



Inspector of the National Anti-Corruption Commission

Inspector of the National Anti-Corruption Commission complaint investigation

**NACC's decision not to investigate
referrals from the Royal Commission
into the Robodebt Scheme**

October 2024

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Executive Summary

As the Inspector of the National Anti-Corruption Commission, I conducted an investigation into agency maladministration or officer misconduct in relation to the decision of the National Anti-Corruption Commission (NACC) not to investigate the referrals of six persons from the Royal Commission into the Robodebt Scheme (the Royal Commission).

The main issue which emerged from the material gathered during the investigation, was the actions taken by the NACC Commissioner following his declaration of a conflict of interest in relation to one of the referred persons.

The NACC Commissioner made a number of declarations describing the interest in relation to that person as a person ‘he knows well’, ‘who is well known to me’ and ‘with whom I have had a close association’.

The NACC Commissioner dealt with his declared conflict by delegating the decision as to whether to investigate the referrals, to a Deputy Commissioner.

I found that, in light of the conflict of interest, the NACC Commissioner should have not only designated a delegate but removed himself from related decision-making processes and limited his exposure to the relevant factual information. This was not done.

I found that the NACC Commissioner’s involvement in the decision-making was comprehensive, before, during and after the 19 October 2023 meeting at which the substantive decision was made not to investigate the referrals.

The NACC Commissioner contributed to the discussion at that meeting, settled the minutes of that meeting and was involved in formulating the reasons for decision and also the terms of the media statement.

I concluded that a third-party, fair-minded observer might reasonably apprehend that the NACC Commissioner’s involvement might have impinged on the impartiality of the decision-making of the delegated Deputy Commissioner. My conclusion is based on an apprehension of partiality rather than actual partiality. I make no finding against the delegated Deputy Commissioner.

I found that natural justice or procedural fairness required the NACC Commissioner not to participate in the decision-making with respect to the referred person. By participating in the decision-making in the way he did, the NACC Commissioner made a mistake of law or fact.

The mistake was as to the requirements of procedural fairness, which amounts to an error of judgement rather than a matter of mere procedure.

I concluded that the NACC Commissioner engaged in officer misconduct as defined in section 184(3) of the *National Anti-Corruption Commission Act 2022 (Cth)* (NACC Act), being conduct that is not unlawful but arose from a mistake of law or fact.

These findings about the declared conflict of interest are based on advice provided by the Hon Alan Robertson SC, former Federal Court judge, whom I engaged to assist me. His advice is contained in the Robertson Report which is attached to this Report.

In submissions to me, the NACC accepted ‘the conclusion ... that the Commissioner’s management of his declared conflict of interest involved a mistake of the kind suggested’. The NACC accepted that ‘having regard to the very wide definitions of “agency maladministration” and “officer misconduct” in s 184(3) of the NACC Act, it necessarily follows that this mistake falls within the definition of “officer misconduct”’.

I also found that the NACC made a misleading statement in its media release, namely that the Australian Public Service Commission (APSC) had remedial powers and could impose a sanction in relation to the persons referred. In fact, it could not because 5 of the referred persons were no longer public servants and the sixth never was a public servant and the APSC could only impose a sanction on current public servants.

I have made one recommendation:

In light of the findings and opinions expressed in the Robertson Report, which I accept, I recommend that the Commissioner delegate the function under s 41(5) of the NACC Act, that is, to reconsider whether or how to deal with a corruption issue, namely the referrals from the Royal Commission into the Robodebt Scheme, to an appropriate person.

The NACC has accepted that the decision should be reconsidered by an appropriate person.

1. Introduction

The Royal Commission into the Robodebt Scheme (the Royal Commission) was established by Letters Patent on 18 August 2022 and was required to report on 30 June 2023. On 24 April 2023, the Royal Commissioner, Catherine Holmes AC SC, sought a short extension in order to refer individuals to the National Anti-Corruption Commission (NACC or the Commission) under s 6(p) of the *Royal Commissions Act 1902* (Cth) should she 'reach the view their conduct may meet the definition of "corrupt conduct" under the *National Anti-Corruption Commission Act 2022* (Cth)' (the Royal Commission, *Report* (2023), p lxvii)).

On 6 July 2023, the NACC received referrals (the Robodebt referrals) concerning 6 public officials from the Royal Commissioner (Referred Persons), five of whom were also subject to referrals to the Australian Public Service Commission (APSC). The sixth referred person was not a public servant and, given the public findings of the public Royal Commission report, is likely to have been a former Minister.

Eleven months later, on 6 June 2024, the NACC published a media release on its website announcing that the NACC had decided not to commence a corruption investigation into the 6 Robodebt referrals.

Shortly thereafter, I received hundreds of complaints about that decision of the NACC. The number of complaints is not surprising, as the Royal Commissioner was scathing in her report about the conduct she found to have occurred. In the Preface to her Report (the Royal Commission, *Report* (2023), p i), the Royal Commissioner stated:

At the outset of my inquiry, I had anticipated that the Commission would uncover how such a patently unreliable methodology as income averaging, without other evidence, to determine entitlement to benefit could become part of an Australian Government debt raising and recovery scheme. What has been startling in the Commission's investigation of the Robodebt scheme has been the myriad of other ways in which it failed the public interest.

It is remarkable how little interest there seems to have been in ensuring the Scheme's legality, how rushed its implementation was, how little thought was given to how it would affect welfare recipients and the lengths to which public servants were prepared to go to oblige ministers on a quest for savings. Truly dismaying was the revelation of dishonesty and collusion to prevent the Scheme's lack of legal foundation coming to light. Equally disheartening was the ineffectiveness of what one might consider institutional checks and balances – the Commonwealth Ombudsman's Office, the Office of Legal Services Coordination, the Office of the Australian Information Commissioner and the Administrative Appeals Tribunal – in presenting any hindrance to the Scheme's continuance.

1.1. My role

As the Inspector of the NACC, I am independent of the NACC and the Australian Government. I hold a part time appointment and I am assisted by a Director and an Administration Officer.

I can investigate corrupt conduct of the NACC and complaints of agency maladministration or officer misconduct made in relation to the NACC or a staff member of the NACC. Corrupt conduct is essentially the misuse of public power, position, information or property, usually for private purposes. Maladministration includes acts which are unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or arise from a mistake of fact or law. Officer misconduct is conduct of a staff member of the NACC that would be maladministration if the NACC did it.

I do not have the power to substitute a decision of my own for a decision of the NACC. Accordingly, my investigation is not a merits review process. Thus, I will not comment on the merits of the decision not to investigate the Robodebt referrals.

1.2. The sealed section of the Royal Commission Report

The Royal Commissioner made the following non-publication order:

Pursuant to s 60(3) of the *Royal Commissions Act 1902* (Cth) (the Act), I, Catherine Ena Holmes AC SC, Commissioner of the Royal Commission established under Letters Patent dated 18 August 2022 the "Letters Patent"), to inquire into the Robodebt scheme ("Royal Commission"), direct that the confidential chapter of my report containing communications (the s 6P Communications) made by me to persons or bodies pursuant to section 6P of the Act (the Confidential Chapter), and the identity of the persons subject to a communication, is not to be published.

I have taken the view that I am bound by the non-disclosure direction and therefore cannot reveal the names of those referred, or any other part of the confidential chapter. Accordingly, throughout this Report, I refer to the Referred Persons as Referred Persons 1-6. I use 'Referred Person 1' to refer to the person in relation to whom the NACC Commissioner declared a conflict of interest. I refer to 'Referred Person 6' to refer to the person who was not a public servant.

1.3. Centralised Code of Conduct Inquiry Taskforce

Following the Robodebt Royal Commission, the Secretaries of the Australian Government Departments agreed a centralised process to investigate possible breaches of the Australian Public Service Code of Conduct to ensure consistency across the public service. The APSC appointed independent reviewers to conduct inquiries into the action of public servants associated with the Robodebt Scheme (the Taskforce). Sixteen people were referred to the Taskforce, 5 of whom were also referred to the NACC.

The Taskforce reported on 13 September 2024. Twelve people were found to have breached the Code of Conduct, 2 of whom were named by the Australian Public Service Commissioner. They are Kathryn Campbell and Renee Leon. However, no sanction was applied against either of them because they both are former Agency Heads. The Australian Public Service Commissioner gave the following reasons for identifying them:

Considerations in support of the public interest in public disclosure of information about the findings of breach of the Code include the following.

Between them, both Secretaries breached the Code of Conduct 25 times.

The public needs to know that the most senior of public servants, those who have enormous power and influence in the public service, are accountable for their actions, especially in the case of demonstrated, numerous and serious failures in public administration.

There are unique and high responsibilities for Agency Heads as the Accountable Authority of an Australian Government entity under the *Public Governance, Performance and Accountability Act*, and public accountability matters for public confidence.

Having regard to information already in the public arena, disclosure of information about the findings of breach of the Code by the two former Secretaries, even if not named, would enable

their identification. It would also lead to speculation about their identity and the possibility of others being mistakenly identified.

It is not possible to redact the breach findings to remove material that would enable the two former Secretaries to be identified while also ensuring the disclosure of the findings is meaningful.

I am satisfied that in all the circumstances it is fair and reasonable to publicly disclose identifying information about the two former Secretaries and to name them.

Three findings against Ms Campbell made by the Royal Commissioner were not substantiated by the Taskforce.

2. Inquiry process

On 12 June 2024, I wrote to the National Anti-Corruption Commissioner, the Hon Paul Brereton AM RFD SC (the NACC Commissioner) advising that I proposed to issue a media release stating that I will be making inquiries of the NACC about its reasons for not investigating the Robodebt referrals.

On 13 June 2024, I published a media release announcing I would inquire into the NACC's decision not to investigate the Robodebt referrals.

On 13 June 2024, the Commissioner wrote to me advising that the NACC will cooperate with my inquiries. The Commissioner also advised that 'As the Deputy Commissioner who made the relevant decision, Deputy Commissioner Rose will have lead responsibility for responding to your requests'.

On 14 June 2024, I met with Deputy Commissioner Rose and Commission staff, at Deputy Commissioner Rose's request, to discuss the material I would need from the NACC. I also requested that the NACC prepare a chronology of its activities since receiving the Robodebt referrals.

On 14 June 2024, I confirmed in writing my requests for:

All documents considered by the Commission in making the decision (except the public Royal Commission Report) including:

1. all material provided by the Royal Commission
2. all other material considered
3. any documents created by Commission officers in that process.

On 19 June 2024, at my request, the NACC provided me with the sealed section of the Confidential Chapter of the Royal Commission's Report.

On 20 June 2024, the NACC provided all 'Tranche 1' material (that is, all material provided by the Royal Commission to the NACC).

About one month later, on 19 July 2024, the NACC provided me with:

- the material requested in tranches 2 and 3 (of my letter of 14 June 2024)
- an index with links to the relevant documents
- a detailed chronology with links to the relevant documents

- a dramatis personae, outlining the titles and positions of staff referred to in the material provided and the role of the Commission's Senior Assessment Panel (NSAP) and Statutory Office Holders (SOH) meeting.

On 6 August 2024, I wrote to Deputy Commissioner Rose, seeking further documents relating to the declared conflicts of interest.

On 13 August 2024, Deputy Commissioner Rose provided the NACC's initial submissions (**Attachment A**) and answers to questions about conflicts of interest raised in my letter of 6 August 2024. Deputy Commissioner Rose also provided further correspondence that was omitted by oversight from the documents provided with Tranche 2 ('as Tranche 3').

On 15 August 2024, I provided Deputy Commissioner Rose with complaints about the decision received by my Office, up to and including 12 August 2024.

On 16 August 2024, I requested clarification regarding some statements in the NACC's initial submissions.

On 21 August 2024, Deputy Commissioner Rose provided a further tranche of documents relating to the SOH meeting of 3 July 2023 ('Tranche 4'). Deputy Commissioner Rose confirmed that the delegation to her in relation to the Robodebt referrals was not accompanied or followed by any written or oral direction, and that the Commissioner gave no direction to Deputy Commissioner Rose in connection with the exercise of power under the delegation.

On 26 August 2024, I provided Deputy Commissioner Rose with an additional 66 relevant complaints about the NACC's referral decision which were not included in those provided on 15 August 2024.

After reviewing the material provided, I determined to conduct an investigation into complaints of agency maladministration or officer misconduct made in relation to the conduct or activities of the NACC or a staff member of NACC, within the meaning of s 184(1)(e) of the NACC Act. I refer later to these provisions.

On 26 June 2024, I appointed barrister Trent Glover (as he then was) to assist me. On 9 August 2024, on behalf of the Commonwealth, I engaged the Hon Alan Robertson SC, former Federal Court Judge, to assist me in my inquiries. Specifically, I engaged Mr Robertson to review the material provided to me by the NACC, including the NACC's submissions to me dated 13 August 2024, and to prepare a report of his findings 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?

I also engaged Mr Robertson to advise me of his opinion as to whether the conduct he found to have occurred amounted to officer misconduct as defined in the NACC Act.

I received Mr Robertson's Report on 30 August 2024 (the Robertson Report) (**Attachment B**).

On 3 September 2024, I forwarded my draft report, setting out my draft findings and proposed recommendation and the Robertson Report to the NACC. I invited submissions on each report as well as to publication of my final Report, and any redactions, which in the NACC's view, should be made.

On 8 October 2024, I received part 1 of the NACC's submissions which primarily concerned submissions about my draft report and the Robertson Report (**Attachment C**).

On 21 October 2024, I received part 2 of the NACC's submissions which concerned my recommendation and matters relating to the publication of my Report (**Attachment D**).

The versions of the submissions that are attached to this Report have been redacted so as not to contain information that identifies any of the Referred Persons, or names NACC staff or their positions, or information that is subject to legal professional privilege, or is other information which is irrelevant to my findings.

Mr Robertson's report has been redacted so as not to contain information that identifies any of the Referred Persons, or names NACC staff or their positions.

In conducting my investigation, I held no hearings and did not exercise any coercive powers under the NACC Act. I requested the information from the NACC and it was provided voluntarily. My investigation relied solely on the extensive information provided by the NACC, which included a hyperlinked 136-page chronology and thousands of documents.

I publish this Report after giving the Commissioner, the CEO and the Attorney-General a copy of the Report and being satisfied that it is in the public interest to publish the Report.

3. Short chronology

On 3 July 2023, the Commissioner signed an instrument delegating decision-making functions generally to each Deputy Commissioner.

The Commissioner made his first declaration of a conflict of interest concerning Referred Person 1 at the Statutory Office Holders Meeting held on 3 July 2023. That meeting was attended by the Commissioner, each Deputy Commissioner and the CEO. The terms of the declaration were

It was highly possible he 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].

On 6 July 2023, the NACC received referrals concerning six public officials from the Royal Commissioner (Referred Persons), five of whom were also subject to referrals to the APSC.

On 7 July 2023, the Commissioner made his second declaration by email to Deputy Commissioner Rose and senior staff

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 this reason, Deputy Commissioner 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 – particularly the scope of 'corrupt conduct' – will necessarily have ongoing ramifications for us.

On 13 July 2023, the Commissioner sent detailed instructions to the NACC's internal lawyers for advice as to whether the conduct of the Referred Persons would come within the concept of corrupt conduct for the purposes of the Act.

The advice was provided to the Commissioner and other senior staff on 10 August 2023.

On 11 August 2023, the Commissioner wrote to the Attorney-General:

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 ... I would recuse myself from decision-making concerning [Referred Person 1].

On 17 October 2023, at 6pm, the members of the NACC's senior assessment panel (NSAP) were emailed assessment reports about the Robodebt referrals prepared by the NACC's Intake and Triage team and provided with links to the material provided by the Royal Commission.

On 19 October 2023, the NSAP, chaired by the Commissioner, and comprising the Deputy Commissioners and senior staff, met to consider the Robodebt referrals.

There were notes and draft minutes taken of the meeting. The minutes were never finalised. Mr Robertson's Report sets out the detail of the notes and draft minutes.

Suffice to say for this chronology, according to the draft minutes of the meeting, the meeting commenced at 11.33am, the Commissioner left the meeting at 12.12pm and returned at 12.20pm. The meeting concluded at 12.33pm.

The notes recorded the decision 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.

The draft minutes, as revised by the Commissioner state: DECISION: TO BE FINALISED FOLLOWING FUTHER INPUT.

This was the only NSAP meeting where a decision about the Robodebt referrals was recorded.

Between 23 October 2023 and 16 April 2024, the reasons for the decision, particularly in relation to the five public servants, and what would become the media release were drafted with input from the Commissioner, Deputy Commissioner Gauntlett, Deputy Commissioner Rose and senior staff.

From at least early November 2023, Deputy Commissioner Gauntlett was considering options for dealing with the public official who was not a public servant (Referred Person 6).

Between January and March 2024, Deputy Commissioner Gauntlett circulated various drafts of his review of the options for dealing with Referred Person 6 (the review) to Deputy Commissioner Rose and others.

On 7 March 2024, the Commissioner and Deputy Commissioners were advised that the APSC was confident that further information was available in respect of one of the Referred Persons and the APSC had limited powers to obtain that information and could not compel its production. I am informed that Deputy Commissioner Rose took this information into account in making her decision.

On 28 March 2024, Deputy Commissioner Gauntlett provided a draft of the review to the Commissioner.

On 16 April 2024, Deputy Commissioner Rose, as the delegate of the Commissioner, signed a record stating that she decided to take no action with respect to each Referred Persons under s 41(6) of the NACC Act. This decision was communicated to the Referred Persons on 22 April 2024 who were given an opportunity to comment on a proposed public statement.

The record included in part:

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 [Referred Person 1].

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 the referral of [Referred Person 6]. 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.
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.

Between 22 April and 9 May 2024, lawyers for the Referred Persons were invited to and made submissions to NACC about a proposed public statement.

On 31 May 2024, the NACC CEO gave evidence before Senate Estimates.

On 6 June 2024, the NACC published a media release which included in part:

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 NACC 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 NACC 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.

4. The complaints

I have received over 1200 complaints relating to the NACC's decision to not investigate the Robodebt referrals. There were, across the complaints, expressions of profound disappointment in the NACC's decision. Many of the complaints expressed similar sentiments.

Common themes arising from the complaints I received were:

- the Commissioner's conflict of interest
- the NACC's decision disregarded, disrespected and/or misunderstood the Royal Commissioner's referral
- lack of public accountability for former Ministers and former Australian Public Service (APS) employees
- the decision was unacceptable, unreasonable and unjust to the victims of the Robodebt Scheme
- the NACC's reasons for its decision not to investigate the Robodebt referrals were inadequate
- the lack of timeliness in the NACC's decision.

I set out a short precis of the complaints received.

It needs to be emphasised that my role is not to conduct a review of the merits of the NACC decision. I can only investigate corrupt conduct of the NACC and complaints of agency maladministration or officer misconduct made in relation to the NACC or a staff member of the NACC.

4.1. Conflict of interest

Some complainants referred to the fact that the Commissioner and Referred Person 1 are known to one another, giving rise to a conflict of interest. However, many of the complaints provided no further explanation of this conflict.

Some complainants also took issue with 'a nameless Deputy Commissioner' having made the decision not to investigate the Robodebt referrals, and suggested that the Deputy Commissioner was only doing the Commissioner's bidding.

4.2. It disregarded, disrespected or misunderstood the Royal Commissioner's referral

Complainants considered the NACC had breached the public trust by not investigating the Robodebt referrals, particularly in circumstances where the Royal Commissioner purposely referred the Referred Persons to the NACC because she did not have any authority to take action. One complainant said '[i]t's not rocket science'.

Complainants said it was unacceptable, having received referrals from the Royal Commissioner, to in turn cite the Royal Commission being undertaken as a reason not to pursue the referrals. The Royal Commission exposed much dishonest, secretive and unlawful behaviour. In making its decision not to investigate, the NACC misunderstood the Robodebt referrals. The NACC was not to duplicate the work of the Royal Commissioner but rather to take the evidence and findings made by the Royal Commissioner and conduct its own investigation into whether there was corrupt conduct and/or maladministration.

Some complaints acknowledged the limitations in the Royal Commissioner's powers and observed the NACC had broader (and specific) powers to investigate corrupt conduct and maladministration.

4.3. Public accountability for former Ministers and former APS employees

Complainants expressed disappointment that the NACC's decision sent a 'woeful' message to not only those affected by the Robodebt Scheme but to Australians generally that there is no public accountability for corrupt conduct and maladministration, something the NACC was set up to ensure.

More specifically, some complainants observed it was likely at least one of the Robodebt referrals made by the Royal Commissioner concerned a former Minister, and that the NACC's decision ignored the fact that former Ministers are not subject to APSC processes. They considered that only the NACC could hold former Ministers accountable.

To similar effect, some complainants acknowledged the APSC was limited to imposing sanctions only on current APS employees. Many of those implicated had left the public service and thus the APSC had no power to sanction those former public officials.

4.4. The decision was unacceptable, unreasonable and unjust to the victims of the Robodebt Scheme

Complainants described the scheme as one of the most egregious episodes of cruelty and dishonesty in recent memory relating to the administration of government. They said the failure in public policy led to the suicide of many people who were accused of owing money they did not, in fact, owe. For those persons, complainants considered the fact the NACC would not investigate further is an abrogation of responsibility, discriminatory to the victims, and has brought the NACC into disrepute. This was unacceptable, unreasonable and unjust.

4.5. NACC's reasons were inadequate

Complainants described the NACC's reasons for declining to investigate the Robodebt referrals as 'egregiously inappropriate', 'insufficient', 'patronising' and containing 'no substance'. Other complainants said that the reasons given 'fly in the face of both logic and fact'. They said that the NACC needed to explain publicly what led to its decision. Failing to do so meant the NACC lost 'all credibility'.

4.6. Timeliness of decision

Complainants took issue with the length of time the NACC took to make its decision, particularly in circumstances where the NACC concluded there was no need to assess the Robodebt referrals further. Some asked why it took 11 months to reach a decision? One said the 'justice delayed is justice denied' aphorism was apt to describe the timeliness of the NACC's decision.

5. The issues considered in my complaint investigation

The principal issue that arose from my review of the material provided by the NACC was the management of the Commissioner's declared conflict of interest in relation to one of the referred persons. As I have stated, I engaged the Hon Alan Robertson SC to provide a report to assist me on this issue.

An ancillary issue was the content of the media release.

This Report will first deal with the relevant statutory provisions, and then consider each of these issues raised.

The detailed facts relevant to considering the management of the Commissioner's declared conflict of interest are set out in the Robertson Report and I do not repeat them here, save for where necessary.

6. The statutory provisions

The NACC is established by the NACC Act.

6.1. Provisions concerning the Inspector

My 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.

By section 213, the Inspector may perform an investigation in such manner as the Inspector thinks fit.

The powers of the Inspector to investigate are set out in s 214. None of those powers were exercised in this investigation.

Section 215 sets out my relevant reporting obligations:

215 Report on NACC corruption investigation or NACC complaint investigation

Inspector must prepare a NACC investigation report

(1) After completing:

- (a) a NACC corruption investigation; or
- (b) a NACC complaint investigation;

the Inspector must prepare a report (a **NACC investigation report**) on the investigation.

Contents of a NACC investigation report

(2) Subject to section 217, the NACC investigation report must set out:

- (a) the Inspector's findings or opinions on the NACC corruption issue or the complaint; and
- (b) a summary of the evidence and other material on which those findings or opinions are based; and
- (c) any recommendations that the Inspector thinks fit to make; and
- (d) if recommendations are made—the reasons for those recommendations.

Note: See also section 219, which requires the Inspector to give certain persons an opportunity to respond before including certain information in the report. That section also requires additional information to be included in a NACC investigation report in certain circumstances.

(3) For the purposes of paragraph (2)(a), if:

- (a) the NACC investigation report relates to a NACC corruption investigation; and
- (b) the Inspector forms the opinion that a person whose conduct has been investigated has engaged in corrupt conduct of a serious or systemic nature;

the Inspector must include a statement to that effect in the NACC investigation report.

(4) To avoid doubt, for the purposes of paragraph (2)(a), if:

- (a) the NACC investigation report relates to a NACC corruption investigation; and
- (b) the Inspector forms the opinion that a person whose conduct has been investigated has not engaged in corrupt conduct;

the Inspector must set out that opinion in the report.

(5) If:

- (a) a person gives evidence at a hearing in relation to a NACC corruption investigation or a NACC complaint investigation; and
- (b) the person is not the subject of any findings or opinions in relation to the investigation;

the Inspector may include a statement to that effect in the NACC investigation report if the Inspector is satisfied that it is appropriate and practicable to do so to avoid damage to the person's reputation.

Recommendations that may be made

(6) Without limiting paragraph (2)(c), the Inspector may make one or more of the following recommendations:

- (a) taking action in relation to a person, in accordance with relevant procedures, with a view to improving their performance;
- (b) terminating the employment of a person in accordance with relevant procedures;
- (c) taking action to rectify or mitigate the effects of the conduct of a person;
- (d) adopting measures to remedy deficiencies in the policy, procedures or practices that facilitated:
 - (i) the employment or engagement of an unsuitable person; or
 - (ii) a person engaging in corrupt conduct; or
 - (iii) the failure to detect corrupt conduct engaged in by a person.

Section does not limit what may be included in a NACC investigation report

(7) This section does not limit what may be included in a NACC investigation report.

219 Opportunity to respond must be given before including certain information in NACC investigation report

(1) Before including in a NACC investigation report an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, the NACC or any other person, the Inspector must give the head of the agency, the head of the entity, the Commissioner or the other person concerned:

- (a) a statement setting out the opinion, finding or recommendation; and
- (b) a reasonable opportunity to respond to the opinion, finding or recommendation.

(2) The response may be given by:

(a) the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head; or

(b) in relation to the NACC—the Commissioner, or a person authorised by the Commissioner; or

(c) in relation to any other person concerned—the other person concerned, or, with approval, a person representing the other person.

(3) If:

(a) the opinion or finding is that a person has engaged in corrupt conduct; and

(b) the person provides a response to the finding or opinion;

the Inspector must include in the NACC investigation report a summary of the substance of the response if the person requests the Inspector to do so.

(4) Subsection (3) is subject to section 217.

(5) However, the Inspector must not include in the NACC investigation report any information in a response given under this section that would identify any person who, in the opinion of the Inspector, has not engaged in corrupt conduct unless the Inspector:

(a) is satisfied that it is necessary to do so in the public interest; and

(b) is satisfied that doing so will not cause unreasonable damage to the reputation, safety or wellbeing of the person; and

(c) includes in the report a statement that, in the opinion of the Inspector, the person has not engaged in corrupt conduct.

222 Publishing NACC investigation report in whole or in part

(1) The Inspector may publish the whole or a part of a NACC investigation report if:

(a) the Inspector has given the Commissioner the NACC investigation report under subsection 220(1); and

(b) the Inspector is satisfied that it is in the public interest to publish the whole or the part of the report (as the case may be).

(2) This section is subject to section 223.

223 Opportunity to respond must be given before publishing a NACC investigation report containing critical opinions etc.

(1) This section applies to a NACC investigation report that:

(a) has not been tabled in Parliament; and

(b) is published, in whole or in part, under section 222 more than 3 months after the report is given to the Commissioner under subsection 220(1).

(2) The NACC investigation report must not include an opinion, finding or recommendation that is critical (either expressly or impliedly) of a Commonwealth agency, a State or Territory government entity, the NACC or any other person, unless the Inspector has given the head of the agency, the head of the entity, the Commissioner or the other person concerned:

(a) a statement setting out the opinion, finding or recommendation; and

- (b) a reasonable opportunity to respond to:
 - (i) the opinion, finding or recommendation; and
 - (ii) the proposed publication of the opinion, finding or recommendation.
- (3) The response may be given by:
 - (a) the head of the Commonwealth agency or of the State or Territory government entity concerned, or a person authorised by the head; or
 - (b) in relation to the NACC—the Commissioner, or a person authorised by the Commissioner; or
 - (c) in relation to any other person concerned—the other person concerned, or, with approval, a person representing the other person.

6.2. Provisions concerning the NACC

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.

By section 32 any person may refer to a corruption issue or provide other information about a corruption issue to the Commissioner.

Section 41 sets out how the Commissioner deals with corruption issues:

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.

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.

7. Conflict of interest

I have attached the Robertson Report on the decision by the NACC to take no action on the Robodebt referrals (**Attachment B**). The Robertson's Report sets out the evidence, Mr Robertson's reasoning and his findings and opinion. Mr Robertson's findings are:

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.

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.

His reasoning includes the following:

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.

...

... 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].

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.

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].

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.

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.

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.

In its submissions, the Commission accepted the conclusion in the Robertson Report that the Commissioner's management of his declared conflict of interest involved a mistake 'of the kind suggested' and that it necessarily followed that the mistake falls within the definition of 'officer misconduct'.

The Commission made a comment in its submissions to me which requires a response in this Report.

The Commission referred to the conclusion in the Robertson Report as that 'there was a procedural error in relation to the initial decision'. I disagree about two aspects of that submission. The conduct was not at one point of time, but was over an extended period. As found by Mr Robertson 'the Commissioner's involvement in the decision-making was comprehensive, before, during and after the 19 October 2023 meeting at which the substantive decision was made'.

Further, it was a mistake as to the requirements of procedural fairness which is apt to be described as an error of judgement rather than a matter of mere procedure. To state otherwise is to seek to minimise the seriousness of the finding and, again, to prefer form over substance.

As is quoted in the Robertson Report, 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.

Having taken into account the Commission's submissions, I agree with the findings expressed by Mr Robertson and his reasons for those findings.

The finding relates to an apprehension of partiality rather than actual partiality. I make no finding against the delegated Deputy Commissioner.

I find that the Commissioner engaged in officer misconduct as defined in section 184(3) of the NACC Act in that the steps taken by the Commissioner to manage his conflict of interest arose from a mistake of law or a mistake of fact as natural justice required the Commissioner not to participate as he did 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 or of fact.

The Robertson Report concerns the management of the declared conflict of interest by the Commissioner. For completeness, I note there were two other relevant declarations.

Acting Deputy Commissioner Hinchcliffe emailed the Commissioner, Deputy Commissioner Rose, Deputy Commissioner Gauntlett, and senior staff on 10 July 2023:

This is my written conflict of interest declaration in relation to the Robodebt Royal Commission referral. I have separately made a verbal conflict of interest declaration to the Commissioners.

During the period of the second Ombudsman investigation into Centrelink's Automated Debt Raising and Recovery System, I was the Deputy Commonwealth Ombudsman. I was present at meetings with members of staff from Centrelink when they explained the concept of averaging and why they considered that it was legal (including their explanation based on the "best

evidence rule”) and I explicitly raised with Centrelink staff whether the way that the system was undertaking averaging to raise debts was ultra vires. I was aware that some email correspondence I had written had been considered in evidence in the Royal Commission. I was never called to give evidence nor was I included in any procedural fairness processes. I am now aware that I am explicitly referred to in the report.

To the extent that the referral to the NACC by the Royal Commission relates to the engagement of the Centrelink with the Ombudsman’s office or the conduct of the Ombudsman’s office, I have an actual conflict of interest and I will excuse myself from any consideration of the issues.

Acting Deputy Commissioner Hinchcliffe thereafter did not read any material prepared or attend any meetings or participate in any decision making in relation to the consideration of the Robodebt referrals.

In an undated “NSAP Conflict of Interest Declaration” form, Deputy Commissioner Gauntlett declared a professional association in the following terms:

In my role as Disability Discrimination Commissioner at the Australian Human Rights Commission I had to deal with [Referred Person 1] on a couple of occasions to discuss the government’s Covid-19 response, disability employment policy and reforms to the National Disability Insurance Scheme. I have not had any dealings with [Referred Person 1] since in or around June 2021.

He marked “No impact” in the section recording any impact on participation in NSAP.

The draft minutes of the 19 October 2023 NSAP meeting record:

Deputy Commissioner Dr Ben GAUNTLETT stated that he had met [Referred Person 1] on two occasions and would complete the relevant COI paperwork. He notified the Panel that he did not believe this should preclude his involvement in the matter. This was NOTED by the Panel.

Deputy Commissioner Gauntlett participated in each stage of the decision making and in the drafting of reasons in relation to the Robodebt referrals.

8. The media release

The terms of the media release are set out earlier. The reference to the sanctions available to the APSC warrants scrutiny.

The NACC Commission had the Royal Commission report when considering the action to be taken in respect of the Robodebt referrals. The Royal Commissioner set out her view in that report as to the limitation of the powers of the APSC:

A number of employees involved in the Scheme have resigned from the public service. In 2013, the Public Service Act was amended with the introduction of s 41B to empower agencies to determine alleged breaches of the Code by former APS employees.

The Public Service Commissioner may inquire into a former APS employee’s conduct, but given that sanctions relating to a breach of the APS Code of Conduct can only be imposed on current APS employees, no meaningful consequence would flow from any found breach.

The assessment reports for each of the six Referred Persons considered at the 19 October 2023 NSAP meeting, advised, rightly or wrongly, that each of the five public servants had left the APS employ.

It was also known at that point, that Referred Person 6 was not a public servant and thus there was no APSC sanction available in respect of them or indeed, any other sanction.

Thus, before the decision, albeit provisional, not to investigate the referrals, it was made known to the participants in the NSAP meeting that no sanction was available in respect of any of the Referred Persons.

Notwithstanding having 'carefully considered each referral and reviewed the extensive material provided by the Robodebt Royal Commission, including its final report, and the Confidential Chapter', the media release stated:

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).

Even though the wording of the reasons had occupied the time of the Commissioner, the Deputy Commissioners and a number of senior staff since 19 October 2023, that is for over six months, the media release still contained this misleading reason.

In its submissions to me, the Commission stated:

... 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. This was a regrettable but unintentional mistake. The delegated Deputy Commissioner's decision and reasons of 16 April 2024 did not contain, and are not affected by, this mistake.

That may be the case, but it is not to the point what Deputy Commissioner Rose said in her record of decision, because that was not published.

Further, the media release stated:

...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.

It is now known that the APSC made different findings of fact from the Royal Commission, without any apparent difficulty.

I note that no separate reasons were given in the media release in relation to Referred Person 6, when there were quite different considerations in relation to that person. Referred Person 6 was

- not subject to any other sanctions and
- would not be investigated on multiple occasions.

9. Recommendation

In light of the findings and opinions expressed in the Robertson Report, which I accept, I recommend that the Commissioner delegate the function under s 41(5) of the NACC Act, that is, to reconsider whether or how to deal with a corruption issue, namely the referrals from the Royal Commission into the Robodebt Scheme, to an appropriate person.

The Commission has accepted that the decision should be reconsidered by an appropriate person.