

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

## Introduction and Summary

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

**Preliminary matters**

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

**The main issue and the proposed recommendation**

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

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

**The ancillary issues**

7. The Commission accepts that its public statement contained a regrettable but unintentional mistake, in suggesting that the APSC had the ability to impose sanctions in respect of the Referred Persons, when it should have correctly outlined the APSC's powers in relation to former APS staff, namely, to conduct an investigation for breaches of the APS Code of Conduct with the potential for any breach finding to affect future employment in the APS or engagement as a contractor by a Commonwealth Government Agency. The Commission notes that the delegated

Deputy Commissioner's decision record and reasons of 16 April 2024 did not contain this mistake.

## Preliminary Matters

### Identification of the delegate

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

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

### **Identification of other staff**

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

## **The Principal Issue: the Conflict of Interest**

### **The proposed finding**

13. The Robertson Report concludes that a fair-minded lay observer might reasonably apprehend that, on account of the Commissioner's past professional association with Referred Person 1, the Commissioner's involvement in the decision-making process might have impinged on the impartiality of the Deputy Commissioner's decision.<sup>1</sup> For the Commissioner to consider otherwise was to engage in conduct which, though not unlawful, arose from a mistake of law as to what the principles of natural justice required in the circumstances, or alternatively from a mistake of fact as to whether a fair-minded lay observer might reasonably apprehend a lack of impartiality on the part of the decision-maker in the circumstances. It was thus 'officer misconduct', according to the wide definition of that term in the Act.

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<sup>1</sup> Robertson Report, [106].

14. The Commission accepts the Robertson Report's conclusion that, in the decision-making process for the Robodebt referrals, the Commissioner made a mistake of law or fact when applying the principles of apprehended bias through association. The Commission prefers the view that it is better characterised in the alternative way expressed in the Robertson Report, that is as a mistake of fact as to whether a fair-minded lay observer *might* apprehend that the decision-maker *might* not be impartial,<sup>2</sup> but this does not affect the ultimate conclusion.
15. There are some aspects of the reasoning in the Robertson Report that the Commission does not altogether share. However, as the Commission accepts that the ultimate conclusion is open, and that in those circumstances it is preferable that its decision be independently reconsidered, the Commission does not consider that it would be constructive to engage in debate about them. Rather, the Commission makes the following points to ensure that the conclusions in the Robertson Report are properly understood and contextualised.
16. **First**, the terms "agency maladministration" and "officer misconduct", as defined in s 184(3), are labels which apply to a very broad variety of circumstances, including many which would not ordinarily attract the epithet of "misconduct". They apply in the present case simply because of a legal or factual mistake regarding apprehended bias. This is a form of error which has occurred in relation to many judicial decisions, including by eminent judges, and many administrative decisions, including by senior tribunal members and decision-makers. Such an error does not require, and typically does not involve, any form of deliberate wrongdoing or misconduct. In particular, it does not involve any conclusion at all that there was actual bias.
17. There is no suggestion in the Robertson Report of any actual bias, or of any deliberate wrongdoing or misconduct other than this kind of mistake. It would be unfortunate, and unfair, if the statutory labels were to be used in a way that suggested otherwise. Accordingly, the Commission respectfully submits that it would be appropriate for the Final Report to record specifically that the "officer misconduct" found arose solely from

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

a mistake of law or fact in the application of the principles of apprehended bias, and that there is no broader suggestion of any actual bias, or any other impropriety, in the management of the Commissioner's conflict of interest. It would be fair to explain that whether circumstances are such as to give rise to a reasonable apprehension of bias is a question of judgment on which minds can and often do reasonably differ,<sup>3</sup> and that the fact that an appellate court concludes that, on account of apprehended bias, a trial judge ought not have sat "*does not involve any personal criticism of the judge at first instance, or any assessment of [their] qualities or [their] ability to have dealt with the case ... fairly and without pre-judgement or bias*".<sup>4</sup> Thus while the Commission accepts that the conclusion in the Robertson Report is open, and proposes to act on it, this does not mean that there was intentional impropriety.

18. In this respect, it is important not to lose sight of those aspects of the decision-making process which were supportive and indicative of an independent decision being made by the delegated Deputy Commissioner. The Robertson Report focusses on those aspects of the process in which the Commissioner had involvement: given the nature of the issue being examined this is understandable, and no criticism is made of the report on that account.<sup>5</sup> However, read alone, the summary of the evidence in that report tends to obscure other relevant aspects of the decision-making process in which the Commissioner had no involvement, or which supported the independence and impartiality of the delegated Deputy Commissioner. As a matter of fairness, it would be appropriate to ensure that the Final Report reflects a balanced picture of the decision-making process as a whole, while nonetheless accepting that it was affected by the mistake identified. That process is outlined in detail in the Commission's initial submissions (the **August submissions**) at [36]-[97]. It suffices to note the following matters here:

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

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

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

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

manner outlined in the Robertson Report. But it does locate the Commissioner's mistake as having arisen in a process in which an experienced decision-maker did in fact make a decision which aligned with the recommendation made to them independently of the views of the Commissioner, and in which the actual decision-maker made a decision free of actual bias.

21. **Secondly**, to ensure a complete picture, it is also important to explain why the Commissioner was involved to the degree he was. Prior to the 19 October 2023 NSAP meeting, the Commissioner had involvement in internal discussions and processes related to the decision because he considered that the legal, policy and resourcing considerations that were involved would have ongoing ramifications for the Commission, and he advised the delegated Deputy Commissioner and other senior staff of this when he declared his perceived conflict on 7 July 2023. His observations at the 19 October 2023 NSAP meeting were directed to ensuring that relevant considerations were taken into account, not to achieving a particular outcome. The referrals were received in the first week of the Commission's existence, while it was just establishing views and processes relevant to its work more generally, not just in relation to the Robodebt referrals. These were matters with which the Commissioner would, absent any potential conflict, have been very closely involved. The fact that they fell to be considered at a very early stage in a matter in which the Commissioner did have a perceived conflict of interest was unfortunate, and significantly complicated the position.
22. The same considerations apply, even more strongly, after the provisional decision had been made by the delegated Deputy Commissioner on 19 October 2023. The outstanding issue concerned Referred Person 6, in respect of whom the Commissioner had no conflict. The manner in which the decision made by the delegated Deputy Commissioner would be represented in public could have a significant and material effect on the reputation of the Commission and was the subject of legitimate involvement by the Commissioner *after* the decision had been made.
23. The Robertson Report appropriately recognises that the Commissioner could legitimately have an ongoing interest in the decision-making at this level.<sup>6</sup> However, the Robertson Report also concludes that the Commissioner made a mistake in remaining involved in so far as the policy questions bore a double character, raising

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<sup>6</sup> Robertson Report, [90].

both policy and factual matters. Without denying this conclusion, it remains important as a matter of fairness to reflect that there were in play important issues for the Commissioner and that his involvement was directed at these matters, not an attempt to influence the delegate by reference to his association with Referred Person 1.

24. **Finally**, the Robertson Report and the Draft Report (at least in this respect) are concerned with a question of process, not the merits of the decision in relation to the Robodebt referrals. The decision whether to take any action in relation to those referrals was one that involved a broad discretion and a wide array of factors, as explained in the documents evidencing the decision-making process and in the Commission's August submissions (e.g. at [8]-[15], [27]-[32], [104]-[105]). It is (quite properly, with respect) not suggested in the Robertson Report or the Draft Report that the actual decision made by the delegated Deputy Commissioner was not a decision that was reasonably open to them.
25. In circumstances where the Commission is minded to agree to an independent reconsideration of its decision, if possible (discussed in more detail below), it is respectfully submitted that it is important that the Final Report make clear that the Inspector has not sought to reach or express a view about the merits of the decision actually made by the delegated Deputy Commissioner, or to be made by any new delegate.

### **Reconsideration**

26. The Commission is minded to agree that the appropriate way forward is for the question of whether, and if so how, to deal with the Robodebt referrals to be reconsidered by an appropriate independent person. The concerns raised in the Draft Report and the Robertson Report emphasise the importance of ensuring a heightened degree of transparency and independence in the reconsideration process, and the Commission has begun the process of seeking to identify an appropriate independent eminent person to undertake the task.
27. In circumstances where, under s 276(1) of the Act, the Commissioner's power of delegation is limited to Deputy Commissioners and certain employees of the Commission, the Commission is considering how best this reconsideration could be undertaken without raising the same concerns about apprehended bias that are identified in the Robertson Report, in particular those at [97], [98], [99] and [106]. The Commission is exploring the practical issues involved in implementing the

recommendation including the appointment of an appropriate person as a temporary staff member, or alternatively their retainer as a consultant (which also is not free from difficulty, as it would not be permissible for a decision-maker to agree in advance to be bound by a view expressed by a consultant).

28. Any reconsideration will also need to have regard to s 45 of the Act, which provides that, in circumstances where a public official's conduct has previously been investigated by a Commonwealth integrity agency, the Commissioner may commence a corruption investigation into such conduct only if satisfied that another investigation is in the public interest. On 13 September 2024, the Australian Public Service Commissioner made a public statement about the outcome of Code of Conduct inquiries conducted by the APSC in relation to Robodebt matters. To the extent that the conduct investigated by the APSC overlaps with the conduct referred to the Commission, any new decision-maker would have to be satisfied for the purposes of s 45 that another investigation of the same conduct is in the public interest.
29. These matters remain under consideration by the Commission and will be addressed further in the next tranche of submissions.

## **Ancillary Issues: Availability of Sanctions**

### **Availability of sanctions**

30. The Draft Report states that the public statement contained a 'misleading reason' which did not apply to any of the Referred persons.
31. Shortly after the referrals were made, the Commission received information that two of the five public servants remained employed in the APS. As is noted in the Draft Report, the assessment papers, which were considered in October 2023, stated that all of the public servants had left the APS. However, this was incorrect, and in fact, one of the referred persons remained employed by the APS until May 2024, after the delegated Deputy Commissioner made their decision. However, by the time the Commission made its public statement, in June 2024, no sanctions were available to the APSC against any of the Referred Persons.
32. In those circumstances, the Commission agrees that the public statement should not have suggested that the APSC had the ability to impose sanctions in respect of the Referred Persons. Rather, it should have correctly outlined the APSC's powers in relation to former APS staff, namely, to conduct an investigation for breaches of the APS Code

of Conduct with the potential for any breach finding to affect future employment in the APS or engagement as a contractor by a Commonwealth Government Agency.

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

## **Conclusion**

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

**The Hon PLG Brereton AM RFD SC**

Commissioner

8 October 2024