



FEDERAL COURT OF AUSTRALIA – INVESTIGATION INTO REGISTRAR APPOINTMENTS

KEY NARRATIVE

- In 2020, the Commission conducted an investigation after a public interest disclosure (PID) was allocated to us by the Commonwealth Ombudsman.
- The investigation was finalised in December 2020.
- In December 2021, we were informed that the Commonwealth Ombudsman was conducting a preliminary inquiry into whether to conduct an investigation into the handling of the PID complaint.
- We have provided material to the Commonwealth Ombudsman to assist with the preliminary inquiry.
- The outcome of the preliminary inquiry will determine whether or not an investigation is required.

QUESTIONS AND ANSWERS

If asked about why the Commission conducted this investigation

- The investigation was the result of a public interest disclosure made to the Commonwealth Ombudsman.
- The *Public Interest Disclosure Act 2013* (PID Act) provides that when a PID is made the handling of the disclosure can be allocated to one or more agencies.
- In this case, the handling of the disclosure was allocated by the Commonwealth Ombudsman to the Commission.

If asked about the conduct of the investigation

- I understand that this matter relates to a public interest disclosure. The PID Act has protections in place to protect the identity of disclosers and obligations to ensure the confidentiality of the investigation, so I will talk in general terms about the investigation.
- The investigation commenced in May 2020, when the PID was allocated to the Commission by the Commonwealth Ombudsman.
- As reported in the media, Kate McMullan was appointed to investigate the complaint.
- As reported in the media, the investigation was completed in December 2020.
- The discloser was provided with a redacted copy of the investigation report on or around 23 December 2020.



If pressed on the length of time of the investigation

- During the course of the investigation, a substantial amount of documentation was provided by relevant parties.
- The disclosures involved allegations that proper practices were not undertaken with respect to recruitment processes leading to a number of appointments.
- The Commonwealth Ombudsman agreed to two extensions of time to allow the Commission to properly consider the material and to complete its investigation.

If asked about the findings of the investigation

- The handling of a disclosure may be the subject of a complaint to the Commonwealth Ombudsman.
- The Ombudsman has contacted the Commission to inform us it is conducting a preliminary inquiry to determine whether or not conduct an investigation.
- We are waiting for the outcome of that inquiry to determine whether the matter requires further consideration.

If pressed on when the Commonwealth Ombudsman will complete their inquiry/investigation

- We understand the Commonwealth Ombudsman will let us know the outcome of its preliminary inquiry; however, questions on timeframes are best put to the Ombudsman.

If asked about the commentary in media articles about broadbanding of SES positions

- Broadbanding is an arrangement where two or more APS classifications are combined into a single broader group of duties (a band) to meet the needs of a particular agency.
 - Senior Executive Service (SES) classifications are excluded from broadbanding arrangements under the *Public Service Classification Rules 2000* (section 9(5)).
- Role evaluation is the method of determining the relative work value of a job (role) through assessing the nature, impact and accountabilities of the role.
- In support of consistent classification decision-making across the Australian Public Service (APS), agencies are encouraged to incorporate a structured role evaluation process into their classification management practices.
- It is not uncommon for positions with the same job title to be classified differently because of differences in one or more of the evaluation factors – for example, the scope and complexity of the roles.
- A role evaluation, which determines that the appropriate classification for a role could differ depending on the nature of the work involved, is distinct and separate to a broadbanding arrangement which relates to the grouping of two or more classifications into a single band.



If asked about the specifics of the complaint?

- I am not able to comment on the specifics of the investigation or complaint. It would be an offence to do so, as it would breach the confidentiality requirements of the PID Act.

If asked about what happens if an APS employee is found to have breached the PS Act or Commissioner's Directions?

- What happens at the end of an investigation will vary with the circumstances.
- Actions might include:
 - Commencing Code of Conduct proceedings under the Public Service Act
 - Implementing or changing policies, procedures or practices
 - Conducting training and awareness sessions for staff.

Did APSC mishandle the matter?

- This investigation was finalised in 2020 and we were only made recently aware that a complaint has been made about the handling of this matter.
- The Commonwealth Ombudsman is looking into it – and that is appropriate.
- We are waiting for the outcome of the Commonwealth Ombudsman's preliminary inquiry.

BACKGROUND

MEDIA

8 February 2022, 'Untried lawyers score key positions', *The Australian*. Article alleges that two 'untried and underqualified' candidates were appointed to 'high paid, senior positions' by the Federal Court of Australia. The article quotes from a 'confidential Australian Public Service Commission investigation' into the appointments. Quotes from the Commission report – which was a report on a public interest disclosure – state that the investigation found that there had been a breach of the *Public Service Act 1999* in relation to one of the recruitment processes that led to the appointment of one of the candidates because 'all eligible members of the community were not given a reasonable opportunity to apply to perform the relevant duties'. Other quotes from the report state that there was found to be one instance of disclosable conduct in relation to the appointment of one of the candidates to the position of National Registrar because, on the balance of probabilities, the candidate did not hold an essential qualification for the position.

state that the which found. <[the-australian-20220207.pdf \(stream.com.au\)](#)>

9 February 2022, 'Federal Court boss warned on job rule sidestep', *The Australian*. Article discusses concerns held by the now General Counsel of the Federal Court of Australia about recruitment processes by the Federal Court where candidates were appointed at, but paid above, a specific classification level. The article refers to the practice of broadbanding, implying that there was broadbanding of SES and Legal 2 positions in the relevant recruitment processes and noting that pursuant to legislation (*Public Service Classification Rules 2000*) SES positions cannot be broadbanded. The article quotes from a report by the Commission into the recruitment processes



which, according to the article 'did not substantiate allegations of impropriety in the recruitment processes which resulted in the appointment of eight registrars under the arrangement because there had been "a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load".' The article also quotes a spokesperson for the Commission explaining what a role evaluation is, and noting that those evaluations are separate and distinct from broadbanding arrangements. <[Federal Court boss warned on job rule sidestep](#)>

TIMELINE

Date	Action
11 May 2020	Public Interest Disclosure in relation to recruitment activities at the Federal Court of Australia allocated to the Commission by the Commonwealth Ombudsman. The PID relates to recruitment run by the Federal Court for National Registrar positions in 2018.
7 August 2020 (and 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020, and 11 November 2020)	Supplementary information and correspondence provided by the discloser.
7 August 2020	Commonwealth Ombudsman granted an extension of 92 days for completion of the investigation (original due date 9 August 2020, new due date <u>9 November 2020</u>).
18 September 2020 (and 27 October 2020, 23 November 2020, and 24 November 2020)	Materials provided by the Federal Court of Australia in response to request from information by Ms McMullan.
6 November 2020	Commonwealth Ombudsman granted a further extension for completion of the investigation from 9 November 2020 to <u>9 December 2020</u> .
9 December 2020	Investigation completed. Total length of investigation 212 days.
23 December 2020	A redacted copy of the PID investigation report was provided to the discloser.
20 December 2021	The Commonwealth Ombudsman informed the APSC a preliminary inquiry under section 7A of the <i>Ombudsman Act 1976</i> to determine



	whether or not conduct an investigation into the handling of the complaint.
14 January 2022	The Commission provided the requested documents to the Commonwealth Ombudsman, who have advised that it will contact the Commission again in mid-February.

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s 47F	Integrity	s 47F	
Consultation s 47F	Legal Team	s 47F	s 47F