



Senator D. Hinch
Derryn Hinch's Justice Party – Senator for Victoria

Senator Ian Macdonald
Suite S1.38
Parliament House
CANBERRA ACT 2600

CC: Senate Legal and Constitutional Affairs Legislation Committee

Dear Senator Macdonald,

Two articles ('Triggs accused of misleading Senate over Leak case' and '18C: Gillian Triggs at odds with key statements by Bill Leak's lawyer') appearing in *The Australian* today allege that Australian Human Rights Commissioner Professor Gillian Triggs misled the Senate during a Committee hearing yesterday regarding the Commission's receipt of a response from cartoonist Bill Leak in connection with complaints over a provocative cartoon depicting indigenous disadvantage.

This alleged misleading claim was made in response to my question to Professor Triggs at 10:53am regarding why the ADHC failed to counsel the complainants that the cartoon would likely be captured by an exception under section 18D.

The Australian writes that on 28 February 2017, Professor Triggs told the Committee:

"We asked Mr Leak or gave him the opportunity to advise us that he had produced that cartoon in good faith and had he responded by making a good faith point we would almost certainly have ended the matter precisely at that moment. But despite these two requests to him to justify an 18D basis for the cartoon, we received no response."

In direct contradiction to Professor Triggs' comments, Mr Justin Quill, the lawyer representing Leak and *The Australian*, asserts that they did in fact respond to the AHRC in writing on 21 October 2016, stating that the cartoon was published 'in good faith', and for a 'genuine purpose in the public interest' in accordance with section 18D of the Act. Excerpts from this letter have now been published. Please see attached correspondence.

I have been advised directly by Mr Quill that a substantial letter was produced by him and provided to the AHRC at that time detailing *The Australian* and Leak's position. Contrary to Professor Triggs' assertion that such a reply would have ended the matter, it continued.

Professor Triggs appears to have contradicted Mr Quill's claim on ABC radio this morning, saying "that's not my understanding of the matter... and as he's raised that, that is directly contrary to my advice about this case."

Mr. Chairman, it would appear that Professor Triggs has misled the committee in answering my questions. I bring it to your, and the Committee's, attention to determine what we should do next.

Cordial regards

Derryn Hinch

21 October 2016

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

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 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.

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.

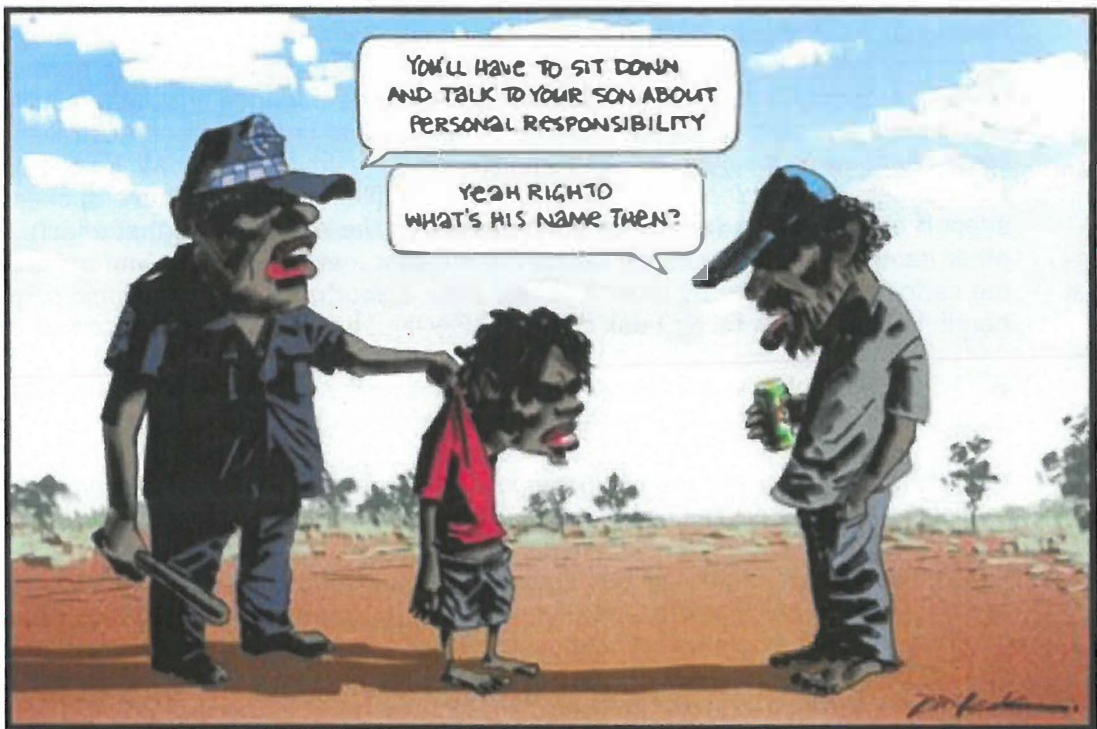
Our clients appreciate that, under s.46P(4) of the AHRC Act, if it appears to the AHRC that a person wishes to make a complaint of unlawful discrimination, and that the person “*requires assistance to formulate the complaint or to reduce it to writing*”, the AHRC is obliged to “*take reasonable steps 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.



**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

8 November 2016

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

M&K Lawyers Group Pty Ltd
ACN 122 450 337

Melbourne
Level 22
114 William Street
Melbourne VIC 3000

GPO Box 1666
Melbourne VIC 3000
DX 174 Melbourne

Tel + 61 3 8615 9900
Fax + 61 3 8615 9999

Dandenong
Tel + 61 3 9794 2600

info@mk.com.au

mk.com.au

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.

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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*”, are 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

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

9 November 2016

Freedom of Information Officer
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

M&K Lawyers Group Pty Ltd
ACN 122 450 337

Melbourne
Level 22
114 William Street
Melbourne VIC 3000

GPO Box 1666
Melbourne VIC 3000
DX 174 Melbourne

Tel + 61 3 8615 9900
Fax + 61 3 8615 9999

Dandenong
Tel + 61 3 9794 2600

info@mk.com.au

mk.com.au

Dear Sir/Madam

COMPLAINT AGAINST THE AUSTRALIAN AND MR BILL LEAK BY MELISSA DINNISON

We refer to the above matter and confirm we act for Nationwide News Pty Ltd (as publisher of *The Australian* newspaper) and Mr Bill Leak.

To avoid ambiguity, in this letter:

(a) **our clients** means:

- Nationwide News Pty Ltd, as publisher of *The Australian* newspaper; and
- Mr Bill Leak, a cartoonist with *The Australian*;

and also includes, where relevant, any member of the editorial staff, and any journalist, reporter, news correspondent, or other employee of *The Australian*.

(b) the **AHRC** means the Australian Human Rights Commission.

(c) **AHRC officer** means:

- the President of the AHRC; and
- a Commissioner of the AHRC; and
- an employee of the AHRC; and
- an external consultant to the AHRC; and

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- an employee of an external consultant to the AHRC.
- (d) **Miss Dinnison** means Miss Melissa Dinnison, by whom a complaint dated 4 August 2016 was lodged with the AHRC.
- (e) the **Complaint** means the complaint so lodged by Miss Dinnison.
- (f) **Mr Leak's cartoon** means the cartoon published on 4 August 2016 which is the subject of the Complaint.
- (g) **Dr Soutphommasane's comments** means the comments concerning Mr Leak's cartoon attributed to Dr Tim Soutphommasane in *The Sydney Morning Herald* on 4 August 2016.
- (h) the **media** includes:
- any organ of the print media;
 - any television, cable television, radio, or other electronic medium; and
 - any weblog, blog, or other information sharing service, provided by or through any social networking or social media service, or otherwise published on or accessible via the Internet.
- (i) **media outlet** means any person, entity or resource which forms part of the media.
- (j) a **public figure** means a natural person who is or has been:
- a member of the Parliament of Australia; or
 - a candidate for election to the Parliament of Australia; or
 - the secretary, under-secretary, director-general, deputy director-general, or holder of an equivalent position in any department of the Australian Government; or
 - a journalist, reporter or news correspondent with any media outlet; or
 - the publisher, editor, news editor, or other senior officer of any print media outlet; or
 - a presenter, producer, director, editor, news editor, or other senior officer of any electronic media outlet.
- (k) **section 18C** means section 18C of the *Racial Discrimination Act 1975* (Cth).

(l) **document** includes:

- any paper-writing;
- any document in an electronic form;
- any text message;
- any record of an oral communication; and
- any message, posting, contribution or other upload to or for the purposes of any weblog, blog, or other information sharing service, provided by or through any social networking or social media service, or otherwise published on or accessible via the Internet;

and also includes emails, letters, files, file notes, and anything else which is intended to be or is capable of being read.

(m) **AHRC communication** means any document comprising, recording or reflecting correspondence or another communication between (on the one hand) the AHRC or any AHRC officer and (on the other hand):

- another AHRC officer; or
- the media; or
- any media outlet; or
- any other person.

We seek copies of the following documents held by the AHRC pursuant to the *Freedom of Information Act 1982* (Cth):

- (1) All documents showing, reflecting, recording or disclosing what was done in relation to the Complaint by the AHRC or any AHRC officer in the period of two months following the lodgement of the Complaint with the AHRC on 4 August 2016.
- (2) All documents which mention any reason for, or provide any explanation of, the two-month delay in:
 - a) the AHRC's informing our clients that it had received the Complaint; or
 - b) the provision by the AHRC to our clients of a copy of the Complaint.
- (3) All documents recording, disclosing or canvassing the views, opinions or expectations of the AHRC or any AHRC officer, on or since 4 August 2016, regarding:

- a) Mr Leak's cartoon; or
 - b) the publication of Mr Leak's cartoon in *The Australian*; or
 - c) Dr Soutphommasane's comments; or
 - d) the number of complaints which may be or may be expected to be received by the AHRC concerning Mr Leak's cartoon following Dr Soutphommasane's comments; or
 - e) the number of complaints in fact received by the AHRC concerning Mr Leak's cartoon following Dr Soutphommasane's comments; or
 - f) the Complaint.
- (4) All documents recording, disclosing or canvassing the views, opinions or expectations of the AHRC or any AHRC officer, since 1 January 2016, regarding:
- a) current political discussion, debate or scrutiny concerning section 18C; or
 - b) current discussion, debate or scrutiny concerning section 18C, in the media; or
 - c) the editorial policy of *The Australian* in relation to section 18C; or
 - d) any media report in relation to section 18C; or
 - e) the editorial policy of *The Australian* in relation to the President of the AHRC; or
 - f) any media report concerning the President of the AHRC.
- (5) All documents recording, disclosing or canvassing the views, opinions or expectations of the AHRC or any AHRC officer, since 21 October 2016, regarding:
- a) the editorial policy of *The Australian* in relation to the Complaint; or
 - b) any media report in relation to the Complaint; or
 - c) our letter to the AHRC of 21 October 2016.
- (6) All AHRC communications and other documents regarding:
- a) any assistance provided by the AHRC or any AHRC officer to Miss Dinnison in formulating the Complaint; or
 - b) any potential assistance offered by the AHRC or any AHRC officer to Miss Dinnison in formulating the Complaint; or

- c) any consideration or discussion by the AHRC or any AHRC officer regarding the form and substance of the Complaint.
- (7) All AHRC communications and other documents containing specific information about Miss Dinnison, including:
 - a) her State or Territory of residence; or
 - b) the postcode of her address; or
 - c) her age; or
 - d) her background; or
 - e) her race or ethnicity; or
 - f) her employment history; or
 - g) her current employment status; or
 - h) her socio-economic status; or
 - i) her political interests or affiliations.
- (8) All AHRC communications and other documents recording, reflecting or concerning the extent (if any) of Miss Dinnison's experience in respect of:
 - a) any aboriginal community; or
 - b) any remote aboriginal community; or
 - c) crime or recidivism amongst aboriginal youths; or
 - d) parental neglect by the father of any aboriginal youth; or
 - e) excessive alcohol consumption by the father of any aboriginal youth.
- (9) All documents comprising, recording or reflecting correspondence or other communications between Miss Dinnison and the AHRC or any AHRC officer on or since 4 August 2016.
- (10) All documents comprising, recording or reflecting:
 - a) the referral of the Complaint to the President of the AHRC on or since 4 August 2016; or
 - b) the results or outcome of such referral.
- (11) All documents comprising, recording or reflecting:

- a) any inquiry into the Complaint by the AHRC or any AHRC officer on or since 4 August 2016; or
 - b) the results or outcome of any such inquiry.
- (12) All AHRC communications in respect of:
- a) Mr Leak's cartoon; or
 - b) Mr Leak; or
 - c) the publication of the Mr Leak's cartoon by *The Australian*; or
 - d) *The Australian*; or
 - e) Dr Soutphommasane's comments; or
 - f) the Complaint; or
 - g) current political discussion, debate or scrutiny, since 1 January 2016, concerning section 18C; or
 - h) current discussion, debate or scrutiny, since 1 January 2016, concerning section 18C, in the media; or
 - i) any media report, since 1 January 2016, in relation to section 18C; or
 - j) any media report, since 1 January 2016, concerning the President of the AHRC; or
 - k) any media report, since 21 October 2016, in relation to the Complaint; or
 - l) our letter of 21 October 2016.

Please be advised that:

- A. Our clients do not object to the redaction, in respect of any natural person, of:
- the person's residential address; or
 - the person's private telephone or private mobile telephone number, provided that a "land line" telephone number must not be redacted so as to conceal the area code; or
 - the person's private email address, provided that such an email address must not be redacted so as to conceal the domain or hostname (i.e., that part of an email address appearing after the symbol "@"); or
 - any other private contact details for the person.

9 November 2016

- B. Our clients do not object to the redaction, in respect of any natural person other than an AHRC officer or a public figure, of:
- the person's business address; or
 - the person's business telephone or business mobile telephone number, provided that a "land line" telephone number must not be redacted so as to conceal the area code; or
 - the person's business email address, provided that such an email address must not be redacted so as to conceal the domain or hostname; or
 - any other contact details for the person.
- C. Our clients do not object to the redaction, in respect of any natural person who is an AHRC officer or a public figure, of:
- the person's direct business telephone or business mobile telephone number, provided that a "land line" telephone number must not be redacted so as to conceal the area code; or
 - the person's direct business email address, provided that such an email address must not be redacted so as to conceal the domain or hostname.
- D. Our clients are willing to limit the scope of the documents sought by them if:
- it emerges that a "practical refusal reason" exists in relation to this request, within the meaning of section 24 of the *Freedom of Information Act 1982* (Cth); and
 - in the course of or for the purposes of a request consultation process in accordance with section 24AB of the *Freedom of Information Act 1982* (Cth), the AHRC promptly advances a sensible proposal for limiting the scope of the documents sought.

Yours faithfully,

Macpherson Kelley
JUSTIN QUILL
Principal

Our Ref: JHQ:264803
Your Ref: 2016-15045 / 2016-15046

15 November 2016

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

M&K Lawyers Group Pty Ltd
ACN 122 450 337

Melbourne
Level 22
114 William Street
Melbourne VIC 3000

GPO Box 1666
Melbourne VIC 3000
DX 174 Melbourne

Tel + 61 3 8615 9900
Fax + 61 3 8615 9999

Dandenong
Tel + 61 3 9794 2600

info@mk.com.au

mk.com.au

Dear Ms Ball

**COMPLAINT BY BRUCE TILL AND KEVIN GUNN AGAINST THE AUSTRALIAN
AND MR BILL LEAK**

We refer to the above matters and confirm 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*.

As you may be aware, Mr Kevin Gunn and Mr Bruce Till have made public comments indicating their intention to withdraw their complaints under section 18C of the *Racial Discrimination Act 1975* against our clients.

As we are currently preparing a response to the complaints, please confirm whether Mr Till and Mr Gunn's matters are proceeding or if they will be withdrawn.

We note that in your correspondences of 2 November 2016, you have requested that our clients provide a response to the complaints by Friday, 25 November 2016.

To that end, we would appreciate a response to this query by no later than **Friday, 18 November 2016**.

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Jodie Ball



15 November 2016

Yours faithfully

 **Macpherson Kelley**
JUSTIN QUILL
Principal

Our Ref: JHQ:264803
Your Ref: F2016/44

20 January 2017

Bronwyn Byrnes
Legal Section
Australian Human Rights Commission
Level 3, 175 Pitt Street
GPO Box 5218
SYDNEY NSW 2001

M&K Lawyers Group Pty Ltd
ACN 122 450 337

Melbourne
Level 22
114 William Street
Melbourne VIC 3000

GPO Box 1666
Melbourne VIC 3000
DX 174 Melbourne

Tel + 61 3 8615 9900
Fax + 61 3 8615 9999

Dandenong
Tel + 61 3 9794 2600

info@mk.com.au

mk.com.au

Dear Ms Byrnes

FREEDOM OF INFORMATION REQUEST NO.F2016/44

We confirm we act for Nationwide News Pty Ltd (as publisher of *The Australian* newspaper) and Mr Bill Leak.

We refer to our Freedom of Information request dated 9 November 2016 (**FOI Request**) and your correspondence dated 21 December 2016. In particular, we refer to your decision in relation to categories 1-2 and 6-11 of our FOI Request.

Application for internal review – categories 1-2 and 6-11

We request an internal review of your decision regarding categories 1-2 and 6-11.

The reasons we believe a review is necessary are as follows:

Public interest

1. Our FOI Request was in relation to the racial discrimination complaint made by Miss Melissa Dinnison about Mr Leak's cartoon published in *The Australian* newspaper on 4 August 2016 (**Complaint**).
2. The circumstances surrounding the Complaint were highly unusual. Given the public nature of the matter, it was one which attracted, and continues to attract, significant amounts of public interest.
3. There are a number of factors which created this level of public interest. They

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include:

- a) Race Discrimination Commissioner Dr Tim Soutphommasane's comments in early August 2016 where he encouraged members of the public to lodge a complaint about Mr Leak's cartoon;
 - b) the two-month delay by the Commission in notifying our clients of the Complaint, which is yet to be adequately explained;
 - c) the process in which the Commission required our clients to prove the cartoon was not racist before substantiating Miss Dinnison's Complaint;
 - d) the fact the Complaint was eventually withdrawn by Miss Dinnison; and
 - e) the largely public nature of the matter in general.
4. In addition, a significant amount of public debate has occurred over recent months in relation to whether there should be a Human Rights Commission at all. The Commission's overall effectiveness and internal processes have been questioned at length, and the work of key Commission staff has come into question.
5. Given the above, it is clear this matter has been anything other than a standard complaints process. The public interest surrounding this matter is significant. As a result, our clients ought to be entitled to all relevant documents which relate to the way in which the Commission has dealt with the Complaint.

The redactions and conditional exemptions

6. In light of the above, the numerous redactions contained in the bundle of documents you provided us on 21 December 2016 (**Bundle**) are plainly excessive.
7. The redactions go beyond what the public interest conditional exemptions provide for, namely section 47E (certain operations of agencies) and section 47F (personal privacy) of the *Freedom of Information Act 1982 (Cth)* (**Act**) which you have relied upon.
8. In our view, and pursuant to section 11A(5) of the Act, the public interest in this matter is of such significance that further disclosure of the relevant documents is necessary (that is, disclosure of the relevant documents would *not* be contrary to the public interest).
9. In many circumstances, entire email chains have been redacted (for example, those found at pages 15 – 16, 48 – 51 and 70 – 71 of the Bundle). To use the conditional exemptions as a mechanism to redact whole emails, not just relevant portions of emails, is in our view wholly unreasonable.
10. In relation to section 47E of the Act, you state disclosure of documents evidencing frank and private discussions between the Commission and Miss Dinnison would have a "substantial adverse effect" on the Commission's inquiry

and conciliation function. While it is arguable some aspects of this correspondence should be captured by this exception, we disagree entirely with the extent of the correspondence you claim is protected.

In particular, and in light of paragraph 5 above, correspondence from the Commission to Miss Dinnison regarding her Complaint ought to be produced. This information goes directly to the principle of transparency and without it, the public cannot maintain any trust or confidence in the Commission's integrity (which has recently been the subject of widespread criticism).

As such, we disagree with your statement that disclosure of this information is contrary to the public interest. Mr Leak was subject to a racial discrimination complaint which was triggered by a Commission employee, conducted in a manner which assumed he was guilty until proven innocent and played out in the public domain. The public interest concerning this matter is significant. Therefore, access to the relevant documents should be granted.

11. We further note section 3(2)(b) of the Act which states one of the legislation's key purposes is to "promote Australia's representative democracy by increasing scrutiny, discussion, comment and review of the Government's activities". In our view, the extent of the redactions is contrary to this purpose.
12. Finally, the Complaint has caused Mr Leak a considerable amount of harm and distress. Filing a racial discrimination complaint should not have been made lightly. Relying on conditional exemptions to provide Miss Dinnison with a blanket protection is inappropriate and wholly unfair to our clients. Put simply, the Commission should not rely on conditional exemptions as a shield to protect information it does not want to disclose.
13. In light of the above, the Commission should reduce the number of redactions in the Bundle.

Further documents

14. Almost all emails and letters contained in the Bundle were between the Commission and Miss Dinnison, or the Commission and our office. We would be surprised if no documents exist as between Commission staff which are captured by categories 1-2 and 6-11. In our view, more documents should have been produced.

In considering the above points, we trust following an internal review the Commission will reduce the overall redactions in the Bundle and provide additional documents captured under categories 1-2 and 6-11.

20 January 2017

Agreement to further narrow request – categories 3-5 and 12

We also refer to your decision dated 21 December 2016 in relation to categories 3-5 and 12 of our FOI Request (which was subsequently narrowed by email on 5 December 2016).

We note we are lodging a request with the Information Commissioner to review that decision.

However, we are prepared to withdraw that application if the Commission agrees to further narrow the scope of categories 3-5 and 12 to the following:

- any internal emails or text messages from Gillian Triggs and Tim Soutphommasane mentioning Bill Leak or the complaints involving Mr Leak's cartoon from 4 August 2016 (that is, emails or texts sent only to AHRC employees); and
- any internal emails or text messages to and from Jodie Ball mentioning Bill Leak or the complaints involving Mr Leak's cartoon from 4 August 2016 (that is, emails or texts from AHRC employees to Ball, and emails or texts from Ball to AHRC employees).

These amended categories are significantly narrower than our previous request and in our view would not substantially and unreasonably divert the Commission's resources.

Please confirm the Commission agrees to narrow our request in relation to categories 3-5 and 12 by no later than **Friday, 27 January 2016**. Should we fail to receive such confirmation by this time, we will maintain our request for an internal review regarding categories 1-2 and 6-11.

Yours faithfully

Macpherson Kelley
JUSTIN QUILL
Principal