order to avoid any possible perception of a conflict of interest, the Commissioner delegated the decision in this matter to a Deputy Commissioner.

The Commission will not be making further comment.

Consideration

78. The primary facts are not controversial. The issue is what natural justice required in light of the Commissioner's conflict of interest.
79. That conflict of interest was "managed" by the Commissioner designating a delegate, Deputy Commissioner Rose, as the decision-maker under section 41 and by absenting himself from the formal, albeit provisional, making of the decision on 19 October 2023.
80. The question is whether that step was legally sufficient. The alternative "management" of the conflict was for the Commissioner to stay away from all aspects of the decision-making under section 41 in relation to Referred Person 1.
81. There is an issue as to when the decision was made. Formally it was made on 16 April 2024 although the reasons were substantially the same as on 19 October 2023. It was provisional in light of what was then said: Deputy Commissioner Rose said: "we've made decision, overly cautious, need [to] have discussion re specifying the section as to why we are taking NFA, get draft letter". The decision was recorded in the notes as: "NFA at this stage, with further discussion to take place around communication with the APSC and avenues of referral/ oversight mechanisms within the Act." This issue does not affect the analysis.
82. In relation to these referrals, the period between 19 October 2023 and 16 April 2024 was largely taken up, in relation to this matter, with formulating the reasons and the media statement. The Commissioner had an ongoing involvement in these steps.

83. What was actually done on 19 October 2023 by the Commissioner is significant because declarations 1-3 required a different approach.
84. It will be recalled that in the first declaration the Commissioner had said that if Referred Person 1 was the subject of a referral, then he would not be involved in decision-making concerning [REDACTED]. He said he “knows [Referred Person 1] well”.
85. In the second declaration the Commissioner said “I will not be involved in any decisions concerning [Referred Person 1].” He said [Referred Person 1] “is well known to me”.
86. In the third declaration the Commissioner said “I would recuse myself from decision-making concerning [REDACTED]” He said [Referred Person 1] was “one of those with whom I have had a close association”.
87. These statements provide the basis for the apprehension of the third party fair-minded observer. The conflict existed in the terms it was disclosed, rather than in the terms of the gloss in [47b] of the NACC’s submission to the Inspector dated 13 August 2024 which refers to “The perceived conflict arose from a prior professional association, and not a close personal relationship.”
88. The fourth declaration, on 19 October 2023 showed a different approach: The Commissioner stated that *he would not be the decision-maker* for the matters, Deputy Commissioner Rose would be the ultimate decision-maker; and that he, the Commissioner, would make some general observations about the matters generally and then leave while the decision is considered.
89. In the second declaration the Commissioner said he would retain an overall interest in the policy questions that arise concerning these referrals generally, because those questions – in particular the scope of “corrupt conduct” – will necessarily have ongoing ramifications for us. This approach could not be criticised although it is necessary to bear in mind that policy questions may not arise in the abstract and often have a double character both as a policy question and as a question involving facts and views specific to an individual. This was the case here.
90. The main question is whether not being the decision-maker in formal terms is sufficient to address the conflict based on perception. There is a real difference between saying that a person will not be the decision-maker and the person will not be *involved in decision*

making about an individual. The issue is one of substance rather than form, consistent with the objective nature of the question through the eyes of the third party observer.

91. The factors are as follows.
92. Here, the logical connection between the nature of the interest and the possibility of departure from impartial decision-making is clear: see *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63 at [8]. The declarations of conflict were made because it was apparent that the Commissioner, in having had a close working relationship with [Referred Person 1], would have formed, or would apparently have formed, a view about ss 46(b) & 47E(d) character.
93. The category is reasonable apprehension of partiality: see Deane J in *Webb & Hay v R* [1994] HCA 30 at [12]: an association which may give rise to a perceived or real conflict of interest between private relationships, associations or acquaintances and the exercise of the statutory power.
94. The question arises in a statutory context: an exercise of public power. What may be appropriate in the case of a meeting of a club or other contractual settings, such as attending but not voting, is not the starting point.
95. The nature and functions of the body are significant. As the NACC CEO Mr Reed wrote in the NACC Integrity Policy dated 18 July 2023: “ Maintaining high standards of integrity is core to the NACC’s identity and culture, and one way the NACC protects our people, information, assets, and organisational integrity. As a NACC staff member, regardless of your role, you are expected to have a high level of personal integrity and awareness of the critical importance of protecting the NACC’s organisational integrity.”
96. The delegate in this case was a Deputy Commissioner. As set out above, by section 19, the functions of a Deputy Commissioner are to assist the Commissioner in performing the Commissioner’s functions; and any other function conferred on a Deputy Commissioner by this Act or another Act. In performing those functions, a Deputy Commissioner must comply with any directions of the Commissioner.
97. By section 276(6) in performing or exercising a function, power or duty delegated under subsection (1) or paragraph (2)(b), the delegate must comply with any directions of the

Commissioner. It is not to the point when considering the position of a delegate that there were no such directions in this case.

98. Similarly, by section 34AB of the *Acts Interpretation Act 1901*, a delegation by the Commissioner does not prevent the performance or exercise of a function, duty or power by the Commissioner. It is not to the point that in form the Commissioner was not the decision-maker here.
99. The present point is made at [45] of the NACC's submission to the Inspector dated 13 August 2024, referring to the Commissioner having primary responsibility for carrying out the Commission's functions and the primacy of the Commissioner's role. This makes it more important for the Commissioner to avoid involvement in a case where he has a conflict.
100. The Commissioner's involvement in the decision-making under section 41 was comprehensive, before, during and after the 19 October 2023 meeting at which the substantive decision was made.
101. The views the Commissioner expressed at the meeting on 19 October 2023 were not limited to policy questions concerning the referrals generally as the policy questions had a strong factual element specific to, amongst others, Referred Person 1. The discussion was framed by the issues raised by the Commissioner. The Commissioner settled the minutes of the 19 October 2023 meeting.
102. A further factor is that after the 19 October 2023 meeting the Commissioner was involved in formulating the reasons for decision and also the terms of the media statement.
103. The reasons of the Deputy Commissioner on 16 April 2024 were closely related to what the Commissioner had said at the meeting on 19 October 2023.
104. Material sent to the Commissioner relevant to this issue was not redacted on the basis that the Commissioner had said it was perfectly normal to receive and read evidence and then not take it into account. This was not the appropriate analysis in the context of the apprehension by a third party of administrative decision making: see *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40 per Allsop J.
105. For those reasons, from the standpoint of the third party fair-minded observer, that observer might reasonably apprehend that the Commissioner's involvement might have impinged

on the impartiality of the decision-making of the Deputy Commissioner. No doubt she was fully aware of the Commissioner's conflict of interest but she was also fully aware of his views on the exercise of the statutory power in the case of, amongst others, Referred Person 1.

106. Contrary to the NACC's submissions to the Inspector dated 13 August 2024 at [34]-[35], it is not an answer to say that the delegate was an experienced public servant with a background in regulatory, intelligence and law enforcement and each was a senior position requiring the exercise of independent judgment in the context of complex and controversial decision making. So to reason adopts the wrong perspective, the correct perspective being the apprehension of the third party fair-minded observer.
107. The strategy to manage the risk should have been not only to designate a delegate but to remove the Commissioner from related decision-making processes and limit his exposure to the relevant factual information. This was not done, including in the request for legal advice because the request for the advice, the advice itself and the deployment of that advice by the Commissioner in the 19 October 2023 meeting was fact heavy and included the position of, amongst others, Referred Person 1.
108. Contrary to the NACC's submissions to the Inspector dated 13 August 2024 at [46], to say that the Commissioner had an advisory role in this matter is not a sufficient description of his involvement, but if it was sufficient it would give added point to, rather than allay, the apprehension of the third party fair-minded observer.
109. Similarly, to say that the Commissioner was not present when the decision was made is insufficient to allay the perception in the mind of the third party fair-minded observer. As Spigelman CJ said in *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209 at [27], in a different factual context, in a conflict of interest case an adverse conclusion of what an independent observer might believe would more readily be drawn.
110. To conclude otherwise would be to substitute form for substance. The focus is on the overall integrity of the decision-making process: *Isbester v Knox City Council* [2015] HCA 20 at [58] per Gageler J.
111. I turn lastly to the issues for this Report.

112. In terms of issue (i) in [6] above, I find that the steps taken by the Commissioner were not consistent with the management option chosen in his first three declarations, that is, not to be involved in decision-making concerning Referred Person 1. That management option was consistent with law. The option acted on, for the Commissioner to absent himself only from the formal step of deciding, either on 19 October 2023 or 16 April 2024, was not so consistent.
113. In terms of issue (ii) in [6] above, I find that in light of the Commissioner’s declared conflict of interest, the management option chosen, in the sense that it was the option acted on, was not appropriate nor consistent with law.
114. I turn to the issue in [7] above, my opinion as to whether the conduct I find to have occurred amounted to officer misconduct as defined in section 184(3) of the National Anti-Corruption Commission Act. What follows are my opinions.
115. I have found that the steps taken by the Commissioner to manage his conflict of interest, that conduct, arose from a mistake of law, as natural justice required the Commissioner not to participate in the decision-making with respect to Referred Person 1. The Commissioner’s conduct, if engaged in by the NACC, would have been agency maladministration as defined in section 184(3), being conduct that is not unlawful but arose from a mistake of law. As I have said, the mistake of law was as to what the law required to be the action taken in consequence of the Commissioner disclosing his interest. On this analysis, there has been “officer misconduct” as defined in section 184(3) of the *NACC Act*.
116. Alternatively, if the question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, as held in *Isbester v Knox City Council* [2015] HCA 20 at [20], then here the conclusion of “officer misconduct” would be the same as amounting to agency maladministration, being conduct that arose from a mistake of fact.

ALAN ROBERTSON SC

30 August 2024