

OPERATION KURUMBA

SUPPLEMENTARY REPORT TO PARLIAMENT PURSUANT
TO SECTION 132 *LAW ENFORCEMENT CONDUCT
COMMISSION ACT 2016*

December 2022

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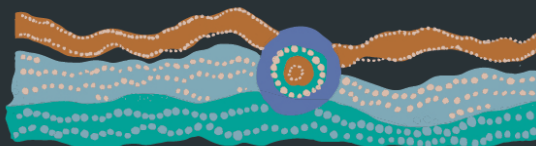
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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



Office of the Chief Commissioner

13 December 2022

The Hon Matthew Ryan Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O’Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Supplementary Report in Operation Kurumba

In accordance with section 132(3) of the *Law Enforcement Conduct Commission Act 2016* (‘the Act’), the Commission hereby furnishes to you a Supplementary Report in relation to its investigation in Operation Kurumba.

Pursuant to section 142(2) of the Act, the Commission recommends that this Supplementary Report be made public immediately.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Peter Johnson', with a long horizontal flourish extending to the right.

The Hon Peter Johnson SC
Chief Commissioner

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1. Introduction

- 1.1 The Law Enforcement Conduct Commission's ('the Commission'), Operation Kurumba, arose from media reports relating to the former Commissioner of Police, Michael Fuller. The allegations made in the media regarding Mr Fuller related to his ownership of shares in a number of racehorses, and the awarding of a catering contract.
- 1.2 In the course of the Commission's investigation, a private examination of Mr Fuller was conducted. On 15 March 2022, the Commission tabled in Parliament its report in Operation Kurumba ('the Kurumba Report'), pursuant to s 132 of the *Law Enforcement Conduct Commission Act 2016* ('the LECC Act').
- 1.3 Subsequently, the Commission was notified on 11 July 2022 by the Inspector of the Law Enforcement Conduct Commission ('the Inspector') that his office had received from the Australian Broadcasting Corporation ('ABC'), a letter which raised a number of concerns regarding the Commission's investigation and reporting in Operation Kurumba and a related investigation, Operation Kainite.
- 1.4 Operation Kainite involved an investigation by the Commission in regard to the awarding and renewal of a catering contract by the NSW Police Force ('NSWPF') to Ozmart Catering Group Pty Ltd in 2012 and 2017, and resulted in a report being tabled in Parliament pursuant to s 132 of the LECC Act on 15 March 2022.
- 1.5 Correspondence passed between the Commission and the Inspector between 11 July 2022 and 24 August 2022. On 24 August 2022, the Inspector informed the Commission that, following a review, he concluded that there were no valid criticisms of the report in Operation Kainite, nor of the Kurumba Report in regard to Mr Fuller's involvement in the awarding of the NSWPF catering contracts.

1.6 The Inspector did however raise a number of concerns regarding the Kurumba Report:

- (a) On 1 September 2015, the *Code of Ethics and Conduct for New South Wales Government Sector Employees*,¹ came into effect which required heads of organisations to submit an annual Declaration of Interest, to the Department of Premier and Cabinet, even if they considered they had no conflict to declare. The NSW Police Force Code of Conduct and Ethics required officers in the NSWPF above the rank of Superintendent to complete a Declaration of Interest. However, as observed in the Kurumba Report, the only Declarations of Interest submitted by Mr Fuller were in 2017 when he was appointed Commissioner of Police, and in 2021. However, the Kurumba Report's finding (expressed at paragraph 9.4) that the evidence 'does not support a finding of serious misconduct or any misconduct at all', appeared to be inconsistent with Mr Fuller's failure to complete Declarations of Interest between 2018 and 2020.
- (b) When Mr Fuller did complete a Declaration of Interest in 2021,² he ticked the box to say that he had no conflict of interest to declare. Completing the form in this way was arguably inconsistent with the obligations imposed upon police officers by the NSWPF *Procedures for Managing Conflicts of Interest*, which identifies three potential types of conflict of interest: actual, perceived or potential. Any of these types of conflict need to be declared. Furthermore, in the case of the Commissioner of Police, there is a requirement for that person to list any private financial business or personal interests or relationships which have the potential to influence, or could be perceived to influence decisions made, or advice which may be given, as outlined in the guidelines. Whilst the Kurumba Report at

¹ Exhibit JSN1.

² Exhibit QRX5C.

paragraph 9.2 addressed the issue of whether or not Mr Fuller had any *'actual conflict of interest'*, it did not appear to consider whether Mr Fuller's shares in racehorses may give rise to a *'perceived'* or *'potential'* conflict of interest with his duties as Police Commissioner.

- (c) Was it open to the Commission to conclude at paragraph 4 of the Kurumba Report that the evidence did not support a finding of any misconduct at all?
- (d) The Kurumba Report included comments suggesting that people hostile to Mr Fuller were malevolently attempting to cause him reputational harm and arguably that passage suggested that, knowingly or unknowingly, the ABC was party to the *'malevolent attempt'* to cause Mr Fuller harm. Two issues arose from this. Firstly, no adequate reasons were given for the Commission arriving at this conclusion. Secondly, the comments could be construed as an *'adverse comment'* within the meaning of s 143(1) of the LECC Act, and therefore, the journalists concerned should have been given the opportunity to be heard and make submissions before the report was tabled in Parliament.

1.7 In the correspondence between the Inspector and the Commission, the Commission had indicated on 27 July 2022 a preparedness to proceed by way of an addendum to the Kurumba Report. A decision was made by the Commission to extend its investigation in Operation Kurumba in order to deal with the issues that the Inspector had raised and that, upon its conclusion, a supplementary report would be tabled in Parliament. The Inspector was so informed on 6 September 2022.

1.8 On 29 September 2022, the Commission wrote to Mr Fuller, the Commissioner of Police and the ABC, outlining the Inspector's concerns, and the Commission's proposed course of action. Those parties were

invited to provide the Commission with written submissions on particular issues which it proposed to consider, together with any factual statements they considered necessary. Those letters appear at Appendix 1 to this Supplementary Report.

- 1.9 Before proceeding further, it is appropriate to refer to the statutory provisions and the legal principles which are relevant to this investigation.

2. **The Commission's statutory functions**

- 2.1 The relevant provisions of the LECC Act are set out in Appendix 2 to this Supplementary Report.
- 2.2 The Commission has had regard to the statutory provisions and legal principles referred to in Appendix 2 in the preparation of this Supplementary Report.
- 2.3 The statutory scheme under the LECC Act places limits upon the findings and opinions which the Commission can make, in particular when the Commission is considering whether "serious misconduct" has occurred. The more demanding statutory test for "serious misconduct" in s 10 LECC Act must be kept in mind.
- 2.4 Further, the Commission must not include in a report a finding or opinion that conduct was "officer misconduct" unless the conduct is "serious misconduct": s 29(6).
- 2.5 However, s 29(6) of the LECC Act does not preclude a finding or opinion about a person's conduct that may be capable of being "officer misconduct" as long as a finding or opinion is not made or expressed which describes the conduct as "officer misconduct". Findings may be made concerning the conduct of the person but the finding cannot utilise the statutory term mentioned in s 29(6).

3. The Commission's Investigation

- 3.1 The scope and purpose of the Commission's extended investigation was to address the following issues:
- (a) The failure by Mr Fuller to submit annually a Declaration of Interests in relation to his ownership of shares in racehorses, from the time he became Commissioner of Police in 2017 until his retirement from the NSWPF in 2022.
 - (b) In respect of Declarations of Interest submitted by Mr Fuller in 2017 and in 2021, the question whether his failure to disclose his ownership of shares in racehorses was inconsistent with the obligations imposed by the NSWPF policies for the handling of conflicts of interest.
 - (c) Whether it was open to the Commission to conclude, at paragraph 9.4 of the Kurumba Report, that the evidence did not support a finding of misconduct at all on the part of Mr Fuller.
 - (d) Based upon the material gathered in the course of its investigation, was it appropriate for the Commission to adversely criticise the 'media' in respect of articles written in relation to Mr Fuller, and if it was, should the ABC and its journalists have been given the opportunity to respond to such criticism prior to the tabling of the Kurumba Report in Parliament.
- 3.2 In conducting this further investigation, the Commission reviewed the material gathered in the course of the initial investigation in Operation Kurumba. This included a transcript of evidence given by Mr Fuller during a private examination on 3 March 2022. As Mr Fuller's evidence already provided a response to the issues identified in paragraphs 3.1(a), 3.1(b) and 3.1(c) of this Supplementary Report, the Commission concluded that no purpose would be served in having him recalled for further examination.

- 3.3 The issues for consideration regarding the conduct of Mr Fuller were of a narrow focus, and the Commission therefore concluded that its consideration of the initial investigation in Operation Kurumba would be appropriately dealt with by a review of the evidence given by Mr Fuller on 3 March 2022, the exhibits tendered in the course of his private examination, and further relevant documents including the policies of the NSWPF relating to the identification and management of officer conflicts of interest.
- 3.4 In response to the letters dated 29 September 2022 referred to in paragraph 1.8 above:
- (a) The ABC provided written submissions on the topic referred to in paragraph 1.6(d) above, concerning the criticism of the media made in the Kurumba Report;
 - (b) Mr Fuller made no additional submissions but indicated that submissions may be made by him after he had seen the draft Supplementary Report;
 - (c) The Commissioner of Police informed the Commission of steps taken since the Kurumba Report to ensure obligations are met under the relevant Directions requiring the completion of Annual Declarations of Interest.
- 3.5 In accordance with the indication given in the letters of 29 September 2022 (Appendix 1), each party was provided with the draft Supplementary Report on a confidential basis for the purpose of allowing an opportunity to make any further submissions to the Commission. This process was made confidential as it was an aid to parties to make written submissions by reference to the subject matter of the investigation. The Chief Commissioner gave a direction under s 176(1) of the LECC Act that the

draft Supplementary Report was not to be disclosed to any person except for the purpose of preparation of written submissions. At times, the Commission has adopted the practice of supplying a draft report to interested persons to provide procedural fairness to those persons and this practice operates as an important safeguard to ensure fairness and accuracy in the final published report.³

3.6 Written submissions were made by Mr Fuller and the ABC with respect to the draft Supplementary Report and those submissions have been taken into account by the Commission in finalising the Supplementary Report.

4. **Michael Fuller’s ownership of racehorses and his association with racehorse syndicate members and others in the horseracing industry**

4.1 The evidence given by Mr Fuller during his private examination did not give rise to any areas of dispute or controversy. In regard to his ownership of racehorses and his associates, this is set out in paragraphs 6 and 7 of the Kurumba Report of March 2022. Although this extended investigation is only examining Mr Fuller’s involvement in horseracing syndicates from the time that he became Commissioner of Police in April 2017, by way of background in this Supplementary Report, it is useful to provide a summary of his involvement in horseracing syndicates overall. In doing so, other persons will not be mentioned by name. It is not necessary to do so for the purpose of the Supplementary Report.

Racehorse Syndicates

4.2 (a) In December 2012 Mr Fuller was a member of a “punters club”, which was comprised of four friends from school, together with three serving police officers. The “punters club” purchased shares in the racehorse ‘Lime Burner Lola’. The horse raced a couple of

³ *Independent Broad-based Anti-Corruption Commission v The Age Company Ltd* [2022] VSC 678 at [8].

times before it was retired and sold in July 2014. According to Mr Fuller, the horse *'didn't amount to much'*.

- (b) In May 2014, the same group of people purchased shares in the racehorse 'Half a Danish', but the horse never raced and was sold.
- (c) On 11 June 2015, a racehorse syndicate of which Mr Fuller was a member, purchased the racehorse 'Mad Magic'. The syndicate comprised 14 individuals. Mr Fuller's actual share in the horse was 5%. The horse was raced but in early 2017, before Mr Fuller was appointed Commissioner of Police, the horse broke its leg and had to be destroyed.
- (d) On 26 November 2019, a syndicate, which comprised of 17 individuals, including Mr Fuller, purchased through the trainer of 'Mad Magic', the racehorse 'Once Epona Time'. Mr Fuller's actual ownership in the horse was 2%. In giving evidence, Mr Fuller said that he was not sure if this horse ever raced. The horse was on-sold on 10 December 2020. This was the last racehorse in which Mr Fuller owned a share.

Associates of Mr Fuller

- 4.3 (a) Media articles in February of 2022 identified by name three persons, with the inference being (at least) that Mr Fuller's association with those persons, as part of a horseracing syndicate, was capable of giving rise to a perceived or potential conflict of interest.
- (b) Mr Fuller, together with two of the named individuals and 11 others, were members of the syndicate that owned the racehorse, 'Mad Magic'. A further named person was the trainer of horses 'Mad Magic' and 'Once Epona Time'.

- (c) In March 2022, Mr Fuller gave evidence before the Commission in regard to his association with those three persons.
- (d) The Commission was satisfied there was nothing inappropriate in regard to Mr Fuller's association with one of those persons who, in 2012, was the successful tenderer to provide catering to NSWPF at functions. This contract was renewed in 2017. Mr Fuller's contact with that person was limited to meetings at these events, and whilst known to each other, they were not close friends.
- (e) In regard to Mr Fuller's association with another of those persons, the Commission was made aware that person had been investigated in 2016 for fraud, but that he had never been charged with having committed an offence. The Commission accepted evidence from Mr Fuller that he was not aware of any allegations of wrongdoing against that person until he read the ABC article in February 2022. Mr Fuller said that he only met that person on two or three occasions socially, and had had no interest in developing a friendship with him.
- (f) According to Mr Fuller's evidence, his association with the trainer was limited to one or two meetings. He said that until the publication of the ABC article, he was not aware of any horse doping allegations against the trainer or any illegal practices.

5. **Submission of Conflict of Interest Declarations by Mr Fuller during his time as Commissioner of Police**

- 5.1 Mr Fuller was appointed Commissioner of Police on 3 April 2017, and maintained that rank until his retirement from the NSWPF on 9 January 2022.
- 5.2 During this period Mr Fuller had a share in one racehorse, 'Once Epona Time' (26 November 2019 – 10 December 2020). He also had a share in the racehorse 'Mad Magic' (June 2015 – until early 2017), prior to being appointed Commissioner.
- 5.3 A Declaration of Interests was submitted by Mr Fuller on 31 May 2021.⁴ Although not produced by the NSWPF, Mr Fuller gave evidence that he completed a Declaration in 2017 as part of his appointment process for the position of Commissioner of Police. In respect of the Declaration completed in 2021, Mr Fuller stated that he had no private interests to declare. In relation to the Declaration Mr Fuller believed that he completed in 2017, he said in his evidence that he did not say anything about his interest in racehorses.
- 5.4 As disclosed in paragraph 8.1 of the Kurumba Report, in 2019, Mr Fuller verbally informed the then Minister for Police, Mr David Elliott, that he had a part ownership in a racehorse. According to Mr Fuller, the reason for this was not because of any policy requirement, but because he occupied a high profile position, and he felt it was the right thing to do. In his evidence to the Commission, Mr Fuller said that the Minister said to him that he (Fuller) was 'entitled to a 'hobby'.' The Commission sought confirmation of this account from the Minister and it received a letter from Mr Elliott which acknowledged his discussion with Mr Fuller in 2019, and that he said to Mr Fuller that he was entitled to a 'hobby', or words to that effect.⁵

⁴ Exhibit QRX5C.

⁵ Exhibit QRX1C.

- 5.5 Through the Commission’s inquiries it was able to confirm that, in 2019, Mr Fuller had an interest in only one racehorse, that being ‘Once Epona Time’.
- 5.6 The Kurumba Report referred to an obligation imposed upon Mr Fuller, as Commissioner of Police, to submit an annual Declaration of Interests,⁶ and noted that in his evidence Mr Fuller said that he may have failed to comply with this obligation. The source of this ‘obligation’ is more fully considered later in this Supplementary Report. However, the Kurumba Report did not address Mr Fuller’s failure to disclose his racehorse ownership in the Declarations that he did submit in 2017 and 2021, other than to find that there *‘was no lack of care or any actual conflict of interests with his duties as Police Commissioner.’*⁷
- 5.7 In regard to NSWPF policies concerning disclosure and his compliance, Mr Fuller said in his evidence that his interest in horseracing syndicates was a ‘hobby’, and he went on to say:

‘Have I breached policy? Have I got it right every time? No, probably I haven’t. Have I submitted every piece of paperwork on time? Perhaps I haven’t. But at no time, even [on] reflection, do I look at the way I handled myself with this and feel that I have breached policy or let people down the people of New South Wales in terms of the decisions that, you know, I made to enter these syndicates, and the way that I have dealt with not just horseracing syndicates, but the lunches I go to, the dinners I go to, the people I stand next to in photos, the community events, you know, I have always acted with the highest ethical standards. I’m not suggesting to you sir, that I’ve got everything right.’

6. Conflicts of Interest

- 6.1 Conflicts of interest on the part of public officials generally arise where there is the risk of tension between the public interest and the private interest of the person. Assessment of conflicts of interest occurs in many settings and requires an understanding of the public functions of the

⁶ Kurumba Report, paragraph 8.4.

⁷ Kurumba Report, paragraph 9.2.

person in question, the context in which those functions are carried out and the nature of the private interest which requires consideration.

- 6.2 Factual matters relevant to Mr Fuller were summarised earlier at Parts 4 and 5 of the Supplementary Report.

Conflicts of Interest in a Policing Context

- 6.3 For present purposes, the relevant public position is that of a senior member of the NSWPF including as Commissioner of Police. The mission and function of the NSWPF are set out in s 6 *Police Act 1990*. Each member of the NSWPF is to act in accordance with the statement of values in s 7 *Police Act 1990* including placing integrity above all (s 7(a)) and upholding the rule of law (s 7(b)). The Commissioner of Police is responsible for the management and control of the NSWPF and the Commissioner's responsibility includes the effective, efficient and economical management of the functions and activities of the NSWPF: s 8 *Police Act 1990*. Clause 7 of the NSWPF Code of Conduct and Ethics requires employees of the NSWPF to take "reasonable steps to avoid conflicts of interest, report those that cannot be avoided, and co-operate in their management".
- 6.4 Given the important powers and functions of members of the NSWPF, express provision is made concerning conflicts of interest: *NSWPF Procedures for Managing Conflicts of Interest, Professional Standards Command, February 2016*⁸ (the 2016 Policy). The 2016 Policy is essentially the same (with some different paragraph numbering) as the later version issued in December 2019⁹ (the 2019 Policy).
- 6.5 Clause 5.1 of the 2016 Policy defines "conflict of interest" in the following way:

⁸ Exhibit JSN3.

⁹ Exhibit JSN4.

“5.1 What is a conflict of interest?”

Conflicts of interest occur when the private interests of a NSW Police Force employee interferes with or influences, or appears to interfere with or influence their official duties and responsibilities.

A conflict of interest can involve gaining a personal advantage as well as avoiding or minimising personal disadvantage. That is, a conflict of interest may allow you to avoid a loss, expense, or something else that has a negative impact on your personal or private interests.

Where a conflict of interest arises, you are required to put the public interest before your private interests, whether on or off duty.”

- 6.6 Clauses 5.2 and 5.3 of the 2016 Policy define “public interest” and “private interest” as follows:

“5.2 Public Interest

As a NSW Police Force employee, you have a public duty to always put the public interest above your own personal or private interests when carrying out your official duties and responsibilities, or when a conflict that is related to your employment arises when you are on or off duty.

Acting in the public interest means you must carry out official duties and responsibilities for the benefit of the public, in a fair and unbiased way, make decisions that are not affected by self-interest, personal values, private opinions, private affiliations or the likelihood of personal gain or loss.

5.3 Private interest

Private interest is broadly defined as anything personal in your private life that impacts on you. It is only relevant to this policy where there is a connection to your official duties.

Private interests can include your social, community, professional and business interests and those of the people and groups with which you associate (including friends, relatives, associations / businesses, community groups, rivals and enemies).”

- 6.7 Clauses 5.4 to 5.6 of the 2016 Policy make provision with respect to “pecuniary (financial) interests”, “non-pecuniary (non-financial) interests” and “official duties and responsibilities”.

6.8 Clause 5.7 of the 2016 Policy provides an expanded classification of actual, perceived and potential conflicts of interest:

“5.7 Types of conflicts of interest

There are three main types of conflicts of interest: actual, perceived and potential. Each of these presents the same personal and organisational risks and therefore need to be managed appropriately. If you are unsure if a conflict exists, you should discuss the matter with your commander / manager.

Actual conflict of interest	Perceived conflict of interest	Potential conflict of interest
Where a conflict exists between your official duties or responsibilities and your private interests.	Where it could be seen by others that your private interests could improperly interfere with or influence you in the performance of your official duties or responsibilities, whether or not this is in fact the case.	Where your private interests could interfere with or influence your official duties or responsibilities in the future.”

6.9 Clause 7 provides examples of conflicts of interest including “secondary employment” and “declarable associations” (as defined in clause 6.2).

6.10 Clause 8 provides examples of “high risk” situations which may result in conflicts of interest.

6.11 Clause 9.1 concerns identification of conflicts of interest. In this respect, clause 9.2 states:

“9.2 Consider the perceptions of others

The hardest conflict of interest to recognise is often your own and therefore you might not always find it easy to identify. You might make the mistake of assuming that you do not have a conflict of interest unless you

have an actual conflict of interest. This could mean that the conflict of interest will not be managed until it has become a problem.

Perceived and **potential** conflicts of interest are often characterised by other people's opinions or perceptions. If a conflict of interest has not been identified and managed, the perceptions of others can cast doubt on the integrity of individuals and the NSW Police Force **even if there has not been misconduct**. Such situations are more difficult to manage in crisis (for example, where there is high media interest). It is therefore necessary for the NSW Police Force to implement strategies for dealing with the conflict of interest in advance.

To identify conflicts of interest, ask yourself the following questions.

- Could a member of the public reasonably consider / perceive a conflict in the circumstances?
- Given my personal interests, could my involvement cast doubt on my integrity / duties / decision making or impact in any way on the reputation of the NSW Police Force?
- Could my decision appear to have been biased in favour of another person?
- If I participate, would I be happy if other NSW Police Force employees and the public became aware of my involvement and any associations / connections I have?
- Could I justify my actions if they were criticised in the media?
- Do I benefit, or appear to benefit, personally or on behalf of others from my decisions or actions?"

6.12 Appendix 1 to the 2016 Policy contains a form entitled "Declaration of Interests – Senior Executive" and Appendix 2 is headed "Declaration of Interests – Commissioner of Police."

6.13 The 2016 Policy makes reference to the Code of Ethics and Conduct for NSW Government Sector Employees issued as Public Service Commissioner Direction No 1 of 2015 on 20 April 2015 (the 2015 Code of Ethics) which took effect from 1 September 2015.¹⁰ Schedule 1 confirms that the 2015 Code of Ethics applies to the NSWPF as a separate public service agency with the Commissioner of Police as agency head. The Kurumba Report (at paragraphs 8.3-8.4) stated that the 2015 Code of Ethics applied to Mr Fuller as agency head. However, the 2015 Code of

¹⁰ Exhibit JSN1.

Ethics applied only to employees of an agency and not statutory officeholders. A direction seeking to impose requirements under the 2015 Code of Ethics on statutory officeholders would go beyond the scope of s 13 of the *Government Sector Employees Act 2013*. However, the 2015 Code of Ethics provided for statutory officers to “accept coverage voluntarily”:¹¹

“As at the date of publication of the Code, all heads of Separate Public Service Agencies are statutory officeholders, not employees of their agencies, and therefore are not covered by the Code. Nevertheless, they are invited to accept coverage voluntarily.”

6.14 Accordingly, it appears appropriate to qualify what was said in the Kurumba Report by reference to the 2015 Code of Ethics, which did not itself create an obligation upon the Commissioner of Police to file a declaration. The 2015 Code of Ethics has been replaced (in largely similar terms) by the 2022 Code of Ethics issued as Public Service Commissioner Direction No 2 of 2022 on 19 August 2022 to operate from 1 November 2022.¹² The 2022 Code of Ethics has been amended to clarify its application to statutory officeholders.

6.15 However, it is necessary to read together parts of the 2015 Code of Ethics and the 2016 Policy. It may be seen that the 2016 Policy adopts some of the procedures in the 2015 Code of Ethics so that parts of the 2015 Code of Ethics are made to apply to senior NSWPF officers including the Commissioner of Police. The 2015 Code of Ethics provided,¹³ *inter alia*, that ‘senior executives’ must make a written declaration at least annually, of their private, financial, business, personal or other relationships that have the potential to influence, or could be perceived to influence, decisions made or advice given by them. This requirement was repeated in the 2016 Policy under the heading ‘Additional requirements for Senior Executives’.¹⁴

¹¹ *Ibid.*

¹² Exhibit JSN2.

¹³ Exhibit JSN1 (pp 17-18).

¹⁴ Exhibit JSN3.

A 'senior executive' is defined in s 32(3) of the *Police Act 1990* NSW as officers holding the rank of Deputy Commissioner and Assistant Commissioner. Section 32(2) states specifically that the Commissioner is not a 'senior executive'. Accordingly, as the Commissioner is not a 'senior executive' of the NSWPF, Mr Fuller was not required under the 2015 Code of Ethics to submit a Declaration of Interests annually. However, this appears to have been foreshadowed when the 2016 Policy was being drafted by the NSWPF, since footnote no. 1 (which appears on page 18 of the 2016 Policy) provides:

“The Commissioner of Police is required to make a declaration to the Secretary, Department of Premier and Cabinet in accordance with these Guidelines. References to “senior executives” in the Guidelines apply to the Commissioner unless the requirement is irrelevant to the office of the Commissioner.”

Therefore, whilst Mr Fuller was not required under the 2015 Code of Ethics to submit a Declaration of Interests, there is an obligation to do so under the 2016 Policy.

6.16 To the extent that it may have any broader relevance to the issue of conflict of interest, the following observations are made about the 2015 Code of Ethics. Amongst the core values of the 2015 Code of Ethics, under the heading “Integrity”, was “place the public interest over personal interest”.¹⁵ A mandatory requirement for all managers and executives was to “ensure that any real or perceived conflicts of interests are avoided or effectively managed”.¹⁶

6.17 The 2015 Code of Ethics addressed the management of conflicts of interest:¹⁷

¹⁵ Exhibit JSN1 (page 52; clause 2.2).

¹⁶ *Ibid* (page 53, Clause 2.2).

¹⁷ *Ibid* (page 54, clause 2.2).

“How do I manage conflicts of interests?”

Sometimes you may find that your private interests make it difficult for you to perform your duties impartially in the public interest. This may happen when there is a direct conflict between your current duties and responsibilities and your private interests (an ‘actual’ conflict of interests); when a person could reasonably perceive that your private interests are likely to improperly influence the performance of your official duties, whether or not this is in fact the case (a ‘reasonably perceived’ conflict of interests); or when you have a private interest that could conflict with your official duties in the future (a ‘potential’ conflict of interests). Actions you should take include:

- Always disclose actual, potential or reasonably perceived conflicts of interests to your manager as soon as you become aware of the conflict
- Where a conflict of interests occurs it should always be resolved in favour of the public interest, rather than your own.”

6.18 As is clear, the classification of conflicts of interest in the 2015 Code of Ethics and the 2016 Policy extends beyond actual conflicts of interest to encompass perceived and potential conflicts as well.

Importance of an objective test in identifying conflicts of interest

6.19 It may be seen that the 2015 Code of Ethics and the 2016 Policy pick up some features of the test for reasonable apprehension of bias when an application is made to a judicial officer to disqualify themselves from hearing a case. The test for actual bias is a subjective one where the actual state of mind of the judicial officer is in issue. The test for apprehended bias is an objective one where the focus is on the apprehension of the bystander. The test is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.¹⁸

6.20 It has been said that, as the apprehended bias rule is concerned with appearance of bias, and not the actuality, it is the perception of the

¹⁸ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at [6].

bystander that provides the yardstick – it is the public’s perception of neutrality with which the rule is concerned.¹⁹

6.21 The High Court has stressed that the principles developed for the courts and judges cannot be automatically transposed to other decision-makers, although the rule is not a strict one that is weakened or softened outside the courts but varies in its application due to the type of each decision-maker.²⁰ It has been said that the rule applies to judges, juries, administrative officials and elected officials in their decision-making (although its content can vary in these differing contexts).²¹

6.22 It will be apparent from clauses 5.1, 5.7 and 9.2 of the 2016 Policy (set out at paragraphs 6.5, 6.8 and 6.11 above) that the explanation provided by the Courts concerning reasonable apprehension of bias assists in the present context as well.

6.23 A helpful description of issues pertinent to conflicts of interest in a policing and public sector context was provided by Gordon Boyce and Cindy Davids:²²

“There is a distinction between conflict of interest and other forms of official wrong-doing, even though the two are related. Many studies of this issue do not clearly or unambiguously distinguish the underlying problem of conflict from its manifestations in breaches or other neglects of official duty. Although the latter may flow from conflicts of interest, they do not constitute the conflicts themselves (see Davids 2008; cf. Parker 1987). Thus there is a conceptual and practical distinction between (1) problematic or potentially problematic situations (conflicts of interest); (2) problematic actions (breaches or neglects of duty that flow from conflicts of interest); and (3) problems of perception or appearances of conflict of interest, judged using a ‘reasonable person’ standard (Davids 2008).

¹⁹ *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283; [2011] HCA 2 at [139].

²⁰ Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, Thomson Reuters, 6th Edition, 2017, paragraph [9.20].

²¹ Australian Law Reform Commission Report 138, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, December 2021, paragraph 3.6.

²² Boyce and Davids, *Conflict of Interest in Policing and the Public Sector*, (2009) Vol 11 Public Management Review 601 at 605.

The particular value of a clearly defined concept of conflict of interest is in tying these three elements together in a regulatory and management framework that draws attention to the capacity of private interests to affect performance of public duties. Such a capacity is prior to an actual breach of duty; thus, this idea adds to notions of public sector ethics, integrity, and social accountability by encompassing situations anterior to neglects of duty. The significance accorded to public perceptions in analysis of conflict of interest is a further dimension that distinguishes conflict of interest from many other public sector ethical problems.”

6.24 Boyce and Davids explained the practical operation of the reasonable observer test in the following way:²³

“The test to be applied is similar to the common law notion of the ‘reasonable person’ and is thus an objective standard on the basis of directly observable states rather than interpretations of perceived mental states. Difficulties associated with judging the ‘rightness’ of subjective decisions and the validity of subjective defences such as ‘I did not allow myself to be influenced...’ are obviated in applying this test. Although unreasonable or irrational perceptions cannot themselves be eliminated, if the known facts could lead a reasonable person to conclude that a conflict of interest exists, then the conflict of interest so perceived is a problem.”

Special NSWPF Provisions Restricting Involvement in Gaming and Racing

6.25 The present context involves a senior NSWPF Officer, who became Commissioner of Police, owning racehorses as part of a syndicate involving a number of persons. The factual details of Mr Fuller’s ownership of racehorses are summarised at Parts 4 and 5 of this Supplementary Report.

6.26 Involvement by serving members of the NSWPF in gaming and racing has received consideration in the context of secondary employment. In the *Final Report of the Royal Commission into the NSW Police Service, Volume II: Reform*, May 1997, Justice Wood said:²⁴

“3.288 While acknowledging that it is fair for police to have some opportunity for secondary employment, this Commission takes the view

²³ *Ibid* at pp 607-608.

²⁴ At page 292, paragraph 3.288.

that their role as a police officer must always remain paramount, whether on or off duty. In order to maintain the integrity of the Service, it would be wise to rule out secondary employment in those industries in which police also have a regulatory or law enforcement role, for example, commercial and private inquiry agents, transport, liquor, security and gaming and racing. A considerable range of part-time or casual work is left available, which can comfortably fit in with the shift work of police, and not interfere with their official duties.”

6.27 Recommendation 60 of the Royal Commission stated:²⁵

“Secondary Employment

Secondary employment be prohibited in those areas in which police have a regulatory role such as commercial and private inquiry agents, transport, liquor, security, gaming and racing (para 3.288).”

6.28 It appears that the NSWPF did not prohibit secondary employment in gaming and racing. Rather, gaming and racing were included as “high risk” industries for the purpose of applications for secondary employment.²⁶ A more intensive level of scrutiny was to be applied to applications by serving NSWPF officers to take up secondary employment in “high risk industries” including gaming and racing.

6.29 The “high risk” industry approach in approval of secondary employment appears to have had mixed success in the late 1990’s. However the Police Integrity Commission observed in its report to Parliament in Operation Saigon in June 2001:²⁷

“The Commission notes, however, that since the Operation Saigon investigation, secondary employment guidelines have been further restricted by the Police Service, in that the approval of the Regional Commander is required and a probity assessment risk/conflict analysis by Internal Affairs is required prior to approval being granted for secondary employment in the ‘high risk’ industries, such as the commercial and

²⁵ At page 544.

²⁶ Nadja Kirsch, *Misconduct risks associated with authorised secondary employment: A Review of Compliance with NSW Police Force Policies and Guidelines*, Police Integrity Commission Research and Issues Paper No 9, February 2014, paragraphs 4.1 and 5.2.

²⁷ Page vi of Executive Summary.

private enquiry agents, transport, liquor, security and gaming and racing industries.”

6.30 Throughout the period between 2016 and 2022, the relevant secondary employment policy was contained in *Secondary Employment Policy and Procedures* (issued on 1 January 2010) (‘Secondary Employment Policy’)²⁸ and an associated document entitled *Secondary Employment – Definition of High Risk Industries* (also issued on 1 January 2010).²⁹ Both of these policies are said by the NSWPF to be under review in 2022. The Secondary Employment Policy applies to all persons employed by the NSWPF with the exception of members of the NSWPF Senior Executive Service who can only undertake secondary employment with the explicit approval of the Commissioner of Police.³⁰

6.31 Clause 3.18 of the Secondary Employment Policy identifies a number of “high risk industries” including “gaming and racing”. Clause 3.19 states:

“3.19 Because it is considered to be high risk for the NSW Police Force, approval to engage in secondary employment will NOT be granted where:
a) there is clearly a conflict of interest between the role of the NSW Police Force and the operations of the secondary employer; or
b) there is a significant threat to the good reputation of the NSW Police Force.”

6.32 Clause 3.20 expands upon the meaning of “high risk employment” in the following way:

“3.20 High risk employment includes;
a) work in any industry
(i) that is regulated by, or licensed through, the NSW Police Force, such as the security industry; or
(ii) those in which an officer has statutory powers and obligations.
.....”

²⁸ Exhibit JSN5.

²⁹ Exhibit JSN6.

³⁰ Exhibit JSN5, Clause 1.

6.33 Clause 3.26 of the Secondary Employment Policy lists activities that do not require secondary employment approval including:

“f) Hobbies – applications are not required for hobbies or personal interest activities that generate an occasional income for the employee.”

6.34 Clause 6 of the *Secondary Employment – Definition of High Risk Industries* refers to “gaming and racing” in the following way:

“6 Gaming and Racing

a) any employment undertaken in the gaming and racing industries including activities associated with off course betting, on course betting, bookmaking, sports betting, public lotteries, Keno and the production/manufacture of gaming machines/equipment; and/or

b) any employment which involves duties for a company/business/commercial enterprise or as a self employed operator or training/consultancy within the gaming and racing industry.

Examples: Working as Clerk of the Course; attendants/bookmakers etc. at race meetings; selling gaming products such as Keno in registered clubs or licensed premises; selling gaming products such as Lotto, Powerball or lottery tickets as the agent appointed by a licensee under the provisions of the *Public Lotteries Act 1996* (i.e. the agent is the owner of the newsagency).”

The Horseracing Context

6.35 The rationale for inclusion of gaming and racing as “high risk” industries is understandable. The horse racing industry is heavily regulated under several statutes in NSW, including the *Thoroughbred Racing Act 1996* and the Rules of Racing NSW. The Powers of Racing NSW extend to registration or licensing of, amongst others, owners of racehorses: s 14(2)(b) *Thoroughbred Racing Act 1996*.

6.36 The Rules of Racing NSW are made under s 290 *Thoroughbred Racing Act 1996* which empowers Racing NSW to make rules, not inconsistent with the Act, for or with respect to the control and regulation of horse racing. Rules AR35 to AR44 of the Rules of Racing NSW concern horse

ownership, including a limitation on the number of persons who can own or race a horse³¹ and fitness and propriety restrictions on persons who can own or race a horse.³²

- 6.37 Further, the *Betting and Racing Act 1998* includes amongst its objects ensuring “the integrity of racing in the public interest” (s 3(a)) and minimising “the adverse social effects of lawful gambling” (s 3(c)). Amongst other things, the *Betting and Racing Act 1998* provides for the licensing of racecourses including, importantly, a provision (s 15B) whereby the Commissioner of Police may exclude persons from racecourses by way of exclusion orders. Part 4A of that Act relates to responsible gambling.
- 6.38 In addition, the *Unlawful Gambling Act 1998* provides for different forms of unlawful gambling where officers of the NSWPF may exercise powers. These include the powers of NSWPF officers to remove persons engaged in unlawful betting from a racecourse or other premises (s 38). Section 39 of the *Unlawful Gambling Act 1998* creates an offence of obstructing a NSWPF officer in the execution of duties under that Act and s 40 provides for the issue of a search warrant to a NSWPF officer with respect to relevant premises.
- 6.39 That these layers of regulation are required reflects upon the nature of the horse racing industry. There are enormous sums of money being wagered on the outcome of horse races. It is a matter of record that corrupt practices, including race fixing and betting offences, have occurred in the horse racing industry. Criminal activities of various types have been associated with the horse racing industry. Concern in this respect serves to explain the multi-faceted statutory scheme regulating the horse racing industry and betting by members of the public. The NSWPF is involved, in various ways, in the regulation and policing of the

³¹ Rule AR35.

³² Rule AR36A.

horse racing industry.

- 6.40 The high volume of media advertising which, for some years, has promoted betting outlets provides powerful contemporaneous evidence of the financial gain to be made by gaming outlets in promoting betting on horse races.

Conflict of Interest Arising From Ownership of Racehorses by NSWPF Officers

- 6.41 These features serve to reinforce the “high risk” nature of horse racing for the purpose of secondary employment by serving NSWPF officers. Consideration in this context extends beyond the interests of the individual NSWPF officer to protection of the reputation and integrity of the NSWPF itself. Maintenance of public trust in the NSWPF is of critical importance and this aspect weighs heavily in considering whether a perceived or potential conflict of interest arises.³³ It may be said that the risk of reputational harm to the NSWPF is elevated when senior officers of the NSWPF are involved in ownership of racehorses.
- 6.42 The reasoning behind the Secondary Employment Policy concerning gaming and racing as “high risk” industries applies as much to the conflict of interest policy where a senior police officer wishes to acquire ownership or part ownership of a racehorse.
- 6.43 It is not to the point that the officer may consider racehorse ownership as a “hobby”. The reference to “hobbies” as an exception to compliance with the secondary employment policy (see paragraph 6.33 above) does not assist in this context. The test to be applied is an objective one as to whether there is a perceived conflict of interest where a police officer (including a senior police officer) has a share in ownership of a racehorse or racehorses. For the officer to label that as a “hobby” (a term not used in

³³ Boyce and Davids, *Conflict of Interest in Policing and the Public Sector*, (2009) Vol 11 Public Management Review pp 633- 634.

the conflict of interest policy) is no substitute for application of the objective test for identification of a conflict of interest described earlier in this Supplementary Report.

- 6.44 Nor does it matter that the racehorse turns out to be unsuccessful so that no financial benefit is obtained.
- 6.45 It does not assist to compare the position of senior NSWPF officers with other categories of racehorse owners who lie outside the NSWPF. Those persons are not subject to the conflicts of interest and secondary employment policies which apply to NSWPF officers. Nor are they members of the NSWPF whose officers are empowered to carry out statutory regulation and enforcement functions which affect directly the racing industry.
- 6.46 There is no useful comparison either with situations such as ownership (solely or jointly) of a horse used for social horse riding or a motor vehicle or a boat. These circumstances are not associated with gaming and racing, let alone being subject to the close regulatory structure found in the *Thoroughbred Racing Act 1996*, the *Rules of Racing NSW*, the *Gaming and Betting Act 1998* and the *Unlawful Gambling Act 1998*.
- 6.47 The question to be considered is whether the ownership of a racehorse by a senior NSWPF officer is sufficient to trigger the low threshold for disclosure based upon perceived or potential conflict of interest. This question is not resolved by the officer stating that, in his or her view, there is no actual conflict of interest.
- 6.48 It is important to keep in mind that declaration of a perceived or potential conflict of interest is not an admission of wrongdoing. Rather, the disclosure process forms an important part of a transparent system applying to NSWPF officers where the interest is declared and is able to be assessed by a third party. This is an important step in circumstances

where the reputation of the NSWPF may be affected adversely, as well as the risk of the officer having contact or association with others in the racing industry which may expose the officer to a serious and direct conflict of interest. This may occur in a number of ways through association with persons with problematic histories or backgrounds (whether as trainers or fellow owners) or as part of a syndicate where the officer may not even be aware of the identity of some syndicate members, let alone of their backgrounds (see paragraph 4.3 above).

6.49 From what has been said so far, it is clear that ownership of a racehorse by a senior NSWPF officer of itself gives rise to a declarable perceived or potential conflict of interest.

6.50 Having regard to the evidence of Mr Fuller's ownership of racehorses, the Commission finds that he should have completed declarations which disclosed his ownership of racehorses based upon a perceived or potential conflict of interest.

7. Issues to be addressed in the Supplementary Report

7.1 As noted earlier in this Supplementary Report, the Commission's extension of its investigation in Operation Kurumba is limited to issues relating to Mr Fuller's ownership of racehorses after he was appointed Commissioner of Police in 2017.

7.2 As stated in the letters dated 29 September 2022 sent to the ABC, Mr Fuller and the Commissioner of Police (Appendix 1), the Commission is considering the following issues:

1. Was any failure by Mr Fuller to complete an annual Declaration of Interests form under the 2015 Code of Ethics (even if he did not believe he had a conflict of interest) in 2018, 2019 and 2020 serious

misconduct?

2. Was Mr Fuller's involvement in a racehorse owning syndicate at the time that he was Commissioner of Police, an interest that should have been disclosed under the 2016 Policy or 2019 Policy? If so, was the failure to disclose this interest and/or relationship serious misconduct?
3. Was it open to the Commission to conclude at paragraph 9.4 of the Kurumba Report that the evidence did not support a finding of any misconduct at all?
4. Should the Kurumba Report have included the comments at paragraphs 7.3 and 9.1 suggesting that the media had reported malevolent claims made about Mr Fuller?

The First Issue

- 7.3 The short answer to the first issue is that the 2015 Code of Ethics did not apply directly to Mr Fuller as he was a statutory officeholder as Commissioner of Police and not an employee of an agency.
- 7.4 Accordingly, as noted earlier, that part of the analysis and finding in the Kurumba Report at paragraphs 8.3 – 8.4 which depended solely on the 2015 Code of Ethics must be qualified in that way.
- 7.5 In any event, the critical requirement arose under the 2016 Policy (which imported parts of the 2015 Code of Ethics) and the 2019 Policy, those being requirements which applied directly to the NSWPF including the Commissioner of Police.

The Second Issue

- 7.6 The relevant requirements under the 2016 Policy and the 2019 Policy were summarised at paragraphs 6.5 to 6.15 above. They applied to Mr Fuller as Commissioner of Police.
- 7.7 For the reasons provided at paragraphs 6.3 to 6.50 above, Mr Fuller's ownership or part ownership of racehorses should have been declared by him as giving rise to a perceived or potential conflict of interest. In approaching the issue as he did, Mr Fuller appears to have considered the question only by reference to an actual conflict of interest and his own assessment that it was a "hobby". However, his subjective state of mind was not determinative. The test for conflict of interest extends beyond that to application of an objective test (see paragraphs 6.19 to 6.24 above).
- 7.8 It is necessary to keep in mind the threshold for "serious misconduct" under s 10 LECC Act (see Appendix 2 and paragraph 2.3 above). This is not a case where Mr Fuller sought to keep secret his racehorse ownership. As noted in the Kurumba Report (at paragraph 8.2), Mr Fuller had told the then Minister of Police of his ownership of racehorses and this topic was also known to this Commission in 2019 (Kurumba Report, paragraphs 4.3 - 4.4).
- 7.9 Mr Fuller erred in failing to declare his racehorse ownership in accordance with the 2016 Policy and the 2019 Policy because he was asking himself too narrow a question based solely upon actual conflict of interest.
- 7.10 The omission of Mr Fuller to make declarations in these years attracts criticism. This is especially so given his position as Commissioner of Police, the most senior officer in the NSWPF. However, the Commission does not consider that these circumstances call for a finding of serious misconduct which requires the substantial level of gravity identified in

s 10 of the LECC Act (see Appendix 2).

The Third Issue

- 7.11 In approaching this question, it is necessary to keep in mind the limits upon the power of the Commission to find misconduct which falls short of serious misconduct (see paragraphs 2.3 to 2.5 above).
- 7.12 Mr Fuller failed to make the necessary declarations under the 2016 Policy and the 2019 Policy. This was of particular concern as he was the Commissioner of Police, with the expectation that he would demonstrate strict compliance with such requirements to set an example to other NSWPF officers.
- 7.13 It is necessary, once again, to keep in mind that the failure arose from Mr Fuller asking himself too narrow a question. This occurred in the context of the somewhat confusing conflict of interest and secondary employment policies then in place. He was not attempting to keep secret his ownership of racehorses. Rather, he perceived that the obligation to declare did not apply to him in the circumstances. This was a regrettable failure on his part.
- 7.14 By operation of s 29(6) of the LECC Act, it is not open to the Commission to make a finding of officer misconduct. However, the criticisms made of Mr Fuller in this part of the Supplementary Report are available on the evidence and it is appropriate for the Commission to record them.

The Fourth Issue

- 7.15 The underlined portions of the paragraphs in the Kurumba Report to which the ABC took objection were as follows:

“7.3 In respect of KUR2, the suggestion is again that an association with him was not appropriate for the Police Commissioner because KUR2 was investigated for fraud in 2016, but he was never charged. Self-evidently, KUR2 was never charged because there was no evidence to prove he had committed any offence. Again, it is worrying that this has been raised and it lends credibility to the explanation that someone is prepared to throw whatever mud they can, in the hope something sticks. Mr Fuller gave evidence he had only met KUR2 two or three times socially and it was not the practice for members of the syndicate to get together.

.....

9.1 In 2017, when Mr Fuller became the Police Commissioner, it was at a time when there was considerable disharmony in the upper echelons of the NSW Police Force. Mr Fuller, at the time, was an Assistant Commissioner of Police and his promotion to Police Commissioner was at the expense of the then Deputy Commissioners and other applicants. Mr Fuller’s evidence in this inquiry was that there had been approximately five years of serious unrest in the NSW Police Force when he assumed the role of Police Commissioner and he set out to make reforms to sort out the problems that existed. In doing that, he no doubt created hostility amongst people who thought they should be promoted in preference to others and also in people who felt they should leave the NSW Police Force. It would appear that it is probably one or more of these disaffected officers who have mounted a campaign to harm the reputation of Mr Fuller as the Police Commissioner. The repetition of old claims at the time of his retirement would appear to be a malevolent attempt to cause him harm when he is seeking to establish a new life after his retirement from the NSW Police Force. The LECC notes, the media report states that his bid to join the Board of Racing New South Wales failed because of these allegations being raised. It raises a distinct possibility that these allegations were raised for that very purpose.”

- 7.16 The Kurumba Report did not refer expressly to the ABC, or the journalists who wrote the articles, in the criticism expressed concerning the media reports. The Commission accepts, however, that it would be open to an informed reader of the Kurumba Report to consider criticism of the media reports in the Kurumba Report as being directed to the authors of the ABC articles.
- 7.17 In the submissions dated 20 October 2022 on behalf of the ABC, Mr Linton Besser outlined the investigative work undertaken by ABC journalists before the publication of articles by the ABC concerning Mr Fuller in February 2022. It is apparent that substantial research lay behind the

articles.

- 7.18 In a submission dated 5 December 2022, Mr Besser complained about the second sentence in paragraph 7.3 of the Kurumba Report (reproduced at paragraph 7.15 above). It was submitted that the fact that the person was not charged did not mean that there was “no evidence to prove he had committed any offence”. To the extent that this topic is relevant to Operation Kurumba, the more accurate statement would have been the bare statement that the person in question was not charged.
- 7.19 It is fair to say that criticism of a media outlet or outlets for publication of articles concerning Mr Fuller in February 2022 was not necessary for the purpose of the Kurumba Report.
- 7.20 The Kurumba Report made comment as to the possible motivation of persons who raised matters adverse to Mr Fuller. The comments were not expressed as findings. The media articles had raised a number of questions as to which the Commission expressed its satisfaction in the Kurumba Report concerning Mr Fuller’s responses to the matters raised in the articles. Those aspects were appropriate for findings to be made under s 29 of the LECC Act. Additional matters have now been addressed by the Commission in this Supplementary Report.
- 7.21 The Commission accepts that the Kurumba Report should not have expressed criticism of the media for raising issues concerning Mr Fuller, racehorse ownership and a possible conflict of interest. Those parts of the Kurumba Report which are capable of being read as critical of the media are withdrawn (being the underlined words extracted at paragraph 7.15 above). A note to this effect will be attached to the Kurumba Report on the Commission’s website.

8. Affected Persons

- 8.1 In Appendix 2 of this Supplementary Report, the Commission set out the provisions of s 133 of the LECC Act dealing with the contents of reports to Parliament. Sections 133(2) and (3) relate to ‘affected persons’.
- 8.2 The Commission is of the opinion that Mr Fuller is an affected person within the meaning of subsection 133(2) of the LECC Act, being a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of this investigation.
- 8.3 The Commission has expressed criticism of Mr Fuller’s failure to lodge declarations identifying a perceived or potential conflict of interest in paragraphs 7.9, 7.10, and 7.12 to 7.14 of the Supplementary Report.
- 8.4 Having regard to the findings made in the Supplementary Report, the Commission is not of the opinion that any action under s 133(2) of the LECC Act is warranted.

9. Persons to be heard

- 9.1 The Commission does not consider that any person, apart from Mr Fuller, is the subject of adverse comment in this Supplementary Report so as to call for an opportunity to be heard under s 143 of the LECC Act.

10. Recommendations

- 10.1 It will be apparent from the analysis contained in this Supplementary Report that there is some tension, if not disconnect, between the NSWPF Secondary Employment Policy and the NSWPF 2016 Policy and 2019 Policy concerning conflicts of interest. The Secondary Employment Policy makes express provision for “high risk industries” (including gaming and racing) for reasons explained as long ago as the Final Report of the Royal

Commission in 1997.³⁴ Those reasons continue to have relevance at the present time.

- 10.2 There is a clear connection between issues of secondary employment and conflict of interest with respect to the NSWPF, with secondary employment constituting an area where assessment of actual, perceived or potential conflicts of interest arise squarely.
- 10.3 The NSWPF 2016 Policy and 2019 Policy provide examples of “high risk situations”. However, reference is not made to “high risk industries” specified for the purpose of the Secondary Employment Policy including, in particular, gaming and racing. It is, at least, highly desirable that there be express reference to these “high risk industries” in the 2019 Policy on conflict of interest as well.
- 10.4 It is, of course, a matter for the Commissioner of Police to determine the content of the NSWPF conflict of interest policy. If reference is made to gaming and racing as a “high risk situation” in that policy, it will be a matter for the Commissioner of Police to consider what prohibitions or requirements may be appropriate, in particular (in the present context) with respect to ownership of racehorses by serving members of the NSWPF of any rank.
- 10.5 The perceived or potential categories of conflict of interest are triggered readily by ownership of racehorses by NSWPF officers for reasons explained in this Supplementary Report. There is a risk (at least) of reputational damage to the NSWPF through such ownership. The risk of reputational damage to the NSWPF is elevated when senior officers of the NSWPF are involved in ownership of racehorses. It may be difficult to

³⁴ *Final Report of the Royal Commission into the NSW Police Service, Volume II: Reform*, May 1997, Wood, JRT at pages 292, 544 (see paragraphs 6.26 and 6.27 of this Supplementary Report).

fashion conditions or limits upon racehorse ownership which allow that risk to be mitigated appropriately.

- 10.6 It would be open to the Commissioner of Police to consider prohibition of racehorse ownership by NSWPF officers of any rank. There may be an advantage in clarity in this regard. However, it remains a matter for the Commissioner of Police to consider those issues as part of the Commissioner's duty to manage and control the NSWPF under s 8 *Police Act 1990*.
- 10.7 The Commission recommends, for the purpose of s 133(2) of the LECC Act, that the Commissioner of Police consider amendment of the NSWPF policy concerning conflict of interests by inserting a reference to gaming and racing as a "high risk industry" and addressing the circumstances (if any) in which ownership of racehorses by NSWPF officers is to be permitted, and the controls and requirements to be put in place if racehorse ownership is to be permitted.

**Operation Kurumba
Supplementary Report pursuant to s 132 Law Enforcement Conduct
Commission Act 2016
December 2022**

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Appendix 1



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Office of the Chief Commissioner

52145/845

29 September 2022

Mr Michael Fuller

By email: [REDACTED]

Dear Mr Fuller

A supplementary report in relation to Operation Kurumba

As you are aware, in March 2022, the Commission produced a report in relation to Operation Kurumba. This report ("the Kurumba Report") was tabled in Parliament and made publicly available on the Commission's website.

In July 2022, the Commission received a letter from the Inspector of the Law Enforcement Conduct Commission. The Office of the Inspector had received a complaint from Mr Linton Besser on behalf of the Australian Broadcasting Corporation ("ABC") concerning the Commission's reports in relation to Operation Kurumba and Operation Kainite.

After further correspondence with the Inspector, the Commission has decided to extend its investigation in Operation Kurumba to deal with some additional issues. The Commission seeks further submissions from you on these issues.

In due course the Commission will table a supplementary report in Parliament under s 132 of the *Law Enforcement Conduct Commission Act 2016* ("the LECC Act"). The ABC will be given the opportunity to make submissions with respect to an issue to be addressed in the supplementary report.

The Commissioner of Police will also be given an opportunity to update the Commission on any changes to the New South Wales Police Force's ("NSWPF") policies and practices since the Kurumba Report was tabled.

Background

On 15 February 2022, the Sydney Morning Herald reported that you had applied to join the Board of Racing NSW. On 17 February 2022, the ABC news website published a report titled *Newly retired NSW Police commissioner Mick Fuller did not declare racehorse shares to NSW government*. A further article appeared on 20 February 2022 titled *NSW police watchdog knew about former commissioner Mick Fuller's racehorse co-ownership for years*.

The Commission commenced an investigation into these issues on 22 February 2022 called Operation Kurumba.

A private examination of you was held on 3 March 2022 under s 62 of the LECC Act. At that examination, you gave evidence that:

- You recalled completing an extensive Declaration of Interest in 2017 when you were appointed as Commissioner.
- You were shown and adopted a Declaration of Interest dated 31 May 2021, in which you said that you had no interest to declare.

The Commission issued a notice under s 55 of the LECC Act for any Declarations of Interest completed by you. The only Declaration of Interest that was produced was dated May 2021.

The Kurumba Report was tabled in Parliament on 15 March 2022 under s 132 of the LECC Act.

ABC complaint to the Inspector

In a letter to the Inspector of LECC, which was provided to the Commission on 11 July 2022, the ABC complained to the Inspector that the conduct of the Commission in its investigation and reporting in Operations Kurumba and Kainite may rise to the level of "agency maladministration".

The ABC raised a number of concerns. The relevant concerns for present purposes are:

1. The Operation Kurumba report included comments (in paras 7.3 and 9.1) suggesting that people hostile to Mr Fuller were malevolently attempting to cause him harm. Reference was made to the following parts of the Kurumba Report:
 - *regarding Mr Fuller's alleged attempts to clean up existing problems in the NSW Police Force, which allegedly created hostility among some police officers, "It would appear that it is probably one or more of these disaffected officers who have mounted a campaign to harm the reputation of Mr Fuller as the Police Commissioner. The repetition of old claims at the time of his retirement would appear to be a malevolent attempt to cause him harm when he is seeking to establish a new life after his retirement from the NSW Police Force";*
 - *regarding the timing of the ABC articles, "The Commission notes, the media report states that his (Mr Fuller's) bid to join the Board of Racing New South Wales failed because of these allegations being raised. It raises a distinct possibility that these allegations were raised for that very purpose";* and,
 - *regarding Mr Fuller's association with KUR2, who was subject to a criminal investigation, "it is worrying that this has been raised and it lends credibility to the explanation that someone is prepared to throw whatever mud they can, in the hope something sticks."*
2. Although the authors of the "media report" referred to in the Kurumba Report were not identified by name, the ABC said that its reporters,

Mr Rubinsztein-Dunlop and Mr Welch, were readily identifiable in their roles as the authors of the February 2022 news reports. The ABC said:

"The idea that ABC journalists were tricked into being, or allowed themselves to be, used to tarnish a person's name is offensive and must be considered an "adverse comment" as found at section 143 of the LECC Act. The assertion that ABC journalists allowed "malevolent" material to be published should also be considered an adverse comment."

The ABC argued that these comments should not have been included in the Kurumba Report without the ABC having an opportunity to comment under s 143 of the LECC Act.

3. The ABC argued that the Kurumba Report neglected to mention that NSWPF policies and procedures required all employees to declare not only actual conflicts of interest, but also potential or perceived conflicts of interest. It was argued that the Kurumba Report did not draw a conclusion on these matters and that the Commission had failed to consider whether this amounted to conduct which was serious maladministration.

The ABC's complaint also raised concerns about whether the awarding of the catering contract to Ozmart Catering required you and Assistant Commissioner McCusker to declare a potential conflict of interest.

The ABC alleged that there were also a number of factual errors in the Kurumba Report.

Inspector's views

The Inspector provided the ABC's complaint to the Commission on 11 July 2022, asking for a response to the ABC's complaints, and highlighting particular matters.

The Commission responded to the Inspector on 27 July 2022. In that letter, the Commission addressed a number of issues and indicated that a way forward may be for the Commission to receive further submissions and make a supplementary report on several topics.

The Inspector replied in a letter dated 22 August 2022.

The Inspector said that he did not consider that there were any valid criticisms of the Operation Kainite Report, nor of the Kurumba Report's consideration of your involvement in the awarding of the NSWPF catering contract.

However, the Inspector expressed the following concerns:

1. In February 2016, the *Code of Ethics and Conduct for New South Wales Government Sector Employees* came into effect which required heads of organisations to submit an annual Declaration of Interest, to the Department of Premier and Cabinet, even if they considered they had no conflict to declare. The NSW Police Force Code of Conduct and Ethics required officers in the NSWPF above the rank of Superintendent to complete a declaration of interest.

- The only Declarations that you submitted were in 2017, when you were appointed Commissioner of Police, and in 2021.
 - The Kurumba Report's finding expressed at [9.4] that the evidence did "not support a finding of . . . any misconduct at all", was inconsistent with your failure to complete Declaration of Interests forms between 2018 and 2020.
2. When you did complete a Declaration of Interest in 2021 you ticked the box to say that you had no conflict of interest. Completing the form in this way was arguably inconsistent with the obligations imposed by NSWPF *Procedures for Managing Conflicts of Interest*, the most recent version of which was published in December 2019.
- The NSWPF *Procedures for Managing Conflicts of Interest* identified (at clause 5.8) three potential types of conflict of interest: actual, perceived or potential. Any of these types of conflicts need to be declared.
 - Appendix 2 of the *Procedures for Managing Conflicts of Interest* make specific provision in relation to the Commissioner of Police and require the Commissioner to list any private financial business personal or other interests or relationships which have the potential to influence or could be perceived to influence decisions made or advice which may be given as outlined in the guidelines.
3. The suggestion in the Kurumba Report that the ABC stories repeated malevolent allegations meant that the ABC journalists should have been dealt with as affected persons within the meaning of s 143 of the LECC Act and given an opportunity to be heard and make submissions before the Report was tabled.

The Inspector agreed with the Commission's proposal to prepare a supplementary report to the Kurumba Report and to receive submissions on these issues for that purpose.

Statutory basis for extending the investigation

Section 132(1) of the LECC Act allows the Commission to prepare reports in relation to any matter that has been or is the subject of investigation under Part 6 of the Act. Although the Operation Kurumba investigation has resulted in one report being tabled, that does not prevent the Commission from preparing and tabling further reports in relation to that investigation if that is appropriate. Section 48 of the *Interpretation Act 1987* supports this view.

Given the concerns raised by the Inspector, the Commission considers that an extension of the Operation Kurumba investigation and the tabling of a supplementary report are appropriate.

Issues to be addressed

The Commission acknowledges that you owned a share in one or more racehorses from 2012.

However, the Commission's extension of its investigation in Operation Kurumba will be limited to the issues relating to your ownership of racehorses after being appointed Commissioner of Police in 2017.

The Commission will be considering the following issues:

1. Was any failure by you to complete an annual Declaration of Interests under the *Code of Ethics and Conduct for New South Wales Government Sector Employees* form (even if you did not believe you had a conflict of interest) in 2018, 2019 and 2020 serious misconduct?
2. Was your involvement in a racehorse owning syndicate at the time that you were Commissioner of Police, an interest that should have been disclosed under the *NSWPF Procedures for Managing Conflicts of Interest*? If so, was the failure to disclose this interest and/or relationship serious misconduct?
3. Was it open to the Commission to conclude at paragraph 9.4 that the evidence did not support a finding of any misconduct at all?
4. Should the Kurumba Report have included the comments at paragraphs 7.3 and 9.1 suggesting that the media had reported malevolent claims made about you?

The ABC will be invited to furnish written submissions confined to Issue four only.

Proposed timetable for submissions

The Commission proposes the following timetable for providing submissions:

1. Your submissions should be provided to the Commission by 20 October 2022.
2. Any submissions received from the ABC and the Commissioner of Police must also be provided to the Commission by 20 October 2022.
3. A draft supplementary report will be provided to you, the ABC and the Commissioner of Police for comment before being tabled in Parliament.

If you think that you need to provide supplementary evidence to the Commission, in addition to your submissions, any factual statements may be included as part of your submissions.

If you cannot meet this timetable, please let me know.

All submissions made as part of this extended process are to be treated as confidential. There is to be no disclosure of submissions, or the process being undertaken by the Commission, by operation of s 176(4)(e) LECC Act.

When the process is complete, a s 132 supplementary report will be prepared by the Commission and tabled in Parliament.

Legal representation

Mr Robert Tumeth of the Commission has had discussions with [REDACTED] from the Department of Communities and Justice. If you wish to be legally represented in order to respond to this request, that can be arranged through the Legal Representation Office.

Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] to make that arrangement.

Attachments

To assist you, I attach a copy of:

1. A transcript of your evidence from 3 March 2022.
2. The 2016 and 2019 NSWPF *Procedures for Managing Conflicts of Interest*.
3. The Code of Ethics and Conduct for New South Wales Government Sector Employees.

If you have any questions in relation to this letter, please feel free to contact Robert Tumeth on [REDACTED] or at [REDACTED]

Yours sincerely



Peter Johnson SC
Chief Commissioner

Office of the Chief Commissioner

52145/846

29 September 2022

Ms Karen Webb APM
Commissioner of Police
NSW Police Force

By email: [REDACTED]

Dear Commissioner

A supplementary report in relation to Operation Kurumba

As you are aware, in March 2022, the Commission produced a report in relation to Operation Kurumba. This report ("the Kurumba Report") was tabled in Parliament and made publicly available on the Commission's website.

In July 2022, the Commission received a letter from the Inspector of the Law Enforcement Conduct Commission. The Office of the Inspector had received a complaint from Mr Linton Besser on behalf of the Australian Broadcasting Corporation ("ABC") concerning the Commission's reports in relation to Operation Kurumba and Operation Kainite.

After further correspondence with the Inspector, the Commission has decided to extend its investigation in Operation Kurumba to deal with some additional issues. The Commission will seek further submissions from Mr Michael Fuller on these additional issues.

The ABC will also be given an opportunity to make submissions on one aspect which arose out of the Kurumba Report.

In a letter dated 28 August 2022, responding to the Kurumba Report and the Commission's report in Operation Cowal, A/Assistant Commander David Driver noted that changes were being made to the New South Wales Police Force's ("NSWPF") policies and practices in relation to the completion of conflict of interest declarations. The Commission invites you to provide submissions on this issue if you wish.

The Commission will then table a supplementary report in Parliament under s 132 of the *Law Enforcement Conduct Commission Act 2016* ("the LECC Act").

Background

On 15 February 2022, the Sydney Morning Herald reported that Mr Fuller had applied to join the Board of Racing NSW. On 17 February 2022, the ABC news website published a report titled *Newly retired NSW Police commissioner Mick Fuller did not declare racehorse shares to NSW government*. A further article appeared on 20 February

2022 titled *NSW police watchdog knew about former commissioner Mick Fuller's racehorse co-ownership for years*.

The Commission commenced an investigation into these issues on 22 February 2022 called Operation Kurumba.

A private examination of Mr Fuller was held on 3 March 2022 under s 62 of the LECC Act.

At that examination, he gave evidence that:

- He recalled completing an extensive Declaration of Interest in 2017 when he was appointed as Commissioner.
- He was shown and adopted a Declaration of Interest dated 31 May 2021, in which he said that he had no interest to declare.

The Commission issued a notice under s 55 of the LECC Act for any Declarations of Interest completed by Mr Fuller. The only Declaration of Interest that was produced was dated May 2021.

The Kurumba Report was tabled in Parliament on 15 March 2022 under s 132 of the LECC Act.

ABC complaint to the Inspector

In a letter to the Inspector of LECC, the ABC complained to the Inspector that the conduct of the Commission in its investigation and reporting in Operations Kurumba and Kainite may rise to the level of "agency maladministration".

The ABC raised a number of concerns. The relevant concerns for present purposes are:

1. The Operation Kurumba report included comments (in paras 7.3 and 9.1) suggesting that people hostile to Mr Fuller were malevolently attempting to cause him harm. Reference was made to the following parts of the Kurumba Report:
 - *regarding Mr Fuller's alleged attempts to clean up existing problems in the NSW Police Force, which allegedly created hostility among some police officers, "It would appear that it is probably one or more of these disaffected officers who have mounted a campaign to harm the reputation of Mr Fuller as the Police Commissioner. The repetition of old claims at the time of his retirement would appear to be a malevolent attempt to cause him harm when he is seeking to establish a new life after his retirement from the NSW Police Force";*
 - *regarding the timing of the ABC articles, "The Commission notes, the media report states that his (Mr Fuller's) bid to join the Board of Racing New South Wales failed because of these allegations being raised. It raises a distinct possibility that these allegations were raised for that very purpose"; and,*
 - *regarding Mr Fuller's association with KUR2, who was subject to a criminal investigation, "it is worrying that this has been raised and it lends credibility*

to the explanation that someone is prepared to throw whatever mud they can, in the hope something sticks.”

2. Although the authors of the “media report” referred to in the Kurumba Report were not identified by name, the ABC said that its reporters, Mr Rubinsztein-Dunlop and Mr Welch, were readily identifiable in their roles as the authors of the February 2022 news reports. The ABC said:

“The idea that ABC journalists were tricked into being, or allowed themselves to be, used to tarnish a person’s name is offensive and must be considered an “adverse comment” as found at section 143 of the LECC Act. The assertion that ABC journalists allowed “malevolent” material to be published should also be considered an adverse comment.

The ABC argued that these comments should not have been included in the Kurumba Report without the ABC having an opportunity to comment under s 143 of the LECC Act.

3. The ABC argued that the Kurumba Report neglected to mention that NSWPF policies and procedures required all employees to declare not only actual conflicts of interest, but also potential or perceived conflicts of interest. It was argued that the Kurumba Report did not draw a conclusion on these matters and that the Commission had failed to consider whether this amounted to conduct which was serious maladministration.

The ABC’s complaint also raised concerns about whether the awarding of the catering contract to Ozmart Catering required Mr Fuller and Assistant Commissioner McCusker to declare a potential conflict of interest.

The ABC alleged that there were also a number of factual errors in the Kurumba Report.

Inspector’s views

The Inspector provided the ABC’s complaint to the Commission on 11 July 2022, asking for a response to the ABC’s complaints, and highlighting particular matters.

The Commission responded to the Inspector on 27 July 2022. In that letter, the Commission addressed a number of issues and indicated that a way forward may be for the Commission to receive further submissions and make a supplementary report on several topics.

The Inspector replied in a letter dated 22 August 2022.

The Inspector says that he did not consider that there were any valid criticisms of the Operation Kainite Report, nor of the Kurumba Report’s consideration of Mr Fuller’s involvement in the awarding of the NSWPF catering contract.

However, the Inspector expressed the following concerns:

1. In February 2016, the *Code of Ethics and Code for New South Wales Government Sector Employees* came into effect which required heads of organisations to submit an annual Declaration of Interest, to the Department of Premier and

Cabinet, even if they considered they had no conflict to declare. The NSW Police Force Code of Conduct and Ethics required officers in the NSWPF above the rank of Superintendent to complete a declaration of interest.

- The only Declarations that Mr Fuller submitted were in 2017, when Mr Fuller was appointed Commissioner of Police, and in 2021.
 - The Kurumba Report's finding expressed at [9.4] that the evidence did "not support a finding of . . . any misconduct at all", was inconsistent with Mr Fuller's failure to complete Declaration of Interests forms between 2018 and 2020.
2. When Mr Fuller did complete a Declaration of Interest in 2021 he ticked the box to say that he had no conflict of interest. Completing the form in this way is arguably inconsistent with the obligations imposed by NSWPF *Procedures for Managing Conflicts of Interest*, the most recent version of which was published in December 2019.
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3. The suggestion in the Kurumba Report that the ABC stories repeated malevolent allegations meant that the ABC journalists should have been dealt with as affected persons within the meaning of s 143 of the LECC Act and given an opportunity to be heard and make submissions before the Report was tabled.

The Inspector agreed with the Commission's proposal to prepare a supplementary report to the Kurumba Report and to receive submissions on these issues for that purpose.

Statutory basis for extending the investigation

Section 132(1) of the LECC Act allows the Commission to prepare reports in relation to any matter that has been or is the subject of investigation under Part 6 of the Act. Although the Operation Kurumba investigation has resulted in one report being tabled, that does not prevent the Commission from preparing and tabling further reports in relation to that investigation if that is appropriate. Section 48 of the *Interpretation Act 1987* supports this view.

Given the concerns raised by the Inspector, the Commission considers that an extension of the Operation Kurumba investigation and the tabling of a supplementary report are appropriate.

Issues to be addressed

The Commission acknowledges that Mr Fuller owned a share in one or more racehorses from 2012.

However, the Commission's extension of its investigation in Operation Kurumba will be limited to the issues relating to his ownership of race horses after being appointed Commissioner of Police in 2017.

The Commission will be considering the following issues:

1. Was any failure by Mr Fuller to complete an annual Declaration of Interests under the *Code of Ethics and Conduct for New South Wales Government Sector Employees* form (even if he did not believe he had a conflict of interest) in 2018, 2019 and 2020 serious misconduct?
2. Was Mr Fuller's involvement in a racehorse owning syndicate at the time that he was Commissioner of Police, an interest that should have been disclosed under the NSWPF *Procedures for Managing Conflicts of Interest*? If so, was the failure to disclose this interest and/or relationship serious misconduct?
3. Was it open to the Commission to conclude at paragraph 9.4 that the evidence did not support a finding of any misconduct at all?
4. Should the Report have included the comments at paragraphs 7.3 and 9.1 suggesting that the media had reported malevolent claims made about Mr Fuller?

Proposed timetable for submissions

Mr Fuller is being invited to make submissions on all four issues. The ABC is being invited to make submissions confined to Issue four only.

The Commission invites you to provide submissions setting out any changes to the Declarations of Interest or Conflict of Interest policies that have been introduced by the NSWPF since March 2022.

1. Your submissions should be provided to the Commission by 20 October 2022.
2. Any submissions received from the ABC and the Commissioner of Police must also be provided to the Commission by 20 October 2022.
3. A draft supplementary report will be provided to you, Mr Fuller and the ABC for comment before being tabled in Parliament.

All submissions made as part of this extended process are to be treated as confidential. There is to be no disclosure of submissions, or the process being undertaken by the Commission, by operation of s 176(4)(e) LECC Act. If you think that you need to provide evidence to the Commission, in addition to your submissions, any factual statements may be included as part of your submissions.

If you cannot meet this timetable, please let me know.

When the process is complete, a s 132 supplementary report will be prepared by the Commission and tabled in Parliament.

If you have any questions in relation to this letter, please feel free to contact Robert Tumeth on [REDACTED] or at [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to be 'PJ', with a long, wavy horizontal line extending to the right.

Peter Johnson SC
Chief Commissioner

Office of the Chief Commissioner

52145/847

29 September 2022

Mr Linton Besser
Editor, Investigations
ABC News
By email: [REDACTED]

Dear Mr Besser

A supplementary report in relation to Operation Kurumba

As you are aware, in March 2022, the Commission produced a report in relation to Operation Kurumba. This report ("the Kurumba Report") was tabled in Parliament and made publicly available on the Commission's website.

On 11 July 2022, the Commission received a letter from the Inspector of the Law Enforcement Conduct Commission. The Office of the Inspector had received a complaint from you on behalf of the Australian Broadcasting Corporation ("ABC") concerning the Commission's reports in relation to Operation Kurumba and Operation Kainite.

After further correspondence with the Inspector, the Commission has decided to extend its investigation in Operation Kurumba to deal with some additional issues. A supplementary report will be made by the Commission in due course.

The Commission will seek further submissions from Mr Michael Fuller on these additional issues.

The ABC is being invited to make submissions on one aspect which arose in the Kurumba Report.

The Commissioner of Police will also be given an opportunity to update the Commission on any changes to the New South Wales Police Force's ("NSWPF") policies and practices since the Operation Kurumba Report was tabled.

The Commission will then table a supplementary report in Parliament under s 132 of the *Law Enforcement Conduct Commission Act 2016* ("the LECC Act").

Background

On 15 February 2022, the *Sydney Morning Herald* reported that Mr Fuller had applied to join the Board of Racing NSW. On 17 February 2022, the ABC news website published a report titled *Newly retired NSW Police commissioner Mick Fuller did not declare racehorse shares to NSW government*. A further article appeared on 20 February 2022 titled *NSW police watchdog knew about former commissioner Mick Fuller's racehorse co-*

ownership for years.

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At that examination, he gave evidence that:

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The Kurumba Report was tabled in Parliament on 15 March 2022 under s 132 of the LECC Act.

ABC complaint to the Inspector

In an undated letter to the Inspector of LECC, you complained (on behalf of the ABC) to the Inspector that the conduct of the Commission in its investigation and reporting in Operations Kurumba and Kainite may rise to the level of "agency maladministration". You raised a number of concerns. The relevant concerns for present purposes are:

1. The Operation Kurumba report included comments (in paras 7.3 and 9.1) suggesting that people hostile to Mr Fuller were malevolently attempting to cause him harm. Reference was made to the following parts of the Kurumba Report:
 - *regarding Mr Fuller's alleged attempts to clean up existing problems in the NSW Police Force, which allegedly created hostility among some police officers, "It would appear that it is probably one or more of these disaffected officers who have mounted a campaign to harm the reputation of Mr Fuller as the Police Commissioner. The repetition of old claims at the time of his retirement would appear to be a malevolent attempt to cause him harm when he is seeking to establish a new life after his retirement from the NSW Police Force";*
 - *regarding the timing of the ABC articles, "The Commission notes, the media report states that his (Mr Fuller's) bid to join the Board of Racing New South Wales failed because of these allegations being raised. It raises a distinct possibility that these allegations were raised for that very purpose";* and,
 - *regarding Mr Fuller's association with KUR2, who was subject to a criminal investigation, "it is worrying that this has been raised and it lends credibility*

to the explanation that someone is prepared to throw whatever mud they can, in the hope something sticks.”

2. Although the authors of the “media report” referred to in the Kurumba Report were not identified by name, you said in your letter that ABC reporters, Mr Rubinsztein-Dunlop and Mr Welch, were readily identifiable in their roles as the authors of the February 2022 news reports. You said:

“The idea that ABC journalists were tricked into being, or allowed themselves to be, used to tarnish a person’s name is offensive and must be considered an “adverse comment” as found at section 143 of the LECC Act. The assertion that ABC journalists allowed “malevolent” material to be published should also be considered an adverse comment.”

You argued that these comments should not have been included in the Kurumba Report without the ABC having an opportunity to comment under s 143 of the LECC Act.

3. The ABC argued that the Kurumba Report neglected to mention that NSWPF policies and procedures required all employees to declare not only actual conflicts of interest, but also potential or perceived conflicts of interest. It was argued that the Kurumba Report did not draw a conclusion on these matters and that the Commission had failed to consider whether this amounted to conduct which was serious maladministration.

Your complaint also raised concerns about whether the awarding of the catering contract to Ozmart Catering required Mr Fuller and Assistant Commissioner McCusker to declare a potential conflict of interest.

I note that you also alleged that there were a number of factual errors in the Kurumba Report.

Inspector’s views

The Inspector provided your complaint to the Commission on 11 July 2022, asking for a response and highlighting particular matters.

The Commission responded to the Inspector on 27 July 2022. In that letter, the Commission addressed a number of issues and indicated that a way forward may be for the Commission to receive further submissions and make a supplementary report on several topics.

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Cabinet, even if they considered they had no conflict to declare. The NSW Police Force Code of Conduct and Ethics required officers in the NSWPF above the rank of Superintendent to complete a declaration of interest.

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The Inspector agreed with the Commission's proposal to prepare a supplementary report to the Kurumba Report and to receive submissions on these issues for that purpose.

Statutory basis for extending the investigation

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3. Was it open to the Commission to conclude at paragraph 9.4 that the evidence did not support a finding of any misconduct at all?
4. Should the Kurumba Report have included the comments at paragraphs 7.3 and 9.1 suggesting that the media had reported malevolent claims made about Mr Fuller?

Proposed timetable for submissions

The Commission invites you to provide written submissions on Issue four only.

1. Your submissions should be provided to the Commission by 20 October 2022.
2. Any submissions received from Mr Fuller and the Commissioner of Police must also be provided to the Commission by 20 October 2022.
3. A draft supplementary report will be provided to you, Mr Fuller and the Commissioner of Police for comment before being tabled in Parliament.

All submissions made as part of this extended process are to be treated as confidential. There is to be no disclosure of submissions, or the process being undertaken by the Commission, by operation of s 176(4)(e) LECC Act.

If you think that you need to provide evidence to the Commission, in addition to your submissions, any factual statements may be included as part of your submissions. If you cannot meet this timetable, please let me know.

When the process is complete, a s 132 supplementary report will be prepared by the Commission and tabled in Parliament.

If you have any questions in relation to this letter, please feel free to contact Robert Tumeth on [REDACTED] or at [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to be 'Peter Johnson', with a stylized flourish extending to the right.

Peter Johnson SC
Chief Commissioner

Appendix 2

Relevant Provisions in the LECC Act and Other Legal Principles

1. Section 3 of the LECC Act sets out the multifaceted objects of the Act. Objects clauses operate as a source for identifying the purpose or object of legislation to assist statutory construction.³⁵ The objects section may give practical content to an understanding of various terms in the LECC Act and assist the construction and operation of the Act.³⁶

2. Section 3 of the LECC Act states:

The Objects of this Act are –

- (a) *to promote the integrity and good repute of the NSW Police Force and the Crime Commission by ensuring that they properly carry out their functions and responsibilities in relation to the handling of complaints (and information that the Commission becomes aware of otherwise than through a complaint that indicates or suggests conduct is (or could be) officer misconduct or officer maladministration or agency maladministration),*
- (b) *to provide for the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force and the Crime Commission that may have occurred, be occurring, be about to occur or that is likely to occur,*
- (c) *to provide for independent oversight and review (including, where appropriate, real time monitoring and review) of the investigation by the NSW Police Force of misconduct matters concerning the conduct of its members and the Crime Commission concerning its officers,*
- (d) *to prevent officer misconduct and officer maladministration and agency maladministration within the NSW Police Force and the Crime Commission by –*
 - (i) *providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer*

³⁵ Section 33 *Interpretation Act 1987* NSW.

³⁶ *ID, PF and DV v Director General, Department of Juvenile Justice* (2008) 73 NSWLR 158; [2008] NSWSC 966 at [255] – [257]; *Lynn v State of NSW* (2016) 91 NSWLR 636; [2016] NSWCA 57 at [54]; Pearce, *Statutory Interpretation in Australia*, 2019, 9th edition, Lexis Nexis paragraphs 4.63 – 4.64.

misconduct, officer maladministration and agency maladministration, and

- (ii) assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers, and*
 - (iii) encouraging collaborative evaluation of opportunities for, and implementation of, desirable changes in such procedures, and*
 - (iv) making recommendations with respect to education and training about prevention of officer misconduct, officer maladministration and agency maladministration,*
- (e) to ensure that agencies work collaboratively to support and promote the prevention of officer misconduct, officer maladministration and agency maladministration and to improve their processes and systems,*
 - (f) to recognise the primary responsibilities of the NSW Police Force and Crime Commission to investigate and prevent officer misconduct and officer maladministration within those agencies and agency maladministration while providing for oversight of those functions,*
 - (g) to foster an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct, officer maladministration and agency maladministration,*
 - (h) to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force,*
 - (i) to provide for the scrutiny of the exercise of powers by the Law Enforcement Conduct Commission and its officers by an Inspector and for the Commission and for the Inspector to be accountable to Parliament,*
 - (j) to provide for the oversight by the Inspector of the use of covert powers under various Acts.*

3. Section 10 of the LECC Act defines “serious misconduct”:

- (1) For the purposes of this Act, **serious misconduct** means any one of the following:*
 - (a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious*

disciplinary action against the officer or employee for a disciplinary infringement,

(b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,

(c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

(2) *In this section:*

serious disciplinary action *against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.*

serious offence *means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.*

4. “Officer maladministration” and “agency maladministration” are both defined in s 11 of the LECC Act. “Officer maladministration” is defined in s 11(2) in these terms:

Officer maladministration *means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

(a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(b) arises, wholly or in part, from improper motives, or

(c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(d) arises, wholly or in part, from a mistake of law or fact, or

(e) is conduct of a kind for which reasons should have (but have not) been given.

5. The conduct of an officer or agency is defined as “serious maladministration” if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly

discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

6. The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61 (a).
7. Section 29 provides the authority for the Commission to make findings and express opinions:

(1) The Commission may:

- (a) make findings, and*
- (b) form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:*
 - (i) has or may have occurred, or*
 - (ii) is or may be occurring, or*
 - (iii) is or may be about to occur, or*
 - (iv) is likely to occur, and*
- (c) form opinions as to:*
 - (i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or*
 - (ii) whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and*
- (d) make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and*

- (e) *make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter or opinions or the results of any such investigations.*
- (2) *Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.*
- (3) *The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (4) *An opinion or finding that a person has engaged, is engaging or is about to engage in:*
 - (a) *officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or*
 - (b) *specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (5) *Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*
- (6) *The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.*

(7) *The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.*

8. This report is made pursuant to Part 11 of the LECC Act. Section 132(1) provides that the Commission may prepare reports “in relation to any matter that has been or is the subject of investigation under Part 6”.

9. Section 133 (Content of reports to Parliament) provides that:

(1) *The Commission is authorised to include in a report under section 132:*

(a) *statements as to any of the findings, opinions and recommendations of the Commission, and*

(b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*

(2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

(a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*

(b) *the taking of action against the person for a specified disciplinary infringement,*

(c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*

- (d) *the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*
- (e) *the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

Note. See section 29 (4) in relation to the Commission's opinion.

- (4) *An "**affected person**" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.*
- (5) *Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

10. The Commission does not sit as a criminal or civil court. It does not determine the rights of any person. However, the Commission may make findings which are adverse to persons and their reputation. The standard of proof to be applied by the Commission in making findings of fact is the civil standard of proof, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test is whether the facts have been proved to the reasonable satisfaction of the Commission.³⁷

³⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34; *Rejtek v McElroy* (1965) 112 CLR 517 at 521; [1965] HCA 46; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171-172; [1992] HCA 66.

