

***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 [Referred Person 1] is the subject of a referral, then he would not be involved in decision-making concerning [Referred Person 1].

33. The second was in writing, to the statutory officeholders and NACC senior staff members, 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 [Referred Person 1] were to be the subject of a referral to the Commission, I would recuse myself from decision-making concerning [Referred Person 1] 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 by adding 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 [Referred Person 6] 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 [other] 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 ~~on~~ [Referred Person 6] [sic] ~~but~~ and not

the public servants. The Commissioner noted however that there is a justifiable distinction in that [Referred Person 6] cannot be ~~impacted~~ dealt with by the APSC.

38. A note or draft note by a NACC staff member, 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 a NACC staff member 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, a NACC staff member emailed a NACC senior staff member: “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 a NACC senior staff member and Deputy Commissioner 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 and NACC senior staff members 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 and NACC senior staff members:

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 a NACC senior staff member 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 a NACC senior staff member 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 ... [NACC senior staff member] – 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 a NACC senior staff member 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 [Referred Person 6] 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 a NACC staff member at 7.28pm:

Hi Nicole,

I've read [NACC staff member] recent email, but at this stage at least I'll limit my comments to you, though feel free to share them with [NACC senior staff member]. 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. [NACC senior staff member]'s 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 [NACC senior staff member]'s 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 [NACC senior staff member]'s 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 a NACC senior staff member, 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**):
  - [REDACTED]
  - [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 [REDACTED].
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 [REDACTED]. 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 [Referred Person 1]. 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 [Referred Person 1].” 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 [Referred Person 1] 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

