

The Hon Keith Mason AC KC and the Hon Leslie Katz SC

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Emailed & posted.

The Hon Mark Dreyfus KC
Attorney-General for the Commonwealth of Australia

Dear Attorney,

Concerns about the Administrative Appeals Tribunal:
Secrecy and possible invalidity of recent appointments

We are retired solicitors-general and judges.

For several years we have discussed privately the constitutionality of a Government facing general election pre-empting a successor Government by making appointments to public office that will not take effect before polling day. To take a clear hypothetical example, it would not have been open to the Morrison Government to have appointed the next chief justice of the High Court given the age of the present incumbent and the absence of any notice of her resignation. United States decisions under the rubric of 'public office' reveal relevant case law that we plan to discuss in a law journal article, if only we can obtain confirmatory access to the key primary documents.

Michael Pelly, the legal editor of the *Australian Financial Review* wrote on 4 April 2022 on 'Former Liberal MPs, advisers appointed to tribunal on up to \$500k', discussing appointments recently announced by Attorney-General Cash. What caught our attention was the reference to '26 current members [of the Administrative Appeals Tribunal (AAT) who] were promoted or had their terms extended.' Names were not provided in the article, and only ~~been~~ recently have we succeeded in getting access to the former Attorney's announcement. David Crowe, the Chief political correspondent of the *Sydney Morning Herald* wrote on 'Federal officials flouting FOI rules' on 5 September 2022. The revelations about Mr Morrison's secret ministerial offices that have prompted the inquiry by the Hon Virginia Bell AC are also relevant background to our concerns.

Our efforts to date have revealed serious shortcomings in the information that ought to be available to the public and litigants before the AAT. And they have raised in our minds serious doubts about the validity of an unknown but significant number of the recent appointments.

Details of important appointments to public office used to be individually gazetted. No longer.

We have discovered that the 26 appointments to the AAT whose validity we wish to explore were made by Instrument of Appointment executed by the Governor-General in Executive Council on 31 March 2022, a fortnight before Parliament was dissolved and the writs issued for a general election with a polling day of 21 May 2022. We are not suggesting any breach of the caretaker convention. Nor do we doubt the validity of any appointment merely because its term will reach well into the

future. But as will appear, several serving members of the AAT with terms already expiring in late 2022 or later years were announced by Senator Cash to have had *those terms* 'extended' and this would seem to fall foul of the constitutional principle to which we have adverted.

The *Freedom of Information Act 1982* (FOI Act) requires agencies to publish online 'details of...appointments of officers of the agency that are made under Acts' (s 8 (2) (d)). According to the Information Commissioner these details should state for each designated officer the name of the person appointed and the length or term of his or her appointment. These details have not been published with respect to the appointments made on 31 March 2022. Indeed, what has been published by the AAT masks and suppresses highly relevant information. Worse still, it would appear on our present researches that the former Attorney-General did not accurately represent what was actually done by the Governor-General.

The upshot is secrecy, confusion and serious questions touching the validity of an uncertain but significant number of appointments. If there is invalidity it may touch upon the rights of litigants in this important Tribunal.

Let us explain these serious propositions, at the same time highlighting concerns about the secrecy prevailing.

One of our number began by emailing the President of the AAT on July 13 requesting confirmation that the appointments to her Tribunal were as announced by Senator Cash. Her Honour was informed of the academic issue we were exploring and requested to provide an anonymised copy of one of the relevant commissions. The response via the Registrar of the Tribunal was that: 'If, as you say, the matters you are interested in could possibly raise constitutional issues, it would be inappropriate for Her Honour, as a Chapter III judge, to engage.' It was further suggested that inquiry might be made of the Attorney-General's Department or the AAT's 'public record'.

We embarked upon written and also less formal enquiries of the Department but, to date, have received no response.

The 'public record' of the AAT is seriously defective in that it does not provide accurate or adequate information about the appointments of any of the current members of the AAT. Nor does it comply with the AAT's obligations under s 8 of the FOI Act.

Some time on or after 22 July 2022 the AAT published on its website a *Table of Statutory Appointments (as at 22 July 2022)*. It listed the current judicial and other members of the AAT in order of seniority stating their respective offices as at that date, their several dates of 'First appointment' and 'Appointment expires'. Not only was this information inadequate. But the concurrent removal of an earlier *Table (as at 7 March 2022)* prevented discovery of the corresponding inadequately disclosed position immediately before the election. Eventually this earlier Table was made available to the writers, itself providing no more than a limited snapshot of the situation as it stood about a month before the pre-election appointments. The delay in publishing the later Table and the suppression of the earlier one was only one aspect of non-compliance with the FOI statutory obligations. More significant substantive breaches were the suppression of the date of each of the new appointments, which of them entailed promotions, and the starting dates and respective terms of the new appointments.

To give an example: The *Table (as at 7 March 2022)* provided with respect to Ms Karen Synon, a Non-Judicial Deputy President – Full Time, only the following information:

| | | | |
|-------------------|-------------|---------------------|------------------|
| First appointment | 1 July 2015 | Appointment expires | 16 December 2023 |
|-------------------|-------------|---------------------|------------------|

The entries in the *Table (as at 22 July 2022)* for Ms Synon stated:

First appointment 1 July 2015 Appointment expires 8 May 2027

We have ascertained that Ms Synon's original or first appointment in 2015 was to a different office in the AAT than the one she held at the time the general election was called. She was appointed a Non-Judicial Deputy President in 2020. The date, starting time and terms of the recent appointment remain entirely undisclosed other than their expiry date.

There are several AAT members who would appear to be similarly placed, but that has only come to light through a painstaking comparison of two Tables spanning many pages. Some of the members have moved from one office of the AAT to another, presumably by way of promotion. There is no information about when the 'new' appointments were made or (more importantly) when their new terms were appointed to commence from. Nor is there any information about whether, if at all, or when the respective appointees took the prescribed oath or affirmation under s 10B of the *Administrative Appeals Act 1975* (AAT Act) required of them before they could proceed to discharge duties under a particular appointment. The *Table (as at 22 July 2022)* has recently been replaced by one in similar format.

If, as Senator Cash announced on 4 April 2022, 26 named persons were 'promoted and/or extended' by the Governor-General a few days earlier, this alone presents a serious question touching the validity of the exercise, at least as regards any changes to their term and/or status said to occur after the general election. Thus, for Ms Synon, there would at least be a question as to the lawfulness of her continuing to hold her stated office after 16 December 2023, in light of the constitutional principle to which we have adverted.

In fact, more serious and different questions touching the validity of the 26 appointments may exist; and they create doubts about the *present* status of the officers concerned. We have information from a reliable source, but it is yet to be confirmed by access to the Instrument of Appointment that we have been seeking for over two months, that *all* of the appointments purportedly made by his Excellency on 31 March 2022 were expressed in the following terms:

'Pursuant to s 6 (1) of the Administrative Appeals Act I. appoint each of the following to the listed offices' [in each case expressed as a term of years from 9 May 2022].

To announce March 2022 appointments as extensions of existing appointments that have months if not years to run is misleading.

But how is it possible to simply superimpose a second appointment on an existing one? Consider the Synon appointments that we have focussed upon (only because they were the first to come to our attention as an apparent exemplar of a more extensive problem). Which of Ms Synon's appointments is the one currently operative? The original one commencing in 2020 and expiring in 2023 or the one made in 2022 and expiring in 2027? If the latter, was the requisite oath or affirmation taken before 9 May 2022? Or at least before Ms Synon commenced to discharge the duties of the office she now believes herself to be performing, presumably that represented by Senator Cash which now expires in 2027?

We have information from a reliable source that Ms Synon never tendered to the Governor-General written notice of her resignation of the office she held as at 31 March 2022. Nor has it been terminated by the Governor-General. Cf ss 8 (3), 13 and 15 of the AAT Act. Given that she could not hold and be remunerated for two similar offices concurrently, what office does she currently hold?

These questions may possibly replicate with all of the other 26 officers in her situation. Indeed, they

may be more acute with those members who were purportedly 'promoted' as and from 9 May 2022. Perhaps for them Senator Cash procured their resignation in proper form and tendered the notice to the Governor-General (cf s 15 of the *Administrative Appeals Tribunal Act*) before 31 March 2022. Unlikely, but Who knows?

Our endeavours also indicate that the scope of the FOI exemption available to the Office of the Governor General is far too broad. *Kline v Office of the Governor General* [2013] HCA 52 means that no citizen has any right to be given any information from that source about appointments or other official acts purportedly made under statute, or resignations.

Copies of this letter will be sent to the Chief Justice of the Federal Court of Australia, the President of the Administrative Appeals Tribunal, the President of the Australian Institute of Administrative Law and the two journalists referred to above.

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