National Anti-Corruption Commission

Investigation Report
Operation Myrtleford

An investigation into the 6 persons referred by the Royal Commission into the Robodebt Scheme.

nacc.gov.au

Acknowledgement of Country

In the spirit of reconciliation, the National Anti-Corruption Commission acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Further information

Enquiries about this report should be directed to the National Anti-Corruption Commission.

Phone: 1300 489 844
Website: nacc.gov.au
Post: GPO Box 605, Canberra ACT 2601
Address: 5 Constitution Avenue, Canberra ACT 2601

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Mr Withnell

The Commission found that Mr Withnell engaged in corrupt conduct by intentionally misleading officers of the Department of Social Services in 2015 during preparation of a submission to the Expenditure Review Committee of Cabinet of a proposal that became the Robodebt Scheme. See *Findings, Mark Withnell* for detail.

Ms Wilson

The Commission found that Ms Wilson engaged in corrupt conduct by intentionally misleading the Ombudsman in 2017 during the Ombudsman's own motion investigation into the Robodebt Scheme. See *Findings, Serena Wilson* for detail.

Recommendations and outcomes

The investigation made findings of serious corrupt conduct against 2 individuals. It also concluded that there was insufficient *admissible* evidence to establish the alleged offences against either Mr Withnell or Ms Wilson beyond reasonable doubt. Key admissions and statements made during this investigation are not admissible in criminal proceedings. It is therefore not appropriate to refer either to the Commonwealth Director of Public Prosecutions.



Mark Withnell

Not Relevant

Not Relevant

Conclusion

914. I conclude that, at all relevant times, Mr Withnell knew and intended that automatic default averaging would be central to OCI, and I am satisfied that, by representing to Mr Kimber and Mr McBride that OCI would not involve averaging, Mr Withnell engaged in deliberate conduct that was designed to mislead Mr Kimber and Mr McBride, and, through them, DSS.

915. I am not satisfied that Mr Withnell intended to mislead ERC. For the reasons previously expressed, I think it possible that, by 26 February 2015, Mr Withnell was persuaded by Mr Ryman's and Mr Britton's view that legislation was not required.

Not Relevant

916. But even so, by engaging in deliberate conduct designed to mislead Mr Kimber and Mr McBride, Mr Withnell engaged in conduct amounting to the dishonest performance by him of his official functions or duties as a public official, and further or alternatively the performance of his functions and duties for an improper purpose and thus a breach of public trust, and that was corrupt conduct within the meaning of section 8 of the NACC Act.

917. Mr Withnell's moral culpability may be lessened by the circumstances in which that conduct was committed. But it was, nonetheless, serious corrupt conduct committed by a high-ranking public official. Accordingly, if there were sufficient admissible evidence to establish Mr Withnell's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer him to the Commonwealth Director of Public Prosecutions for consideration of whether he should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

918. But there is not sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Mr Withnell's evidence before the Royal Commission is admissible against him in criminal proceedings,[1084] his evidence in this investigation is not,[1085] and, without the contradictions which his evidence in this investigation disclose – his evidence in this investigation that it was he who crafted the amendments to the proposal to reflect pretendedly that there would be no averaging; and his evidence in this investigation that he always knew that the proposal involved averaging – there would remain reasonable doubt as to the extent of his involvement and state of mind.

919. I do not consider it is appropriate to refer Mr Withnell for prosecution.

1084 Royal Commission Act, s 6A(2).
1085 NACC Act, s 113(2).

Serena Wilson

Not Relevant

Not Relevant

Conclusion

1065. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

a. omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

b. making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

i. That in response to concerns expressed by DSS to DHS in early 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

ii. That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

iii. That the 2014 advice was premised on a proposal that was different from OCI.

Not Relevant

1066. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by Ms Wilson of her official functions or duties as a public official and further or alternatively the dishonest exercise of her official functions or duties as a public official for the improper purpose of misleading the Ombudsman, and thus was serious corrupt conduct within the meaning of section 8(1)(a) and further or alternatively section 8(1)(b) of the NACC Act.

1067. If there were sufficient admissible evidence to establish Ms Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

1068. I do not consider, however, that there is sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Ms Wilson's evidence before the Royal Commission would be admissible in criminal proceedings,[1240] her evidence in this investigation would not be.[1241] And without her admissions in this investigation that it is probable she omitted the 2014 DSS Legal Advice from the response to the first Ombudsman's request, or her evidence in this investigation that she believed that OCI did not involve averaging, or her evidence in this investigation of her discussions with Mr Kimber late in 2015 and in 2016 when he questioned whether the DSS should warn the Minister that legislation might be required, I do not consider that a rational jury properly instructed could exclude as reasonable possibilities that Ms Wilson did not delete the 2014 DSS Legal Advice from the 23 February 2017 response and did not believe that the representations in the 1 March 2017 response were misleading.

1240 Royal Commission Act, s 6A(1A).
1241 NACC Act, s 113(2).

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Ms Wilson

The Commission found that Ms Wilson engaged in corrupt conduct by intentionally misleading the Ombudsman in 2017 during the Ombudsman's own motion investigation into the Robodebt Scheme. See *Findings, Serena Wilson* for detail.

Recommendations and outcomes

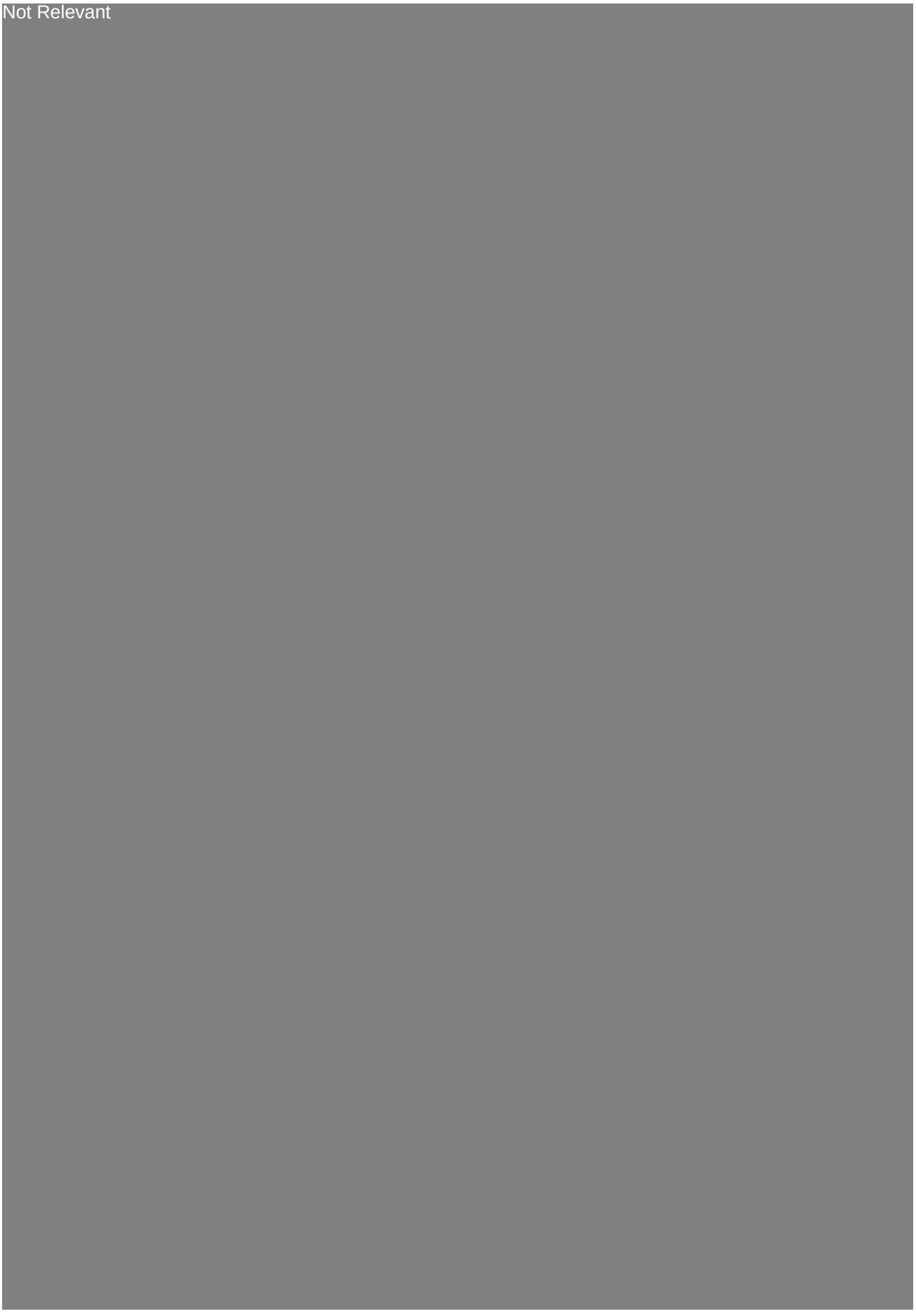
The investigation made findings of serious corrupt conduct against 2 individuals. It also concluded that there was insufficient *admissible* evidence to establish the alleged offences against either Mr Withnell or Ms Wilson beyond reasonable doubt. Key admissions and statements made during this investigation are not admissible in criminal proceedings. It is therefore not appropriate to refer either to the Commonwealth Director of Public Prosecutions.




Not Relevant

Mark Withnell

Not Relevant



Not Relevant

Conclusion

914. I conclude that, at all relevant times, Mr Withnell knew and intended that automatic default averaging would be central to OCI, and I am satisfied that, by representing to Mr Kimber and Mr McBride that OCI would not involve averaging, Mr Withnell engaged in deliberate conduct that was designed to mislead Mr Kimber and Mr McBride, and, through them, DSS.

915. I am not satisfied that Mr Withnell intended to mislead ERC. For the reasons previously expressed, I think it possible that, by 26 February 2015, Mr Withnell was persuaded by Mr Ryman's and Mr Britton's view that legislation was not required.

Not Relevant

916. But even so, by engaging in deliberate conduct designed to mislead Mr Kimber and Mr McBride, Mr Withnell engaged in conduct amounting to the dishonest performance by him of his official functions or duties as a public official, and further or alternatively the performance of his functions and duties for an improper purpose and thus a breach of public trust, and that was corrupt conduct within the meaning of section 8 of the NACC Act.

917. Mr Withnell's moral culpability may be lessened by the circumstances in which that conduct was committed. But it was, nonetheless, serious corrupt conduct committed by a high-ranking public official. Accordingly, if there were sufficient admissible evidence to establish Mr Withnell's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer him to the Commonwealth Director of Public Prosecutions for consideration of whether he should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

918. But there is not sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Mr Withnell's evidence before the Royal Commission is admissible against him in criminal proceedings,[1085] his evidence in this investigation is not,[1086] and, without the contradictions which his evidence in this investigation disclose – his evidence in this investigation that it was he who crafted the amendments to the proposal to reflect pretendedly that there would be no averaging; and his evidence in this investigation that he always knew that the proposal involved averaging – there would remain reasonable doubt as to the extent of his involvement and state of mind.

919. I do not consider it is appropriate to refer Mr Withnell for prosecution.

1085 Royal Commission Act, s 6A(2).
1086 NACC Act, s 113(2).

Serena Wilson

Not Relevant

Not Relevant

Conclusion

1065. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

a. omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

b. making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

i. That in response to concerns expressed by DSS to DHS in early 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

ii. That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

iii. That the 2014 advice was premised on a proposal that was different from OCI.

Not Relevant

1066. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by Ms Wilson of her official functions or duties as a public official and further or alternatively the dishonest exercise of her official functions or duties as a public official for the improper purpose of misleading the Ombudsman, and thus was serious corrupt conduct within the meaning of section 8(1)(a) and further or alternatively section 8(1)(b) of the NACC Act.

1067. If there were sufficient admissible evidence to establish Ms Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

1068. I do not consider, however, that there is sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Ms Wilson's evidence before the Royal Commission would be admissible in criminal proceedings,[1241] her evidence in this investigation would not be.[1242] And without her admissions in this investigation that it is probable she omitted the 2014 DSS Legal Advice from the response to the first Ombudsman's request, or her evidence in this investigation that she believed that OCI did not involve averaging, or her evidence in this investigation of her discussions with Mr Kimber late in 2015 and in 2016 when he questioned whether the DSS should warn the Minister that legislation might be required, I do not consider that a rational jury properly instructed could exclude as reasonable possibilities that Ms Wilson did not delete the 2014 DSS Legal Advice from the 23 February 2017 response and did not believe that the representations in the 1 March 2017 response were misleading.

1241 Royal Commission Act, s 6A(1A).
1242 NACC Act, s 113(2).

Proposed findings regarding Ms Wilson

Not Relevant

Conclusion

145. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

(a) omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

(b) making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

(i) That in response to concerns expressed by DSS to DHS in early 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

(ii) That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

(iii) That the 2014 advice was premised on a proposal that was different from OCI.

146. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by Ms Wilson of her official functions or duties as a public official and further or alternatively the dishonest exercise of her official functions or duties as a public official for the improper purpose of misleading the Ombudsman, and thus was serious corrupt conduct within the meaning of section 8(1)(a) and further or alternatively section 8(1)(b) of the NACC Act.

147. If there were sufficient admissible evidence to establish Ms Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

148. I do not consider, however, that there is sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although

Ms Wilson's evidence before the Royal Commission would be admissible in criminal proceedings[156], her evidence in this investigation would not be[157]. And without her admissions in this investigation that it is probable she omitted the 2014 DSS Legal Advice from the response to the first Ombudsman's request, or her evidence in this investigation that she believed that OCI did not involve averaging, or her evidence in this investigation of her discussions with Mr Kimber late in 2015 and in 2016 when he questioned whether the DSS should warn the Minister that legislation might be required, I do not consider that a rational jury properly instructed could exclude as reasonable possibilities that Ms Wilson did not delete the 2014 DSS Legal Advice from the 23 February 2017 response and did not believe that the representations in the 1 March 2017 response were misleading.

156 *Royal Commission Act 1902* (Cth), section 6A(1A).
157 *National Anti-Corruption Commission Act 2022* (Cth), section 113(2).

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HIGHLY CONFIDENTIAL

SUBJECT TO DIRECTIONS NOT TO PUBLISH MADE BY THE ROYAL COMMISSION INTO THE ROBODEBT SCHEME

TBC

the Department of Prime Minister and Cabinet website

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Serena Wilson

Not Relevant

97 Royal Commissions Act, section 6A(1)

Not

Not Relevant

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b.

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iii.

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HIGHLY CONFIDENTIAL

SUBJECT TO DIRECTIONS NOT TO PUBLISH MADE BY THE ROYAL COMMISSION INTO THE ROBODEBT SCHEME

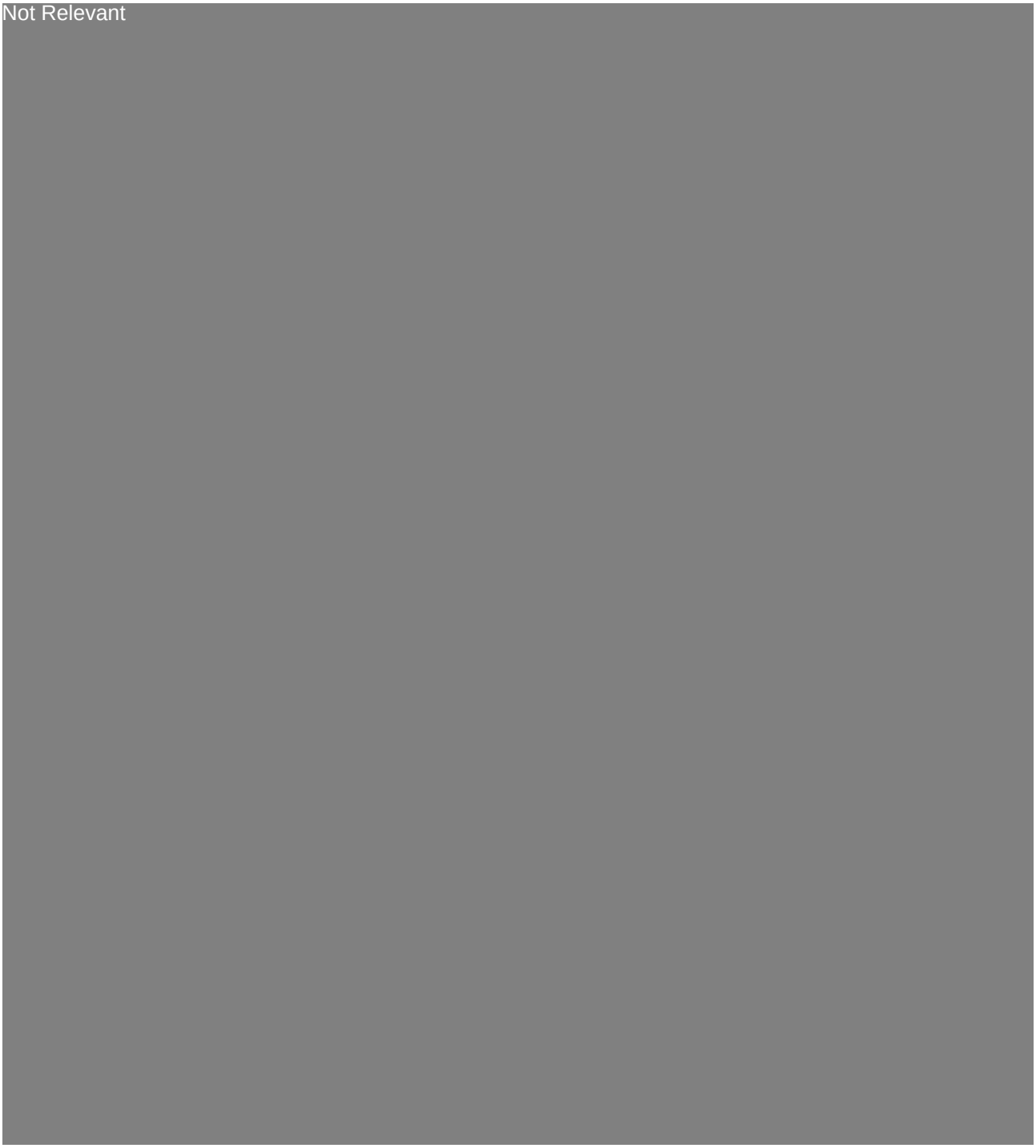
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231 *Royal Commission Act 1902* (Cth), section 6A(1A)
232 National Anti-Corruption Commission Act 2022 (Cth), section 131(2)

Not 22 ele

Proposed findings regarding Ms Wilson

Not Relevant



Conclusion

115. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

(a) omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

(b) making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

(i) That in response to concerns expressed by DSS to DHS in early 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

(ii) That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

(iii) That the 2014 advice was premised on a proposal that was different from OCI.

116. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by Ms Wilson of her official functions or duties as a public official and further or alternatively the dishonest exercise of her official functions or duties as a public official for the improper purpose of misleading the Ombudsman, and thus was corrupt conduct within the meaning of section 8(1)(a) and further or alternatively section 8(1)(b) of the NACC Act.

117. If there were sufficient admissible evidence to establish Ms Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

118. I do not consider, however, that there is sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Ms Wilson's evidence before the Royal Commission would be admissible in criminal proceedings[134], her evidence in this investigation would not be[135]. And without her admissions in this investigation that it is probable she omitted the 2014 DSS Legal Advice from the response to the first Ombudsman's request, or her evidence in this investigation that she believed that OCI did not involve averaging, or her evidence in this

134 *Royal Commission Act 1902* (Cth), section 6A(1A).
135 *National Anti-Corruption Commission Act 2022* (Cth), section 113(2).

investigation of her discussions with Mr Kimber late in 2015 and in 2016 when he questioned whether the DSS should warn the Minister that legislation might be required, I do not consider that a rational jury properly instructed could exclude as reasonable possibilities that Ms Wilson did not delete the 2014 DSS Legal Advice from the 23 February 2017 response and did not believe that the representations in the 1 March 2017 response were misleading.

Proposed findings regarding Ms Wilson

Not Relevant

Not Relevant

Conclusion

73. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

(a) omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

(b) making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

(i) That in response to concerns expressed by DSS to DHS in early 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

(ii) That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

(iii) That the 2014 advice was premised on a proposal that was different from OCI.

74. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by Ms Wilson of her official functions or duties as a public official and further or alternatively the dishonest exercise of her official functions or duties as a public official for the improper purpose of misleading the Ombudsman, and thus was corrupt conduct within the meaning of section 8(1)(a) and further or alternatively section 8(1)(b) of the NACC Act.

75. If there were sufficient admissible evidence to establish Ms Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or

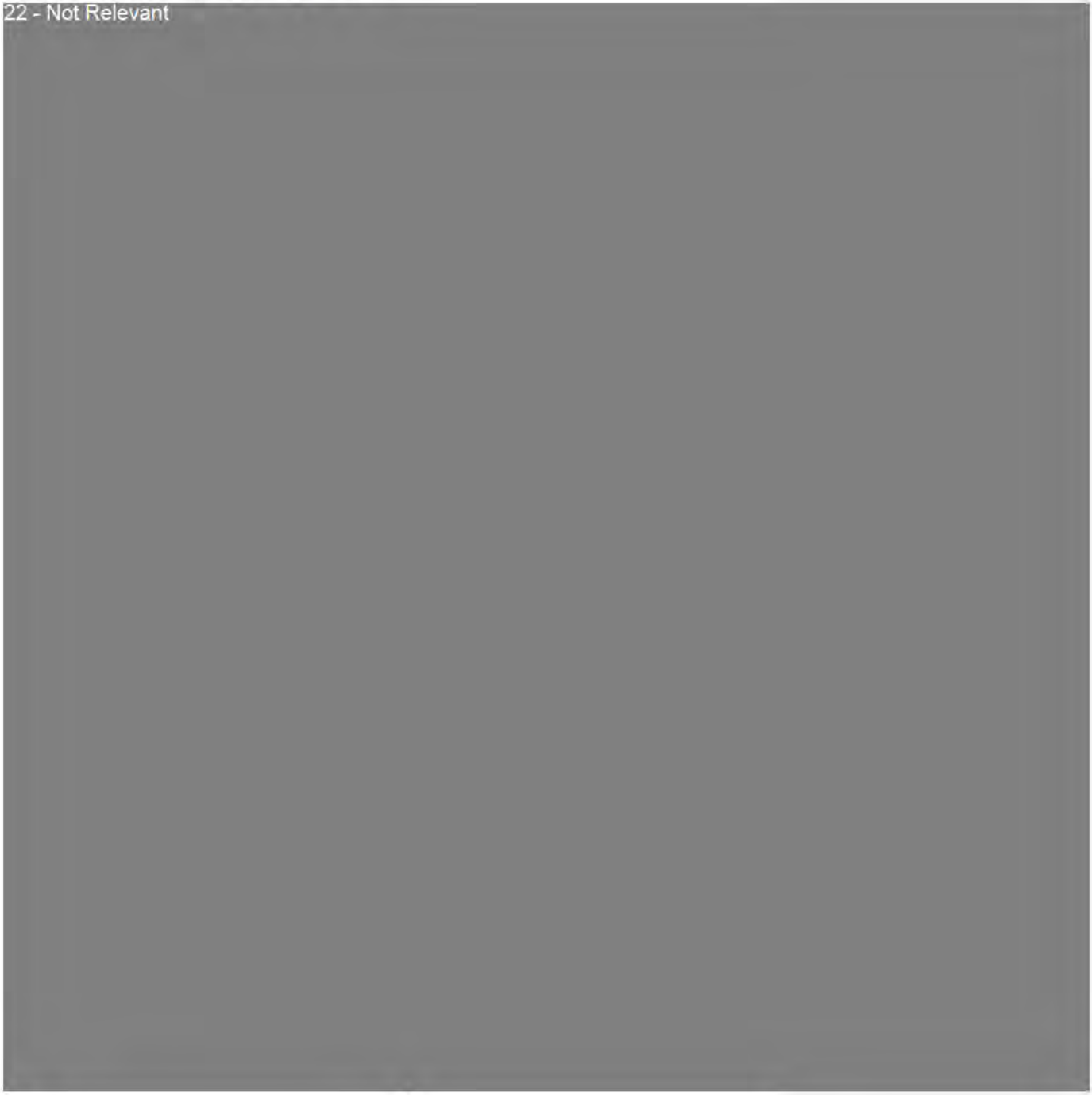
performing functions under or in connection with a law of the Commonwealth.

76. I do not consider, however, that there is sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Ms Wilson's evidence before the Royal Commission would be admissible in criminal proceedings[83], her evidence in this investigation would not be[84]. And without her admissions in this investigation that it is probable she omitted the 2014 DSS Legal Advice from the response to the first Ombudsman's request, or her evidence in this investigation that she believed that OCI did not involve averaging, or her evidence in this investigation of her discussions with Mr Kimber late in 2015 and in 2016 when he questioned whether the DSS should warn the Minister that legislation might be required, I do not consider that a rational jury properly instructed could exclude as reasonable possibilities that Ms Wilson did not delete the 2014 DSS Legal Advice from the 23 February 2017 response and did not believe that the representations in the 1 March 2017 response were misleading.

83 *Royal Commission Act 1902* (Cth), section 6A(1A).
84 *National Anti-Corruption Commission Act 2022* (Cth), section 113(2).

OFFICIAL:Sensitive

Proposed findings regarding Ms Wilson



OFFICIAL:Sensitive

22 - Not Relevant

[redacted]

Conclusion

73. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

(a) omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

(b) making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

(i) That in response to concerns expressed by DSS to DHS in early 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

(ii) That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

(iii) That the 2014 advice was premised on a proposal that was different from OCI.

74. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by Ms Wilson of her official functions or duties as a public official and further or alternatively the dishonest exercise of her official functions or duties as a public official for the improper purpose of misleading the Ombudsman and thus was therefore corrupt conduct within the meaning of section 8(1)(a) and further or alternatively section 8(1)(b) of the NACC Act.

75. If there were sufficient admissible evidence to establish Ms Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for

an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

76. I do not consider, however, that there is sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Ms Wilson's evidence before the Royal Commission would be admissible in criminal proceedings, her evidence in this investigation would not be. And without her admissions in this investigation -that it is probable she omitted the 2014 DSS Legal Advice from the response to the first Ombudsman's request, or her evidence in this investigation that she believed that OCI did not involve averaging, or her evidence in this investigation of her discussions with Mr Kimber late in 2015 and in 2016 when he questioned whether the DSS should warn the Minister that legislation might be required, I do not consider that a rational jury properly instructed could exclude as reasonable possibilities that Ms Wilson did not delete the 2014 DSS Legal Advice from the 23 February 2017 response and did not believe that the representations in the 1 March 2017 response were misleading.

Proposed findings regarding Mr Mark Withnell

Not Relevant

Not Relevant

Conclusion

37. I conclude that, at all relevant times, Mr Withnell knew and intended that automatic default averaging would be central to OCI, and I am satisfied that, by representing to Mr Kimber and Mr McBride that OCI would not

Not Relevant

involve averaging, Mr Withnell engaged in deliberate conduct that was designed to mislead Mr Kimber and Mr McBride, and, through them, DSS.

38. I am not satisfied that Mr Withnell intended to mislead ERC. For the reasons previously expressed, I think it possible that, by 26 February 2015, Mr Withnell was persuaded by Mr Ryman's and Mr Britton's view that legislation was not required. But even so, by engaging in deliberate conduct designed to mislead Mr Kimber and Mr McBride, Mr Withnell engaged in conduct amounting to the dishonest performance by him of his official functions or duties as a public official, and further or alternatively the performance of his functions and duties for an improper purpose and thus a breach of public trust, and that was corrupt conduct within the meaning of section 8 of the NACC Act.

39. Mr Withnell's moral culpability may be lessened by the circumstances in which that conduct was committed. But it was, nonetheless, serious corrupt conduct committed by a high-ranking public official. Accordingly, if there were sufficient admissible evidence to establish Mr Withnell's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer him to the Commonwealth Director of Public Prosecutions for consideration of whether he should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

40. But there is not sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Mr Withnell's evidence before the Royal Commission is admissible against him in criminal proceedings[41], his evidence in this investigation is not,[42] and, without the contradictions which his evidence in this investigation disclose; his evidence in this investigation that it was he who crafted the amendments to the proposal to reflect pretendedly that there would be no averaging;

41 Royal Commission Act, section 6A(2).
42 NACC Act, section 113(2).

and his evidence in this investigation that he always knew that the proposal involved averaging, there would remain reasonable doubt as to the extent of his involvement and state of mind.

41. I do not consider it is appropriate to refer Mr Withnell for prosecution.

Reasons for proposed findings regarding Mr Mark Withnell

Not Relevant

Not Relevant

Conclusion

37. I conclude that, at all relevant times, Mr Withnell knew and intended that automatic default averaging would be central to OCI, and I am satisfied that, by representing to Mr Kimber and Mr McBride that OCI would not involve averaging, Mr Withnell engaged in deliberate conduct that was designed to mislead Mr Kimber and Mr McBride, and, through them, DSS.

38. I am not satisfied that Mr Withnell intended to mislead ERC. For the reasons previously expressed, I think it possible that, by 26 February 2015, Mr Withnell was persuaded by Mr Ryman's and Mr Britton's view that legislation was not required. But even so, by engaging in deliberate conduct designed to mislead Mr Kimber and Mr McBride, Mr Withell engaged in conduct amounting to the dishonest performance by him of his official functions or duties as a public official, and further or alternatively 42(1) for an improper purpose and thus a

breach of public trust, and that was corrupt conduct within the meaning of section 8 of the NACC Act.

39. Mr Withnell's moral culpability may be lessened by the circumstances in which that conduct was committed. But it was, nonetheless, serious corrupt conduct committed by a high-ranking public official. Accordingly, if there were sufficient admissible evidence to establish Mr Withnell's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer him to the Commonwealth Director of Public Prosecutions for consideration of whether he should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

40. But there is not sufficient admissible evidence to establish either of those offences beyond reasonable doubt. Although Mr Withnell's evidence before the Royal Commission is admissible against him in criminal proceedings[1], his evidence in this investigation is not,[2] and, without the contradictions which his evidence in this investigation disclose; his evidence in this investigation that it was he who crafted the amendments to the proposal to reflect pretendedly that there would be no averaging; and his evidence in this investigation that he always knew that the proposal involved averaging, there would remain reasonable doubt as to the extent of his involvement and state of mind.

41. I do not consider it is appropriate to refer Mr Withnell for prosecution.

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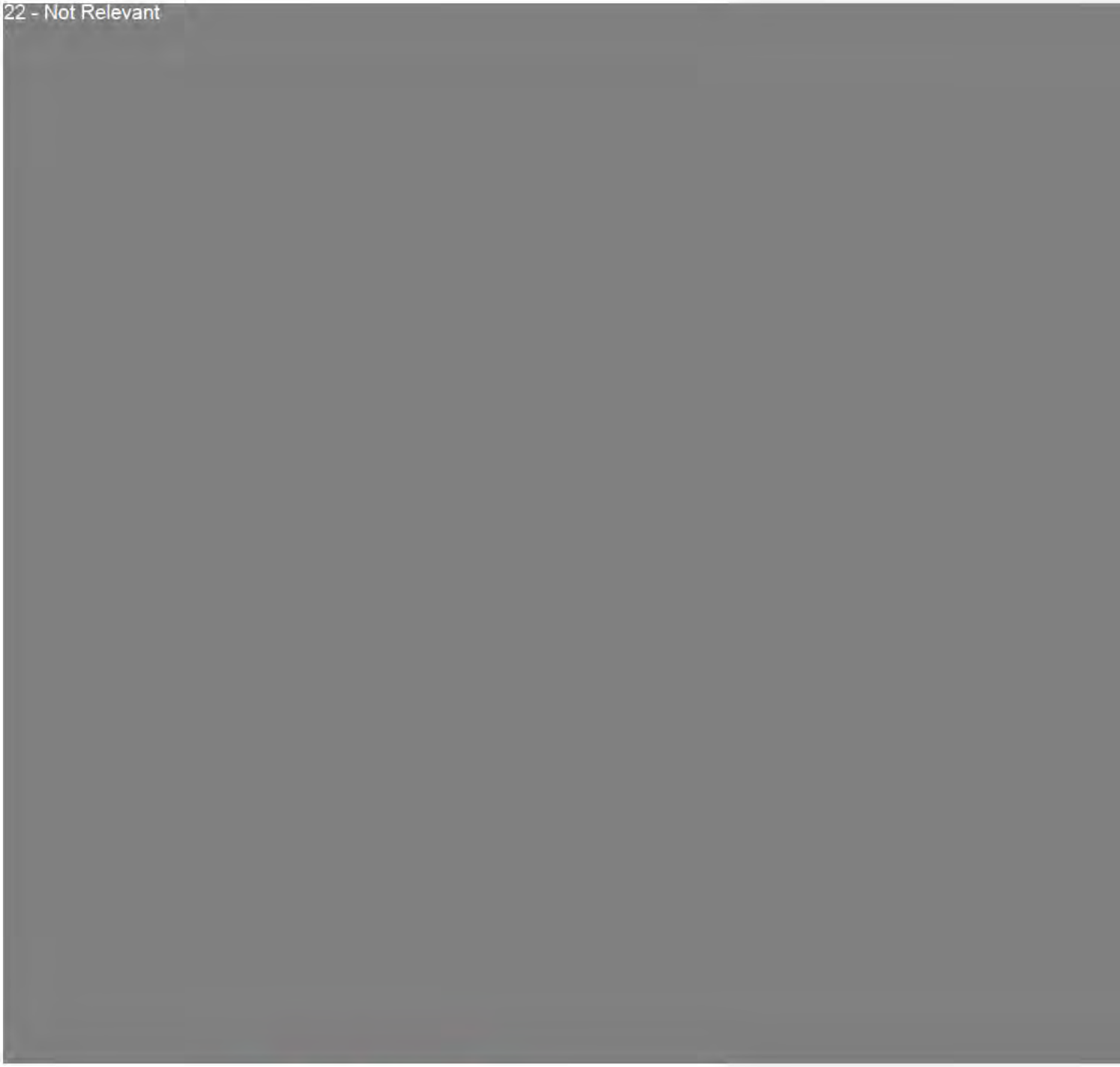
1 Royal Commission Act, section 6A(2).

2 NACC Act, section 113(2).

OFFICIAL:Sensitive Legal-Privilege

Wilson's 42(1)

22 - Not Relevant



Legal-Privilege OFFICIAL:Sensitive

22 - Not Relevant

Conclusion

67. I conclude that Ms Wilson intentionally misled or attempted to mislead the Ombudsman by:

(a) omitting the 2014 DSS Legal Advice from the response to the Ombudsman's first request; and

(b) making the following representations to the Ombudsman in the Response to the Ombudsman's second request, knowing each representation to be misleading:

(i) That in response to concerns expressed by DSS to DHS in 2015, there had been some revision or adjustment to how income averaging was proposed to be used in OCI.

(ii) That as a result of the revision or adjustment, DSS had abandoned its former position that legislative change was required to implement the Scheme.

(iii) That the 2014 advice was premised on a proposal that was different from OCI.

68. Ms Wilson's conduct in so misleading or attempting to mislead the Ombudsman amounted to dishonest performance by M~~r~~s Wilson of her official functions or duties as a public official and was therefore corrupt conduct within the meaning of section 8 of the NACC Act.

69. If there were sufficient admissible evidence to establish M~~s~~r Wilson's commission of the corrupt conduct beyond reasonable doubt, it would be appropriate to refer her to the Commonwealth Director of Public Prosecutions for consideration of whether she should be prosecuted for an offence of acting with the intention of dishonestly influencing a public official in the exercise of duties as a public official or of giving

information known to be false or misleading to a person exercising or performing functions under or in connection with a law of the Commonwealth.

70. 42(1) [redacted]

22 - Not Relevant [redacted]

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70. 42(1) [redacted]

Not Relevant [redacted]