



2 March 2017

Ms Toni Matulick
Committee Secretary
Legal and Constitutional Affairs Legislation Committee

By email: legcon.sen@aph.gov.au

Ms Toni Dawes
Committee Secretary
Parliamentary Joint Committee on Human Rights

By email: human.rights@aph.gov.au

Dear Ms Matulick and Ms Dawes,

Complaint by Ms Melissa Dinnison against *The Australian* and Mr Bill Leak

I refer to an article in *The Australian* on 2 March 2017 that alleges that I misled Parliament in relation to the Commission's handling of a complaint by Ms Melissa Dinnison against *The Australian* and Mr Leak in relation to a cartoon by Mr Leak published in *The Australian* on 3 August 2016 (the **Leak complaint**).

Another article in *The Australian* on the same date attributes comments to the Chair of the Senate Legal and Constitutional Affairs Legislation Committee that suggest he is considering calling the Commission back to give further evidence.

I write to address the points raised by *The Australian* and confirm that I have not misled the Parliament.

The first article referred to above alleges, wrongly, that I:

misled parliament about unexplained delays in the commission's complaint-handling process, the impact of the defences to section 18C and how her organisation dealt with Bill Leak, *The Australian's* cartoonist.

This letter sets out the evidence that I have given to Parliament about the Leak complaint and addresses each of the allegations that I have misled Parliament.

The key points, which I have consistently made are as follows:

- The Commission twice asked the lawyers for *The Australian* and Mr Leak for a submission about how section 18D of the *Racial Discrimination Act 1975* (Cth) applied to the Leak complaint.
- The lawyers for *The Australian* and Mr Leak twice declined to provide the Commission with such a submission.
- If the Commission had been provided with such a submission, there is a good chance that the Leak complaint could have been dealt with even more quickly than it was.

I would appreciate it if you could provide a copy of this letter and the enclosed documents to the members of your Committees.

Evidence given to Parliament

On 23 February 2017 I sent a letter to the Legal and Constitutional Affairs Legislation Committee which enclosed my opening statement at the public hearing of the Parliamentary Joint Committee on Human Rights (PJCHR) on 17 February 2017. That opening statement included the following passage:

Now I would like to make some very brief comments about the complaint concerning a cartoon by Mr Bill Leak. Yet another series of complaints to the commission have attracted significant media attention concerning a cartoon by Mr Leak published in *The Australian* on 3 August 2016. The first complaint was made by Ms Melissa Dinnison. The entire process from the time the respondents were notified of her complaint until the time the complaint was finalised took 39 days. The commission twice asked the respondents for a submission in relation to section 18D providing the basis of a justification. The respondents chose not to provide one. Had a submission in relation to section 18D been provided, there is a good chance that the complaint could have been dealt with even more quickly. Most of the time taken in the course of that inquiry related to two matters. First, the commission had to consider a claim by the respondents that the commission should appoint an external delegate to deal with the complaint because of an alleged apprehension of bias. Secondly, 24 of the 39 days were taken waiting for the respondents to respond to the commission's correspondence.

At the conclusion of that opening statement, I sought to table two documents. One of those documents was a chronology of the Leak complaint. Those documents were tabled and authorised for publication by the PJCHR. A copy of that chronology is **Attachment 1** to this letter. It describes the key correspondence between the Commission and the lawyers for *The Australian* and Mr Leak during the course of the Leak complaint.

During the course of the Senate Estimates hearing on 28 February 2017, the following exchange took place (based on the uncorrected proof transcript):

Senator HINCH: Professor Triggs, people were calling up to complain, and the Doctor said, 'You have some complaints about Bill Leak'. Why was that not pointed out to them immediately, the complainers, that it was 18D and he was in the clear?

Prof. Triggs: There is a very important reason for that, and that is because 18D requires a good faith element. We gave Mr Leak the opportunity to advise us that he had produced that cartoon in good faith. Had he responded by making a good faith point, we would almost certainly have ended the matter precisely at that moment. But, despite at least two requests to him to justify an 18D basis for the cartoon, we received no response. Perhaps I could ask Mr Edgerton to elaborate on that, but that is the key issue there. The matter was in fact handled relatively speedily, but the only delay related to the fact that we had not received a response from Mr Leak or News Corp.

Senator HINCH: But a cartoonist could be forced to do this every day. It is satire; it is satirical and it is fair comment.

Prof. Triggs: It may very well be fair comment; it may very well be in good faith; it may be part of an artistic exercise; it may be accurate. All of those things, however, have to be suggested—in particular the good faith view has to be put by the respondent themselves. In any system in which you have a process of making a complaint—and we have the job of dealing with it—there must be an opportunity, as the Attorney has quite rightly said, for the principles of natural justice, where the party complained against has an opportunity to explain what the justification might have been. In the Leak case, that justification was never provided, so the matter was ultimately terminated. But it could have been terminated much earlier if at least a simple statement been made that he acted in good faith.

Enclosed with this letter is a bundle of the correspondence passing between the Commission and the lawyers for *The Australian* and Mr Leak (the **respondents**) in relation to the Leak complaint. The respondents have confirmed to the Commission that their clients have no objection to the publication of this correspondence.

The course of the Leak complaint

As I have consistently said, the Leak complaint lasted 39 days from the notification of the respondents until the complaint was withdrawn.

(a) *First request for submissions on section 18D*

The Commission notified the respondents of the Leak complaint by way of a letter dated 4 October 2016. Page 3 of that letter included the following passage:

Section 18D of the RDA outlines exemptions under the racial hatred provisions. If the respondents consider that an exemption applies in relation to this matter, please provide a submission on this issue.

The Commission sought a response by 28 October 2016.

On 21 October 2016, the respondents replied to the Commission. In their letter they said ‘our clients require that the AHRC take no further part in any inquiry into, or any attempt to conciliate, Miss Dinnison’s complaint’ because there was a ‘reasonable apprehension of bias’ in the Commission dealing with the complaint itself.

The respondents said that ‘until the AHRC resolves its pervasive conflict of interest ... **our clients have nothing further to say**’ (emphasis added). That is, no submission in relation to section 18D would be provided until the question of apprehended bias was dealt with.

A schedule was attached to the letter which was said to contain ‘a range of issues which our clients will wish to address to any independent person appointed as delegate of the AHRC President to handle Miss Dinnison’s complaint’.

As part of that schedule, the respondents said:

once the AHRC has identified the person who will be conducting the relevant inquiry, our clients will wish to advance submissions to that person to the effect that the inquiry should be a formal, and preferably public, hearing.

The respondents said that ‘[a]s presently advised, our clients anticipate’ that at any such hearing, they intend to advance ‘evidence from Mr Leak himself to establish’ a number of matters including that ‘the cartoon was created “*in good faith*” and for a “*genuine purpose in the public interest*” in accordance with s.18D(b)’.

As will be described in more detail below, the respondents later confirmed that the matters contained in the schedule were **not** ‘statements about the kind of evidence our clients consider relevant to this complaint’. That is, the Commission should not take what was said in this letter as a submission about section 18D.

(b) Decision re apprehended bias

I carefully considered the respondents’ allegations about apprehended bias and I provided the respondents with a decision on 1 November 2016.

(c) Second request for submissions on section 18D

On the same day, the Commission wrote to the respondents and for a second time sought a submission about section 18D.

In that letter, the Commission said:

I note that in Section F of the Schedule to your letter of 21 October 2016, Response to AHRC Inquiries, you state that your clients’ position is that:

(a) there has been no contravention of section 18C of the RDA;

(b) alternatively, were there such a contravention of section 18C, it is excluded from legal sanction by the operation of each of: section 18D(a) and/or section 18D(b) and/or section 18D(c).

In particular, I note that in Section E of the Schedule you have made a number of statements about the kinds of evidence your clients consider relevant to this complaint. Among that evidence is information from Mr Leak himself about a number of matters including his claims:

- that he was not motivated by race, colour or national or ethnic origin
- the cartoon was created ‘in good faith’ and for a ‘genuine purpose in the public interest’ in accordance with section 18D(b)
- the cartoon constituted a ‘fair comment on any event or matter of public interest’ which comprised ‘an expression of a genuine belief held by the person making the comment’ within the meaning of section 18D(c)(ii)
- that his views regarding these issues are both ‘genuine’ and held in ‘good faith’.

Please provide a written submission from Mr Leak covering these points and any other points he would like to make, so that they can be considered by the Commission as part of my inquiry into this matter. Please also provide any submissions The Australian would like to make in relation to why they are of the view that the exemption in section 18D of the RDA applies in relation to the cartoon and The Australian's publication of it.

I ask that these submissions be provided by Wednesday **16 November 2016**.

On 5 November 2016, the *Weekend Australian* published an Editorial in which it said:

This newspaper is deeply attracted to the position articulated by Canadian/American commentator Mark Steyn who fell foul of similar laws in Canada.

As Steyn has written in our pages, it can be a mistake to defend the content of any offending piece. ... To explain Leak's cartoon is to cede the AHRC's right to arbitrate discourse to censor debate.

On 8 November 2016, the respondents replied to the Commission. Under a heading 'Information to be provided to the Commission' the respondents made two points.

First, Section E of the schedule to their first letter contained no statements about the kinds of evidence the respondents consider relevant to the complaint. It merely contained a summary of what the respondents 'anticipate that such evidence will include'.

Secondly, Mr Leak does not intend to make any submission to the Commission.

The letter relevantly provided:

Your letter notes that in Section E of the Schedule to our Letter, we made a number of "*statements*" about the kinds of evidence our clients consider relevant to this complaint.

This misrepresents the position. In Section E of the Schedule, we have made no such "*statements*". Rather, by way of explaining our clients' preferences for a formal and preferably public hearing, we have explained that "*our clients intend to advance evidence to establish that there has been no infringement of Section 18C*". We then proceed to summarise what our clients anticipate that such evidence will include.

You ask us to "*provide a written submission from Mr Leak covering [a number of specified] points and any other points he would like to make, so that they can be considered by the Commission as part of [your] inquiry into this matter*". **We confirm that Mr Leak does not intend to make any submission to your inquiry, whether in writing or otherwise.** Mr Leak is an artist and a cartoonist, not a lawyer and his role in any inquiry will be that of a witness rather than an advocate. Should there be any occasion for any such submission to be made on behalf of either of our clients, then it will be made by their legal representatives.

(emphasis added)

Although this is a passage from a letter from the respondents' legal representatives, it did not include any submission on behalf of the respondents in relation to section 18D. As noted above, the letter also disavowed the fact that any positive statement had previously been made about Mr Leak's position in relation to section 18D.

(d) Termination of the Leak complaint

On 11 November 2016, Ms Dinnison advised the Commission that she did not wish to continue with her complaint.

The same day, the Commission wrote to the respondents to notify them that the delegate was satisfied that Ms Dinnison did not want to continue with her complaint and therefore that the complaint had been finalised under s 46PF(5)(a) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

Importance of a submission in relation to section 18D

The Commission's complaints process is voluntary.

There was no obligation on the respondents to engage in conciliation at all or to provide any submissions requested by the Commission.

The reason why the Commission sought such a submission was so that it could evaluate whether the exemption in section 18D applied. If my delegate was satisfied that the exemption applied, she would have terminated the complaint under s 46PH(1)(a) of the AHRC Act on the basis that she was satisfied that the alleged unlawful discrimination was not unlawful discrimination.

As the Commission noted in its submission to the PJCHR dated 15 February 2017 at [75]-[77]:

75. The President (or his or her delegate) may decide to terminate a complaint as not unlawful discrimination (s 46PH(1)(a)) if he or she is satisfied that an exemption applies.
76. In the case of complaints under section 18C, the relevant exemptions are the free speech protections in section 18D. In order to be satisfied that an exemption applies, the Commission must have some evidence in front of it. An essential aspect of the free speech exemptions in section 18D is that the conduct is done 'reasonably and in good faith'. It is therefore usually necessary for the respondent to provide a submission that explains, at least, why the conduct was done reasonably and in good faith. This is the kind of information that the Commission typically asks a respondent to provide at the point in the flowchart titled 'obtain and review information'.
77. The President (or delegate) will not terminate a complaint on this basis if it is arguable, but not sufficiently certain, that one of these exemptions applies. That is, the application of section 18D must be clear-cut.

This is entirely consistent with the evidence that I gave on 28 February 2017 when I was asked by Senator Hinch why the Commission had sought a submission from the respondents. I said:

It may very well be fair comment; it may very well be in good faith; it may be part of an artistic exercise; it may be accurate. All of those things, however, have to be suggested—in particular the good faith view has to be put by the respondent themselves.

While the question of whether a submission was made is entirely one for the respondents, if the Commission had been provided with such a submission, there is a good chance that the Leak complaint could have been dealt with even more quickly than it was.

Yours sincerely,

Gillian Triggs
President

CC:

James Lambie, Chief of Staff, AGO.

Civil Law Unit, AGD. E humanrights@ag.gov.au

Attachment 1

Complaint by Ms Dinnison against *The Australian* and Mr Leak

Chronology

1 Key points:

- The Commission's inquiry lasted for 39 days, from the notification to the lawyers for *The Australian* and Mr Leak until the complaint was withdrawn
- Of the total period, 24 days (60% of the time) was spent waiting on responses from the lawyers for *The Australian* and Mr Leak
- Of the total period, 11 days (28% of the time) was spent responding to an allegation of apprehended bias raised by the lawyers for *The Australian* and Mr Leak
- During the course of the inquiry, the Commission received two letters from the lawyers for *The Australian* and Mr Leak
- During the course of the inquiry, *The Australian* and the *Weekend Australian* published at least 55 articles and editorials dealing with or referring to the complaint
- Despite requests from the Commission, the lawyers for *The Australian* and Mr Leak did not provide a submission about why the exemption in section 18D of the RDA applied to Mr Leak's cartoon.

2 Chronology

| Date | Event |
|-----------------|--|
| 4 October 2016 | <p>The Commission writes to Macpherson Kelley, lawyers for Nationwide News Pty Ltd, the publishers of <i>The Australian</i>, advising them that it had received a complaint from Ms Dinnison about the publication of a cartoon by Mr Leak in <i>The Australian</i>.</p> <p>As reported in <i>The Australian</i> on 15 October 2016, the Commission's letter advised that 'sections 18C, 18D and 18E of the Racial Discrimination Act appear to be relevant to the complaint' and asked for a response by 28 October 2016.</p> |
| 21 October 2016 | <p>The Commission receives a letter from the lawyers for <i>The Australian</i> and Mr Leak saying that:</p> |

| Date | Event |
|-----------------|--|
| | <ul style="list-style-type: none"> • their clients ‘require that the AHRC take no further part in any inquiry into, or any attempt to conciliate, Miss Dinnison’s complaint’ • the basis for this ‘requirement’ was that a ‘reasonable apprehension of bias’ exists • until this issue is resolved ‘our clients have nothing further to say’. <p>In a schedule to the letter, the lawyers said that once the ‘apprehended bias’ issue was resolved, it wanted a public hearing in relation to the complaints by Ms Dinnison.</p> <p>A full copy of this letter was published in the online version of <i>The Australian</i> on 21 October 2016.</p> |
| 1 November 2016 | <p>Professor Triggs writes to the lawyers for <i>The Australian</i> and Mr Leak enclosing a decision rejecting the allegation of apprehended bias, as reported in <i>The Australian</i> on 4 November 2016.</p> |
| 1 November 2016 | <p>The Commission writes to the lawyers for <i>The Australian</i> and Mr Leak confirming that it will continue to inquire into the complaint.</p> <p>As reported in <i>The Australian</i> on 4 November 2016, the Commission again asked for submissions from Mr Leak covering the following issues which Macpherson Kelley had previously said that their clients ‘anticipate’ that Mr Leak would give at a ‘hearing’:</p> <ul style="list-style-type: none"> • that he was not motivated by race, colour or national or ethnic origin • the cartoon was created ‘in good faith’ and ‘for a genuine purpose in the public interest’ in accordance with section 18D(b) • the cartoon constituted a ‘fair comment on any event or matter of public interest’ which comprised ‘an expression of genuine belief held by the person making the comment’ within the meaning of section 18D(c)(ii) • that his views regarding these issues are both ‘genuine’ and held ‘in good faith’. <p>The Commission asks for a response by 15 November 2016.</p> |

| Date | Event |
|------------------|--|
| 5 November 2016 | <p>The <i>Weekend Australian</i> publishes an Editorial in which it says:</p> <p style="padding-left: 40px;">This newspaper is deeply attracted to the position articulated by Canadian/ American commentator Mark Steyn who fell foul of similar laws in Canada.</p> <p style="padding-left: 40px;">As Steyn has written in our pages, it can be a mistake to defend the content of any offending piece. ... To explain Leak's cartoon is to cede the AHRC's right to arbitrate discourse to censor debate.</p> |
| 8 November 2016 | <p>The Commission receives a letter from the lawyers for <i>The Australian</i> and Mr Leak.</p> <p>It does not contain any submission in relation to section 18D.</p> |
| 11 November 2016 | <p>Ms Dinnison advises the Commission that she does not wish to continue with her complaint.</p> <p>The Commission advises the lawyers for <i>The Australian</i> and Mr Leak and closes its file, as reported in the <i>Weekend Australian</i> on 12 November 2016.</p> |

3 Articles published by *The Australian* and the *Weekend Australian*

The following articles were published by *The Australian* and the *Weekend Australian* during the 39 days in which the Commission's inquiry took place.

| No | Date | Author | Title |
|----|-----------------|---------------------------------|---|
| 1. | 15 October 2016 | Hedley Thomas | Cartoon reviewed for 'racial hatred' |
| 2. | 17 October 2016 | Hedley Thomas and Mark Schliebs | Use of 18C is out of hand: Abbott |
| 3. | 17 October 2016 | Jennifer Oriel | Bill Leak in frontline of battle with champions of bigot rights |
| 4. | 18 October 2016 | Editorial | A stultifying descent into uncontested mediocrity |
| 5. | 18 October 2016 | Andrew Burrell | MP rallies media in support of Leak |

| No | Date | Author | Title |
|-----|-----------------|---------------------------------|---|
| 6. | 19 October 2016 | Sharri Markson | Censorship: editor, cartoonists attack Leak investigation |
| 7. | 19 October 2016 | Mark Steyn | The war on free speech |
| 8. | 19 October 2016 | Janet Albrechtsen | Beheading threats are fine, but don't hurt any feelings |
| 9. | 20 October 2016 | James Allan | Does anyone have the courage to stand up and say 'Je suis Bill Leak'? |
| 10. | 21 October 2016 | Victoria Laurie | Bill Leak 18C cartoon accurate, says WA Police Commissioner |
| 11. | 21 October 2016 | Chris Kenny | Taxpayers should not fund this compassionista |
| 12. | 22 October 2016 | Hedley Thomas | HRC accused of bias in 18C cartoon complaint |
| 13. | 22 October 2016 | Gerard Henderson | Free speech attacks will continue if legislation allows it |
| 14. | 22 October 2016 | Editorial | Taxpayer-funded activism undermining the nation |
| 15. | 22 October 2016 | Chris Merritt | 'You have to keep fighting these cases' |
| 16. | 24 October 2016 | Chris Mitchell | Twigging to questionable HRC |
| 17. | 24 October 2016 | Darren Davidson | Probe into Leak cartoon the biggest threat to press freedom |
| 18. | 24 October 2016 | Opinion | Suppressing free speech the most offensive thing about 18C |
| 19. | 24 October 2016 | John Spooner | Why should a satirist be forced to explain himself? |
| 20. | 25 October 2016 | Jared Owens | Inquiry would widen 18C debate: senator Dean Smith |
| 21. | 25 October 2016 | Ramesh Thakur | This should be the end of the road for Gillian Triggs |
| 22. | 26 October 2016 | Paul Kelly | PM can combine 18C revision with new race hate law |
| 23. | 26 October 2016 | Mark Coultan | States could bolster hate laws if Canberra repeals |
| 24. | 26 October 2016 | Editorial | 18C and the commission of silence |
| 25. | 26 October 2016 | Phillip Hudson and Sarah Martin | Majority opposes 18C case against students |
| 26. | 28 October 2016 | Dennis Shanahan | 18C 'offensive to indigenous women' |
| 27. | 29 October 2016 | Jared Owens and Chris Merritt | Abbott, PM unite on 18C Leak case |
| 28. | 29 October 2016 | Editorial | Free speech is a human right |
| 29. | 30 October 2016 | Joe Kelly | Warren Mundine: 18C puts freedom of speech at risk |
| 30. | 31 October 2016 | Joe Kelly | Need to act on 18C now, says Mundine |

| No | Date | Author | Title |
|-----|------------------|------------------------------------|---|
| 31. | 2 November 2016 | Kerryn Pholi | I'm offended by Human Rights Commission, not Bill Leak |
| 32. | 2 November 2016 | Simone Fox Koob | Grant defends Leak's right to raise issues |
| 33. | 2 November 2016 | David Crowe | Liberals in 'free speech' push on 18C |
| 34. | 2 November 2016 | Editorial | There is never a bad time to defend free expression |
| 35. | 3 November 2016 | Dennis Shanahan and Joe Kelly | Howard slams 18C cartoon inquiry |
| 36. | 3 November 2016 | Michael Sexton | Section 18C as it now stands is here to stay despite its obvious faults |
| 37. | 4 November 2016 | Hedley Thomas | Triggs rejects 18C 'bias' claims |
| 38. | 5 November 2016 | Paige Taylor and Hedley Thomas | 'White lawyers' behind complaint |
| 39. | 5 November 2016 | Andrew Burrell and Victoria Laurie | I am terrified to return, says racism complainant |
| 40. | 5 November 2016 | Editorial | Leak action smothers free speech and hides the truth |
| 41. | 5 November 2016 | John Carroll | Anguish is exquisite for wielders of 18C |
| 42. | 7 November 2016 | David Crowe and Rachel Baxendale | Ministers push PM for 18C action |
| 43. | 7 November 2016 | Chris Merritt | Division in left-wing ranks over section 18C |
| 44. | 7 November 2016 | Angela Shanahan | Bill Leak has offended me, but I'm not complaining |
| 45. | 8 November 2016 | Chris Merritt | Reform not just a matter of fiddling with words |
| 46. | 9 November 2016 | Tim Wilson | Greens thought 18C bad law |
| 47. | 9 November 2016 | Janet Albrechtsen | PM must be firm on freedom |
| 48. | 9 November 2016 | Rosie Lewis | Leak issue must be resolved 'quickly' |
| 49. | 10 November 2016 | Joe Kelly | Most support free-speech overhaul |
| 50. | 10 November 2016 | Rosie Lewis | 'No consequences': Albanese discounts Leak investigation |
| 51. | 11 November 2016 | Kylar Loussikian | Ethnic communities give race act compromise the thumbs-up |
| 52. | 11 November 2016 | Justin Quill | Reform act, ditch AHRC to ensure that debate can be free and frank |
| 53. | 11 November 2016 | Simon Breheny | No room for horse-trading on freedom of speech: repeal is the only solution |

| No | Date | Author | Title |
|-----|------------------|----------------------------------|---|
| 54. | 11 November 2016 | Rosie Lewis and Greg Brown | Dutton ups the pressure on Triggs to fall on sword |
| 55. | 11 November 2016 | Editorial | The 18C culture of complaint |



Australian Human Rights Commission

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**Australian
Human Rights
Commission**

Our ref: 2016-10670

4 October 2016

Mr Justin Quill
Principal – Media, Litigation and Dispute Resolution
Macpherson Kelley Lawyers

Dear Mr Quill

Complaint by Miss Melissa Dinnison

The Australian Human Rights Commission has received a complaint from Miss Melissa Dinnison against Nationwide News Pty Limited – The Australian (The Australian) and Mr Bill Leak. The complaint alleges racial hatred under the *Racial Discrimination Act 1975* (Cth) (RDA).

I note that in her original complaint Miss Dinnison makes references to racial discrimination and racial hatred. At this time, Miss Dinnison's allegations have been accepted as a complaint of racial hatred.

I have attached a copy of the complaint.

Sections 18C, 18D and 18E of the RDA appear relevant to the complaint and you can read these sections of the law by going to the link [here](#).

Contact with the individual respondent

In relation to the complaint against Mr Bill Leak, please provide Mr Leak with a copy of this letter and a copy of the complaint as it relates to the allegations against him. Please confirm with the Commission in writing that this has occurred. Please also advise in writing whether The Australian is representing Mr Leak in relation to this complaint. It is preferred that this information is provided in an electronic format and sent by email.

If The Australian prefers that the Commission communicates directly with Mr Leak about the complaint, please advise the Commission within seven (7) days of the date of this letter and provide direct contact details for Mr Leak. Alternatively, please request that Mr Leak contact the officer who is handling this matter within seven (7) days of the date of this letter. Contact details for the officer are provided at the end of this letter.

The complaint process

When a complaint is received, the President of the Commission is required to inquire into and attempt to resolve the complaint by conciliation. If a complaint cannot be conciliated, or is terminated for some other reason, the person affected by the alleged discrimination may apply to the Federal Circuit Court of Australia or the Federal Court of Australia for the court to decide the allegations.

Links to important information about the Commission's complaint process, including on the conciliation process, are provided below. Please ensure that you read this information. If you need hard copies of these documents, please let us know.

[Information for people and organisations responding to complaints - unlawful discrimination](#)

[Understanding and preparing for conciliation – unlawful discrimination](#)

[Charter of Service](#)

A video presentation about conciliation is also available [here](#).

Response to the complaint

The purpose of this letter is to advise The Australian and Mr Leak of the complaint and provide The Australian and Mr Leak with the opportunity to respond to the complaint. To that end, it is requested that The Australian and Mr Leak provide the information outlined in the attached document and any other information relevant to the complaint by **Friday, 28 October 2016**.

Who should you contact?

If The Australian and/or Mr Leak has any questions about the complaint or the Commission's complaint process, please contact Ms HJ Lee, A/Principal Investigator/Conciliator who is handling the complaint on behalf of the President. Her contact details are:

Any written information The Australian and/or Mr Leak provides should also be marked to the attention of Ms HJ Lee.

Thank you for your co-operation.

Yours sincerely

Jodie Ball
Delegate of the President

Enc. Copy of complaint

Information and documents to be provided to the Australian Human Rights Commission

Please provide the following information and documents by **Friday, 28 October 2016**.

1. Please confirm the legal entity that operates The Australian.
2. Please comment on Miss Dinnison's claims that Mr Leak's cartoon and The Australian's publishing of the cartoon on 4 August 2016 constitute racial hatred under the terms of 18C of the RDA.
3. Section 18D of the RDA outlines exemptions under the racial hatred provisions. If the respondents consider that an exemption applies in relation to this matter, please provide a submission on this issue.
4. Please provide any further submissions that the respondents consider are relevant to the Commission's consideration of this matter.
5. Please advise if the respondents would be willing to participate in a conciliation process to try to resolve this complaint.

It is the Commission's preference that the requested information is provided in an electronic format and sent by email.

Please note that it is the Commission's usual practice to provide a copy of this information to the complainant.

Please also note that the documents the Commission passes between the parties, such as the complaint and any response to the complaint, are provided for the purposes of the Commission's investigation and conciliation function. It is expected that parties will not publish or use the information apart from this purpose while the complaint is before the Commission.

Our ref: 264803
Your ref: 2016-10670

M&K Lawyers Group Pty Ltd

21 October 2016

Melbourne

Level 22

114 William Street

Melbourne VIC 3000

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Melbourne VIC 3000

DX 174 Melbourne

Tel + 61 3 8615 9900

Jodie Ball
Delegate of the President
Australian Human Rights Commission
Level 3, 175 Pitt Street
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Ball

COMPLAINT AGAINST THE AUSTRALIAN AND MR BILL LEAK BY MELISSA DINNISON

We act for:

1. Nationwide News Pty Ltd, ACN 008 438 828, publisher of *The Australian* newspaper; and
2. Mr Bill Leak, a cartoonist with *The Australian*.

We confirm that Mr Leak has been provided with a copy of your correspondence of 4 October 2016, including a copy to the complaint dated 4 August 2016 by Melissa Dinnison.

The AHRC's Position of Conflict

We note that:

- The AHRC is a body corporate¹ comprising a President and seven commissioners².
- One of those commissioners, namely the Race Discrimination Commissioner, is Dr Thinethavone (Tim) Soutphommasane³.
- Dr Soutphommasane has pursued a number of career paths, including as a speechwriter for the then Labor Premier of New South Wales, Mr Bob Carr; as a research officer for the then Federal Labor Opposition Leader, Mr Kevin Rudd; as a

¹ AHRC Act, s.7

² AHRC Act, s.8

³ AHRC website at: <https://www.humanrights.gov.au/about/commissioners/race-discrimination-commissioner-dr-tim-soutphommasane>

Lecturer in Australian Studies and a Research Fellow at the National Centre for Australian Studies at Monash University; and as a journalist.

- In his career as a journalist, Dr Soutphommasane has written for a number of publications, including *The Australian* and some of its principal competitors in the print media.

On 4 August 2016, Dr Soutphommasane was quoted in *The Sydney Morning Herald* (a competitor to *The Australian*) as inviting and encouraging complaints such as Miss Dinnison's. According to that report:

"Race Discrimination Commissioner Dr Tim Soutphommasane told Fairfax Media: "Our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group."

He said "a significant number" of people would agree the cartoon was a racial stereotype of Aboriginal Australians and he urged anyone who was offended by it to lodge a complaint under the Racial Discrimination Act."

A later report attributed to Dr Soutphommasane a statement that:

"If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can consider lodging a complaint under the Racial Discrimination Act with the commission."

Our clients understand that Dr Soutphommasane provided an interview to Fairfax Media, then published remarks to similar effect by way of his "Twitter feed" and on his "Facebook page".

It may be observed that Dr Soutphommasane has not denied that he was correctly quoted in *The Sydney Morning Herald*; nor has he retracted or recanted of his comments. Indeed, at an estimates hearing by the Senate's Legal and Constitutional Affairs Legislation Committee in Canberra on 18 October, Dr Soutphommasane appeared both to confirm the comments attributed to him, and to refuse steadfastly to acknowledge that they were inappropriate. Neither has the AHRC, through its President or any of the other commissioners, dissociated itself from Dr Soutphommasane's remarks. Again, at the estimates hearing on 18 October, President of the AHRC, Professor Gillian Triggs – who was seated beside Dr Soutphommasane – made no attempt to distance herself from his statements.

In these circumstances, it is, we would respectfully suggest, self-evident that the AHRC is irremediably compromised by Dr Soutphommasane's conduct, as well as the silent acquiescence of Professor Triggs in that conduct. That Dr Soutphommasane prejudged the factual and legal basis for a complaint against our clients is bad enough; and his counterfactual denial of any such prejudgement does not help. But the fact that he positively invited and encouraged (even "*urged*") the making of such complaints is utterly indefensible. Whilst it is unclear whether Miss Dinnison's complaint was prompted by Dr

Soutphommasane's blandishments, it would appear to be more than coincidental that she chose to lodge her complaint shortly after Dr Soutphommasane's comments were published.

There can be no doubt that a disinterested observer, with knowledge of the relevant circumstances, could only entertain the most extreme misgivings regarding the AHRC's capacity to deal with Miss Dinnison's complaint impartially and free from any taint of prejudgement. It follows that, at the very least, a "*reasonable apprehension of bias*" arises; indeed, the circumstances would be sufficient to support a case of actual bias, if that were necessary.

Accordingly, our clients require that the AHRC take no further part in any inquiry into, or any attempt to conciliate, Miss Dinnison's complaint. There is a precedent, in the QUT case (where a similar situation of conflict arose), for the AHRC to appoint an independent senior legal practitioner to deal with the complaint as delegate of the AHRC President. Our clients are content for that to happen; although, due to the fact that *The Australian* regularly engages with many members of the legal profession, it would be appropriate to consult with us regarding the identity of the person to be appointed.

Should the AHRC determine to continue dealing with Miss Dinnison's complaint, without having unburdened itself of the wholesale conflict to which it is subject, and without having disencumbered itself of the actuality or perception of bias to which it is now exposed, you may anticipate that we will be seeking our clients' instructions to apply immediately for appropriate injunctive relief.

Otherwise, until the AHRC resolves its pervasive conflict of interest, and determines upon a course of action which will ensure that any inquiry into or attempt to conciliate Miss Dinnison's complaint is not contaminated by actual or perceived bias, our clients have nothing further to say.

Attached as a schedule to this letter is a document identifying a range of issues which our clients will wish to address to any independent person appointed as delegate of the AHRC President to handle Miss Dinnison's complaint. What appears in the schedule is without prejudice to our clients' primary contention that the AHRC must immediately and irrevocably dissociate itself from dealing with Miss Dinnison's complaint.

Yours faithfully

Macpherson Kelley

JUSTIN QUILL

Principal

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SCHEDULE

ISSUES TO BE ADDRESSED TO INDEPENDENT DELEGATE OF THE AHRC PRESIDENT

A. Delay

The AHRC's internal practice manual contemplates that respondents will be informed of a complaint within 28 days. Miss Dinnison's complaint is dated 4 August 2016. However, our clients were not told about it until two months later, on 4 October 2016.

A delay of two months may seem trivial in contrast with the AHRC's delay of 14 months before informing seven of the ten respondents in the QUT case about the complaint against themselves. Even so, a delay of this magnitude would be entirely unacceptable in any case; more particularly so where the complaint is one which the AHRC (through one of its constituent commissioners) has explicitly invited and exhorted to be made, and where the AHRC is accordingly in a position of insuperable conflict.

Our clients can think of no obvious explanation for this delay beyond two possibilities:

1. One possibility is based on the fact that, in the period immediately preceding and following the AHRC's receipt of Miss Dinnison's complaint, section 18C of the RDA was the subject of unprecedented political scrutiny, with a number of different bills being presented to the Federal Parliament with proposals either to repeal or amend the section, and extensive debate about those proposals in many sections of the media. Our clients should be very surprised if it went entirely unnoticed at the AHRC that *The Australian* was at the forefront of media outlets actively supporting changes which the AHRC, itself, vehemently opposed.

In that context, the fact that the AHRC was in receipt of a complaint against *The Australian* under section 18C of the RDA – a complaint which one of the AHRC's own commissioners had invited – and the fact that this complaint apparently sought to gag political debate in *The Australian*, might well have been considered unpropitious for the opponents of free speech championing maintenance of the existing legislative regime.

It is a matter of public record that – by her own admission – the AHRC President, Professor Triggs, orchestrated the timing of the "*National Inquiry into Children in Immigration Detention*" for political reasons. In these circumstances, and given the AHRC's willingness to play politics with respect to an issue as important as the welfare of children, nobody should feel surprised if the AHRC was equally willing to play politics on this occasion, with respect to an issue which is as important to the AHRC as preserving the current provisions of section 18C of the RDA.

2. The second possibility is that, within the AHRC, and especially on the part of Dr Soutphommasane himself, there was an expectation that Dr Soutphommasane's public utterances would carry greater weight in the general community than was actually the case.

That is, the AHRC may have considered that there might have been more complaints to follow Miss Dinnison's complaint and was holding off whilst waiting for those complaints to arrive. When that didn't eventuate the AHRC felt compelled to move on Miss Dinnison's complaint.

However, our clients have no wish to be unfair to the AHRC. So if there is another explanation for the inordinate delay, they would invite the AHRC to tell them what it is.

B. Validity of section 18C

In our view section 18C may be inconsistent with our clients' constitutional right to freedom of expression on political matters. There can be no doubt that the cartoon was part of a political discussion. If it is suggested that section 18C makes Mr Leak's cartoon unlawful (an assertion with which we disagree), then it is not appropriately adapted and compatible with the implied constitutional right to free speech. To that extent the section is invalid.

C. Referral to the President

Section 46PD of the AHRC requires that, "*If a complaint is made to the Commission under section 46P, the Commission must refer the complaint to the President.*" Succeeding steps, such as inquiring into the complaint and attempting to conciliate the complaint, are triggered only after the complaint "*is referred to the President under section 46PD*": see subsection 46PF(1) of the AHRC Act.

Our clients are aware that the AHRC – or at least some of its officers – maintain the view (however implausibly) that, although section 46PD requires that the complaint must be referred "*to the President*", it suffices if it is referred, instead, to any AHRC officer holding "*a delegation from the President of her powers under s 46PF of the AHRC Act to inquire into and attempt to conciliate complaints of unlawful discrimination*". If that view remains prevalent within the AHRC – and we note that Professor Triggs appeared to distance herself from it at the recent Senate estimates committee hearing – then it is a view with which our clients respectfully disagree; and, to avoid any risk of mischief, they do not propose to participate in any inquiry or conciliation by the AHRC until they are assured that there has been strict compliance with the Act's requirements.

Accordingly, our clients seek specific confirmation that Miss Dinnison's complaint has been referred to Professor Triggs, the date on which that referral occurred, and the outcome of that referral.

D. Further Details Required

In order to make any meaningful response to Miss Dinnison's complaint, there are some further details which our clients need. Having regard to the process outlined in the AHRC's internal practice manual, it is surprising that these details were not obtained at the AHRC's own initiative in the two months between the receipt of Miss Dinnison's complaint by the AHRC and the AHRC's referral of it to our clients.

The further details required are as follows:

1. The AHRC's letter of 4 October notes that "*in her original complaint Miss Dinnison makes references to racial discrimination and racial hatred*", but adds that, "*At this time, Miss Dinnison's allegations have been accepted as a complaint of racial hatred*". Frankly, our clients don't understand what that means.

If the AHRC is of the view that the complaint of racial discrimination is misconceived or without foundation, the complaint can be terminated – for example, under s.46PH(1)(a) or s.46PH(1)(c) of the AHRC Act. But, where a complaint is, on its face, a complaint of

both “*racial discrimination*” and “*racial hatred*”, our clients are not aware of any power to “*accept*” the complaint as one thing but not the other.

Our clients appreciate that, under s.46P(4) of the AHRC Act, if it appears to the AHRC that a person wishes to make a complaint of unlawful discrimination, and that the person “*requires assistance to formulate the complaint or to reduce it to writing*”, the AHRC is obliged to “*take reasonable steps to provide appropriate assistance to the person*”. But that is the only statutory provision which contemplates any rôle for the AHRC in re-writing a complaint, and it certainly does not permit the AHRC to treat the complaint as something other than what it actually is.

Moreover, the AHRC’s use of the words “*At this time*” suggest that the AHRC is reserving the possibility of adopting a different attitude towards Miss Dinnison’s complaint at some future point in time. That is entirely unacceptable to our clients. Our clients may have to respond to the complaint, but they only have to do so once; they cannot be expected to deal with part of the complaint, whilst there hangs over their heads the possibility of having to deal with another part of it at some future time.

Accordingly, our clients require that the AHRC ascertain whether Miss Dinnison wishes to persist with her complaint as a complaint of “*racial discrimination*”. If not, it may be amended in accordance with s.46PA of the AHRC Act to delete any assertion of “*racial discrimination*”. But if Miss Dinnison is not willing to amend the complaint in that way, the only proper course is for it to be terminated under s.46PH(1)(a) or s.46PH(1)(c) of the AHRC Act.

2. Whilst Miss Dinnison’s complaint refers specifically to an “*article*” (sic.) which was “*published on the 4th of August, 2016 in The Australian newspaper (available online) by cartoonist, Bill Leak*”, it also refers to “*A series of cartoons [which] illustrate hateful and derogatory material specifically relating to Indigenous australians, their relationships with their children, alcoholism and domestic violence*”. In order to respond fully to the complaint, our clients will need to have Miss Dinnison identify each of the items that she is referring to as a “*series of cartoons*”.
3. With specific reference to the cartoon published on 4 August 2016, Miss Dinnison asserts that it depicts “*racial discrimination [sic.], racial profiling, and racially offensive material*”. Insofar as the cartoon is alleged to be “*racially offensive*”, our clients at least understand what the complainant is trying to say, even though they regard the complaint as misconceived. But we disagree fundamentally with the suggestion the cartoon “*depicts*” both “*racial discrimination*” and “*racial profiling*”.

For ease of reference, the cartoon in question is reproduced here:



As may be seen, the cartoon is set in a remote outback scene. It depicts three people: a man in the uniform of a Northern Territory police officer; a bare-footed boy in grey shorts and a red shirt; and an adult male, also bare-footed, wearing a blue cap, a green shirt, and grey trousers, holding what appears to be a beer can (possibly *Victoria Bitter*). Each of the protagonists is dark-skinned, and obviously intended to represent an Aboriginal Australian. None of them is shown to be engaging in any form of “*racial discrimination*” or “*racial profiling*”, which would be highly anachronistic given that they are all presented as members of the same race.

In order to respond to the complaint, our clients will need to have Miss Dinnison explain precisely how she believes that anything in the cartoon “*depicts*” either “*racial discrimination*” or “*racial profiling*”.

4. Despite her earlier reference to “*racial discrimination*”, the substance of the complaint seems to be an attempt to invoke Section 18C of the RDA; indeed, Miss Dinnison refers specifically to subsections 1(a) and 1(b) of Section 18C, and even sets out the words of those subsections.

It is trite that, to apply s.18C, it is necessary – first – to identify the “*other person or ... group of people*” whom it is alleged that the relevant “*act*” is “*reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate*”. This is critical because s.18C does not apply unless the relevant act was “*done*” by reason of “*the race, colour or national or ethnic origin of the other person or of some or all of the people in the group*”. We request that the “*other person*”, or the “*group of people*”, in question be identified.

To forestall any “false starts” on this issue, we should make it clear that our clients will not accept a superficial response to this question, such as a response identifying “all Aboriginal Australians” or “all Indigenous Australians” – or, at the other extreme, identifying only a select group of Miss Dinnison’s acquaintances – as persons who were “reasonably likely, in all the circumstances” to be offended, insulted, humiliated or intimidated. It is clearly not the case that all Aboriginal or Indigenous Australians have been offended or insulted, let alone humiliated or intimidated, by Mr Leak’s cartoon; indeed, several prominent members of the Aboriginal community have spoken out in support of the cartoon (and have been quoted in *The Australian* to that effect). On the other hand, it would be entirely fatuous to suggest that the drawing and publication of the cartoon was “done” by reason of “*the race, colour or national or ethnic origin*” of a handful of people whom Mr Leak doesn’t know, and has never met or heard of.

So who, precisely, is the person – or who are the people – that the cartoon is supposed to have offended, insulted, humiliated or intimidated?

5. In most (though perhaps not all) instances of complaints of unlawful discrimination, the respondents are likely to know – or, at least, to know of – the complainants. But our clients have no knowledge of a person named Melissa Dinnison. And, even if they did, their prospects of identifying her correctly are substantially diminished because the copy of the complaint which has been supplied is apparently redacted to delete any information which might assist with such identification: not only her address and other contact details (the deletion of which might arguably be justified), but also her suburb, her state or territory, and her postcode (the deletion of which cannot be justified on any basis). Our clients are entitled to know these details.

Our clients are also entitled to know the grounds on which Miss Dinnison claims to have been “*discriminated against because of [her] race*”, and to have “*experienced racial hatred*”. Is she, herself – or does she “identify” as being – Aboriginal or Indigenous? Does she live in a remote community, like that depicted in the cartoon? Is she the parent of a wayward youth, which might explain her taking offence at the suggestion that her own lack of parental responsibility has contributed to the child’s involvement with police (although her choice to be identified as “Miss” would seem to suggest otherwise)?

6. What relief is Miss Dinnison seeking? In her complaint, Miss Dinnison responds to the question “*How do you think this complaint could be resolved?*” with the single word (and entirely inappurtenant) answer, “yes”. Does she claim any pecuniary loss? Does she want an apology – and, if so, to whom? Or is her complaint merely a publicity-seeking exercise, intended to cause inconvenience and embarrassment to our clients, but for no proper purpose?

E. Inquiry

Our clients are conscious of the fact that an “*inquiry*”, as required by s.46PF of the AHRC Act, may take many forms; and that, under s.14(1) of the AHRC Act, the AHRC “*may make an examination or hold an inquiry in such manner as it thinks fit*”.

However, once the AHRC has identified the person who will be conducting the relevant inquiry, our clients will wish to advance submissions to that person to the effect that the inquiry should be a formal, and preferably public, hearing.

The reasons for this are straight-forward:

1. First, our clients intend to advance evidence to establish that there has been no infringement of Section 18C. As presently advised, our clients anticipate that such evidence will include:
 - (once the relevant “*person*” or “*group of people*” has been identified, and depending on the precise terms of that identification) members of the relevant “*group of people*” who will testify that they were neither offended, insulted, humiliated nor intimidated by Mr Leak’s cartoon;
 - evidence from Mr Leak himself to establish that:
 - the persons depicted in the cartoon are merely caricatures – not real people – so that he was not motivated by the “*race, colour or national or ethnic origin of*” any “*person*” or member of the relevant “*group*”, nor any other actual human being;
 - the cartoon was created “*in good faith*” and for a “*genuine purpose in the public interest*” in accordance with s.18D(b), namely to promote thought and discussion surrounding problems afflicting youthful offenders in remote Aboriginal communities, including the undeniable fact that such problems are sometimes caused or contributed to by neglect on the part of parents (especially fathers), including alcohol abuse, and the absence of appropriate paternal role-models;
 - further or alternatively, in the specific context of recent revelations on the ABC television programme *Four Corners*, the cartoon constituted “*a fair comment on any event or matter of public interest*” which comprised “*an expression of a genuine belief held by the person making the comment*” within the meaning of s.18D(c)(ii); and
 - based on his own life-experience, including his direct experience of remote Aboriginal communities and his personal friendships with members of such communities, Mr Leak’s views regarding these issues are both “*genuine*” and held in “*good faith*”;
 - evidence from an art expert, to establish that the cartoon is “*an artistic work*” for the purposes of s.18D(a); and
 - evidence from appropriate experts – such as sociologists and criminologists, as well as witnesses having direct daily exposure to the problems associated with juvenile crime and recidivism in remote Aboriginal communities – to establish that the point made by Mr Leak’s cartoon is both a “*genuine*” matter of concern and a legitimate issue of “*public interest*”.
- (It doubtless goes without saying that the specific nature of any such evidence is subject to revision, once the precise terms of Miss Dinnison’s complaint have been properly clarified.)
2. The second reason why our clients will be seeking a formal, and preferably public, hearing, is that they are seriously affronted by the allegation that they have engaged in

unlawful “*racial vilification*” or “*race hatred*”, especially when such allegations were widely publicised by an AHRC Commissioner – through a rival media organisation – without any attempt to discuss with our clients either:

- the motivation for the cartoon;
- whether the views which it reflected were held in “*good faith*”;
- whether the point which it sought to make was a “*genuine*” one; and
- whether it raised a legitimate issue of “*public interest*” (not only for the benefit of the public at large, but more especially for the benefit of the youthful Indigenous offenders who are the real victims of the very circumstances which Mr Leak’s cartoon sought to highlight).

Accordingly, our clients will require a full and fair opportunity to challenge (including by way of cross-examination) any evidence which may be offered – whether by Miss Dinnison, by Dr Soutphommasane, or by anyone else – in support of what our clients regard as an outrageous slur on their personal judgement, their moral probity, and their journalistic ethics.

F. Response to AHRC Inquiries

We turn, finally, to answer the specific enquiries set out in the attachment to the AHRC’s letter of 4 October 2016. We do so in order.

1. Please confirm the legal entity that operates *The Australian*.

The relevant legal entity is Nationwide News Pty Ltd, ACN 008 438 828.

2. Please comment on Miss Dinnison’s claims that Mr Leak’s cartoon and *The Australian*’s publishing of the cartoon on 4 August 2016 constitute racial hatred under the terms of 18C of the RDA.

On the assumption that your enquiry represents a correct interpretation of Miss Dinnison’s complaint, her claims are denied.

3. Section 18D of the RDA outlines exemptions under the racial hatred provisions. If the respondents consider that an exemption applies in relation to this matter, please provide a submission on this issue.

Our clients’ position is that:

- (a) there has been no contravention of section 18C; and
- (b) alternatively, were there such a contravention, it is excluded from legal sanction by the operation of each of:
 - (i) s.18D(a); and/or
 - (ii) s.18D(b); and/or
 - (iii) s.18D(c).

4. Please provide any further submissions that the respondents consider are relevant to the Commission's consideration of this matter.

Our clients have nothing to add at this time. Nor do they anticipate that they will have anything to add until the matters raised under subheadings A. to D., above, have been satisfactorily addressed.

5. Please advise if the respondents would be willing to participate in a conciliation process to try to resolve this complaint.

Our clients would be willing to participate in a conciliation process to try to resolve this complaint, once:

- (a) the matters raised under subheadings A. to D., above, have been satisfactorily addressed; and
- (b) an appropriate inquiry, in accordance with the AHRC's mandatory obligation under s.46PF of the AHRC Act, has been concluded.

However, so that there is no misunderstanding, we are instructed to make it clear that – as presently advised – our clients would not be expecting to offer any form of remedy or relief to Miss Dinnison (or anyone else) as part of any conciliation process. It is possible, but at this stage seems unlikely, that our clients' position may change by the time of any such conciliation process.



Our Ref: 2016/373

1 November 2016

Mr Justin Quill
Principal
Macpherson Kelley
Level 22, 114 William Street
Melbourne VIC 3000

Dear Mr Quill,

Complaint by Miss Melissa Dinnison against The Australian and Mr Bill Leak

I refer to your letter dated 21 October 2016 requesting that the Commission take no further part in any inquiry into and attempt to conciliate the above complaint.

I have carefully considered the matters raised by you. Please find enclosed a copy of my reasons for decision.

My delegate Ms Jodie Ball will contact you in relation to the next steps in the Commission's process.

Yours sincerely,

Gillian Triggs
President

Reasons for decision

1 Background

1. On 4 August 2016, the Commission received a complaint in writing from Miss Melissa Dinnison against Nationwide News Pty Ltd, the publisher of *The Australian* newspaper (The Australian) and cartoonist Mr Bill Leak (together 'the Respondents'). Miss Dinnison alleged that the Respondents had engaged in conduct contrary to s 18C of the *Racial Discrimination Act 1975* (Cth) (RDA) by publishing a cartoon on 4 August 2016 by Mr Leak.
2. As President of the Commission, I (through complaint handing staff of the Commission) perform the function under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) of inquiring into and attempting to conciliate complaints of 'unlawful discrimination', including complaints of acts and practices contrary to s 18C of the RDA.
3. An officer of the Commission made inquiries about the appropriate contact person to whom the complaint should be sent and was informed that The Australian was represented by Macpherson Kelley Lawyers and that the complaint could be sent to Mr Justin Quill a Principal in the Media, Litigation and Dispute Resolution section of that firm.
4. On 4 October 2016, Ms Jodie Ball, the Deputy Director of the Investigation and Conciliation Section of the Commission and my delegate for the purposes of inquiring into and attempting to conciliate this complaint, sent a letter to Macpherson Kelley enclosing a copy of the complaint. Ms Ball said that the purpose of the letter was to advise The Australian and Mr Leak of the complaint and to provide them with the opportunity to respond to the complaint. Ms Ball asked the Respondents to provide responses to a list of five requests for information.
5. On 21 October 2016, Mr Quill sent a letter to the Commission confirming that Macpherson Kelley was acting on behalf of each of the Respondents. In his letter, Mr Quill said that his clients 'require that the AHRC take no further part in any inquiry into, or any attempt to conciliate, Miss Dinnison's complaint'. This demand was made on the basis that the Commission allegedly has a 'conflict of interest'. Mr Quill said that until this conflict of interest is resolved 'our clients have nothing further to say'.
6. The alleged conflict of interest is put on two bases. First, the Respondents say that Dr Tim Soutphommasane, the Race Discrimination Commissioner, has made public statements about the cartoon published by The Australian which 'prejudged the factual and legal basis' for the complaint made by Miss Dinnison. Secondly, the Respondents say that I 'silent[ly] acquiesce[d]' in the conduct by Dr Soutphommasane.
7. As a result, the Respondents allege that there is a 'reasonable apprehension of bias' in relation to any steps taken by me (or by Ms Ball on my behalf) to inquire into and attempt to conciliate the complaint. They also make the serious, albeit qualified, allegation that 'the circumstances would be sufficient to support a case

of actual bias, if that were necessary'. I do not take the Respondents to be pressing a case of actual bias.

8. While the Respondents demand that the Commission 'take no further part' in inquiring into and attempting to conciliate the complaint, they submit that they are 'content' for me to 'appoint an independent senior legal practitioner' to deal with the complaint.
9. I have taken the letter from the Respondents as a request that:
 - 9.1. neither I nor any member of staff of the Commission (including my delegate Ms Ball), continue to inquire into and attempt to conciliate the complaint by Miss Dinnison; and
 - 9.2. I instead delegate the function of inquiring into and attempting to conciliate Miss Dinnison's complaint to a senior legal practitioner outside the Commission.

2 Legal test

10. The test to be applied in determining whether a judicial officer may be subject to a reasonable apprehension of bias is well established. The High Court in *Ebner* expressed the test in the following way:

[A] judge is disqualified if 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.¹

11. The Court went on to identify two necessary steps in the application of that test:

First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.²

12. The test for apprehended bias is an objective test from the point of view of a fair-minded observer. The question is 'one of possibility (real and not remote), not probability'.³ The High Court has observed that the fair minded observer is taken

¹ *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337, 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Ebner*').

² *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337, 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

³ *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

to be reasonable, to not make snap decisions, and to have knowledge of the actual circumstances of the case and of the material objective facts.⁴

13. While the *Ebner* test applied to judicial decision making, issues of apprehended bias also apply to other kinds of decision making and decision maker. Often, the principle is applied in administrative decision making as an aspect of the rule of procedural fairness. The High Court has said that the application of the principle in connection with decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making.⁵ For example, conduct which, on the part of a judge in adversarial litigation, might result in a reasonable apprehension of bias, might not have the same result when engaged in by an administrative tribunal carrying out non-adversarial procedures.⁶
14. The Commission is not a court and does not have the power to make binding determinations about whether a complaint of unlawful discrimination has been established. When a complaint of unlawful discrimination is made to the Commission, the President is required to inquire into and attempt to conciliate the complaint.⁷ If the President is satisfied that there is no reasonable prospect of the complaint being settled by conciliation, the President may terminate the complaint.⁸ A complaint may also be terminated on a number of other grounds, for example if the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination, or if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance.⁹ Regardless of the ground, once a complaint is terminated, a complainant may decide to make an application to the Federal Court or Federal Circuit Court alleging unlawful discrimination by one or more of the respondents to the terminated complaint.¹⁰ It is only the Court that can make binding determinations of whether or not unlawful discrimination occurred.¹¹
15. The Commission takes seriously its independence and impartiality in dealing with complaints of unlawful discrimination. Although the Commission's processes are not judicial, the role played by the Commission in inquiring into and attempting to conciliate such complaints demand substantial independence and impartiality. I take this into account in applying the *Ebner* test set out above.
16. Questions of disqualifying bias are sometimes raised in an administrative law context as a reason for vitiating a decision on natural justice grounds. The test for the appearance of disqualifying bias in an administrative context mirrors the test

⁴ *Johnson v Johnson* (2000) 201 CLR 488, 492-494 [12] and [14] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 87 (Mason CJ and Brennan J), 95 (Deane J).

⁵ *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337, 343-344 [4] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁶ *Re Minister for Immigration and Multicultural Affairs; ex parte Epeabaka* (2001) 206 CLR 128, 138 [27] (Gleeson CJ, McHugh, Gummow and Hayne JJ), considering the operation of the Refugee Review Tribunal.

⁷ AHRC Act, s 46PF.

⁸ AHRC Act, s 46PH(1)(i).

⁹ AHRC Act, s 46PH(1)(a) or (c).

¹⁰ AHRC Act, s 46PO(1).

¹¹ AHRC Act, s 46PO(4).

for apprehended bias in the curial context.¹² Significantly, where disqualifying bias is said to result from the conduct or circumstances of a person other than the decision-maker, then the part played by that other person in relation to the decision will be important.¹³ In particular, the part played by that other person in relation to the decision will need to be articulated in order to establish the 'logical connection' required by the second step in the *Ebner* test.

3 Knowledge of the fair minded observer

17. In order to apply the legal test, it is necessary to identify what the fair minded observer would know. As noted above, the fair minded observer is taken to have knowledge of the actual circumstances of the case and of the material objective facts.

18. In the recent case of *Isbester*, involving a decision by a non-judicial decision maker, the High Court said:

The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.¹⁴

19. The relevant legal, statutory and factual contexts can be divided into a number of categories. These are:

19.1. Public comments made by Dr Soutphommasane.

19.2. The role and functions of Dr Soutphommasane as Race Discrimination Commissioner.

19.3. My role and functions as President of the Australian Human Rights Commission.

19.4. Public comments made by me.

(a) *Public comments made by Dr Soutphommasane*

20. The Respondents refer to comments made by Dr Soutphommasane to Fairfax Media as reported by the *Sydney Morning Herald* on 4 August 2016 in an article that dealt with the cartoon by Mr Leak published in *The Australian*. They also say that Dr Soutphommasane 'then published remarks to a similar effect' on Facebook and Twitter and that he 'appeared ... to confirm the comments attributed to him' at a Senate Estimates hearing on 18 October 2016.

¹² *Isbester v Knox City Council* (2015) 255 CLR 135, 155 [59] (Gageler J).

¹³ *Hot Holdings Pty Limited v Creasy* (2002) 210 CLR 438, 448 [22] (Gleeson CJ), 454 [47] (Gaudron, Gummow and Hayne JJ).

¹⁴ *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20] (Kiefel, Bell, Keane and Nettle JJ).

21. I put to one side the question of whether it is permissible to rely on what is said (or where people were sitting) during proceedings in Parliament in an application such as this. I deal with the allegations in the way in which they have been put.

22. The *Sydney Morning Herald* article on 4 August 2016 reported that the Indigenous Affairs Minister, Senator the Hon Nigel Scullion, had described the cartoon by Mr Leak as 'racist'.¹⁵ The Minister was also quoted as saying: 'Although Australian cartoonists have a rich tradition of irreverent satire, there is absolutely no place for depicting racist stereotypes. I would urge *The Australian* to be more aware of the impact cartoons like the one published today can have on Indigenous communities'.

23. The *Sydney Morning Herald* sought comment from a number of people, including Dr Soutphommasane, about the cartoon in light of the Minister's comments. Dr Soutphommasane was quoted as saying:

Our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group.

24. He was also quoted as saying that 'a significant number' of people would agree that the cartoon by Mr Leak was a racial stereotype of Aboriginal Australians.

25. In a message on Twitter on 4 August 2016, Dr Soutphommasane said:

Our society shouldn't endorse racial stereotypes of Aboriginal Australians - or, for that matter, of any other group.

26. The message included a link to the *Sydney Morning Herald* article.

27. In a post on Facebook on 4 August 2016, Dr Soutphommasane said:

We shouldn't accept or endorse racial stereotyping of Aboriginal Australians, or of any other racial group. If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can consider lodging a complaint under the Racial Discrimination Act with the Commission. It should be noted that section 18D of the Act does protect artistic expression and public comment, provided they were done reasonably and in good faith.

28. The Facebook post included a link to the *Sydney Morning Herald* article.

29. In the course of a Senate Estimates hearing on 18 October 2016, Dr Soutphommasane was asked about the cartoon by Mr Leak. The following exchange took place:

Senator FAWCETT: ... Is that not a very positive portrayal of members of our Indigenous population?

Dr Soutphommasane: Cartoons will be subject to all matter of public debate. It is a healthy part of our democracy that we have that debate.

¹⁵ C Johnston, 'Indigenous Affairs Minister Nigel Scullion condemns "racist" Bill Leak cartoon,' *Sydney Morning Herald*, 4 August 2016. At <http://www.smh.com.au/national/is-this-bill-leak-cartoon-in-the-australian-racist-20160804-gqkub9.html> (viewed 26 October 2016).

Senator FAWCETT: Indeed. Isn't it therefore a bad thing that people who seek to stimulate that debate are potentially being shut down by the operation of 18C and the fact that complaints can be made a legitimate political statement?

Dr Soutphommasane: I do not accept your characterisation of anyone being shut down.

Senator FAWCETT: That is fine. I think you will find there are many people in the Australian population who would not. Is it fair to say that you have made comment to the media about this cartoon?

Dr Soutphommasane: I have.

Senator FAWCETT: Do you think it is your role to prejudge the decision of the president of your commission?

Dr Soutphommasane: There is no prejudgement that I make. I have a role as defined by the Racial Discrimination Act to promote public understanding and acceptance of the act and compliance with the act.

Senator FAWCETT: So is it correct that on 4 August you made comments to Fairfax and I believe others that:

Our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group.

Dr Soutphommasane: Yes.

Senator FAWCETT: Did you further say that 'a significant number' of people would agree the cartoon was a racial stereotype?

Dr Soutphommasane: I was responding to a question about the cartoon and that was a reflection of the concerns that were expressed on that day by many people in the public domain, including by your colleague, Senator Nigel Scullion, the Indigenous affairs minister.

Senator FAWCETT: Okay. But you did make the comment that you felt 'a significant number' of people would think that that was racial stereotyping?

Dr Soutphommasane: As I said, I did, and it reflected the statements that were made that day in the media and in the public domain.

Senator FAWCETT: Do you accept that that also then prejudices the situation?

Dr Soutphommasane: No, I do not, for two reasons. One, I have no role in handling complaints that are received by the Australian Human Rights Commission; and, two, the commission makes no legal determinations about matters that are brought before it in the form of complaints. So there is no judgement that the commission or I make.¹⁶

¹⁶ Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Canberra, 18 October 2016, p 10 (Professor Gillian Triggs, President of the Australian Human Rights Commission). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0002;query=Id%3A%22committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0000%22> (viewed 25 October 2016).

(b) *The role and functions of the Race Discrimination Commissioner*

30. The position of Race Discrimination Commissioner is provided for by s 19 of the RDA. The Race Discrimination Commissioner is a member of the Australian Human Rights Commission.¹⁷

31. The RDA confers a number of functions on the Commission which are primarily the responsibility of the Race Discrimination Commissioner. These functions include:¹⁸

(b) to promote an understanding and acceptance of, and compliance with, [the RDA];

(c) to develop, conduct and foster research and educational programs and other programs for the purpose of:

(i) combating racial discrimination and prejudices that lead to racial discrimination;

(ii) promoting understanding, tolerance and friendship among racial and ethnic groups;

(iii) propagating the purposes and principles of the [International Convention on the Elimination of All Forms of Racial Discrimination].

32. In the course of performing his function of promoting an understanding and acceptance of, and compliance with, the RDA, it is appropriate for the Race Discrimination Commissioner to make people aware of the complaints mechanisms available under the RDA. As part of his advocacy role, it is also appropriate for Race Discrimination Commissioner to provide his opinion on matters of public interest that relate to questions of racial discrimination.

(c) *The role and functions of the President of the Commission*

33. The President of the Commission is the senior member of the Commission.¹⁹ A number of the functions given to the Commission are functions to be performed by the President.²⁰ Among these is the function under s 11(1)(aa) of the AHRC Act 'to inquire into, and attempt to conciliate, complaints of unlawful discrimination'. The definition of 'unlawful discrimination' includes complaints made under s 18C of the RDA.²¹

34. The other members of the Commission, including the Race Discrimination Commissioner, have no role in inquiring into and attempting to conciliate complaints of unlawful discrimination. While the President may delegate his or her powers to deal with complaints of unlawful discrimination under Part IIB of the AHRC Act to a member of staff of the Commission (or another person or body

¹⁷ AHRC Act, s 8.

¹⁸ RDA, s 20.

¹⁹ AHRC Act, s 8A(2).

²⁰ AHRC Act, s 8(6).

²¹ AHRC Act, s 3: the definition of 'unlawful discrimination' includes in paragraph (b) acts, omissions or practices that are unlawful under Part IIA of the RDA.

approved by the Commission), the President may not delegate any of these powers to any other Commissioner.²²

35. The structural separation between the President's complaint handling functions and the functions performed by the other Commissioners has been in place since 1999. In the second reading speech for the Bill that introduced these amendments, the then Attorney-General said:

The second major reform involves the consolidation of the three complaint handling schemes under the sex, race and disability discrimination acts into one uniform scheme. The bill provides that all complaints of unlawful discrimination under those acts, and complaints involving alleged breaches of human rights and equality of opportunity will now be made under the Human Rights and Equal Opportunity Commission Act 1986 [now the AHRC Act]. The president will assume responsibility for all complaint handling under the new uniform scheme while commissioners are to be given an *amicus curiae* function to argue the policy imperatives of their legislation before the Federal Court.

...

The bill also clearly delineates the commission's function of impartially attempting to conciliate complaints from the commissioners'[] advocacy role in promoting the protection of human rights.²³

(d) *Public comments made by Professor Triggs*

36. I have not made any public comments in relation to the current complaint, nor has my delegate Ms Jodie Ball. I was asked about the complaint during a Senate Estimates hearing on 18 October 2016. The following exchange took place:

Senator FAWCETT: ... Can you confirm some details, then, around the Bill Leak cartoon: when did you receive the complaint for that?

Prof. Triggs: As I mentioned a moment ago, I am afraid I cannot comment on any of the complaints that come before the commission. It is absolutely vital to the process that the matters are confidential. Certainly parties may choose to take the matter to the media, but that is a matter for them. I do not have any capacity to speak about those confidential matters.

Senator FAWCETT: Would you expect the same standard of your commissioners?

Prof. Triggs: There is a very significant difference between my role as president and the role of the seven commissioners. My role as president is to conduct an investigation and conciliation process through the staff of the commission. The commissioners, by contrast, have no function whatsoever with regard to the complaints process and they have a quite strong advocacy role to promote the legislation that falls within their mandates. So the roles are very, very different indeed,

²² AHRC Act, s 19(2A). Other functions can be delegated to other Commissioners, or to any other person or body of persons approved by the Commission.

²³ Commonwealth, *Parliamentary Debates*, House of Representatives (3 December 1998), p 1276 (the Hon Daryl Williams MP, Attorney-General), second reading speech for the Human Rights Legislation Amendment Bill 1998 (Cth). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1998-12-03%2F0021%22> (viewed 25 October 2016).

and there are effectively Chinese walls between the complaints mechanisms of the commission and the advocacy and educational work of our commissioners.

Senator FAWCETT: Have you made any comment on the cartoon that was in *The Australian*?

Prof. Triggs: I have not.

Senator FAWCETT: No comments to the media?

Prof. Triggs: None whatsoever.²⁴

4 Assessment of the claims of apprehended bias

37. The only overt conduct relied on by the Respondents in support of the apprehended bias claim consists of the public statements made by Dr Soutphommasane recorded above. The claim is that Dr Soutphommasane 'prejudged the factual and legal basis for a complaint' against the Respondents.
38. Dr Soutphommasane expressed an opinion that a significant number of people would agree that the cartoon by Mr Leak was a racial stereotype of Aboriginal Australians and an opinion that our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group. These are opinions about factual matters. In response to a question from a journalist, he identified a mechanism by which a complaint could be made to the Commission if a person was aggrieved by that conduct. He did not express any opinion as to whether such a complaint would be successful. Indeed, he drew specific attention to defences to protect artistic expression and public comment that would be available to any such claim. In my view, a fair minded observer would not draw the conclusion that Dr Soutphommasane had prejudged the legal basis for any complaint.
39. However, regardless of the views expressed by Dr Soutphommasane, they are irrelevant to the process of inquiring into and attempting to conciliate the present complaint.
40. As noted in *Ebner*, in order to establish a case of apprehended bias, the Respondents must articulate the logical connection between the matter complained of (here, the comments of Dr Soutphommasane) and the feared deviation from the course of deciding the case on its merits.
41. This process of reasoning is particularly important where bias is said to result from the conduct of a person other than the decision-maker.

²⁴ Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Canberra, 18 October 2016, p 10 (Professor Gillian Triggs, President of the Australian Human Rights Commission). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0002;query=Id%3A%22committees%2Festimate%2F62329d4c-8d92-49bc-b22c-b9371dd27824%2F0000%22> (viewed 25 October 2016).

42. Dr Soutphommasane has no part to play in the Commission's complaint handling process.
43. The only conduct by me that the Respondents allege, in support of an argument that I have prejudged the complaint by Miss Dinnison, is a supposed 'silent acquiescence' in the statements made by Dr Soutphommasane.
44. In support of this argument, the Respondents say that I 'was seated beside Dr Soutphommasane' during the Senate Estimates hearing on 18 October 2016 and that I 'made no attempt to distance [myself] from his statements'.
45. A review of the comments made by me during the Senate Estimates hearing relevantly reveals two things.
46. First, the reasons why I do not make any public comments about complaints that are brought to the Commission are because I am ultimately responsible for the handling of those complaints and because it is important to the process of resolving complaints by conciliation that the parties can rely on the Commission keeping what they say confidential. The fact that I have made no public comment about the substance of this complaint provides no basis for an inference to be drawn that I have prejudged it. If anything, it suggests the opposite.
47. Secondly, given the particular questions asked by the Committee about the Commission's processes more generally there is no need to resort to inferences from an alleged 'silence'. This is because in my answers to questions from the Committee I made the distinction between the roles of the President and the Race Discrimination Commissioner clear and explicit.
48. As described in the second reading speech for what ultimately became the Human Rights Legislation Amendment Bill (No 1) 1999 (Cth), there is a clear delineation between my function of impartially attempting to conciliate complaints and the advocacy role of the other Commissioners. Part of the role of the other Commissioners is to engage in public discussion and debate about current issues relevant to their respective portfolios. Where a matter is the subject of a current complaint to the Commission, I will not make public comment about it. A fair-minded lay observer who had an understanding of the respective roles of the President of the Commission and the Race Discrimination Commissioner would not impute to the President the views or opinions expressed by the Race Discrimination Commissioner.
49. The Respondents do not allege that Ms Ball engaged in any conduct at all, whether by act, omission or 'silent acquiescence', but seem implicitly to argue that she too has prejudged the complaint.
50. The Respondents have not articulated any logical connection between the public comments made by Dr Soutphommasane and the allegation that I (or my delegate) would not bring an impartial mind to the process of inquiring into and attempting to conciliate the complaint made by Miss Dinnison. The allegation to the contrary amounts to no more than a bare assertion. I do not think that a fair-minded lay observer might reasonably apprehend that I or my delegate might not bring an impartial mind to the process of handling that complaint.

5 Actual bias

51. I noted earlier that the Respondents made a qualified allegation that ‘the circumstances would be sufficient to support a case of actual bias, if that were necessary’. I took the qualified and conditional nature of this statement as demonstrating that the Respondents were not pressing a case of actual bias.
52. In case I am wrong about this, I indicate that I also reject any allegation of actual bias.
53. It is clear that an allegation of actual bias will not be made out by suspicions, possibilities or equivocal evidence. Actual bias exists where the decision-maker has prejudged the case so as to be unable or unwilling to decide it impartially,²⁵ or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant.²⁶ In considering the standard required to establish a claim of actual bias, the High Court has said:
- it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be ‘real’. The officer must have so conducted himself that a high probability arises of a bias inconsistent with the performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons.²⁷
54. This will usually require an explicit statement from the decision maker demonstrating that his or her mind has been made up. It is possible to prove actual bias by inference from the surrounding facts and circumstances, however, such cases are rare and typically involve an assessment of a series of actions by the decision-maker which, when taken together, form a whole picture leading to the conclusion of pre-judgment. It is unlikely that one single action, as distinct from a pattern of conduct, will demonstrate actual bias.²⁸
55. To the extent that the Respondents seek to make out a case of actual bias, it is founded not on any statement by a relevant decision maker tending to indicate bias, nor on any evidence of partisanship or hostility. Rather, it is based on silence: the failure to express a concluded view, or even an opinion, about the subject matter of a particular case.
56. There is nothing in the letter from Mr Quill that approaches the standard necessary for a case of actual bias to be made out.

²⁵ *Gamaethige v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 424, 442 [79] (Stone J, with whom Hill J agreed, 426 [1]).

²⁶ *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 123 (Wilcox J), 134 (North J).

²⁷ *R v Australian Stevedoring Industry Board, ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 116 (Dixon CJ, Williams, Webb and Fullagar JJ).

²⁸ *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 135 (North J).

6 Conclusion

57. For the above reasons, the Respondents have not satisfied me that I should decide that neither I nor any member of staff of the Commission (including my delegate Ms Ball) should continue to inquire into and attempt to conciliate the complaint by Miss Dinnison, or that I should delegate the function of inquiring into and attempting to conciliate Miss Dinnison's complaint to a senior legal practitioner outside the Commission.

Gillian Triggs
President
Australian Human Rights Commission
1 November 2016



**Australian
Human Rights
Commission**

Our ref: 2016 - 10670

1 November 2016

Mr Justin Quill
Principal
Macpherson Kelley
Level 22, 114 William Street
Melbourne VIC 3000

Dear Mr Quill,

Complaint by Miss Melissa Dinnison against Nationwide News Pty Ltd, The Australian, and Mr Bill Leak (the Respondents)

Background

I refer to the above complaint by Miss Dinnison against your clients The Australian and Mr Bill Leak alleging racial hatred under the *Racial Discrimination Act 1975 (Cth)* (RDA).

I also refer to my letter of 4 October 2016 the purpose of which was to advise the Respondents of the complaint and to provide them with an opportunity to respond to the complaint. I also asked the Respondents to provide certain information as outlined in the attachment "Information and documents to be provided to the Australian Human Rights Commission".

In your letter dated 21 October 2016 you requested that the Commission take no further part in any inquiry into or any attempt to conciliate the above complaint. This request was made on the basis that the Commission allegedly has a 'conflict of interest'. You said that until this 'conflict of interest' is resolved 'our clients have nothing further to say'.

On 1 November 2016 the President of the Commission, Gillian Triggs, wrote to you and attached her Reasons for Decision in relation to the claim of 'conflict of interest'. For the reasons outlined in this Decision, the President decided that the Respondents had not satisfied her that she should decide that neither her nor any member of staff of the Commission should continue to inquire into and attempt to conciliate the complaint by Miss Dinnison, or that she should delegate the function of

inquiring into and attempting to conciliate Miss Dinnison's complaint to a senior legal practitioner outside the Commission.

Next steps

I confirm that the Commission will continue to inquire into attempt to conciliate this complaint. I am the President's delegate for the purposes of inquiring into and attempting to conciliate Miss Dinnison's complaint.

I am now writing to you as part of my inquiry into this complaint and request that the Respondents provide the information which is outlined below. I am also seeking the Respondents' views on conciliation.

Information to be provided to the Commission

I note that in Section F of the Schedule to your letter of 21 October 2016, Response to AHRC Inquiries, you state that your clients' position is that:

(a) there has been no contravention of section 18C of the RDA;

(b) alternatively, were there such a contravention of section 18C, it is excluded from legal sanction by the operation of each of: section 18D(a) and/or section 18D(b) and/or section 18D(c).

In particular, I note that in Section E of the Schedule you have made a number of statements about the kinds of evidence your clients consider relevant to this complaint. Among that evidence is information from Mr Leak himself about a number of matters including his claims:

- that he was not motivated by race, colour or national or ethnic origin
- the cartoon was created 'in good faith' and for a 'genuine purpose in the public interest' in accordance with section 18D(b)
- the cartoon constituted a 'fair comment on any event or matter of public interest' which comprised 'an expression of a genuine belief held by the person making the comment' within the meaning of section 18D(c)(ii)
- that his views regarding these issues are both 'genuine' and held in 'good faith'.

Please provide a written submission from Mr Leak covering these points and any other points he would like to make, so that they can be considered by the Commission as part of my inquiry into this matter. Please also provide any submissions The Australian would like to make in relation to why they are of the view that the exemption in section 18D of the RDA applies in relation to the cartoon and The Australian's publication of it.

I ask that these submissions be provided by Wednesday **16 November 2016**.

It is the Commission's preference that the requested information is provided in an electronic format and sent by email.

Please note that it is the Commission's usual practice to provide a copy of this information to the complainant.

Please also note that the documents the Commission passes between the parties, such as the complaint and any response to the complaint, are provided for the purposes of the Commission's investigation and conciliation function. It is expected that parties will not publish or use the information apart from this purpose while the complaint is before the Commission.

Conciliation

I note that in Section F of the Schedule you advise that so that there is no misunderstanding, Macpherson and Kelley are instructed to make it clear that – as presently advised – your clients would not be expecting to offer any form of remedy or relief to Miss Dinnison (or anyone else) as part of any conciliation process. Please advise by **16 November 2016** whether your clients' instructions remain as summarised above.

Your clients' request for further details

In Section D of the Schedule you state that your clients request some further details in order to respond to certain aspects of Miss Dinnison's complaint. I will give further consideration to this request as a priority. As you have noted, the way in which the Commission conducts an inquiry is a matter for it. The Commission will advise you if any further information is sought from Miss Dinnison.

I look forward to receiving the information requested in this letter.

Yours sincerely

Jodie Ball
Delegate of the President

Our Ref: JHQ:264803
 Your Ref: 2016-10670

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8 November 2016

Jodie Ball
 Delegate of the President
 Australian Human Rights Commission
 Level 3, 175 Pitt Street
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 SYDNEY NSW 2001

Dear Ms Ball

COMPLAINT BY MELISSA DINNISON AGAINST THE AUSTRALIAN AND MR BILL LEAK

We refer to your letter dated 1 November 2016. We reply using the same subheadings.

Background

1. We also refer to your letter of 4 October 2016, our letter of 21 October 2016 (**our Letter**), and the letter of 1 November 2016 which we received from the Australian Human Rights Commission (**AHRC**) President.
2. In relation to the letter of 1 November 2016 from the AHRC President, we note that our clients are currently considering their position regarding a possible application for judicial review and/or injunctive relief.

Accordingly:

- (a) all of our clients' rights are expressly reserved; and
- (b) what follows, in the balance of this letter, is without prejudice to such rights.

Next steps

3. At a later point in your letter of 1 November 2016, you refer to Section D of the Schedule to our Letter where we set out details our clients need "*in order to make any meaningful response to Miss Dinnison's complaint*". You then tell us that you "*will give further consideration to this request as a priority*".

We reiterate that such details are required for us to provide a meaningful response.

CONFIDENTIALITY

This message together with any attachment is intended for the use of the person to whom it is addressed and contains information that is privileged and confidential. If you are not the intended recipient, or the employee or agent responsible for its delivery to the intended recipient, you are hereby notified that any dissemination, distribution or copying of it is strictly prohibited. Please notify us if you have received it in error, and otherwise take all necessary steps to delete it from any transient or permanent storage device or medium

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However, since you describe this matter as a “*priority*”, we see no merit in canvassing your “*next steps*” until that priority has been dealt with. We look forward to hearing from you at that time.

4. We note that your letter omitted reference to Section A of the Schedule to our Letter. This is of concern to us and we ask that consideration be given to it.
5. Another matter omitted from this part of your letter is any reference to Section C of the Schedule to our Letter.

In our view we made our clients’ position clear when we said that: “*to avoid any risk of mischance, they do not propose to participate in any inquiry or conciliation by the AHRC until they are assured that there has been strict compliance with the Act’s requirements*”.

As this is not included amongst your “*next steps*” – and is not mentioned as a “*priority*” we again request that such an assurance be provided.

6. Another matter omitted from this part of your letter is any reference to Section E of the Schedule to our Letter.

As your “*next steps*” do not envisage our clients having any opportunity to make submissions as to the form which any inquiry should take, does it follow that this is also not a “*priority*” for the AHRC?

Moreover, when you tell us you are now writing to us “*as part of [your] inquiry into this complaint*”, does this mean:

- (a) that you have already made a decision rejecting our clients’ proposal that the inquiry should be in the nature of a formal, and preferably public, hearing?; and
 - (b) that you have made this decision without affording our clients an opportunity to advance submissions on that subject, as our Letter foreshadowed?
7. Given that your letter of 1 November 2016 is expressed to be written “*as part of [your] inquiry into this complaint*” – and as you have not indicated otherwise – our clients apprehend that the form of inquiry preferred by the AHRC is one which will take place ‘on the papers’ and behind closed doors.

Even accepting that the way in which the Commission conducts an inquiry “*is a matter for it*”, the relevant power or discretion must be exercised in a proper manner, taking into account all relevant considerations and without regard to any considerations which are irrelevant. Natural justice also requires that our clients (and the complainant) be given an opportunity to be heard – whether orally or in writing – before a final decision is made.

The starting point is the ordinary meaning of the word “inquiry”, especially when used in an administrative law context. Section 14(3)(a) of the *Australian Human Rights Commission Act 1986 (Cth)* (**Act**) contemplates that evidence may be

“given before the Commission”. Section 46PI of the Act contemplates the exercise of compulsive powers to secure the provision of relevant information or the production of relevant documents. While these provisions do not mandate a “*formal, and preferably public, hearing*”, they certainly contemplate such a hearing as one form, and perhaps the primary form, of inquiry.

The AHRC has, in the past, conducted formal and public hearings for the purposes of an inquiry. For example, as is noted on page 44 of the AHRC’s 2014 Report arising from the *National Inquiry into Children in Immigration Detention*:

“Five public hearings were conducted by the President between April and September 2014. Pursuant to section 21(5) of the Australian Human Rights Commission Act 1986 (Cth), a number of witnesses were compelled to attend and answer questions. Others appeared and gave evidence voluntarily. All evidence was given under oath or affirmation.”

Presumably that course was adopted because the matters in issue on that occasion were matters of significant public interest. In our view, freedom of the press – and freedom of speech and expression generally – are also matters of significant public interest.

The issues which will necessarily arise in any such inquiry will not be limited to deep philosophical questions like freedom of the press, and freedom of speech and expression generally. They will also go to matters of the greatest importance including those that touch on the various issues concerning indigenous community – particularly indigenous youth – in Australia.

If our clients are correct in apprehending that the form of inquiry preferred by the AHRC is one which will take place in private, then that is not a preference which our clients share. They do not wish to see these important issues of public interest dealt with in private.

Rather, our clients want the person conducting the inquiry to be able to see and hear Mr Leak, so as to reach an informed conclusion of his credibility, his reasonableness, and his bona fides. They want the evidence which they would consider adducing – such as from members of the Aboriginal community, evidence from artists and art experts, and evidence from a range of persons with both practical and academic expertise in relation to the problems confronting Aboriginal children in remote communities – viewed and considered in the spotlight of a public hearing, rather than behind closed doors.

Our clients have no way of knowing about the attitude of the complainant, Miss Dinnison. However, it may be inferred that she is a person whose interest in these issues is highly-developed and acute. It may be that she would certainly share our clients’ desire to maximise public exposure and discussion of these issues.

But, whether or not a formal and public inquiry is something which Miss Dinnison would welcome, it certainly represents our clients’ preference. And if our clients are correct in apprehending that the AHRC has already embarked on a different form

of inquiry away from public scrutiny, that will certainly impact on the extent to which, and the manner in which, they are willing to participate in any inquiry the AHRC is purporting to conduct.

Information to be provided to the Commission

8. Your letter notes that in Section E of the Schedule to our Letter, we made a number of “*statements*” about the kinds of evidence our clients consider relevant to this complaint.

This misrepresents the position. In Section E of the Schedule, we have made no such “*statements*”. Rather, by way of explaining our clients’ preference for a formal and preferably public hearing, we have explained that “*our clients intend to advance evidence to establish that there has been no infringement of Section 18C*”. We then proceed to summarise what our clients anticipate that such evidence will include.

9. You ask us to “*provide a written submission from Mr Leak covering [a number of specified] points and any other points he would like to make, so that they can be considered by the Commission as part of [your] inquiry into this matter*”. We confirm that Mr Leak does not intend to make any submission to your inquiry, whether in writing or otherwise. Mr Leak is an artist and a cartoonist, not a lawyer, and his role in any inquiry will be that of a witness rather than an advocate. Should there be any occasion for any such submission to be made on behalf of either of our clients, then it will be made by their legal representatives.

10. You also ask us to “*provide any submissions The Australian would like to make in relation to why they are of the view that the exemption in section 18D of the RDA applies in relation to the cartoon and The Australian’s publication of it*”. All other considerations aside, and for the reasons articulated in our Letter, it remains the case that our clients are unable to make any “*meaningful response*” to Miss Dinnison’s complaint until the basis of the complaint is clarified, and we have proper details and particulars of the complaint.

However, as you have undertaken to “*give further consideration*” to this aspect of the matter, and to do so “*as a priority*”, our clients are willing to revisit the question of providing written submissions once that difficulty has been resolved.

11. You ask us to:

“Please also note that the documents the Commission passes between the parties, such as the complaint and any response to the complaint, are provided for the purposes of the Commission’s investigation and conciliation function. It is expected that parties will not publish or use the information apart from this purpose while the complaint is before the Commission.”

Insofar as this passage expresses an “*expectation*” on the part of the AHRC, our clients are unaware of the source of that expectation.

Our clients have a different expectation.

Our clients are in the business of reporting upon, and publishing commentary about, matters of public interest.

Our clients intend to continue reporting upon, and publishing commentary about, any issue which they regard as newsworthy. Our clients will not allow the AHRC to attempt to inappropriately muzzle the press and media.

Conciliation

12. You refer to a small part of paragraph 5 in Section F of the Schedule to our Letter, dealing with the prospect of a conciliation. So that the context is not lost, we repeat precisely what we said on that topic:

“Our clients would be willing to participate in a conciliation process to try to resolve this complaint, once:

(a) the matters raised under subheadings A. to D., above, have been satisfactorily addressed; and

(b) an appropriate inquiry, in accordance with the AHRC’s mandatory obligation under s.46PF of the AHRC Act, has been concluded.

However, so that there is no misunderstanding, we are instructed to make it clear that – as presently advised – our clients would not be expecting to offer any form of remedy or relief to Miss Dinnison (or anyone else) as part of any conciliation process. It is possible, but at this stage seems unlikely, that our clients’ position may change by the time of any such conciliation process.”

Our instructions, as reflected in the above passage, remain unchanged. We reaffirm that our clients would be willing to participate in a conciliation process to try to resolve this complaint, but only once the necessary pre-conditions have been satisfied. We also reaffirm that our clients would not be expecting to offer any form of remedy or relief to Miss Dinnison (or anyone else) as part of any conciliation process.

Nothing has occurred since 21 October 2016 which would give our clients occasion to revise those instructions. On the contrary, and as you are no doubt aware, several prominent representatives of the aboriginal community – amongst them Mr Warren Mundine and Mr Stan Grant – have offered public comments which do not support the complaint. A number of other public figures with relevant professional expertise, ranging from the Police Commissioner of Western Australia to one of the country’s most celebrated editorial cartoonists, have weighed into the debate, again in terms which do not support the complaint.

So, as matters now stand, our clients have no reason to revise their expectation that they “*would not be expecting to offer any form of remedy or relief to Miss Dinnison (or anyone else) as part of any conciliation process*”. However, as we also said previously, “*it is possible, but at this stage seems unlikely, that our clients’ position may change by the time of any such conciliation process*”.

Our clients’ request for further details

13. This part of your letter of 1 November 2016 has already been addressed in paragraph 3 above.
14. However, so that our clients’ position is as clear as we can possibly make it, we feel that some further emphasis is required.

You have asked us to “*provide any submissions The Australian would like to make in relation to why they are of the view that the exemption in section 18D of the RDA applies in relation to the cartoon and The Australian’s publication of it*”; and you have requested that “*these submissions be provided by **Wednesday 16 November 2016***”. Plainly, this unilateral deadline would not allow for the AHRC to obtain the necessary details and supply them to our clients, or for our clients to consider and respond to those details, even allowing for the matter to be expedited in accordance with your undertaking to give it “*further consideration*”, and to do so “*as a priority*”.

We draw attention, in particular, to paragraphs 1, 2, 3, 4 and 6 in Section D of the Schedule to our Letter. How do you suggest that our clients can properly make a submission or respond when:

- (a) absent the details sought in paragraph 1 in Section D of the Schedule to our Letter, it is unclear whether the complaint will remain (as it presently is) a complaint of both “*racial discrimination*” and “*racial hatred*”, or will be amended to be confined only to the question of “*racial hatred*”;
- (b) absent the details sought in paragraph 2 in Section D of the Schedule to our Letter, our clients remain unaware of the “*series of cartoons [which] illustrate hateful and derogatory material specifically relating to Indigenous Australians, their relationships with their children, alcoholism and domestic violence*” which are (collectively) the subject of the complaint;
- (c) our clients do not understand the details sought in paragraph 3 in Section D of the Schedule to our Letter, the allegations that the cartoon of 4 August 2016 “*depicts*” both “*racial discrimination*” and “*racial profiling*”;
- (d) absent the details sought in paragraph 4 in Section D of the Schedule to our Letter, our clients do not know the identity of the “*other person or ... group of people*” whom it is alleged that the relevant “*act*” is “*reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate*”; and
- (e) absent the details sought in paragraph 6 in Section D of the Schedule to our Letter, our clients do not know, and cannot know, what relief Miss Dinnison is

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seeking, whether she claims any pecuniary loss, whether she want an apology (and, if so, to whom), or whether her complaint is merely a publicity-seeking exercise, intended to cause inconvenience and embarrassment to our clients, but for no proper purpose.

15. As we said in our Letter, our clients have nothing to add at this time and do not *“anticipate that they will have anything to add until the matters raised under subheadings A. to D. [in the Schedule to our Letter], have been satisfactorily addressed”*.

We respectfully suggest that the progress of an *“inquiry”* which the AHRC is presently conducting or purporting to conduct will be much quicker – at least in the long run – if the AHRC would address and deal with the important issues which we have raised.

Yours faithfully

Macpherson Kelley
JUSTIN QUILL
Principal



**Australian
Human Rights
Commission**

Our ref: 2016-10670
Your ref: JHQ:264803

11 November 2016

Mr Justin Quill
Principal
Litigation and Dispute Resolution | Media
Macpherson Kelley

Dear Mr Quill

Closure of complaint

I refer to Miss Melissa Dinnison's complaint against Nationwide News Pty Limited – The Australian and Mr Bill Leak, alleging racial hatred under the *Racial Discrimination Act 1975* (Cth).

Today, Miss Dinnison informed the Commission that she did not want to continue with her complaint.

Section 46PF(5)(a) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) says that the President may decide not to continue to inquire into a complaint if satisfied that the person aggrieved by the alleged unlawful discrimination does not want the President to continue to inquire into the complaint.

In the circumstances, I am satisfied that Miss Dinnison does not want to continue with her complaint. Therefore, Miss Dinnison's complaint has been finalised under section 46PF(5)(a) of the AHRCA and the file is now closed. Please provide a copy of this letter to your clients for their own records.

Yours sincerely

Jodie Ball
Delegate of the President