



Wednesday, 30 October 2024

NACC to reconsider decision not to investigate Robodebt referrals

The National Anti-Corruption Commission has decided to have an independent eminent person reconsider its decision not to investigate the Robodebt Royal Commission referrals.

With the release today of the Report of the Inspector, the Commission can now announce that it is appointing an independent person, who will decide whether or not the Commission should investigate the Robodebt referrals.

In the course of the Inspector's investigation of the Commission's decision, the Inspector provided to the Commission an opinion of a retired judge who found there had been a mistake of law or fact in the process by which its original decision was made.

The mistake involved a misapprehension by the Commissioner of the extent to which a perceived conflict of interest required him to be isolated from the decision-making process. The opinion was to the effect that the Commissioner's participation in some parts of the process meant the decision was affected by apprehended bias.

Apprehended bias means that a reasonable observer *might* think that the Commission's decision *might* not be impartial. In other words, the Commissioner's participation in some steps in the process meant that a reasonable observer could possibly think that the Commission's decision could possibly not be impartial.

The Commission decided, without waiting for the conclusion of the Inspector's investigation, that that possibility required in the public interest that its decision be independently reconsidered, as the Inspector had foreshadowed recommending. The Commission is in the process of engaging such a person.

The Inspector's Report contains no suggestion of actual bias and no finding of intentional wrongdoing or other impropriety. It expressly makes no criticism of the Deputy Commissioner who made the decision under delegation.

Under the NACC Act, any mistake of law or fact falls within the definition of 'officer misconduct'. The definition captures a very wide scope of conduct, including some which would not usually be called 'misconduct'. In this case, the finding of 'officer misconduct' is not a finding of wrongdoing, it is a finding of 'conduct that is not unlawful but arose from a mistake of law or fact', which the Inspector describes as 'an error of judgment'.

The Robodebt Royal Commission referrals were received in the first week of the Commission's existence, while it was establishing processes, policies and procedures for its work generally. The referrals required the Commission to consider several legal questions for the first time, including the scope of its jurisdiction and in particular the meaning of 'corrupt conduct' under the NACC Act. These were matters for which the Commissioner had ultimate responsibility.

The Commissioner declared, immediately and repeatedly, that he had a perceived (not actual) conflict of interest, arising from a prior professional, not personal, relationship with one of the referred persons. The Commissioner and that individual have never socialised other than at official functions, nor visited each other's homes.

There was a fine balance to be struck between the Commissioner's responsibility for, and involvement in, managing the affairs of the Commission and issues that would have lasting implications for it on the one hand, and on the other, avoiding the perception that a prior professional relationship with one of the referred persons might influence the decision.

The Commissioner considered that having regard to the nature of the relationship, the decision to be made (which was whether to open an investigation, not whether to make a finding of corrupt conduct), and the status of the delegate (who was given no direction as to the outcome and whose employment could not be affected by the Commissioner), an appropriate balance could be achieved by delegating the decision to an experienced Deputy Commissioner, and by excusing himself from the meeting when the decision was to be made so that it could be reached freely in his absence.

The Commissioner accepts that his judgment in this respect has been found to be mistaken and takes sole responsibility for the mistake. He said:

Mistakes of law or fact are a professional inevitability for judges, tribunal members and administrative decision-makers. Throughout my judicial career I

was, like every other judge, from time to time reversed on appeal for a mistake of law or fact. As an appellate judge, I often found that judges of unquestioned competence, skill and integrity had made a mistake of law or fact. Our system requires that we accept such findings, even when we don't entirely agree with them. This is no different. Mistakes are always regrettable, but the most important thing is that they be put right. This mistake will be rectified by having the decision reconsidered by an independent eminent person. Meanwhile, the Commission is focused on its 29 current corruption investigations and 31 preliminary investigations.

The Commission will provide further information when the appointment of the independent eminent person has been finalised.