

Investigation Report – Operation Athena

An investigation into an alleged Conflict of Interest.

June 2025

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Acknowledgement of Country

The ACT Integrity Commission acknowledges the Ngunnawal people as the traditional owners and custodians of the Canberra region. We pay our respects to Elders past, present, and emerging and extend our respects to all Aboriginal and Torres Strait Islander people.

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FROM THE OFFICE OF THE COMMISSIONER

Our Ref: INV-2023-3

Mr Mark Parton MLA
Speaker
Legislative Assembly for the ACT
CANBERRA ACT 2601

Dear Mr Speaker

INVESTIGATION REPORT – OPERATION ATHENA

On 30 October 2022, the Commission received a voluntary corruption report pursuant to section 57 of the *Integrity Commission Act 2018 (Act)* alleging that the Commissioner of Fair Trading, Ms Derise Cubin, had a conflict of interest in exercising her functions in connexion with complaints made and litigation threatened by the complainant, Mrs Louise Curtis. On 13 May 2023 the Commission decided to investigate the matter under s 100 of the *Integrity Commission Act 2018 (the Act)*.

Enclosed is the Commission's Investigation Report prepared pursuant to s 182 of the Act and provided to you in accordance with s 189 (Presentation to the Legislative Assembly).

No findings of corrupt conduct were found against Ms Cubin.

Yours sincerely

Michael F Adams KC
Commissioner

13 June 2025

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Overview

1. This is an Investigation Report prepared pursuant to s 182 of the *Integrity Commission Act 2018* (ACT) (**the Act**) at the conclusion of the investigation, codenamed Operation Athena, conducted by the ACT Integrity Commission (**the Commission**). As explained in the Report, I have found that, although some relatively minor shortcomings and errors of judgement arose in assessing and addressing a perceived and potential conflict of interest, the conduct examined in this report does not remotely satisfy the definition of corrupt conduct within the meaning of the Act.
2. In accordance with s 188 of the Act, a proposed version of this Report was given to persons to whom it relates to enable them to provide written comments for consideration before the Report was completed. The Commission received and considered comments of several individuals, and I am satisfied that it has been an appropriate response to the comments to amend the Report where necessary, while not altering the substance of the conclusions that were previously proposed.
3. Persons who are named in this report have been so named pursuant to s 186 of the Act for the purpose of context and to enable records to be identified accurately. Some minor criticisms have been made of Ms Derise Cubin in her capacity as the Commissioner for Fair Trading (the **Commissioner**) and a solicitor from the ACT Government Solicitor's Office (**GSO**). In respect of other identified persons, whether named or referred to by title, they are not the subject of any adverse comment or opinion.



Background

4. The Commissioner is an independent statutory office created by s 32 of the *Fair Trading (Australian Consumer Law) Act 1992 (ACT) (ACL)*. The Commissioner is the ACL regulator in the Australian Capital Territory and is supported by the Fair Trading and Compliance Branch within Access Canberra, for which the Director-General of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) is responsible. The different roles of the Commissioner on the one hand and Access Canberra on the other were not clearly articulated in much of the communications between the parties (an issue which it would be useful for management to address). For present purposes, it is sufficient to deal with the issues on the basis that the Commissioner was responsible for the work performed by the Fair Trading and Compliance Branch within Access Canberra.
5. Mrs Louise Curtis, the complainant in this matter, was the sole director of 86 Candles Pty Ltd (**86 Candles**) and owner of a business named 'Pink Frosting'. 86 Candles was first registered on 24 July 2015 and continues to hold an active registration. Mrs Curtis has been a director of 86 Candles since the company's inception and sole director and shareholder from March 2017. 86 Candles purchased the business known as Pink Frosting, a retailer with a bricks and mortar shop as well as an e-commerce store. Mrs Curtis has stated that she sold the business in January 2020 to an interstate competitor.
6. Pink Frosting came to the attention of various consumer regulatory authorities, including in the ACT, before Mrs Curtis took over the business in August 2015. In early April 2018 the Complaints Management Team in Access Canberra asked Mrs Curtis to provide information in relation to two complaints they had received. On 20 April 2018, in the absence of a response and on receiving further complaints, the complaints were referred to the Investigations and Enforcement Team in Access Canberra (the **IE team**). Engagement with Pink Frosting continued. In January and August 2019 Access Canberra received media inquiries about Pink Frosting, to which their responses were published, disclosing that Pink Frosting was under investigation by Access Canberra.
7. The business closed on 5 March 2020.
8. Mrs Curtis (and 86 Candles) complained about the way the Commissioner and Access Canberra dealt with the complaints, including communications with the media and sought compensation and declarations as to alleged failures to afford natural justice. In



November 2021 she commenced proceedings in the ACT Civil and Administrative Tribunal (ACAT) and ultimately commenced an action in the Supreme Court.

9. Mr David Snowden was, for all material purposes, Commissioner from 2015 until his retirement on 18 January 2021. On 21 January 2021 Ms Cubin was appointed Commissioner.
10. Ms Cubin presently holds several positions and statutory appointments, including that of Commissioner. Prior to 2018, Ms Cubin had other roles within the ACT Government in the compliance stream and the licensing stream in Access Canberra. From 2018, Ms Cubin was appointed the Director of Licensing and Registration Branch. This title has since changed to the Executive Branch Manager of the Licensing and Registration Branch. The role is substantively the same. During the period from 2018 to the present, Ms Cubin also held a statutory appointment as Controlled Sports Registrar, an appointment which has since been 'circulated to another executive in Access Canberra'.
11. On 30 October 2022, the Commission received a voluntary corruption report pursuant to s 57 of the Act from Mrs Curtis in effect alleging that, then Commissioner, Ms Cubin, had a conflict of interest in exercising her functions in connexion with complaints made and litigation threatened by Mrs Curtis about the investigation and media releases. The conflict was alleged to have arisen from the fact that Ms Cubin was at all material times in a de-facto relationship with Mr Snowden.
12. The Commission is aware 86 Candles and Mrs Curtis brought certain legal proceedings against the Commissioner in the ACT Supreme Court relating to a claim of compensation pursuant to s 51 of the ACL, in addition to a claim for declaratory relief. The claims in those proceedings was dismissed on 18 February 2025. This report does not need to address the issues in the proceedings.



Jurisdiction

13. The Commissioner is appointed by the Director-General of the Justice and Community Safety Directorate (**JACS**) pursuant to s 32 of ACL and by notifiable instrument. Mr Snowden and Ms Cubin were both appointed by notifiable instruments for their respective terms. The Commissioner is a public servant exercising the functions specified in s 33 and the powers conferred by Part 5 of that Act. The Commissioner's functions include receiving complaints about fraudulent conduct or unfair practices and dealing with them as the Commissioner considers to be appropriate, including investigation. The Commissioner also has other functions and powers under other relevant ACT legislation. Mr Snowden was a statutory office holder as the Commissioner and, accordingly, a 'public official' within the meaning of the Act. As Commissioner, Ms Cubin was also a 'public official' within the meaning of the Act.



Role of the Commission

14. The Commission is established under the Act with the function, amongst other things, of investigating conduct that is alleged to be corrupt conduct and referring suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action.
15. 'Corrupt conduct' is defined to mean conduct that could constitute a criminal offence, a serious disciplinary offence or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official and also one of the following:
 - (i) conduct by a public official that constitutes the exercise of the public official's functions as a public official in a way that is not honest or is not impartial;
 - (ii) conduct by a public official or former public official that—
 - (A) constitutes a breach of public trust; or
 - (B) constitutes the misuse of information or material acquired by the official in the course of performing their official functions, whether or not the misuse is for the benefit of the official or another person;
 - (iii) conduct that adversely affects, either directly or indirectly the honest or impartial exercise of functions by a public official or a public sector entity;
 - (iv) conduct that—
 - (A) adversely affects, either directly or indirectly the exercise of official functions by a public official or public sector entity; and
 - (B) would constitute, if proved, an offence against a provision of the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences);
 - (v) conduct that involves any of the following:
 - (A) collusive tendering;
 - (B) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety,



protect the environment or facilitate the management and commercial exploitation of resources;

(C) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;

(D) defrauding the public revenue;

(E) fraudulently obtaining or retaining employment or appointment as a public official;

(vi) conduct engaged in by a person in relation to conduct mentioned in subparagraphs (i) to (iv) (the primary conduct), that would constitute an offence against the Criminal Code, part 2.4 (Extensions of criminal responsibility) on the basis that the primary conduct is an offence, whether or not the primary conduct is in fact an offence.

16. 'Serious corrupt conduct' is corrupt conduct that 'is likely to threaten public confidence in the integrity of government or public administration' and 'systemic corrupt conduct' means 'instances of corrupt conduct that reveal a pattern of corrupt conduct in one or more public sector entities'.



Legal requirements

The Commission's management of investigations

17. In the present matter, a *corruption report* was received by the Commission pursuant to Div 3.1.1 of the Act. A *mandatory corruption notification* has also been received by the Commission pursuant to Div 3.1.2 of the Act. It is unnecessary to analyse these terms, which are sufficiently self-evident for present purposes. The initial assessment of the corruption report was considered to raise a reasonable suspicion of corrupt conduct justifying investigation under s 100 of the Act. The conduct in question concerned the possible involvement by Ms Cubin in the investigation of the complaints about Pink Frosting and/or in dealing with claims by Mrs Curtis about these issues.
18. The investigation has now been completed. This Report has been prepared in accordance with Part 3.9 of the Act.

Corrupt conduct

19. The starting point for interpreting the definition in s 9 of the Act of 'corrupt conduct' is to identify the purpose and function of the Act, which is usefully summed up in s 6(a) as 'providing for the identification, investigation and exposure of corrupt conduct.' 'Corrupt' is an ordinary English word which, when describing conduct, denotes behaviour that - to a greater or lesser extent - involves moral turpitude or a lack of probity. Mere ineptitude or carelessness, even negligence, would not suffice unless it reflected this element or, at least, amounted to recklessness (in the sense of indifference to known possible problematic outcomes). This reasoning is reflected in the definition in s 9 of 'corrupt conduct', which essentially requires two elements to be present: the first (para 9(1)(a)), where the conduct must involve possible criminal offences, serious disciplinary offences or reasonable grounds for dismissal or terminating the services of a public official; and, the second, (para 9(1)(b)) where the conduct falls into one or more of the stipulated categories, each of which contains an element of moral turpitude or lack of probity. This is correct even for that in sub-para 9(1)(b)(ii)(A), where the moral turpitude involved in a breach of public trust (implicit rather than explicit, as distinct from the other categories of wrongdoing listed in the paragraph) is the dishonest or intentional misuse or abuse of a power or office reposed in the public official in question. If a breach of public trust involved mere ineptitude or negligence, rather than intentional wrongdoing, this provision would have no work to do



since this conduct in the performance of public responsibilities would be at all events within sub-para 9(1)(a)(ii) or (iii). Thus, s 9 itself exhibits the requirement that ‘corrupt conduct’ connotes moral turpitude or want of probity, which is congruent with the meaning of ‘corrupt’ in common parlance.

20. This reasoning applies to the definition in s 10 of ‘serious corrupt conduct’, which applies where the corrupt conduct (which necessarily has already been found) also has the likelihood of ‘threatening public confidence in the integrity of government or public administration’. ‘Integrity’ carries two major meanings: the first connotes moral rectitude or probity; the second, organisational soundness or efficacy or compliance with requirements. Since s 10 specifies that the seriousness of the corrupt conduct depends, not on the degree to which it is corrupt, but on the negative consequences for public trust, there is no reason to apply an artificial limit to the meaning of ‘integrity’. Accordingly, it is sufficient if a likely consequence of the identified corrupt conduct is to threaten public confidence in either the soundness or efficacy of government or public administration or its probity.

Standard of proof

21. This is not a criminal investigation, nor is this a criminal trial. The standard of proof applied by the Commission is the civil standard on the balance of probabilities that takes into account the seriousness of an allegation and the general assumption that people of good character are minded to act properly. Accordingly, generally put, the implication is that the more grave the proposed findings, the better the quality of the evidence needs to be. This, however, remains to be determined on the probabilities, in marked contrast with the criminal standard, which requires proof beyond reasonable doubt.



Naming of people and entities

22. People and entities relevant to this investigation have been identified in this Report, even where there is no criticism of their conduct. This is because it would otherwise be difficult to make sense of the narrative and to avoid speculation about who was involved in the relevant events. In accordance with the requirement in s 186, I am satisfied that it is desirable to do so in the public interest and will not cause unreasonable damage to the person's reputation, safety or wellbeing. I emphasise that that those persons, with the exception of Ms Cubin and the solicitor, are not the subject of any adverse comment or opinion.



Background chronology

23. This account relies on material provided by Mrs Curtis in a letter of 27 May 2021 from her lawyer, to the GSO set out in the judgment of the Supreme Court (*86 Candles Pty Ltd v Commissioner for Fair Trading* [2025] ACTSC 34). It is referred to for context only, and no conclusions have been drawn about its correctness except that it may be accepted as sufficiently accurate for present purposes. On 8 December 2020, the law firm, Mills Oakley, was engaged by Mr Snowden, then Commissioner, to conduct a review of the investigation conducted by Access Canberra in respect of alleged breaches of the ACL by Pink Frosting. This report concluded, in substance, that the investigation complied with the pertinent parts of the Relevant Guidance and Requirements, was otherwise conducted appropriately and that Pink Frosting was treated fairly in the course of the investigation although, with the benefit of hindsight, there were elements of the process that could have been conducted better. The manner in which the investigation was conducted is not the subject of the Commission's investigation and this report is mentioned only for completeness and, in respect of non-controversial events, as a source of information.
24. It appears that, from June 2018 to August 2018, Access Canberra adopted an “engage, educate and conciliate” approach in dealing with Pink Frosting, which was typically used to initially address consumer complaints. Exchanges between the IE Team and Mrs Curtis occurred in which the team sought certain information. In late October 2018, although some outstanding information had not been provided, the then IE Team Senior Manager (later Director) decided that the investigation should be closed as the complaints against Pink Frosting had appeared to come to a halt and it was thought that Mrs Curtis may have addressed the underlying issues that had led to the complaints. It was also accepted that the range of difficulties that the business had faced in July 2018 seemed to have been outside Mrs Curtis' control. A closure letter was drafted.
25. However, before the closure letter had been sent, Access Canberra received additional complaints about Pink Frosting and further information from other consumer protection agencies. The Director formed the view that there may have been breaches of s 36 of the ACL and decided to shift focus from conciliation to conducting further investigations and exploring potential enforcement outcomes. Such an enforcement outcome could be achieved using a court enforceable undertaking or through civil court action. However, Mrs Curtis was not informed about the change in approach (which was one of her



complaints). On 13 November 2018 the Director informed the investigator that the Pink Frosting complaints would progress to an in-depth investigation.

26. It was agreed shortly after to convene a meeting between the IE Team and Mrs Curtis in mid-January 2019. In the meantime, a journalist contacted Access Canberra for comment about Mrs Curtis and Pink Frosting. By email dated 9 January 2019, the Senior Strategic Communications and Media Officer, Access Canberra responded to this enquiry (attributable to an 'Access Canberra spokesperson') that 'Access Canberra is currently investigating a number of complaints about the ACT based business Pink Frosting' and briefly outlining their gist, also inviting anyone with a complaint about Pink Frosting to make contact.
27. On 12 January 2019, the Daily Telegraph published an article 'Pink Frosting party supplies under investigation by Fair Trading after customers complain about orders', amongst other things quoting 'an ACT Fair Trading spokesman' as saying an investigation was underway. At all events, further communications occurred between Mrs Curtis and the Director, with the former providing what was, in effect, claimed to amount to a comprehensive refutation of all complaints but one, which had been settled.
28. Further information was provided to the media in June 2019. Amongst other things, that information confirmed that 'Access Canberra is continuing to look into this matter.' In August, the Daily Telegraph published a further article referencing Pink Frosting and Mrs Curtis. At the same time, responding to a query from the Canberra Times, the Assistant Director, Strategic Communications and Media, Access Canberra, confirmed the currency of the investigation and invited consumers experiencing problems dealing with Pink Frosting to make contact. Shortly after, the Canberra Times published an article about the 'active investigation' of Mrs Curtis and Pink Frosting.
29. Following a further communication from Access Canberra, Mrs Curtis made complaints about their media releases to the ACT Office of Fair Trading, Access Canberra and the responsible Minister. From early 2020, further exchanges occurred between Mrs Curtis' lawyers and the Manager IE team, culminating in a letter dated 10 August 2020 from the GSO advising that the Commissioner had concluded his investigation and had formed the view that, if litigated, a court would likely find that the alleged breaches of ACL had occurred but, to avoid the costs of litigation, the Commissioner was willing to accept (the enclosed) court enforceable undertaking, including an admission that Pink Frosting had likely contravened the ACL and establish and implement an ACL compliance program and amend



any unfair contract terms. A breach notice was included in that letter. On 11 August 2020 Mrs Curtis lawyers advised the GSO, amongst other things, that the Pink Frosting business had been sold eight months prior, was deregistered and was non-operational and that she would not be signing an enforceable undertaking. On 18 August 2020, the GSO advised Pink Frosting that as the Pink Frosting business was no longer in operation, Access Canberra would discontinue pursuing a court enforceable undertaking. This approach was taken as the deregistration of the business meant that the ongoing risk of harm to consumers no longer existed.

30. On 10 September 2020, the Daily Telegraph published an article to the effect that the Commissioner had found Mrs Curtis and Pink Frosting had likely broken the ACL. On this day Mrs Curtis wrote to the responsible Minister complaining about the communications with media, disputing the number of alleged complaints, claiming damage and seeking to discuss redress. A meeting occurred on 25 November between Mrs Curtis, her lawyers, Mr Snowden, the Manager, the IE team and the solicitor, during the course of which Mr Snowden in effect, took responsibility for the investigation. There was a detailed discussion that included the course of the investigation, dispute about the actual number of complaints, the adequacy of information provided to Mrs Curtis and the appropriateness of the media communications. Mrs Curtis's lawyer had provided a written list of matters to which a response was sought, and the meeting ended with Mr Snowden suggesting that Mrs Curtis submit a claim for compensation and undertaking to respond by the end of the year. Mrs Curtis described the meeting as 'cordial'. Further written exchanges ensued, ultimately in mid-February by a letter from the GSO inviting 86 Candles to submit its claim for compensation for consideration.
31. That invitation instigated the letter of 27 May 2021 to the GSO [as mentioned in [23], which set out a large number of complaints. It is not necessary to rehearse the precise legal basis for the compensation sought. In the letter, 86 Candles claimed \$1,540,910 for loss and damage caused by Access Canberra and the Commissioner as a consequence of their handling of the investigation and, in addition to loss and damage caused to 86 Candles, Mrs Curtis claimed \$800,000 for economic loss and \$200,000 for general damages relating to the adverse impact on Mrs Curtis' health, general wellbeing and loss of enjoyment of life. The letter concluded with a suggestion to the effect that a meeting 'to engage in a without prejudice settlement conference' might be useful.



32. It is unnecessary for present purpose to identify precisely what role Mr Snowden played in instigating or authorising the investigation. There can be little doubt that he was, at least, administratively responsible for it, as it was undertaken under the aegis of the Commissioner, presumably in performance of his investigation functions under the ACL. Indeed, he disclosed during the meeting of 20 November that he had made the decision to commence the investigation. Responsibility for the media communications must also ultimately be sheeted home to him, whatever his actual knowledge was or what actual decisions he directly made about them. It is worth commenting that the apparent confusion as to responsibility exhibited by the media releases, for example by directing attribution to Access Canberra is unfortunate. If actions are taken by the Commissioner, this should be unambiguously identified, not least because those who are affected should understand what entity is responsible. Furthermore, the ACL provides for certain processes to be undertaken by the Commissioner or with their authority, not only for investigations but also including conciliation and the conduct of proceedings on behalf of consumers.

The meeting of 6 July 2021

33. The GSO's solicitor (the **solicitor**) with carriage of the matter on 24 June 2021 received instructions from the ACT Insurance Agency and the acting Executive Branch Manager, Fair Trading and Compliance – Access Canberra (**A/EBM**) relating to the willingness by Mrs Curtis to engage in without prejudice discussions regarding legal issues in her claim against the government. Her view was that such discussions could be a 'useful opportunity for the Territory to clearly articulate its position to assist Mrs Curtis (and her lawyers) to understand the issues and impediments to making a financial payment' with respect to Mrs Curtis' claim against Access Canberra and the ACT Government for loss alleged to have been suffered as a result of their conduct'.
34. The solicitor's understanding of the 27 May letter (as explained in an affidavit tendered to the Commission) may be summarised as follows: although a number of Access Canberra officers were named as being personally involved in the matter, she read the references to "the Commissioner" as involving the statutory office holding the relevant function as distinct from Mr Snowden's personal conduct. In my view this was a reasonable understanding. In the result, she did not consider that the claims in the letter involved any criticisms of the personal conduct of Mr Snowden or any allegation he had engaged in misfeasance in public office or to an investigator whose conduct would give rise to liability under s 51 (1) of the ACL (the details of which do not presently matter). It therefore did not occur to her to



consider any prospect of an actual or perceived conflict of interest in Ms Cubin attending the 6 July 2021 meeting.

35. The suggestion of a meeting in the letter of 27 May was agreed to on 24 June and the meeting was ultimately scheduled for 6 July 2021. That meeting was attended by the solicitor, Ms Cubin, then Commissioner, the relevant A/EBM and Mrs Curtis and her counsel, solicitor and accountant. Ms Cubin's attendance at the meeting was first suggested by the A/EBM in email correspondence between him and the solicitor in which he suggested that she might attend. The solicitor's view was that Ms Cubin's attendance at the meeting in her capacity as Commissioner was important to show Mrs Curtis that the government was taking Mrs Curtis' grievance seriously. It was not expected that any decisions as to the complaints or future litigation would be made at that point, nor did this occur.
36. After the meeting on 6 July, on 4 November 2021 Mrs Curtis lodged a civil dispute application in ACAT, with the Commissioner (Ms Cubin), Mr Snowden and the Director IE Team named as respondents. On 3 December 2021 that application was dismissed without being litigated. It was the commencement of the ACAT action that triggered a new conflict of interest disclosure by Ms Cubin and the implementation of management arrangements (see paragraph 52) removing her from any involvement in this litigation.
37. There is no reason not to accept the solicitor's evidence explaining why the question of a perceived conflict of interest did not occur to her. She was involved in giving legal advice for the purpose of envisaged litigation, not in respect of any administrative or management issues. Given the relationship of the GSO to government, and the potential for confusing or inconsistent messaging were the GSO to enter into a consideration of those issues, it is necessary for its solicitors to carefully observe the boundaries of their retainer and not intrude into the responsibilities of those directly charged with supervising and maintaining public sector standards unless it falls within or is linked in a substantive way with the legal matter of which they have carriage. There is often no bright line and is a matter of policy very much within the purview of the Chief Solicitor and outside the Commission's, where no question of corrupt conduct arises. The question of conflict as having any relevant legal consequences in the present instance certainly did not arise, if for no other reason than that there was no suggestion that Ms Cubin had been involved in any significant way with any of the impugned conduct nor that she would be expected to make any decisions about it at the meeting. That the solicitor had not thought about the possible apprehension of conflict from Mrs Curtis' viewpoint, given that Ms Cubin was, at the time of the meeting, the new Commissioner and potentially could be involved in making relevant decisions about any



claim for compensation was an understandable oversight, and it may have been that, had it been intended that the meeting would lead to any decisions, such a consideration might have been triggered. However, it is not necessary to express any final view about this issue, since it is clear beyond debate that it does not involve any question of corrupt conduct.



Government Conflict of Interest management

General policy

38. The *Conflicts of Interest Policy and Guidelines – March 2016 (2016 Policy)*, as updated in September 2018, February 2021 and June 2021 was applicable at all material times. Prior to Ms Cubin being appointed Commissioner, she was a member of the Senior Executive Service in her role within Access Canberra.
39. The role of Commissioner is also captured by this policy as the role is a statutory appointment embedded within Access Canberra which is led by a Deputy Director-General.
40. In defining a *conflict of interest*, the 2016 Policy extracts the following statement from the Organisation for Economic Cooperation and Development, commonly known as the OECD:

A conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties or responsibilities.
41. Where a conflict of interest is identified, the person is required to disclose to the person's supervisor as soon as the person is aware of the conflict. Once a disclosure is made, any conflict is to be managed in accordance with Clause 6 of the 2016 Policy with a list of defined 'strategies' to be implemented to manage the conflict of interest. Conflicts of interest are to be reviewed 'as part of the individual performance and development discussions or as circumstances change. In instances where the situation changes and the conflict requires a new management strategy, a new disclosure form must be submitted.'
42. The 2016 Policy holds staff responsible for properly assessing and reporting conflicts of interest and properly following management strategies which may be in place where conflict cannot be avoided.
43. The September 2018 update made no material changes that are relevant in the present case. This policy was in place at times material to Ms Cubin holding her position as Commissioner.
44. The ACTPS *Director-General and Executive Handbook* is a separate policy document which exists for the management of the Senior Executive Service within government. The policy explains where potential conflicts may arise:



A potential conflict of interest arises where private interests are, or are perceived to be, in conflict with official duties. That is, a potential conflict can be either real or perceived. These interests can be either financial ... or personal (such as personal relationships ... as well as family and other personal relationships), and can sometimes extend to the interests of an executive's family.

Executives are not only required to disclose their interests, but also take any reasonable steps to identify and manage a conflict, or the appearance of a conflict.

All executives are required to provide a [Disclosure of Private Interests] containing their personal and financial interests on commencement ... The purpose of disclosure is to ascertain and address any perceived or actual conflict of personal interest and public duty. This written statement must be updated:

- *every twelve months;*
- *as soon as possible after any relevant facts requiring a change have come to the employee's notice; and*
- *whenever circumstances change.*

45. It is convenient to pause at this point to consider the significance of a conflict of interest declaration. Having identified and declared an actual or perceived conflict of interest, a person is not simply entitled to 'set and forget' – that is to proceed as if a conflict did not exist just because they have made the declaration. Nor, however, does the mere declaration of it mean the person must be precluded from any and all further dealing with the one interest that may be competing with the other, perhaps a personal interest – though of course this might be the case as, for example, where the director of a public company is not to be present for, or vote on, deliberations on an aspect of the company's business impacted by a conflict. Rather it requires an objective recognition, understanding and assessment of the nature of the circumstances that do or could enliven the actual or perceived conflict and a deliberate strategy to manage the conflict.
46. Individuals all have competing priorities and pressures of various kinds in their private and work lives and need to make judgments, sometimes finely balanced, about how to deal with those priorities. Where a person makes a choice to take one course of action rather than another, even where the first might relate to their private life or a family member and the second their employment, it does not necessarily follow that the person's interests have



conflicted in making the decision. This will often be a matter of fact and degree. The person is entitled to make the choice and deal with the consequence as appropriate. It is different where a situation involves a predisposition to do a thing or take a position that influences the merits of the issue by reference to the particular personal interest. Sometimes there is no actual conflict of interest, but the circumstances might be such as might lead a reasonable person with knowledge of the facts to think that a conflict of interest might affect the particular decision or action. That situation also needs to be avoided if it is practicable to do so and, where it occurs, appropriately managed, even if only by explaining why there is no actual conflict of interest.

47. In this case, on 30 July 2018, following a conflict of interest form lodged by Mr Snowden (then Chief Operating Officer of Access Canberra) and Ms Cubin (then Director Licensing and Registrations of Access Canberra), a management plan was implemented by them with Mr Dave Peffer (then Deputy Director-General of Access Canberra). The plan contained a declaration of the de facto relationship between Mr Snowden and Ms Cubin and put into place measures to manage any actual or perceived conflict of interest which may have arisen as a result of the relationship. Thus, although Ms Cubin's position would ordinarily report to that of Mr Snowden this was changed to report to Mr Peffer. Where, ordinarily, Mr Snowden would be appointed Registrar General of Access Canberra due to his position as Chief Operating Officer, Mr Peffer was appointed to this role to remove danger of a conflict. Any performance or disciplinary issues regarding the Director Licensing and Registrations which would ordinarily go to the Chief Operating Officer were also redirected to the Deputy Director-General.



48. For completeness, the 2018 Conflict of Interest Agreement is extracted below:



Agreement to remove, manage and minimise Conflict of Interest and Apprehension of Bias or Favouritism

Access Canberra is committed to working in a way that upholds the ACT Public Service values and behaviours set out Division 2.1 of the Public Sector Management Act 1994. Critical to our work, as the Australian Capital Territory's largest regulator, is integrity.

Because of this commitment, this agreement is being put in place to outline clear expectations of how Access Canberra, and in particular we the undersigned, will address conflicts of interest (real or perceived, potential or actual) or apprehensions of bias or favouritism (apprehended or actual) arising from Mr David Snowden, Chief Operating Officer, Access Canberra and Ms Derise Cubin, Director Licensing and Registrations, Access Canberra being in a relationship.

We recognise that in any small agency, interaction between executives is required and necessary. Therefore, acknowledging that Mr Snowden and Ms Cubin will at all times continue to act in accordance with the ACTPS values of respect, integrity, collaboration and innovation, the additional following steps have been taken to remove, or manage and minimise, any conflicts of interest or apprehension of bias or favouritism.

As part of the appointment terms, the Director Licensing and Registrations now reports to Mr David Peffer, Deputy Director-General, Access Canberra, rather than to the Chief Operating Officer. This changes the hierarchy of decision making that takes place between the positions and is directed at ensuring that any apprehensions of bias or favouritism and/or any conflict of interest issues involving Mr Snowden and Ms Cubin, do not arise.

The Director-General, Justice and Community Safety Directorate, has also appointed Mr David Peffer, Deputy Director-General, Access Canberra to be Registrar General, instead of the Chief Operating Officer who was previously the Registrar General, to avoid any apprehensions of bias or favouritism and any conflicts of interest in the exercise of the statutory responsibilities of the Registrar General through the reporting line of Director Licensing and Registrations to the Registrar General.

Matters concerning underperformance issues or misconduct allegations relating to team members within Access Canberra's Licensing and Registration Division, which require escalation by the Director Licensing and Registrations, will be referred to the Deputy Director-General and not to the Chief Operating Officer. Matters concerning underperformance issues, misconduct allegations or similar relating to either Director of Licensing and Registration or the Chief Operating Officer, will be referred to either the

Deputy Director-General, Access Canberra or to an independent Deputy Director-General external to Access Canberra.

If any concerns about apprehensions of bias or favouritism or conflicts of interest relating to the interaction of Mr Snowden and Ms Cubin in the workplace are raised (whether by officers or employees of Access Canberra or by members of the public or stakeholders of Access Canberra), these concerns will be immediately escalated to the Deputy Director-General.

Access Canberra has advised all senior executives and deputy directors within Access Canberra of the arrangements being put in place. This included emphasising the right of officers or employees of Access Canberra to bring any concerns directly to the Deputy Director-General, free of repercussion (save for where any such concern is knowingly false and misleading, vexatious or capricious).

This agreement will be revisited as required.

Dave Peffer
Deputy Director-General
Access Canberra

30 July 2018

David Snowden
Chief Operating Officer
Access Canberra

30 July 2018

Derise Cubin
Director Licensing and
Registrations
Access Canberra

30 July 2018

49. In her evidence, Ms Cubin confirmed the basis and effect of the 2018 Conflict of Interest Agreement:

COMMISSIONER: Well, let's not worry about role, let's call it work. The work that you did, were you answerable to Mr Snowden?

COUNSEL ASSISTING: Sorry, at that particular time.

COMMISSIONER: Q. At that time. When you were appointed in 2018. --- A. No, because a new process was put into place.

Q. Was that new process put into place because of your partnership? --- A. Yes.

Q. So it was designed to avoid the issue that might arise because of the partnership if you were answerable to him, the work context? --- A. Yes, Commissioner. That's correct.

Q. All right. Who was responsible for doing that? --- A. For --

Q. For reorganising the role? --- A. That would have been the then Deputy Director-General of Access Canberra.

COUNSEL ASSISTING: And perhaps we can assist with that, Commissioner, because we do have the form at tab 4, if we could look at that, which puts into place this arrangement.

COMMISSIONER: All right.

COUNSEL ASSISTING: Q. So do you recall this agreement to remove, manage and minimise conflict of interest and an apprehension of bias? --- A. Yes, I do.

...

Q. Okay. And do you remember what sort of management strategies were put in place - what sort of management strategies were put in place to deal with that relationship or perceived or potential conflict? --- A. So as noted in here obviously reporting lines were changed. Mr Peffer was made - the role of Registrar-General was transferred to Mr Peffer because the births deaths and marriages team is situated within my branch from a licensing and registration perspective. And then, yes, and as it highlights that reporting lines were altered.

Q. That's all right. And I think any concerns regarding favouritism or conflicts of interest could be raised directly with the Deputy Director-General? --- A. Yes.

Q. And that all senior executives and deputy directors with Access Canberra were advised that these protocols were being put into place. ---A. Yes.

Q. Did this comply, from your understanding, with the CMTEDD conflict of interest policy that existed at the time? --- A. Yes, my understanding it did, based on the - how this was - I guess who took responsibility for drafting this declaration.



Q. Did you have a look at the conflict of interest policy at the time? --- A. I - I can't remember.

Q. Have you seen a conflict of interest - --- A. Yes. Yes.

Q. You have seen a conflict of interest policy and understand the test that's invoked when considering whether or not a conflict of interest exists? --- A. Yes.

50. On 24 November 2021, Ms Cubin made a conflict of interest disclosure by way of a Conflict of Interest Disclosure Form in her capacity as Executive Branch Manager – Licensing and Registrations and as Commissioner. This followed the naming of Mr Snowden as a party to ACAT proceedings. This declaration states, *inter alia*, that it was 'developed to address any decisions relating to ... [the ACAT proceedings] with assistance of ACT Legal Team. Any decisions or legal instructions involving this matter to be avoided by SOP through either Josh Rynehart or my [Mr David Pryce's] position'. Mr Pryce was Deputy Director-General. It should be noted, however, that by this time Ms Cubin had already excluded herself from any involvement in the dispute.

51. In her evidence, Ms Cubin explains the measures taken by her and Mr Pryce to properly record this conflict and how this declaration came about:

COUNSEL ASSISTING: Q. So on 24 November, if we have a look at tab 8, you did submit a conflict of interest form? --- A. Yes.

Q. We will just bring it up so that you can have a look at it. It is some time ago. Now, if you look at that form, if we can scroll down a little. There's the first section there where it says, 'The conflict of interest has been identified as'- --- A. Yes.

Q. And there we can see that there's sort of a digitised cross in 'perceived'. --- A. Yes.

Q. And a pen cross in 'potential'. --- A. Yes.

Q. And a signature at the end of that - --- A. Yes.

Q. - line or initial at the end of that line. Are you able to say who did the digitised cross? --- A. That would be me.

Q. And why did you put that cross there? --- A. I guess because with the timing I perceived there was a conflict of interest but I had already stepped away from having any dealings with this particular matter.

Q. I understand. And, sorry, maybe I should go back to this. And the reason why you filed this conflict of interest disclosure form? --- A. Because Ms Curtis filed matters in ACAT against individuals.

Q. And one of those individuals was Mr Snowden? --- A. Yes.

COUNSEL ASSISTING: Right.

COMMISSIONER: Could you just remind me of the date? When did the proceedings commence?

COUNSEL ASSISTING: The proceedings commenced on 4 November.

COMMISSIONER: And this document is dated?

COUNSEL ASSISTING: 24 November.

COMMISSIONER: Right. Okay.

COUNSEL ASSISTING: And so -

*COMMISSIONER: Q. Did you consult anybody before you filled in this document? -
-- A. I - yes, between the date of the 4th and the 24th, because there was the need to wait for the sealed documents from ACAT as to whether the matter was proceeding.*

Q. Going ahead. --- A. Yes. But in the meantime I had spoken to my Deputy Director-General and talked about it.

Q. Who was? --- A. David Pryce.

Q. Sorry? --- A. David Pryce.

Q. And did you raise this issue with him? --- A. Yes. Yes.

Q. Right. And was this form, in part at least, instigated because of that conversation? --- A. Yes. We decided - well, I advised -

Q. You may already have had decided, but what I mean is the form followed your discussion. --- A. Yes.

COMMISSIONER: Right.

COUNSEL ASSISTING: Q. And so now going back to where we were, you put the digitised cross in the 'perceived' section? --- A. Yes.

Q. And then there it's a pen cross in 'potential' and a signature. --- A. Mmm.

Q. Who did the pen cross? --- A. David Pryce.

Q. And that's his signature at the end, is it? --- A. Yes.

Q. And do you recall the discussion that happened around essentially changing the identification of the conflict? --- A. Yes. We had a conversation around it. Because we had already put in place the controls, so I had filled it out on the basis that the controls were in place and the conversation with David was like, well, we will highlight them to reiterate that the controls are there and to remove. And so it was really just, I guess, between the two of us deciding the best approach.



Q. And when you say 'controls', were they the standard operating procedures that were - --- A. And I was removed from any matters to deal with anything to do with anything to do with Ms Curtis or any -

COMMISSIONER: Q. Well, that was the simplest solution. --- A. Yes. And have - yes, was removed.

COUNSEL ASSISTING: Q. And is it right to say that on this form where there's a digitised cross under the risk of financial - sorry, the risk of conflict of interest has been identified, and - --- A. Sorry, can you scroll -

Q. Sorry, just scroll up a little bit. Yes. Thank you. Just there. There appears to be digitised cross where it says 'low', and that's been scribbled out, and then there's another cross in 'medium.' A. --- Mmm.

Q. Is it the case that your digitised cross was in 'low', that you had assessed the conflict as low? --- A. Yes, I guess because at the time I did it I had already stepped out of being involved.

Q. Right. --- A. But then when David highlighted it to medium, I guess it was the context of the timing.

COUNSEL ASSISTING: I understand.

COMMISSIONER: Q. Although looking at the form itself, Ms Cubin, do you see 'management strategy'. I'm looking at that passage. --- A. Yes.

Q. You see 'register'. So, ie, note the potential risk. Then it looks 'restrict'. So the alternative is 'restrict' which means what? --- A. So in the conflict of interest policy 'restrict' means basically restricting any access or restricting any involvement and then remove. It kind of means the same thing. So I guess it's terminology. But -

Q. Right. So you - you put in 'register', you put in 'restrict'. --- A. Yes.

Q. Following the discussion with Mr Pryce he put the X in 'remove'. --- A. Yes.

Q. But I gather from what you've told me, you did not think that involved a change that was implicit in the 'restrict' which you had already crossed. --- A. Yes.

COUNSEL ASSISTING: Q. And then if we scroll down to the bottom of that, it's been signed by both you, Ms Cubin, and Mr Pryce? --- A. Yes.

Q. With a note I'm assuming was written by Mr Pryce? --- A. Yes.

Q. And while it's taken a little to decipher it - and please correct me if I am wrong - but that I think it says:

'The SOP developed to address any decisions relating to this matter. SOP developed with assistance of AC legal team, and any discussions or instructions involving this matter to be avoided by SOP through either Josh Rinehart or my position'.

A. Yes.




Q. Does that reflect the process that was put in place? --- A. Yes.

Q. And how were other staff members notified about that process? --- A. So - I'm trying to remember. I guess because the matter was running out of a different branch than mine, the key people in that branch were advised that I wasn't to be involved in any matters. And from that point Josh my colleague and David have, I guess, managed or overseen any matters involving Ms Curtis or her business entities.



52. This conflict of interest form is extracted as follows:



ACT
Government

Chief Minister, Treasury and
Economic Development

Conflict of Interest Disclosure


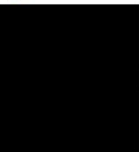
Instructions

1. Read the *Conflicts of Interest Policy and Guidelines*
2. Once completed by the staff member and their manager, the form should be kept as a record within the business unit

Employee Details		
Name: Derise Cubin	Date: 24 November 2021	
Position: EBM/ Commissioner for Fair Trading	Supervisor name: David Pryce	
Branch: Licensing & Registrations	Sub Unit:	
Conflict of Interest / Circumstances		
<ol style="list-style-type: none"> 1. I refer to the recently filed ACAT matter XD/1027/2021 86 Candles Pty Ltd V Commissioner for Fair Trading & Ors. 2. I am the current appointed ACT Commissioner for Fair Trading. My partner David Snowden was previously employed by the ACT Government and held the statutory position of ACT Commissioner for Fair Trading. Mr Snowden is the second respondent in this matter. 		
Duties affected by the Conflict / Circumstances		
<ol style="list-style-type: none"> 1. The filing of this matter in ACAT with both David Snowden and I named may create a perception that a conflict exists or that a bias towards the applicant exists. 2. I hold no bias for or against Ms Curtis / 86 Candles Pty Ltd and will continue to fulfill my statutory role in line with my obligations and responsibilities under relevant legislation PSMA and comply with any other legislative requirements. All information will be managed with sensitivity. 		
The conflict of interest has been identified as (please tick the appropriate box)		
Actual <input type="checkbox"/>	Perceived <input checked="" type="checkbox"/>	Potential <input checked="" type="checkbox"/>
Pecuniary/financial <input type="checkbox"/>	Non-pecuniary <input checked="" type="checkbox"/>	
The risk of the conflict of interest has been identified as (please tick the appropriate box)		
High <input type="checkbox"/>	Medium <input checked="" type="checkbox"/>	Low <input checked="" type="checkbox"/>
Management Strategy (please tick the appropriate box)		
Register <input checked="" type="checkbox"/>	Restrict <input checked="" type="checkbox"/>	Recruit <input type="checkbox"/>
Remove <input checked="" type="checkbox"/>	Relinquish <input type="checkbox"/>	Resign <input type="checkbox"/>
Details of restrictions and strategies implemented		
<ol style="list-style-type: none"> 1. The registration of this perceived conflict is to acknowledge a personal relationship. 2. To remove any concerns, I will not engage with Mr Snowden (the 2nd respondent) in relation to this ACAT matter. Engagement will occur via the EBM Fair Trading and Regulatory Strategy / ACT Government Solicitor. 		

Chief Minister, Treasury and Economic Development
GPO Box 158 Canberra ACT 2601 | phone: 132281 | www.act.gov.au



Employee Acknowledgement		
I, Derise Cubin , hereby declare that the above details are correct to the best of my knowledge and I make the conflict of interest declaration in good faith.	Signature: 	Date: 24/11/2021
Manager Acknowledgement		
I, David Pryce hereby declare that the above details are correct to the best of my knowledge and acknowledge my role in overseeing the management strategy of the conflict of interest as declared.	Signature: 	Date: 26/11/2021

Note: SOP developed to address any decisions relating to this matter. SOP developed with assistance of Ac Legal Team.

Any decisions or legal instructions involving this matter to be avoided by SOP through either Josh Rynehart or my position.

26/11/2021

Note: SOP developed to address any decisions relating to this matter. SOP developed with assistance of the Legal Team.

Any decisions or legal instructions involving this matter to be avoided by SOP through either Josh Rynehart or my position.

53. Mr Pryce provided information to the Commission indicating it was his recollection that it was he who initially made the digital entries in blue colour on the conflict of interest form, after receiving it from Ms Cubin, but he agreed it was also he, who, on further reflection and after seeking advice, placed the further hand-written crosses on the form as Ms Cubin described and for the reasons as she explained them, including specifically to remove her from any decision making process or involvement because of the identified conflict. In the end I am satisfied that nothing material turns on the sequence of annotations to the form – the effect of them was clearly understood and agreed by the participants at the time.



Mr Pryce's adjustments to the disclosure and the development of the standard operating procedure to address the potential conflict was appropriate.

54. Ms Cubin continues to hold appointment as Executive Branch Manager – Licensing Registrations and as Commissioner among other appointments and duties.
55. Ms Cubin provided the Commission with Declaration of Private Interests Forms that she has submitted to her employer for the years 2019 to 2023, as well as conflict of interest disclosure forms for years 2019 to 2023. In each of these annual disclosures, Ms Cubin disclosed her relationship with Mr Snowden and her shared property and financial interests with Mr Snowden. These are not extracted in this report to maintain privacy. The management arrangements referred to above do not, of course, deal with the problems that might have arisen following her appointment as Commissioner. Although no longer in a possibly conflicted reporting line, it became at least potentially problematic if she were called on to make a decision that required evaluation of a decision that had been made by Mr Snowden. It may be that this could only effectively have been dealt with *ad hoc*, as occurred once the ACAT proceedings taken by Mrs Curtis commenced, but it would have been useful and desirable for some management arrangements to have been put in place to deal with such situations at a more general level.

2023 ACT Government Solicitors' advice

56. Following request for advice from the Head of Service, on 3 February 2023, the GSO sent a legal advice to the relevant Executive Branch Manager in CMTEDD in relation to the meeting with Mrs Curtis and the overall management of any conflict of interest.
57. The ultimate questions answered by the GSO were: was it appropriate for Ms Cubin to attend the meeting in July 2021 and has the management of the subsequent potential/perceived conflict of interest matters been appropriate?
58. The ultimate response of the GSO was 'yes' to both questions, that it was appropriate for Ms Cubin to attend and that the management of the potential/perceived conflict of interest is appropriate.
59. The GSO considered that:

Ms Cubin's decision to attend the 6 July meeting, with[out] more evidence, is, prima facie uncontroversial:



The claim [by Ms Curtis] was against the Territory;

Proceedings had not been instituted;

The meeting was for the purpose to (sic) listen to the case that was put forward by the claimant [Ms Curtis];

Ms Cubin was accompanied by others (importantly a senior lawyer within the [GSO]);

The meeting was without prejudice – in other words, the discussions could [not] be used to (sic) as evidence in support of the claim or in response to it;

There is no evidence that Ms [Cubin] disclosed what was discussed to anyone, particularly to Mr Snowden and there is no basis to infer that she did.

60. The GSO further stated that:

It is important to note that no decisions about the claim were made by Ms [Cubin]. She was receiving advice from [the GSO] in relation to the matter. The decisions not to settle the claim and raise a challenge to the ACAT's jurisdiction to hear and determine the proceedings were made with advice consistent with or with the spirit of the Legal Services Directions.

Ms Cubin declared her personal relationship with Mr Snowden after the proceedings were instituted by '86 Candles Pty Ltd' naming Mr Snowden as one of the parties. Decisions were made that Mr David Pryce, the [head of Access Canberra], would act as the Commissioner for Fair Trading in respect of this matter. A Standard Operating Procedure was developed to deal with the issues that arose from this conflict of interest including management of information about the matter to ensure that [Ms Cubin] was not involved in it.

In my opinion, the declaration by Ms Cubin after the formal proceedings were commenced and the subsequent Standard Operating Procedures were appropriate. Steps were taken to remove Ms Cubin from the decision making and the delivery of information relating to the proceedings.



61. As explained below, whilst the opinion of the GSO is not unreasonable, it would have been useful to have considered whether Ms Cubin should have attended the 6 July meeting (without informing Mrs Curtis of her relationship with Mr Snowden) in light of the risk as to how her presence might have been misunderstood by Mrs Curtis, in short, to have considered the potential perception that Ms Cubin might have a conflict of interest concerning claims about the former Commissioner's conduct and managing it appropriately.
62. Ms Cubin's ultimate position as given in her evidence to the Commission was that she did not feel there was an issue with any perceived or other type of conflict because Mr Snowden was her predecessor and had retired from the public service, Ms Cubin and Mr Snowden had disclosed their relationship in 2018, years before the events subject of this investigation, it was well known at high levels of Government that Ms Cubin and Mr Snowden were (and are) in a de facto relationship, and she did not take on a role in respect of the decisions made with regard to 86 Candles Pty Ltd, Pink Frosting or Mrs Curtis.
63. It is important to understand the role undertaken by Ms Cubin following her appointment as Commissioner. About 10 days after her appointment on 21 January 2021, she suffered a family tragedy that entailed a need for leave for six or so weeks. She then returned to work on reduced duties which did not involve the responsibilities of the Commissioner's position but, rather, in relation to another matter related to transport licensing. She then took some further leave towards the end of June and returned to work on 1 July 2021. She said that, apart from being aware of the Pink Frosting matter from informal conversations or from having been copied into emails, the first time it was raised with her in her role as Commissioner was in early July 2021. She had not previously had any occasion as Commissioner to consider the propriety or probity of any of the decisions made or conduct undertaken in relation to the matter.
64. The arrangements for the meeting of 6 July were made whilst Ms Cubin was on leave by the solicitor and the relevant A/EBM at Access Canberra. It was the A/EBM who suggested (by email to the solicitor on 24 June 2021) "It would be good if the Commissioner for Fair Trading could attend the meeting." Ms Cubin understood that the purpose of the meeting was to try to clarify what claims or basis for any claims were being suggested. Ms Cubin said, in effect, that, before the meeting, she was not asked about the matter by the solicitor and was not briefed about it by her, except that its purpose was to ascertain what the issues were. There was no expectation that Ms Cubin would provide any input.



65. It is convenient to note at this point that, in response to the Commission's Proposed Report, lawyers for Mrs Curtis brought to the attention of the Commission numerous documents previously provided to their client in the context of the aforementioned proceedings. Those documents included emails, relating to dealings by Access Canberra with 86 Candles and Mrs Curtis, which appeared to have been sent either directly or by way of copied inclusion to Ms Cubin, to some of which she had responded. The Commission put the material (and other communications gathered under summons) to her directly, and conducted further examinations of several authors and recipients of the additional documents, namely the Executive Branch Manager, Fair Trading and Compliance from early 2021, the Director of the Investigation Enforcement Team from 2019 to 2021 and the Director of Investigations with the Fair Trading Branch of Access Canberra from January 2021.
66. Under examination the three witness were provided with copies of all the emails (including attachments) that they had exchanged with Ms Cubin, either as an action addressee or copied recipient during the entirety of their involvement in the Pink Frosting matter. Each was questioned in general terms about their role in the Pink Frosting matter, and more specifically about their understanding of Ms Cubin's role. I am satisfied that their evidence was candid and as reliable as it could be, bearing in mind that the events had occurred some years previously. While they often spoke in general terms of what they may have, or would have done, rather than being able to recollect what had actually occurred, the substance of their evidence was that they had kept Ms Cubin "in the loop" (because of her earlier position as investigator (in other matters) and gaps in resourcing) about the Pink Frosting matter in her relevant managerial capacity. She had only limited input into the matter, and they discounted the suggestion that she was responsible for any decision making in relation to it. The one exception was that, when the Director of the IE Team had decided to close out the matter, and attempt to resolve it with an enforceable undertaking (which did not proceed, as explained above), he made this suggestion to Ms Cubin, who approved, with, as the Director said, "that decision as the statutory office holder ...[to] ultimately rest with the Commissioner". She gave no directions.
67. For her part, Ms Cubin's own information provided to the Commission, both under examination and subsequently voluntarily in 2024, and in response to having the bundle of additional materials brought (back) to her attention recently, was consistent throughout. She acknowledges that she did, on some occasions, "approve material for internal escalation, and coordinated the internal collation of information on the Pink Frosting matter to enable urgent timeframes to be met at times when the responsible EBM was not



available. These timeframes were in the context of responses to the Minister's office, including responses to emails concerning media enquiries and questions taken on notice. Ms Cubin's involvement in that sense was "peripheral." She does not recall engaging in any depth in relation to that material, rather she ensured it was provided to those with responsibility to deal with it.

68. Similarly, as a senior member of staff within Access Canberra, Ms Cubin was required to attend regular meetings of senior Access Canberra staff, during which high level updates were occasionally provided on the compliance and investigation activities undertaken by Access Canberra. She says updates would have included the Pink Frosting matter on some occasions, though she told the Commission she does not now recall any specific discussions in those meetings regarding the matter. Ms Cubin also acknowledged that she received meeting papers for the Regulatory Complaints Assessment Committee, which were included in the material from Mrs Curtis' lawyers, but confirmed that she did not attend the meetings and that the papers were provided to her for her awareness only.
69. Considering both the documentary material and the evidence to which I have referred, I am satisfied that Ms Cubin's evidence should be accepted, that the information she may have had in relation to the Pink Frosting matter was peripheral and that it was not part of her role to engage with that material in any substantive way, for example by providing any direction or substantive advice in relation to the conduct of the investigation of 86 Candles or exercising any influential decision-making authority in relation to it. At all events, there is no proper basis for finding that, in exercising her *ad hoc* role, she was involved in any conflict of interest that arose out of her relationship with Mr Snowden.
70. The following evidence was given regarding Ms Cubin's own perception about a potential conflict of interest arising from her attendance at the July 2021 meeting.

COUNSEL ASSISTING: At the time in the meeting did you turn your mind to whether or not there may have been a conflict of interest?

COMMISSIONER: In the sense of someone perceiving –

COUNSEL ASSISTING: Q. That's right. Not in terms of there being an actual one, because you have indicated that you were just a witness in this meeting, but did you turn your mind to whether or not there could be a perceived conflict of interest in these circumstances? --- A. No. I think because as noted before, I was in the presence of the Government Solicitor and I was representing the Territory and did not consider that any claims would be against - in a personal context as opposed to the office or the actions of Access Canberra or the Commissioner.



...

COMMISSIONER: Q. What we are looking at is did it occur to you that there might be a problem? --- A. Not at – not in the meeting.

71. Of particular significance is the fact that Ms Cubin was not involved in nor did she make any decision at all in connexion with the meeting with Mrs Curtis or any matter that arose in the meeting.
72. The solicitor says that Ms Cubin did not play a substantive role in this meeting, with most discussion taking place between the solicitor and Mrs Curtis' lawyer. Ms Cubin did not provide instructions in relation to the conduct of the meeting nor in relation to the direction or general strategy of the 86 Candles matter, these being taken from the ACT Insurance Authority and the relevant A/EBM from Access Canberra. However, her presence was not entirely without significance. According to the solicitor, it was 'to demonstrate to Mrs Curtis that Access Canberra and the Territory were taking Mrs Curtis seriously ... [and] Ms Cubin made occasional statements to reflect this position'. In comments on the Proposed Report Mrs Curtis referred to the fact that the solicitor stated in some of her letters to her (Mrs Curtis') lawyers that she had instructions from "the Commissioner for Fair Trading", using the pronoun "she", suggesting that this proved Ms Cubin's active involvement. However, I am satisfied that this merely reflected common practice that various functionaries may exercise delegated authority for and in the name of their principal. Whilst it is technically correct that the entity from which the solicitor's instructions formally emanated was the Commissioner, who happened at that time to be female, in fact it was one or more other individuals with carriage of the matter who were taking relevant steps including the provision of instructions to the lawyers. The solicitor's adoption of conventional lawyer's usage provides no basis for concluding that her evidence that she was not actually being instructed by Ms Cubin should not be accepted.
73. As it happened, the solicitor had been aware for some time of the relationship between Mr Snowden and Ms Cubin but said, in effect, (as mentioned above) that it did not occur to her to consider, in connexion with the meeting, whether there might be a conflict of interest or a perceived conflict as she understood that, as at that stage, no particular allegation against Mr Snowden had been articulated and the prospect of a claim being brought against Mr Snowden personally, was not on the table. (The proceedings commenced in the ACAT on 4 November 2021 against Mr Snowden and a member of staff of Access Canberra personally sought relief substantially different to that sought in the May 2021 letter.



As is earlier discussed, at that point, Ms Cubin and Access Canberra took steps to address the potential conflict.)

74. Although the solicitor did not understand that any claims – clarification of which was the purpose of the meeting – were being made against Mr Snowden personally, it was clear enough from the meeting of 25 November 2020 (which the solicitor had not attended, however) and with greater clarity from the letter of 27 May 2021 that the conduct of the investigation, for which Mr Snowden was responsible as the then Commissioner, was very much in issue and subject to significant (though in some respects obscure and quite possibly unjustified) criticism, whether or not it distinguished between his personal or official capacity. Though her participation in the meeting was minimal, Ms Cubin’s assurances during the meeting, as the succeeding Commissioner, to the effect that Mrs Curtis’ complaints were being taken seriously, implied that she had or would have a role of some kind in dealing with them. It was thus not unreasonable for Mrs Curtis, when she later discovered that Mr Snowden and Ms Cubin were in a relationship, to have perceived that Ms Cubin was (or may have been) conflicted in relation to any involvement in the dispute involving the former. It was unfortunate that this potential problem was not foreseen. It could then have been addressed by not having Ms Cubin present or giving Mrs Curtis an assurance that Ms Cubin was there only to demonstrate that her complaints were being taken seriously but she (Ms Cubin) would have nothing to do with the matter. Either course would have removed any just cause of complaint on Mrs Curtis’ part. At all events, following the meeting, Ms Cubin played no role in dealing with the dispute. When Mrs Curtis commenced proceedings, Ms Cubin (then Commissioner) submitted a further conflict of interest form and continued her separation from dealing with the matter.
75. This investigation was instigated by the allegation that there was some impropriety or conflict in Ms Cubin being present as Commissioner in without prejudice discussions about a dispute which involved decisions made by her predecessor and de facto partner.
76. Ms Cubin was not conflicted out of mere attendance at the meeting by virtue only of her relationship with the previous Commissioner or her previous involvement in the matter. There was no reason in principle why she should not be made aware of the claims that were being made. It was not expected that she would express any opinion or give any indications about what should be done – except for assuring Mrs Curtis that the matter was being treated seriously, which was entirely innocuous.



77. The Commissioner acts in an independent statutory position and there is no evidence of impropriety in Ms Cubin's dealing with the present matter. She disclosed her relationship on a number of occasions, the solicitor representing the ACT Government was aware of her relationship at the relevant times and, except to manage the risk of a potential perception of conflict of interest (as indicated above) there was no obligation on her to disclose her relationship during the meeting. Ms Cubin's previous declarations of personal interest and potential conflicts of interest demonstrate an awareness of and appropriate response to her obligations. Each of these disclosures was reviewed by Ms Cubin's supervisor, Mr Pryce, with subsequent controls being put in place.
78. Mr Snowden had been involved in the disputed matters prior to his leaving the ACT Public Service, having authorised and been administratively responsible for the investigation. There was, however, little to no involvement by Ms Cubin in preparation for or attendance at the July 2021 meeting. The solicitor from GSO, who had knowledge of the relationship between Ms Cubin and Mr Snowden and had direct involvement in these processes had not contemplated the possibility of any perception of a conflict on Mrs Curtis' part, and therefore had not advised Ms Cubin about the potential for there to be a problem in this regard. From the government's point of view, there was no basis for suspecting that the relationship between Ms Cubin and Mr Snowden impacted, or could be perceived to have impacted, any decisions made in respect of the matter. It would have been advisable for Ms Cubin to have informed Mrs Curtis of her relationship with Mr Snowden at the outset of the meeting. However, I accept that this was an oversight and, since the omission could by no means amount even to a suspicion of corrupt conduct, is not a matter that calls for further comment.
79. The development of a standard operating procedure that Ms Cubin not be involved with the matters involving Mrs Curtis was appropriate, given the reasonable perception of potential conflict held by Mrs Curtis, and was a reasonable response to the management of the potential for conflict (by removing any occasion for it to be relevant).



Findings

80. Although any decision actually made by Ms Cubin as to the propriety of Mr Snowden's decisions – namely for present purposes, those connected with Pink Frosting and Mrs Curtis' complaints about how the investigation was conducted and the various communications with the media – could reasonably have been regarded as affected by apprehended bias arising from a conflict of interest, the evidence is that no such decision was made. There was peripheral involvement in managing the investigation but, again, no decisions capable of being affected by a conflict of interest were made. I have already referred to that which excluded her from involvement in the dispute with Mrs Curtis once the litigation commenced.
81. When Ms Cubin became Commissioner, again she was not involved in any decision-making relating to the relevant dispute. At that point it may have been appropriate to have made a conflict of interest declaration that dealt with any potential conflicts that might have arisen if Ms Cubin needed to consider Mr Snowden's decisions. However, there is nothing disclosed in the course of this investigation that requires The Commission to consider the probity of the arrangements put in place more generally than those connected with the subject matter of the complaint. There is no evidence that might suggest a reasonable suspicion of any corrupt conduct that could justify a more wide-ranging inquiry and I do not propose to exercise the Commission's powers under s 101 of the Act to instigate one.
82. The circumstances of the meeting of 6 July 2021 do not give rise in any way to corrupt conduct and it is unnecessary to make any further comment about the matter except to emphasise that none of the individuals mentioned in this report has been the subject of a finding of corrupt conduct.