

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

Introduction

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

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

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

Decision-Making Context

Legislative context

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

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

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

11. Notably, there is no duty even to consider whether to deal with a corruption issue, regardless of by whom it is referred, in any circumstances. Sub-section 41(7) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Policy context

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

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

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

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

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

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

OFFICIAL

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

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

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

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

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

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

¹⁸ Ibid [2.1]-[2.4].

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

¹⁹ Ibid [2.9]-[2.12], [2.15].

²⁰ Ibid [2.16]-[2.18].

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

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

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

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

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

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

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

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

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

Operating context

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

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

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

The delegate

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

The Decision-Making Process

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

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

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

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

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

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

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

Relationship with [Referred Person 1]

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

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

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

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

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

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

Time taken to make a decision

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

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

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

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

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

Preparation of legal advice on the Commission’s jurisdiction

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

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

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

Preparation of assessment summaries

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

²³ Ibid.

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

Consideration by the NSAP

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

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

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

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

Preparation of a supplementary memorandum relating to Referred Person 6

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

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

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

OFFICIAL

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

Preparing letters to referred persons and a public statement

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

OFFICIAL

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

Preparing and finalising a decision record

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

Finalising the letters to affected persons and public statement

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

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

Sufficiency of the Commission's reasons

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

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

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

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

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

The Commission's decision as a breach of public trust

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

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

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

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