AMMA Memorandum

To: AMMA IR Professional and Employment Lawyers (Strictly confidential – not for distribution)

IR Professionals of AMMA member companies (Strictly via request with AMMA's Policy Division)

From: Steve Knott, Chief Executive AMMA

Subject: Fair Work Commission – ALP restructure of Tribunal and appointment process both highly political

Date: 8 September 2014

Introduction

The purpose of this AMMA document

For the past two years, the creation of a new specialist IR appeals body, separate to and independent of the Fair Work Commission, has been a key priority area of AMMA's reform advocacy. AMMA's advocacy in favour of such an appeals jurisdiction has primarily been driven by an identified need for its members and all employers to have greater certainty and consistency of Commission decisions and proper application of long standing industrial precedents in order to run their businesses effectively and with minimal IR disputation.

Consideration of this new appeals process was included in the Coalition's pre-election IR policy document. AMMA was among several organisations that provided confidential submissions to the Employment Minister Senator Eric Abetz in late 2013, at his request. While the Minister is understood to be reviewing these submissions and his policy options, public discussion over the merit of a new appeals process of this nature has ensued.

Unsurprisingly, some with vested interests in keeping the current complex system in place continue to move away from an academic and practical debate about the merits of this proposal, and rather have questioned AMMA's motivations or merit in advocating for a new appeals bench. This has occurred despite AMMA reiterating that such a move would be in-line with international best practice, reduce costs associated with Australia's industrial system and restore employer confidence in the tribunal.

Two recent and prominent examples, featuring in *The Australian Financial Review* and *Workplace Express* on September 3 and 1 respectively, are included as Attachment 4 to this document. These news articles feature the Law Council of Australia implying AMMA's position is politically motivated. That assertion is wrong.

This AMMA Memorandum has been prepared for the strict use of AMMA staff members and IR professionals of AMMA member companies (by request only) to clarify AMMA's concerns about the former ALP government's restructure of the tribunal and commission appointments. This research document is necessary given the ongoing public criticism of its position on this matter, and attempts to discredit its impartiality in advocating for a new appeals jurisdiction. This material builds on AMMA's previous publication series titled "*Fair For Who?: The rhetoric versus the reality of the Fair Work Act*".

The background on tribunal members and case decisions provided is all objective information already on the public record and summarised herein.

Introduction to this matter

Prior to the 2007 federal election the Australian Labor Party (ALP) made several pre-election commitments that Australia's industrial relations system would not be a return to the old industrial relations club or a partisan appointment process. Disappointingly, the promises of the Rudd/Gillard Governments were not kept. The majority of appointments to the Fair Work Commission (initially called Fair Work Australia) has been clearly biased towards persons

who possessed an affiliation with the ALP and/or a trade union. This has not had a theoretical or academic impact on resource companies, but rather, this has had a direct, real and practical impact on the decisions that they are able to make in managing their business operations.

Currently only 12% of the private sector is unionised. In August 1992, the ABS recorded that 43% of male workers and 35% of females were union members in their main jobs. Therefore, AMMA has long believed that the pool of potential candidates to be appointed to the industrial relations commission should also now reflect structural changes to the economy and labour market. This is what was essentially promised by the then-Rudd and Gillard Governments. Moreover, the Labor Government engaged in an unprecedented restructuring of the tribunal's decision making apex, when it abolished in 2009 the statutory positions of Vice President, simply to then re-create these statutory positions in 2012, effectively demoting two Howard Government appointed Vice Presidents in lieu of Labor's preferred appointments.

The Law Council of Australia was critical of this, as was AMMA. While appointed members of Fair Work Commission may strive to maintain a high degree of independence and objectivity in the course of their duties, when new appointments so clearly weigh in favour of those with a union background, it ultimately undermines employers' confidence in the system. This re-alignment of positions at the top of the tribunal structure, coupled with appointments which were heavily skewed towards one side of the social partners to Australian employment is unprecedented, as duly noted in a feature article by Aaron Patrick in the *Australian Financial Review* published on April 2, 2013 (see attachment 5).

Moreover, employers are concerned that there are now "far too many Chiefs and not enough Indians" at the Fair Work Commission as a result of the Labor Government appointments. In 1999, there were 14 Presidential members (including the President, two Vice Presidents, eight Senior Deputy Presidents, and three Deputy Presidents) and 29 Commissioners. There are now 23 Presidential members and 22 Commissioners.

A number of employers and several of AMMA's professional staff have raised concerns about certain tribunal members in some instances appearing to apply their statutory discretion in a manner sympathetic to union representations absent of any real life business experience and analysis. A disturbing trend of such members substituting their decisions for that of management when managers had a valid reason to act in the manner they did is of concern. Whilst members of the tribunal have a longstanding obligation when performing functions or exercising their powers to take into account the "*equity, good conscience and the merits of the matter*" (s.578), it is, nonetheless, human to err. Many matters before the tribunal involve subjective notions of fairness and the skewed nature of the appointment process has heightened perceptions amongst employers and IR professionals that the integrity of the tribunal has been compromised somewhat by the combined appointment and restructuring process undertaken by the Labor government.

This memorandum outlines, in part, the unprecedented politicisation of the so-called "*independent industrial relations umpire*" the Fair Work Commission and provides AMMA professional staff and member company representatives who engage with the tribunal with information to assist with understanding various AMMA policy positions, which may be

considered somewhat controversial having regard to the views of other interest groups and stakeholders, such as trade unions, academics and the legal profession.

The intrusion into valid management decision making, inconsistent findings by Fair Work Commission members on the same subject matter, together with an international best practice approach is interlinked with AMMA's call for the creation of an experienced/specialist IR jurists appeals panel. Contrary to the submissions of the Law Council of Australia, which is pushing against the consideration of a separate appellate body, even if that is modelled on domestic or international best practice approaches, AMMA has consistently advocated that a more senior, experienced and objective appellate panel, which could determine first instance appeals from the Fair Work Commission, will restore much needed business confidence and integrity into the industrial relations system.

Such a mechanism will act as a crucial filter on various matters and be able to set general principles and guidelines to the Fair Work Commission. While the current system favours expensive appeal processes through the courts and judicial system, there should be a viable alternative for all businesses including large, mid and smaller tier firms. AMMA's policy position is that a new and separate appellate body will assist in this regard. Contrary to the views of the Law Council of Australia, AMMA does not believe that these issues will be solved by expanding the existing judicial or court functions, but rather, it is ensuring that the appeal function works as well as it should, based on international best practice.

Some background to the highly union/ALP influenced and unbalanced Fair Work Commission appointment process is set out in the following summary and various attachments.

Summary

Understanding the backgrounds of Fair Work Commissioners appointed during the Rudd/Gillard administrations, the tribunal's significant restructuring and the business impacts of recent case decisions is also critical to appreciating AMMA's sound policy reasons for advocating a new Fair Work appeals jurisdiction.

The current President of the Fair Work Commission, Iain Ross, worked for eight years at the ACTU retiring as Assistant Secretary in 1994 before his appointment to the Australian Industrial Relations Commission (the forerunner to Fair Work Australia) as a Vice President (one of only two positions directly under the President). In 2005, during his time as a Vice President of the AIRC, Ross attended an AWU anti-*WorkChoices* rally whereby he stood with Bill Shorten (then National Secretary of the AWU) and supported the campaign to repeal the Howard Government's *WorkChoices* legislation.

Ross was appointed to the Fair Work Commission (FWC) by the Gillard Government in 2012 when the former President, Geoffrey Giudice (a Howard Government appointment in September 1997 and a respected former barrister) retired in February 2012. Ross is also dually appointed as a Federal Court Judge and has recently been appointed as a part-time judge of the ACT Supreme Court by the ACT Government in 2013. Ross was a controversial appointment, given his active role in the trade union movement and his advocacy against the Howard Government's policies on industrial relations. He was directly involved in discussions with the then-Labor Government, the responsible department and relevant Minister in the creation of two new statutory Vice Presidential roles, despite these roles being abolished by the Rudd Government in 2009. The appointment of Vice President Catanzariti and Vice President Hatcher, effectively demoted the Howard-era appointees who had retained their status as Vice Presidents. Shortly after VP Hatcher commenced, Ross almost immediately delegated his powers to VP Hatcher to convene appeal full benches. Since his appointment, VP Hatcher, a former TWU legal advisor and ALP candidate for the seat of Mackellar, has presided over the majority of appeal matters, including significant cases.

Shortly after Vice President Watson delivered an address to the NSW Industrial Relations Society 2012 Annual Conference - 'Employment Relations - Global Reality' Kiama on 19 May 2012, which provided views on how workplace productivity can be enhanced, Ross published a Members Code of Conduct which warns members when speaking in private or public about policy matters. There was no such Code required under former President Giudice.

An amendment to the *Fair Work Act 2009* by Labor inserted a new power for the President, to determine a Code of Conduct under s.581B(1). Interestingly, this was not recommended by an ALP appointed Panel which was tasked by the Labor Government to review the Fair Work Act. The Code prescribed was, by and large, the same as Ross' earlier Code. It warns members of the Commission that *"workplace relations can be a contentious area and it is generally advisable to avoid speaking or writing on politically sensitive topics"* and from *"involvement in political controversy."* Media reports this month have raised questions about Fair Work Commission Expert Panel member, Tim Harcourt (a former ACTU senior officer) and whether he breached the President's Code of Conduct by allegedly engaging in politically partisan commentary when he presented at an ALP fund raising event. Other instances of

alleged politically partisan commentary was reported to have occurred when Harcourt used twitter and appeared on television.

One of the new Vice President appointees, Joseph Catanzariti was formerly the President of the Law Council of Australia and Partner at law firm Clayton Utz. During his tenure as President of the Law Council, he authorised a submission on the *Fair Work Amendment Bill 2012* stating the Law Council's opposition in creating the two new Vice President positions, as this would effectively reduce the status of the existing Vice Presidents (which under the *Fair Work Act 2009* are technically designated as Deputy Presidents).

The other appointment to a Vice President position was industrial relations barrister Adam Hatcher SC. Immediately prior to his appointment, Hatcher was a Senior Counsel representing the Health Services Union in Federal Court proceedings.

Jeff Lawrence a former ACTU National Secretary who has stated on the record that "*[a]ll I've ever wanted to do, or intend to do, is work for unions*" was appointed by the Labor Government to the Fair Work Commission as a Deputy President. Suzanne Jones, was appointed as Commissioner of Fair Work Australia in September 2011. Jones had worked for the ACTU since 1980 and was the ACTU's National Advocate. Despite only serving for a brief time, in March 2012, President Ross appointed Jones as Head of the Termination of Employment Panel of the Commission. The first non-Presidential member to be so appointed. After only a brief period of time as Commissioner, in June 2013, Jones was appointed as a Judge of the Federal Circuit Court of Australia (formerly known as the Federal Magistrates Court).

Tim Lee was the Labor-appointed General Manager (GM) of the Fair Work Commission from July 2009 until September 2011, during which he oversaw the HSU investigation commencing in 2009. Lee, who had previously worked for the Australian Services Union, was due to be called to Senate Estimates to answer questions about the longest running inquiry ever conducted by the Commission, but was appointed by the Labor Government as a Fair Work Commissioner before he could be called. A KPMG report released after Lee was appointed as a Commissioner indicated that during the period Lee was GM, no credit card analysis took place as part of the HSU investigation. The report said that had this occurred earlier in the investigation, its excessive length would have been truncated.

In 2011, the Labor Government appointed Ms Bernadette O'Neill (whom worked for the LHMU, now United Voice), as the General Manager of the Fair Work Commission to replace Tim Lee and take over the investigation into the HSU. While O'Neill ultimately provided relevant information to police authorities once express statutory powers were provided to her, it was reported that in October 2011 O'Neill refused official Victoria Police requests to provide specific information to assist with criminal investigations into the National office of the HSU and specifically into former Labor member for Dobell, Craig Thompson. Victorian police continued to run a parallel criminal investigation, which ultimately led to Thomson's conviction in February 2014 for obtaining financial advantage by deception and theft (65 dishonesty charges), and a 12 months' jail sentence (nine months of the 12 months' jail sentence was suspended).

In addition to the Labor appointment process of new tribunal members, the majority which possessed an ALP and/or trade union background, the Rudd Government in 2009 also embarked on a new initiative to create a significant number of new conciliator roles in anticipation of an increase workload of unfair dismissal applications. Whilst not exercising powers akin to statutory tribunal members, it is relevant to note that this recruitment process resulted in at least six conciliators having a known background of affiliation to a trade union.

In March 2013, and after yet another round of appointments were announced by the Labor Government, former Chief Executive of the Australian Chamber of Commerce and Industry (ACCI) Peter Anderson aptly remarked: *"It is disappointing that the government has overlooked representatives from industry and employers … that the government could not appoint one person of the eight from an active current role in industry or from among employer bodies is disrespectful to the private sector."*

The Abbott Government is currently considering a re-structure of a number of federal administrative review tribunals in a consolidation exercise. In AMMA's view, it is important that in a similar way the Abbott Government considers reviewing the structure of the Fair Work Commission. All existing tribunals and bodies should ensure that it reflects the needs of all stakeholders. The current structure of the Commission is an anachronism and heavily reflective of its past when it was a commonwealth judicial body. All legal institutions should serve the public and its constituents, and not the other way around. Moreover, it should reflect a modern 21st century economy and the businesses which operate in this economy. AMMA will be advocating to the Abbott Government that it review and streamline the Fair Work Commission accordingly.

In AMMA's view, there are no sound policy reasons why a future modern structure should not consist of a flatter hierarchy of members, consisting of three distinct tiers. This would ideally consist of only a President, a number of Vice Presidents or Deputy Presidents and commissioners. A small number of Vice Presidents or Deputy Presidents (and not both) should have distinct functional and managerial responsibilities to oversee different panels or areas of the tribunal's work. While historical reasons weigh heavily in terms of the existing structure, when viewed objectively, currently Presidential members and commissioners largely undertake the same work and there remains no material differences to justify the existing top-heavy structure.

The reason for outlining the above is it is AMMA's intention to call on the Australian Government to seriously consider a more modern structure for the Fair Work Commission. Our advocacy is driven by the fact that once all of the above is reviewed in context - that is the appointments process, the administration of important matters, the role of new conciliators, and the leadership restructuring; there is absolutely no doubt that the political interference in the so-called independent IR tribunal during the six years of the Rudd/Gillard/Rudd governments has been the greatest since federation.

A first attachment summarises the appointments made by Labor to the Fair Work Commission and also clearly outlines the structural re-alignment of the Fair Work Commission which has now led to an extremely top heavy structure (i.e. too many presidential members vs commission members). The second attachment to this memorandum highlights in greater detail commitments made but not kept by former Prime Ministers Rudd and Gillard in 2007

(then leader and deputy leader of the Opposition) regarding Fair Work Australia/Fair Work Commission appointments. The third attachment provides some background on some of the appointees and decisions on various matters.

The fourth attachment outlines recent comments relating to AMMA's appeals body position, published in the *Australian Financial Review* and *Workplace Express*. The fifth attachment is a feature article by Aaron Patrick, published in the *Australian Financial Review* on 2 April 2013, which chronicles many of the issues and events documented in this research paper.

To reiterate, this information is provided to professional staff of both AMMA and its member organisations (by request only) to ensure that resource industry IR professionals understand significant policy positions AMMA is taking (both publicly and privately) and why it is necessary to continue to advocate in the interests of structural reform to the industrial relations system.

Such an understanding has become increasingly important given AMMA has recently come under public criticism for its advocacy in favour of a new Fair Work appeals jurisdiction, and in particular to address completely erroneous suggestions that AMMA's position is somehow politically motivated.

Steve Knott
Chief Executive, AMMA

ATTACHMENT 1
Appointments to the Fair Work Commission under Labor

(Note: 19 out of a total of 27 members of the Fair Work Commission have a background of affiliation to trade unions/and or the ALP)

President

Iain Ross – legal sector / union affiliated background (ACTU)

Vice Presidents

Joseph Catanzariti – legal sector

Adam Hatcher – legal sector / union affiliated background / ALP (TWU).

Deputy Presidents

John Kovacic – public sector

Jeff Lawrence – union affiliated background (ACTU)

Val Gostencnik – legal sector/union affiliated background (Hospital Employees Federation/ANF)

Anna Booth – private sector/union affiliated background (Textile, Clothing and Footwear Union, the Clothing and Allied Trades Union and the ACTU)

Anne Gooley – public sector/legal sector/union affiliated background (MEAA)

Peter Sams – union affiliated background (Labor Council of NSW)

Ingrid Asbury – employer group

Commissioners

Anne Gooley – public sector/legal sector/union affiliated background (MEAA) (first appointed as a Commissioner then as a Deputy President)

Leigh Johns – legal sector/public sector/ALP

Donna McKenna – union affiliated background (Labor Council of NSW)

Ian Cambridge – union affiliated background (AWU)

Danny Cloghan – public sector/union affiliated background (WA Prison Officers Union)

John Ryan – union affiliated background (SDA)

Julius Roe – union affiliated background (AMWU)

Michelle Bissett – union affiliated background (ACTU)

Chris Simpson – union affiliated background (AWU)

Tim Lee – union affiliated background (ASU)

Suzanne Jones – legal sector/public sector/union affiliated background (ACTU)

Bernie Riordan – union affiliated background / ALP (CEPU/ETU)

Ingrid Asbury (First appointed as a Commissioner then as a Deputy President)

Susan Booth – legal sector / public sector

Peter Hampton – employer group / public sector

Geoff Bull – employer group/public sector

David Gregory – employer group

Nick Wilson – public sector / employer group

Other Appointments

Fair Work Commission /Fair Work Australia General Managers

Tim Lee – public sector/union affiliated background (ASU)

Bernadette O'Neil – public sector/private sector/union affiliated background (Australian Liquor, Hospitality and Miscellaneous Workers Union).

Australian Building and Construction Commission / Office of Fair Work Building & Construction

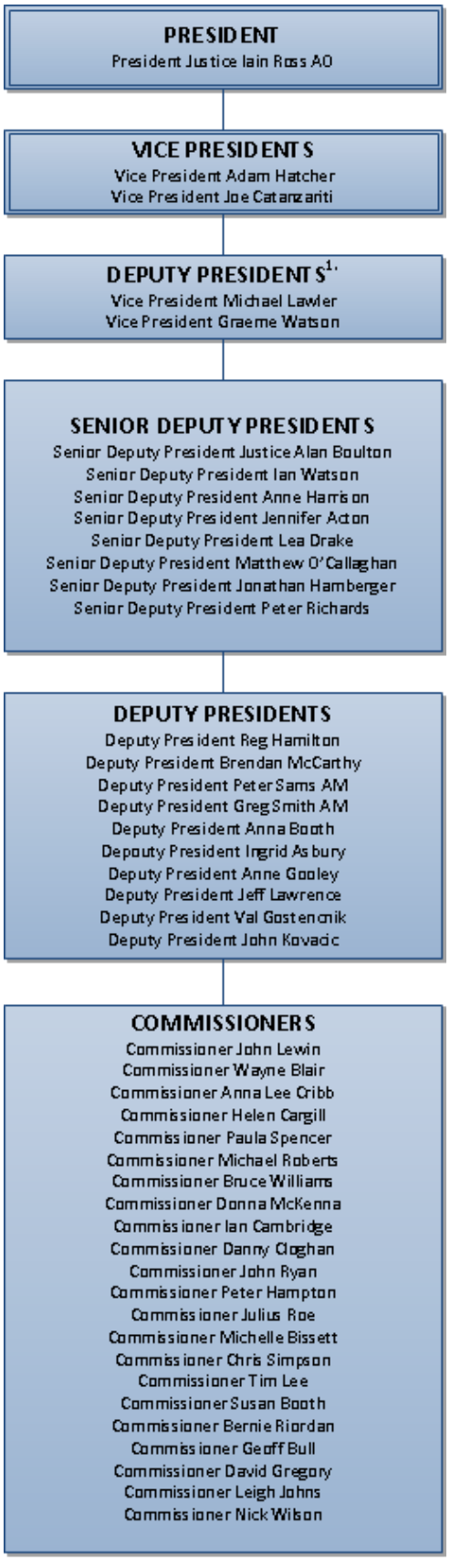
Val Gostencnik – legal sector/union affiliated background (Hospital Employees Federation/ANF)

Leigh Johns – legal sector/public sector/ALP

This diagram sets out current tribunal members by designation and status (as of September 2014).

Note: Former members of the Australian Industrial Relations Commission (AIRC) retain their designation and status.

This means that upon commencement of the *Fair Work Act 2009*, the existing Vice Presidents, Senior Deputy Presidents and Deputy Presidents of the AIRC were all appointed as Deputy Presidents of Fair Work Australia (now the Fair Work Commission), pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Schedule 18, items 1, 2, and 4.



1. Deputy Presidents Lawler and Watson retain their Vice President Titles

ATTACHMENT 2
Pre-election Promises of the Former Labor Government

Kevin Rudd (Leader of the Opposition)

7.30 REPORT, 30 April 2007

> *"Well, I give you this as an absolute guarantee here on your program. I will not be prime minister of this country and appoint some endless tribe of trade union officials to staff or ex trade union officials to staff the key positions in this body. That's not my intention. That's not the way in which it's going to work. What we want is people of fairness and of integrity, of independence who can get the balance right here."*

Julia Gillard (Shadow Minister for Employment & Industrial Relations & Shadow Minister for Social Inclusion)

Address to the National Press Club, 30 May 2007

> NEW APPOINTMENTS PROCESS FOR FAIR WORK AUSTRALIA
>
> This last point is important. Our new industrial umpire will be independent of unions, business and government.
>
> It will definitely not be a return to the old industrial relations club.
>
> Appointments will not favour one side over the other.
>
> Labor will remove all perceptions of bias.
>
> To achieve this, today I am announcing the process by which appointments will be made to Fair Work Australia.
>
> Of course, the separate judicial division of Fair Work Australia will need judicial members and those judicial members will be appointed in accordance with current processes.
>
> But it will also need decision makers. Those who hear unfair dismissals, review awards, hear minimum wage cases and assist with bargaining.
>
> Under Labor's new process, while the Minister responsible for Employment and Industrial Relations will ultimately be accountable to Parliament for the appointments, he or she will be only be able to appoint after completing the following processes.
>
> The shortlist of candidates will be scrutinised by a panel comprising:
>
> • a senior official from the Department of Employment and Industrial Relations (who will chair the panel);

• a senior official from the Australian Public Service Commission; and

• a senior official from each State (and Territory) Department of Industrial Relations that wishes to participate.

Upon receipt of the shortlisted candidates, and prior to making any decision about appointments to recommend to Cabinet, the Minister will also be required to consult with:

• the opposition spokesperson for industrial relations; and

• the head of Fair Work Australia.

This process will be rigorous and provide for bi-partisan involvement. It will ensure that all appointments made to Fair Work Australia are themselves fair, balanced and made on merit alone.

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It's time to break a cycle that sees each political party in government use appointments to the industrial umpire as political spoils.

I want Fair Work Australia to never be able to be impugned as a body of political appointees.

I want Fair Work Australia to be a body that serves the nation.

That's what a balanced, centrist industrial relations system demands.

While putting the appointments system beyond politics, Labor will also end the conflict of interest that has the Industrial Registrar serving two masters. The Industrial Registrar is required by legislation to comply with directions given by the President of the Commission but, like the Employment Advocate, the Industrial Registrar's performance pay is at the discretion of the Minister of Employment and Workplace Relations.

Fair Work Australia's senior staff will answer to the head of Fair Work Australia, not the Minister. One independent officer reporting to another independent officer. A system beyond politics.

ATTACHMENT 3
Detailed Background on Certain Labor-Appointees to the Fair Work Commission since 2009

Iain Ross (President)

1986	Industrial Officer at the Australian Council of Trade Unions (ACTU)
1990	Appointed Assistant Secretary of the ACTU
1994 - 2006	At age 35 appointed to the AIRC as Vice President and resigned effective Friday, 27 January 2006
2006	Partner at law firm Corrs Chambers Westgarth.
23 October 2007	Appointed Judge to the County Court of Victoria
9 November 2009	Appointed Judge of the Supreme Court of Victoria
1 Apr 2010 – 23 Feb 2012	President of the Victorian Civil and Administrative Tribunal
1 March 2012	Appointed Judge of the Federal Court of Australia and President of Fair Work Australia
December 2013	Appointed as a part-time Judge of the ACT Supreme Court

The Labor Government appointed Iain Ross as President of then-Fair Work Australia following the retirement of Justice Geoffrey Guidice in March 2012. He is a former Assistant Secretary of the ACTU who was appointed as Vice President of the then Australian Industrial Relations Commission (AIRC) before a brief stint in the private sector and numerous appointments to state courts/tribunals (appointed by Labor state governments).

Ross continues to concurrently sit on the Federal Court determining matters arising from the *Fair Work Act 2009*, bankruptcy, and migration cases. It was relatively unnoticed that Ross was also appointed to the ACT Supreme Court recently. The ACT Government (Labor government) appointed Ross as a part-time judge of the ACT Supreme Court in December 2013. In addition to the growing workload at the Fair Work Commission (particularly the dramatic increase in unfair dismissal claims, a new workplace bullying jurisdiction and a four year review of all modern awards which commenced in early 2014), Ross continues to sit on the ACT Supreme Court (including when it sits as the Court of Appeal) and preside over criminal law matters involving indictable offences. It is unclear why Ross has accepted this appointment and why Ross believes it is in the best interests of the Fair Work Commission to devote his time to work in other jurisdictions, albeit in a part-time or ad-hoc capacity.

Ross has previously complained at Senate Estimates about the lack of resources to deal with an increasing workload at the FWC. For example, at Senate Estimates in 2013, Ross indicated

that there was insufficient resources to deal with a proposed new workplace bullying jurisdiction within the Fair Work Commission.

Ross has been public in his stance on policy matters, even when he was Vice President of the AIRC and attended an anti-WorkChoices rally in 2005. On 28 May 2012, Ross tabled a statement to a Senate Estimates Committee indicating that he did not intend to engage in public debates about the legislative framework of workplace relations, apart from those issues which affect the "*independence and standing of the Tribunal*", and noted that workplace relations is a "*contentious field*":

> *Finally, I have limited my observations about the current legislative framework to those matters which affect the independence and standing of the Tribunal. Workplace relations is a contentious field. There are a range of views about the appropriate legislative balance between the interests of employers, employees and their representatives. Where that balance lies is a matter for Parliament. It is not appropriate for me, or any member of Fair Work Australia, to enter the public debate about such issues and I do not intend to do so.*

In subsequent Senate Estimates, a senior officer of the Department of Employment and Workplace Relations (who was himself subsequently appointed to the Commission by the Labor Government) revealed that Ross had been involved in multiple private discussions with the Minister and the Department about the need to create either one or two new Vice President positions. It remains unclear as to whether Ross requested one or two positions. A meeting took place on 30 April 2012, whereby Ross provided an agenda for this meeting. The Labor Government did accede to this request and ultimately created two new Vice President positions, which was opposed by business organisations such as AMMA and the Law Council of Australia (see below). It remains unclear as to exactly why Ross requested the creation of one or two new Vice President positions. The Department's submission to the Fair Work Amendment Bill 2012 which created these two new positions indicated that: "*[d]uring consultations, Justice Ross proposed that two vice-president positions be created in order to attract senior legal specialists with high-level expertise and to assist him in the administration and management of the tribunal.*" Vice Presidents (Deputy Presidents) Lawler and Watson were both senior and experienced legal practitioners prior to being appointed to the Australian Industrial Relations Commission. They were Panel heads under Justice Giudice and were highly experienced in the management of the tribunal.

On 26 June 2013, and almost immediately following the commencement of Vice President Hatcher, Ross indicated that he would be delegating his powers to Vice President Adam Hatcher to manage the appeals roster, including the composition of benches and issuing of directions. According to the Fair Work Commission's own published data, between the period 1 July 2013 to 31 March 2014, Vice President Hatcher and Vice President Catanzariti had 30 and 24 allocations of appeal matters respectively. This should be compared to Vice President (Deputy President) Watson (18) and Vice President (Deputy President) Lawler (3).

Adverse reactions by industry in respect of recent high-profile matters before Justice Ross includes the following.

In one matter, Ross presided over voluntary conciliations between the CFMEU and Grocon which the Victorian Supreme Court ultimately found to be illegal blockades to Grocon sites

in the Melbourne CBD. Following conciliation proceedings on 30 August 2012 Ross issued a recommendation which called for a 14 day cooling off period with Grocon to suspend legal action before the Supreme Court and for the CFMEU to not engage in industrial action or picketing.

Ross' recommendation commenced as follows: *"[t]o provide an environment more conducive to productive discussions in respect of the dispute between the parties I recommend that the parties agree to a 14 day cooling off period"*. Grocon refused to accept this recommendation, with the then Minister Bill Shorten, urging the parties to accept the recommendation, stating:

> *The Government strongly urges that both parties accept the President's recommendations as the most sensible path towards lasting resolution.*

It was reported that Daniel Grollo responded to the above by stating: *"[w]ith respect to where the Minister stands - if he would tell the CFMEU to obey the law and stop illegally blockading our sites then we could be meeting with the CFMEU leadership right now."*

To the company's credit, its refusal to agree to the recommendation was vindicated when the Supreme Court found against the CFMEU for the illegal blockades.

Justice Anthony Cavanough fined the union more than $1M for blockading and hindering access on multiple sites in 2012. He also ordered the union to pay Grocon's costs on an indemnity basis. The judge described the conduct of the CFMEU in flouting the orders as follows:

> *It involved deliberate defiance. It occurred in public. It was, for the most part, highly visible to the general public.*
>
> ****
>
> *The Court must visit the defiance of the CFMEU with a penalty which will not only adequately respond to the scale of the defiance but also act as a general and specific deterrent. No fines of the level previously imposed could do that.*

The office of the Fair Work Building and Construction industry inspectorate has initiated concurrent proceedings in the Federal Court regarding this matter.

In a second more recent matter, Ross was found by a Full Federal Court to have erred when he appointed himself to a Superannuation Expert Panel which is established under the *Fair Work Act 2009*. The process to determine which superannuation funds are to be named in 122 modern awards is in part, decided by the Expert Panel. Ross appointed himself and Tim Harcourt (an Expert Panel member appointed by the Labor Government to determine minimum wage cases) to the Panel to replace two Panel members whom were directed by Ross to not deal with the matters (due to a potential conflict as defined by the *Fair Work Act 2009*). The Financial Services Council intervened in the matter and questioned the composition of the Panel and asked for a brief extension of time to the directions currently set down. Ross issued a formal statement indicating that he would join the Expert Panel to *"put beyond doubt"* that the Panel was properly constituted, with the correct number of

members to make a quorum. He concluded that: *"In my view this resolves any uncertainty that the Expert Panel is properly constituted"*. A decision by the Ross-led Expert Panel indicated that if the Financial Services Council saw any issue with the composition of the Panel it should seek judicial review before the courts and also denied a brief extension of time to file applications, sticking to the original timetable. The Full Court, while recognising the provisions Ross was required to consider were complex, found that Ross acted outside of his powers when he appointed himself to the Expert Panel. After the Full Federal Court decision was handed down, the President issued a further statement indicating that the Panel could not proceed with the matter any further and leaving the entire future process in doubt until a replacement Expert member can be appointed by the Government.

Joseph Catanzariti (Vice President)

Joseph Catanzariti was appointed Vice President of the Fair Work Commission in June 2013.

During Catanzariti's time as President of the Law Council of Australia, the Law Council submitted a submission to the Parliamentary inquiry examining the *Fair Work Amendment Bill 2012*. An extract from the submission on the Labor Government's proposals to create two new Vice President positions is below:

> Upon the commencement of the Fair Work Act, the existing Vice Presidents, Senior Deputy Presidents and Deputy Presidents of the AIRC were all appointed as Deputy Presidents of FWA. However, they remained entitled to retain their designation (ie title), respective status and remuneration: see Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), schedule 18, items 1, 2 and 4.
>
> In particular, while the two incumbent Vice Presidents were appointed as Deputy Presidents to FWA they continued to be designated as Vice Presidents with status above that of all other Deputy Presidents. Consistent with their seniority they continued to be allocated senior functions within the Tribunal.
>
> Proposed Part 6 of Schedule 8 in the Amendment Bill seeks to amend the Fair Work Act to provide that in addition to Deputy Presidents (including the two current Deputy Presidents who are designated Vice Presidents) there will be two Vice Presidents.
>
> The Vice Presidents are to be given additional responsibilities and have a higher status than existing Deputy Presidents. Should the Government appoint the two individuals currently designated Vice President to the two statutory Vice President positions, then their status will not be reduced. However, if the two Deputy Presidents designated Vice Presidents are not so appointed, the effect of the Bill will be to reduce their status. Henceforth responsibilities that would have been capable of being delegated or given to them by nature of their senior status would instead be given to the new statutory Vice Presidents.
>
> This would have the tendency to reduce the independence of the Tribunal in that it will reduce the role and privileges associated with particular individuals. The Committee's concerns would not arise if those individuals currently designated Vice President are appointed to the new statutory Vice President positions, however given that applications are required for the positions, no such outcome could be regarded as certain even if intended.

Adam Hatcher (Vice President)

Adam Hatcher was appointed as Vice President of Fair Work Commission in June 2013.

Hatcher is a former TWU legal officer and barrister who frequently represented the Transport Workers Union and just prior to his appointment represented the HSU.

In 2009, the then Workplace Relations Minister, Julia Gillard, appointed Hatcher to be part of a government advisory panel (called the Safe Rates Advisory Group), which ultimately led to the creation of the new legislation and the Road Safety Remuneration Tribunal. Both of which was a longstanding policy position of the TWU.

Hatcher represented the TWU in proceedings before the Road Safety Remuneration Tribunal.

He stood as a Labor Party candidate in the 1990 federal election for the Northern Sydney seat of Mackellar. While Hatcher's attempt to break into Federal politics was unsuccessful, he did however achieve a 2.1% two party preferred result swing to Labor.

John Kovacic (Deputy President)

John Kovacic was appointed as Deputy President of the Fair Work Commission in September 2013.

Kovacic is the former Assistant Secretary of the Department of Education, Employment and Workplace Relations (DEEWR).

Early in 2013, Kovacic informed a Senate Estimates committee (see below transcripts) that President Ross initially requested the creation of two new Vice President positions, despite Ross asserting that he recalled only requesting one. During subsequent Senate Estimates, Kovacic indicated that the number fluctuated. It remains unclear as to which version reflects what actually transpired with the creation of the two new positions.

Subsequently, Mr Kovacic was appointed as a Deputy President of the FWC.

Senate Estimates, Hansard, Wednesday 13 February 2013:

> Senator ABETZ: Media reports have indicated, and Mr Ross confirmed earlier today, that he had asked for a position, not for two positions. We were led to believe that the two positions were something that the president had advocated for and how dare we, as a coalition, stand in the way. We now find out that that is not what the president actually advocated for. Who put into the public domain, and on what basis, that the president was supportive of the appointment of two?
>
> Mr Kovacic: My recollection is that there was some discussion at the last estimates hearing around that particular issue of the vice presidents in terms of where the suggestion was made. Also, at the Senate committee inquiry into the Fair Work Amendment Bill, there were some comments made by me in terms of the department's evidence to that committee of inquiry to that effect.

Senator ABETZ: Why were we told that the president supported two positions when it is quite clear he only supported one?

Mr Kovacic: My recollection is that the evidence that I provided to the committee is accurate. I am happy to check my notes of any conversations to see whether that is an accurate reflection. My recollection is that certainly the proposition of the creation of vice president positions was something that emanated from the president. With respect to the conversations as to whether it was around one position or two positions, I am happy to take that on notice and check my records.

Senate Estimates, Hansard, Monday 3 June 2013:

Senator ABETZ: Yes, but you did not recommend to the department that there should be two vice-presidents?

Mr Ross: I do not recall having any discussion along those lines. I have a number of discussions with the department.

Senator ABETZ: It would be a strange thing if you said one thing to the minister about the number of decisions and a different thing to the department.

Mr Ross: That would depend on the timing.

Senator ABETZ: We were told that the idea of a vice-president position, or positions, emanated from you and I think your evidence was that there be one position.

Mr Ross: My evidence was that I had a recollection of a conversation I had had with the minister and I certainly advanced the idea of one position during that conversation. I think I have only had the one conversation.

Senator ABETZ: Since then things have changed. If you were told that were going to be two positions, that is what you then started discussing with the department.

Mr Ross: Yes.

Senator ABETZ: The genesis of the vice-president position or positions was with you, and your recommendation to the minister was for one position?

Mr Ross: Yes, with the crossover that we discussed on the last occasion.

Senate Estimates, Hansard, Tuesday 4 June 2013:

Ms Paul: on this matter of the meetings between, or meeting between, the president and the department on the matter of one or two vice president positions. We might just return to Mr Kovacic's evidence.

Mr Kovacic: As I was saying, the response to the estimates question 928_13 indicates that, as to the number of vice president positions that have been created, it did fluctuate across the course of the year. That response alludes to a meeting that I had with the president on 30 April. That is the freedom of information material that I indicated had been released to you in redacted form, which is an extract of the agenda for that meeting, with my annotations in respect of the issue of the vice

presidents and also the issue of cross-appointments which the president referred to last night, which clearly shows that the president canvassed with me the appointment of two vice presidents.

****

Mr Kovacic: Senator, I interpret that as he had absolutely no difficulty with what my handwritten note was in terms of that meeting.

Senator ABETZ: If there was no difficulty it is quite clear that we are talking about cross-appointing Federal Court judges. Has that occurred?

Mr Kovacic: It has not, Senator.

Senator ABETZ: No, it has not. So we are talking about a completely different scenario to that which was legislated. You know that, I know that and I think it is somewhat disingenuous to seek to assert that, when he starts off by saying one vice-president—and after that the numbers fluctuate in a completely different setting—then, somehow, we are told during the Senate committee hearing and in the Senate proper, the reason we have two appointments is that that was the recommendation of the President of the Fair Work Commission; that is something that he has specifically rejected not once now but twice.

****

Senator ABETZ: Why on earth would the president be asking for two appointments in circumstance where he is pleading, sane, 'Two appointments will adversely impact on the tribunal's capacity.'

Mr Kovacic: Can I again refer you to the response to the question EW0928_ 13 from the last estimates. It said:

As to the number of positions to be created, the number proposed did fluctuate across the course of the year.

For instance, in a meeting with Mr Kovacic on 30 April 2012 the President proposed that the Fair Work Act 2009 be amended to provide for the appointment of two Vice Presidents who would have the same status as a Federal Court judge and be remunerated accordingly.

Later on it says:

Reinforcing the fluid nature of the discussions on this issue, the appointment of only one Vice President was canvassed by the President during those discussions with the Minister.

****

Senator ABETZ: So we have given the excuse for two, that it started off with one but then fluctuated, but even if we were to accept your evidence we now have this: he started off asserting two but then changed his mind to one, which is clearly your evidence on this. Right? It is clearly your evidence that, by the looks of it, the last was that he said to the minister, 'I want one.' How can you then, knowing that this was his final position, assert to the Senate committee that the president had asked for two, even if that is correct, without informing us that he had in fact changed his mind?

> Mr Kovacic: I was not involved in all of the conversations that the president had with the minister. As is said in the response to question 928, given that the president raised with me on 30 April—advocated for the appointment of two vice-presidents—it was against that background that I stated in my evidence to this committee, in terms of its inquiry into the 2012 amendment bill, the creation of the two vice-president positions was suggested by Iain Ross, President of Fair Work Australia.
>
> Senator ABETZ: At all times—read the Senate Hansard during the debate—the cover always was, 'Not our decision. It was the president's suggestion. We adopted the president's suggestion.' It is quite clear on the president's evidence that he had sought only one, at all times. But even if we were to accept your version of events it is clear that he changed his mind and said only one, and it was never told to the Senate or to the Senate committee that the president had changed his mind, which only has an impact of $850,000 of taxpayers money.

Jeff Lawrence (Deputy President)

Jeff Lawrence was appointed as a Deputy President of the Fair Work Commission in June 2013.

Lawrence was the ACTU's National Secretary (2007 – 2012), and previously was the former Secretary of the LHMU (now known as United Voice). Lawrence has stated on the public record that "*[a]ll I've ever wanted to do, or intend to do, is work for unions.*" As Secretary of the ACTU, Lawrence was instrumental in the Labor Government translating the ACTU's policies into the *Fair Work Act 2009*. At the Fair Work Commission's ceremonial sitting on 11 June 2013, Lawrence reiterated this:

> *I am also proud of the ACTU's role in negotiating the Fair Work Act. … Our aim with the Fair Work Act, and I think we largely succeeded in this, was to resuscitate some of the traditional aspects of the Australian system which were established at the start of the last century … So in 2006 and 2007 as the ACTU was debating the policy that subsequently became Forward with Fairness, and then through 2008, early part of 2009, as we negotiated the Fair Work Act we had many options as to how the bargaining system and the award system and the system generally might operate. … Overwhelmingly the path that we chose and the government chose was to give discretion to the commission.*

A recent case has caused alarm among employers, particularly those who attempt to enforce strict work, health and safety standards. In early 2014, a Sydney ferry master was involved in a collision of his vessel with the Cabarita Wharf in the Parramatta River. Upon completion of a drug and alcohol test it was found that he had marijuana in his system. His employment was terminated by the company which had in place a zero tolerance drug and alcohol policy to ensure the safety of staff and the public.

Despite finding that the company was "*correct in having stringent standards for alcohol and drug use to protect employees and the travelling public*" and there was a valid reason to terminate his position, Lawrence found that other matters were relevant and that he should be reinstated.

AMMA has previously highlighted in the media that this is a continuation of a disturbing trend of tribunal members substituting their decision for that rightly the domain of management.

The resource sector has a longstanding commitment to strive to maintain the highest standards in workplace health and safety. In the case of drug and alcohol policies, employers often have strict protocols (ie. zero tolerance) to managing these important issues. This is a reasonable management response, particularly in the resource sector, to eliminating or reducing to the extent possible a potential OH&S risk. This is what OH&S regimes require of both employers and workers who also have shared duties and legal responsibilities. It is also reasonable for such action to be about detection, as the trigger for dismissal (or disciplinary action), and not actual impairment. The employee, employer, Fair Work Commission members and expert medial advisors can all make judgements that may vary about whether someone is fatigued, impaired, and so forth, but often without absolute certainty.

The employer with a zero harm approach on OH&S can reasonably eliminate a potential risk by having no tolerance to employees presenting to work with the presence of drugs in their system. The employee also can choose not to work for that employer if they choose not to be subject to this requirement.

Having unqualified tribunal members substituting their views on alcohol and drug testing regimes for that of the employer is not, in AMMA's view, the role of the Fair Work Commission. It is also, left unchallenged, a dangerous precedent that will chip away at safety regimes and ultimately be a foreseeable contributing factor to an incident and/or fatality in the workplace.

In the Sydney ferries case, the Deputy President was in no position to state with absolute certainty that the ferry captain was not impaired.

In short, in AMMA's view it is not unreasonable for employers to test for alcohol and drug (licit or illicit) and advise workers and the public at large that they have a zero tolerance approach to any breach of their alcohol and drug policy.

This is a serious policy area for the resources sector where such testing regimes have been in place and well understood for decades standing.

It is also not unreasonable that the travelling public, be it by way of ferry, bus, train, air and so forth to have full confidence that the employer, as the primary duty holder, has done everything reasonably possible to eliminate risk from any worker being impaired due to alcohol or drug use.

Michelle Bissett (Commissioner)

Michelle Bissett was appointed as a Commissioner of the Fair Work Commission in December 2009. Bissett was a former senior industrial officer employed by the ACTU.

In an August 2014 unfair dismissal case, Bissett found that a truck driver who urinated at a Woolworths' warehouse during a delivery engaged in unaccepted conduct warranting

dismissal. However, the Commissioner upheld the employee's unfair dismissal claim and ordered compensation for lost income, citing concerns over the investigation process.

Tim Lee (Commissioner)

Tim Lee was the inaugural General Manager of Fair Work Australia (27 July 2009 until 7 September 2011), when he was appointed as a Fair Work Commissioner in September 2011. Lee has previously worked for the Australian Services Union.

HSU Investigation:

While General Manager of the Fair Work Commission Lee was responsible for the investigation into the HSU, one of the longest running investigations to date by the Commission. During his tenure it was reported that no financial analysis of any relevant credit card statements ever took place. A report commissioned by Lee's replacement indicated that:

> *The analysis of credit card expenditure in the National Office investigation was conducted near the end of the investigation. This analysis could have been conducted at an earlier stage of the investigation, and may have led to the investigation being completed in a shorter timeframe, considering that alleged unauthorised credit card expenditure was a significant focus of this investigation.*

A KPMG report of 2012 into the excessive length of the HSU investigation made the following finding (Number 30) regarding Lee's tenure in charge:

> *Considering that a focus of the National Office investigation was alleged unauthorised credit card expenditure, a full analysis of that expenditure (as was undertaken from September 2011 onwards) should have been conducted at an earlier stage of the investigation.*

At relevant Senate Estimates hearings, this issue was raised as follows (Hansard, Monday, 30 May 2011):

> Mr Lee: The powers that can be exercised at the conclusion of this or any other investigation are ultimately exercised by me or the person who occupies the role as the general manager. To answer your question: in terms of any sense of takeover, the reality is that I am, at the end of the day, accountable for what happens or does not happen at the conclusion of the investigation.
>
> Senator RONALDSON: I assumed that. Now can you answer my question: have you taken over the investigation of this matter, the day-to-day handling of it, or does that still lie with Mr Nassios?
>
> Mr Lee: That still lies with Mr Nassios. Mr Nassios remains, to be clear, the delegate who is conducting the investigation.
>
> ****
>
> Senator RONALDSON: So we are aware of the process—because I intend being back here later in the year and I am sure you will be Mr Nassios—once you have finished your investigation, what is the process from there?

Mr Nassios: If I can give you an indication of what we have done in relation to the Victoria No. 1 Branch, which is an investigation that I have been conducting at the same time, that will answer your question.

Senator RONALDSON: Yes.

Mr Nassios: In terms of that investigation, once we compiled all the material, all the evidence, we drafted a report. In terms of any adverse findings in that report, we have provided that to the persons that we have made adverse findings against to provide them an opportunity to in some way comment on the material. We take those comments back. We will finalise the report. That has not yet been done in terms of the Victoria No. 1 Branch but we will finalise the report. My obligations under the act are, if there are any contraventions by the reporting unit, to advise the reporting unit of those contraventions and I will provide that report to the general manager.

Senator RONALDSON: Mr Lee is the one that then makes the decision, is he?

Mr Nassios: Under the act Mr Lee cannot delegate that latter function. I only have the function of gathering the information and evidence.

At subsequent Senate Estimates hearings this issue was also raised (Hansard, Wednesday, 19 October 2011):

Senator ABETZ: Yes, on a similar basis as we have used before. It seems yet again serendipitous that union backgrounds do feature. I am sure it was all merit based and it is just serendipitous.

Ms Paul: It was merit based, as was the previous one.

Senator ABETZ: As were the other seven. It seems amazing how the merit of these trade union officials outshines all other contenders. That is what we are told, but a lot of people find it difficult to believe that it is fully merit based.

Senator Chris Evans: I make the point that I do not know any of the three successful applicants well. In fact, I do not think I met two of them. All had extensive experience in a range of areas. Two of them, as I understand it, had some union connection in their background, but they all had public service, industry or legal backgrounds. I think to characterise them in the way you have sought to do is not accurate or fair. I want to put that on the record.

Senator ABETZ: That is fine. We hope that Mr Lee's decisions will be a little quicker than his investigations into the HSU matter which we heard earlier today has lumbered along for over 2½ years.

Senator Chris Evans: As you know, Senator Abetz, Mr Lee was not the investigating officer.

Senator ABETZ: These things are often not just subject to the investigating officer. Those that do these things are often required to do other things as well, as determined by the Manager.

Leigh Johns (Commissioner)

Leigh Johns was the former Commissioner of the now abolished Australian Building and Construction Commission (ABCC) appointed by the Labor Government in October 2010.

Johns was appointed by the Labor Government to the Fair Work Commission, in June 2013.

Johns is a former political aspirant who stood for Labor in the Brighton electorate in the 1992 Victorian State Election, then in 2004 with the backing of then Premier John Thwaites (Labor) he stood for Port Phillip Council in the 2004 Election – both of his attempts were unsuccessful.

Johns commenced with the ABCC on 11 October 2010, and it was reported that at the time he was still a member of the Australia Labor Party, however terminated his membership in March 2011.

At Senate Estimates this issue was raised as follows (Hansard, Monday, 30 May 2011):

> Senator ABETZ: I am sure you are prepared for this question, Mr Johns, but I note you are no longer a member of the Labor Party. Can I congratulate you on that and ask you on what date did you finish up, if you can remember?
>
> Mr Johns: It was late March, Senator.

John Ryan (Commissioner)

John Ryan was appointed as a Fair Work Australia Commissioner in December 2009. He was previously the National Industrial Officer at the Shop Distributive and Allied Employees Association (SDA).

Ryan has the highest number of appeals upheld against his decisions. Presidents, both past and present, have stated that the appeal mechanism is the appropriate vehicle to address errors by tribunal members. However, this is cold comfort to employers, particularly small business owners, having to expend significant people and financial resources via such a process.

At Senate Estimates hearings this issue was raised as follows (Hansard, Monday, 30 May 2011):

> Senator ABETZ: . . . last time we had a discussion about those commissioners who had a higher number of appeals upheld against them than others . . .
>
> Justice Guidice: I do not think that is an appropriate matter for me to comment on . . . All I can say about it is that the way in which errors in decision making are dealt with is through the appeals system.

And further at subsequent Senate Estimates hearings (Hansard, Monday, 17 October 2012):

Senator ABETZ: . . . But there is a particular commissioner who has now had appeal after appeal upheld against his decisions . . .

Justice Ross: You mean seek to influence how they arrive at their decisions or their conclusions?

Senator ABETZ: Or to try to counsel them to ensure that the decisions they make are such that they will not be overturned on appeal time and again.

Justice Ross: I think the danger with that approach is that it can be misconstrued. It could be taken as me issuing them with a formal direction that they need to adopt a particular view of the legislation or a particular approach. I think the most transparent way of dealing with legal error is the appeal mechanism. If there are broader concerns about the competence of any member or any issue like that, that is a matter for parliament.

Bernie Riordan (Commissioner)

Bernie Riordan was appointed to the Fair Work Commission in March 2012.

Riordan was President of the NSW ALP and NSW Secretary of the ETU.

Riordan's appointment was controversial at the time as claims were made against him as a result of his involvement on industry boards. It was reported that Riordan was being sued by the Victorian Branch of the ETU for receiving $1.8 million in directors' fees from industry boards he sat on from the period 1998 – 2010. The claim was withdrawn. Riordan was shortly later appointed by the Labor Government to the Fair Work Commission.

Further information from Senate Estimates (Hansard Tuesday 29 May 2012) is below:

Mr Kovacic: My understanding is that the minister wrote not only to you as the opposition spokesperson but also to state and territory ministers regarding a number of proposed appointments. I understand that the letter was undated—if I can put it that way—but we understand that it was dispatched from Minister Shorten's office on 20 February.

Senator ABETZ: I was given a list of names in a letter about seven days before the announcement was made, but in the letter I was not given any timeline by which to respond to the minister's office in the event that there were any concerns or objections. Then out of the blue I got a phone call—as we were still undertaking due diligence, might I add, including on Mr Bernie Riordan and the Supreme Court actions against him. I received the phone call from Mr Shorten advising me who was appointed. So, just for the record, that is the consultation. Was Mr Ross consulted? Or was it Mr Guidice?

Mr Kovacic: My recollection was it was Justice Guidice.

Senator ABETZ: Right, so the previous president; understood.

****

Senator ABETZ: The chances are that we have a differing definition of what the appropriate occasion is. I turn now to the appointment of members to the Fair Work tribunal. What liaison

and what advice occurred in the appointment of one Mr Reardon? It just seemed very serendipitous that Mr Reardon happened to settle his outstanding $1.8 million lawsuit with the Electrical Trades Union the very day before Mr Shorten made the announcement of his appointment as a commissioner of Fair Work Australia. Is the department able to advise as to whether the minister contacted Mr Reardon in relation to this outstanding legal matter?

Mr Kovacic: I would have to take that on notice. I am not aware of whether—

Senator ABETZ: Parliamentary Secretary, are you aware from your internal ministry discussions or whatever whether the minister had discussions with Mr Reardon about his legal matters?

Senator Jacinta Collins: I am not aware, so I will take that on notice. I should indicate that I was actually representing the Commonwealth at the swearing in of a new member, but I am not aware of the question you ask.

Senator ABETZ: Having a $1.8 million lawsuit outstanding against you, with a lot of media publicity, and then it just happens to be settled the day before you are publicly announced would suggest that the minister at least had been advised that a settlement was imminent; or it was just, once again, so very coincidental that the minister happened to announce the appointment and on the previous day the lawsuit had been settled. One cannot help but think there must have been some discussion that made these two timelines coincide. If we can have a fuller answer, please, Parliamentary Secretary, as to the circumstances surrounding Mr Reardon and his appointment. Can I ask—but I think I know the answer—I trust Mr Reardon was not one of those personally approached by the minister?

Mr Kovacic: No. Mr Reardon applied in response to the ads that appeared in the press last year.

Attachment 4

Australian Financial Review, Australia
03 Sep 2014, by Joanna Mather

General News, page 8 - 177.00 cm²
National - circulation 62,455 (MTWTFS)

ID 306959551 BRIEF #AMMA INDEX 1 PAGE 1 of 1

Political motives threaten Fair Work, says Law Council

Joanna Mather

The legal profession has warned the Abbott government against creating a new appeals panel to sit over the Fair Work Commission because it will look like political interference.

In advice provided to Employment Minister **Eric Abetz**, the Law Council of Australia said installing the panel would "undermine the standing of the commission and consequentially its capacity to be an effective body".

"Such action could reasonably be portrayed as being taken to enable parliament or the executive to appoint tribunal members that they prefer to favour a particular outcome (or ideological position)," the council's Industrial Law Committee chairman, Ingmar Taylor, SC, said.

Senator Abetz is considering an appeals jurisdiction that would be able to overrule commission decisions. He is responding to criticism from employer groups, who argue the previous Labor government stacked Fair Work with pro-union commissioners while demoting two top-ranking officers installed by **John Howard**.

Mr Taylor has also taken a swipe at the Australian Mines and Metals Association, which has taken the lead on agitating for an appeals panel made up of industrial relations experts.

"There is at least one significant organisation that is presently proposing a new appellate level body as a necessary step to redress concerns arising from the background of appointments made by the last executive," Mr Taylor wrote in a law council newsletter.

Commission decisions can be appealed in the Federal Court. However, the court can only make rulings on matters of jurisdiction, not alleged errors of fact or law.

"The current appeal mechanisms have existed in essentially the same terms since 1988, during which time the relevant legislation has otherwise been amended and re-enacted," Mr Taylor wrote. "There are no reasons why the appeal mechanisms now need to be changed.

"However, if there was seen to be a need to increase the capacity to correct error, the Federal Court's jurisdiction could be expanded to permit it to correct errors of law."

According to AMMA, 19 of 27 appointees made to the commission by the Gillard-Rudd governments were aligned with the Labor Party or unions.

The group says inconsistent decision making by commissioners, including an array of full benches "arriving at essentially different decisions on the same subject matter", has created uncertainty.

"The system is resulting too often in unnecessary, expensive appeals through the commission and judicial system," AMMA chief **Steve Knott** said.

"While members of the Law Council may have a vested interest in maintaining the high ... transactional costs of the existing system, AMMA has a vested interest in reducing these costs for our members in the resource industry."

Both the law council and AMMA criticised Labor when it replaced two Howard appointees with new vice-presidents.

Fair Work president Iain Ross said there was no justification for changing the way the commission operates, in June.

Don't change FWC appeal process: Law Council

Workplace Express
Monday, September 01, 2014, 3:19pm

The Law Council has come out against the Coalition's proposed creation of an independent appeal jurisdiction for the Fair Work Commission, saying the current mechanisms "do not need to be altered".

In its latest newsletter, the Law Council argues as a fall-back that if the Government does see a need to "increase the capacity to correct error", then expanding the Federal Court's jurisdiction would be a better option than the model it has suggested.

The Coalition's pre-election IR policy says it will give "active consideration to the creation of an independent appeal jurisdiction" for the tribunal (Related Article).

Employment Minister Eric Abetz - who has described himself as being "actively dating" but not "engaged or wedded" to the idea - last year asked for submissions on the concept. He confirmed the body he was considering would be similar to the NSW Court of Appeal (see Related Article). He has made no detailed announcement on the matter since.

But the Law Council, which has put its position to the Department of Employment, says that it does not support a NSW Court of Appeal-style model.

"The standing of the FWC as an independent and impartial body applying the law as required of it under its governing statute is a paramount consideration," it says.

"The status of the FWC also depends upon the independence and impartiality of its Members being maintained and being seen to be maintained.

"The creation of a new appellate body, sitting above the current FWC, with freshly appointed members, would have the tendency to undermine the standing of the FWC and consequentially its capacity to be an effective body."

The council continues that "such action could reasonably be portrayed as being taken to enable Parliament or the Executive to appoint tribunal members that they prefer to favour a particular outcome (or ideological position) or in the expectation that such appointees will override decisions of members appointed by previous Executives".

While not naming AMMA, it says that its concern "is not far-fetched – there is at least one significant organisation that is presently proposing a new appellate level body as a necessary step to redress concerns arising from the background of appointments made by the last Executive".

The resources sector peak body has been highly critical of what it describes as "inconsistent" decision-making by the Fair Work Commission, and earlier this year called for a specialist body, saying it would be "far clearer, more transparent and more effective than trying to secure the same ends less visibly via the tribunal president's powers to allocate matters" (seeRelated Article).

The Law Council says the same concerns with the tribunal's independence were behind it speaking out against the former Labor Government's creation of two new vice presidents' positions on the tribunal (see Related Article), filled by Adam Hatcher and Joe Catanzariti (see Related Article).

"That those positions were created and filled by the last Parliament does not create a valid precedent or justifiable reason for the current Parliament to create a fresh appellate body,' the council says.

"Whatever policy decision is ultimately made on this issue, it is essential that appointments to the FWC be of the highest standing so as to engender respect for the institution from all sides of the political and industrial spectrum."

Federal Court could fill the role

In arguing for its fall-back option of expanding the Federal Court's power to correct error, the Law Council also raises practical concerns.

It says that a federal appeals body by nature has to sit at various locations across Australia, and a model under which there are only a small number of tribunal or court members able to form, for example, a three-member appeal bench, could create "difficulties" - particularly for appeals that have to be heard quickly, which is often the case for industrial matters.

Attachment 5
Australian Financial Review Article 2/04/2013

Unfair play by workplace umpire

PUBLISHED: 02 APR 2013 00:05:00 | UPDATED: 02 APR 2013 09:47:32

AARON PATRICK – AUSTRALIAN FINANICAL REVIEW

The email hit inboxes at the Fair Work Commission around 5pm on a Friday. It said the industrial relations umpire's president, Iain Ross, was heading overseas for two weeks to attend a conference in Canada and to take time out from his hectic schedule. It also said Alan Boulton, a deputy president of the tribunal and a former lawyer at the Australian Council of Trade Unions, would be in charge until he returned.

Normally such an email would be routine, but on the commission's strict seniority list, Boulton ranked below Graeme Watson, who had led some of the biggest anti-union legal cases in Australian history as a private lawyer. He would normally fill in while the president was away. Now, he was being snubbed.

The email backed up rumours that had been spreading through the clubby industrial world since Ross was appointed by the Labor government last February: Watson, ranked number three at the commission, and another Coalition appointee, Michael Lawler, ranked second, were being frozen out. Their out-of-favour status became official last Thursday when Minister for Employment and Workplace Relations Bill Shorten appointed eight new members to the commission. Two of them, Joe Catanzariti, a partner at Clayton Utz law firm, and Adam Hatcher, a barrister, are vice-presidents and slot in above Lawler and Watson. They are, in effect, Ross's new deputies.

Though fewer than one in five Australians belong to a union, the commission, like the federal Treasury and Reserve Bank of Australia, remains a powerful institution through its ability to influence pay and how workplaces operate in important industries like transport, mining, energy and retailing.

People who follow the workings of the commission say the demotions are an example of Ross's us-versus-them approach that has eroded the collaborative atmosphere established by his predecessor, Geoffrey Giudice. The new members, who include Jeff Lawrence, a former secretary of the ACTU, will lock in a pro-union tilt at the commission for years and could have long-lasting implications for workplaces, they say.

SIGNIFICANCE 'OVERSTATED'

"The tribunal has been well and truly relegated to that of an ALP political plaything," said Steve Knott, the chief executive of the Australian Mines and Metals Association, an employer lobby group.

Others say the significance of the new vice-presidents is overstated, the complaints are driven by a right-wing ideological agenda which instinctively opposes unions, and Ross is moving quickly to make the commission more responsive to the needs of employers and employees.

"Much of this is simply political criticism of the government," Andrew Stewart, a University of Adelaide law professor who specialises in industrial relations, said before the appointments were made public.

There is no dispute that the appointments are a big deal in the industrial relations world. Never in 24 years has a government interfered so directly in the body which rules on pay and industrial disputes, lawyers say.

In 1989, the Hawke government replaced the Commonwealth Conciliation and Arbitration Commission with the Australian Industrial Relations Commission (IRC). Only one member wasn't reappointed: the communist Jim Staples, whose strongly worded decisions had embarrassed the commission and government. At the time jurists, Liberal politicians and civil libertarians leapt to Staples' defence. The president of the NSW Court of Appeal, Michael Kirby, called on the government to respect the independence of the judiciary and published a scholarly article in the *Journal of Industrial Relations*defending Staples.

This time, there was no widespread outcry, a difference some attribute to Watson and Lawler's status as Liberal appointees. Asked last week about their impending demotion, Kirby, who retired from the High Court in 2009, declined to comment. "I am more careful now to stay out of political issues," he said in an email.

The struggle for control of the commission is complicated by the interlocking personal histories of the people involved.

POLITICAL ENEMIES

Lawler was a criminal prosecutor whose partner, Kathy Jackson, is national secretary of the Health Services Union and a political enemy of Shorten's. One new member of the commission, Val Gostencnik, was a partner at Corrs Chambers Westgarth, who represented Shorten in a legal fight last year for control of the HSU. When Jackson accused Shorten of physically confronting her at an internal Labor Party vote, Gostencnik threatened to sue media outlets on behalf of Shorten, including *The Australian Financial Review*, that published the allegation. Shorten strongly denied the accusation.

Ross, who was appointed by Shorten, was an assistant secretary at the ACTU in the early 1990s under then secretary Bill Kelty, a mentor to Shorten. Ross appeared on the stage at a rally in 2005 with Shorten, who was then national secretary of the Australian Workers' Union, and opposed the Howard government's Work Choices legislation, according to Jamie Briggs, a federal Liberal MP. At the time, Ross was a member of the IRC. He resigned in early 2006 and became a partner at Corrs Chambers Westgarth. Three years later he was made a Victorian Supreme Court judge. When he was made president of the Fair Work commission, the government also granted him a judgeship on the Federal Court. Shorten declined to comment for this article.

Members of the commission's tribunal normally aren't judges, and often have no legal training, although they are granted similar protections to members of the High Court. They can only be removed by parliament or when they turn 65. They are expected to maintain discrete private lives and avoid political controversy. When they enter one of the commission's tribunals, which are like modern courtrooms, those present are expected to stand.

Unlike regular judges, who are paid to interpret the law, members of the commission are often required to decide on questions which come down to personal judgment. The commission is regularly asked to assess the value of an individual or a group's work, and balance the opposing interests of employers and employees. "They are required to make objective judgments about matters in which fairness is the guiding principle," said Frank Parry, an industrial relations barrister.

MINIMUM WAGE A KEY DECISION LOOMING

One of the commission's most important decisions this year will be to set the minimum wage, now $15.96 an hour. Beyond the effect on the economy, the ACTU will ask it to consider the needs of the low paid and their ability to participate in society.

The president is responsible for the operations of the commission, which has an $80 million budget and 300 staff. It isn't his job to select the tribunal members – that's done by the government – or manage them. Each member of a tribunal has an equal say on cases and the president doesn't have the right to suggest or direct how they rule.

Given the adversarial nature of the industrial relations system, tribunal members have either an employer or union background. Once they join the commission, they are expected to put aside allegiances and rule impartially. Sometimes their backgrounds clash with their new roles.

When Ross was a member of the IRC in 1995, he was part of a three-person bench considering a union challenge over Comalco's plan to move workers on to individual contracts. Comalco, a unit of CRA (now Rio Tinto), was represented by Watson, its long-term lawyer from Freehills. Watson knew that when Ross was an ACTU assistant secretary he signed off on the campaign to fight Comalco over the contracts, which union leaders regarded as a dangerous threat to their power. In a letter, Watson told Ross he could be perceived as being biased and asked him to remove himself from the case. Ross declined. Watson then asked two queen's counsels, Robert Buchanan and Chris Jessup, to explain why Ross shouldn't hear the case, an argument Ross listened to from the bench. Eventually he stepped aside.

People who know both men say the incident added more friction to a relationship naturally strained from representing opposite sides of an often bitter debate.

WATSON EMERGED AS MINOR HERO

Both Ross and Watson are modest, courteous lawyers who worked hard to get to the top of their profession. Lawler, who lives on the NSW south coast, has had little involvement in the commission over the past year because he has been supporting his fiancee, Jackson, who is on extended sick leave from the HSU for stress that triggered a breakdown. Since she publicised allegations of corruption in the HSU, Jackson has become a fierce critic of Shorten's and the relationship between the union movement and the Labor Party. "Bill Shorten as Minister for Workplace Relations is the most obvious example of Dracula being in charge of the blood bank," she told the HR Nicholls Society, a right-wing discussion group, last June.

In recent years, Watson has emerged as a minor hero in the business community for seeking a more market-oriented approach to workplace negotiations. Last year, he led a decision which prevented the Transport

Workers' Union from limiting Qantas Airways' use of contractors as baggage handlers. In 2011, he ruled retailers could hire school kids for shorter than the previous minimum shift of three hours, if they had parental consent, a decision that outraged the shop assistants' union. The Federal Court refused to overturn the ruling.

Last year, he was the only member of a five-person full bench to oppose 18 to 41 per cent wage rises over eight years for 150,000 social, community and disability workers. The federal government took up the case as an example of its commitment to equal pay for women, who dominate that workforce. Some state governments, which will pay for the raises, complained it would further strain their budgets. Victoria put the bill at $900 million to $1.1 billion over six years.

In a dissenting judgment, Watson argued that men and women in the industry received similar pay. Making charities and other employers pay more than they could afford would merely reduce total employment, he said. A blanket direction to 4000 employers would undermine the long-term shift in Australia to negotiating wage deals business-by-business, he argued.

"To selectively extract an entire industry from the enterprise bargaining legislative framework is a change of mammoth proportions," he wrote. "It is not an overstatement to suggest that the future status of enterprise bargaining in this and other industries with similar attributes is at stake."

POWER OF PANEL HEADS

One of Ross's first big decisions was to shuffle responsibilities at the top of the commission. Lawler and Watson each ran a "panel", specialist groups of tribunal members who focus on industries. The panel heads are powerful figures who allocate cases to tribunal members. They can expect to be involved in high-profile cases. Under Giudice, they came together as an informal management committee which met regularly to discuss the tribunal's direction.

Two months after he became president Ross increased the number of panels from four to six, an expansion that meant existing panel heads had to give up industries. Lawler lost responsibility for the Northern Territory. Watson lost hospitality and retailing, which excluded him from hearing a request to cut weekend penalty rates by 50 per cent for the fast food, retail, hair and beauty and hospitality industries. The issue hadn't been considered since the 1960s and was seen as a big step towards helping many small businesses open on Sundays.

A full bench of the commission rejected the proposal and said there was "no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance".

As part of the panel changes, the most junior commission member, Suzanne Jones, was placed in charge of unfair-dismissal cases. Notwithstanding her lack of seniority, the decision surprised many observers because of the position held by her husband, Dave Oliver, who is ACTU secretary. Lawler and Watson were also removed from several committees that manage the commission's internal workings.

Ross's changes disturbed many industrial relations experts who wanted the commission to encourage a freer labour market. "His task is to mobilise the total capability of the organisation; not to diminish it," said Geoff McGill, a former first assistant secretary of the Department of Employment and Industrial Relations, who worked with Watson in the private sector. "Why would you not be seeking as a president to make the best use of the resources available to you?"

Most people in the commission didn't know Lawler and Watson would be demoted until the government tabled the bill that would create the vice-presidential positions on October 30. Ross tried to calm upset members by implying that Shorten had kept him in the dark until almost the last minute. On November 1, he sent them an email which said: "I was emailed a copy of the [sic] an earlier version of the bill late on Wednesday 24 October and provided with a limited time within which to comment."

CONSULTATION CLAIM CONTRADICTED

In the email, Ross said he didn't want two new vice-presidents unless they were paid the same as Federal Court judges, an idea already rejected by the government. "I also made it clear that absent such changes I saw little purpose in the proposed amendments," he wrote. Ross was telling Lawler, Watson and their colleagues he didn't want them demoted unless he had the budget to hire the equivalent of a senior judge.

Ross's suggestion he wasn't fully consulted was contradicted by the Department of Education, Employment and Workplace Relations, which told a Senate committee it was his idea. "During consultations, Justice Ross proposed that two vice-president positions be created in order to attract senior legal specialists with high-level expertise and to assist him in the administration and management of the tribunal," the department wrote in a parliamentary submission filed in the second half of November.

Either the government or Ross was being untruthful, pointed out Eric Abetz, the Coalition's spokesman on workplace relations. Ross declined to comment for this article.

Supporters of Lawler and Watson in the legal profession rallied to their defence. The Law Council of Australia urged Shorten to reconsider. Les Kaufman, a commission member about to retire, complained to Ross in an email that was leaked to the *Financial Review*. The Business Council of Australia objected. Shorten ignored all pleas.

Last Thursday, the day before Good Friday, he revealed the names of the new vice-presidents. Presumably he knew the two newspapers which had followed the story most closely, the *Financial Review* and *The Australian*, wouldn't publish printed editions the following day.