AMMA 2013 West Coast Industry Forum

Opening Address by Steve Knott

Thursday, 21 November 2013

Welcome

Good afternoon. It's great to see around 200 resource industry professionals from Western Australia turn out here today to support this event.

It's a pleasure to be here in Western Australia, a state that has always been at the forefront of workplace relations reform in this country. While the ACTU/union-led anti-Work Choices campaign succeeded in installing a federal Labor government back in December 2007, Western Australia was going its own way and voting in a Liberal government at the September 2008 state election. Western Australia has always been a bit ahead of the times in that regard, with a Coalition government later returned federally at the recent September 2013 election.

Under the new federal government, AMMA will of course continue to assiduously represent the needs of its members, as it always has done under Coalition and Labor governments at both state and federal levels.

When New Employment Minister Eric Abetz spoke at AMMA's second annual Tasmania conference in Hobart, he identified the Coalition's WR reform priorities.

The minister also noted AMMA's top six reform priorities, which were in the areas of:

- Greenfield agreement making
- Union access to workplaces (right of entry)
- Individual flexibilities
- Protected industrial action
- Permitted content in agreements and
- Adverse action.

The minister confirmed that the new government's reform priorities for early next year were to introduce legislation enacting its *Policy to improve the Fair Work laws* in relation to greenfield agreement making and union right of entry, two of AMMA's top reform priority areas.

"Our agenda is not AMMA's agenda," the minister told delegates at the Tassie conference. "Our agenda is to serve the national interest. But it is a much welcome and happy stance that AMMA's agenda has so much overlap with the national interest."

The Minister also spoke about the Coalition government's consideration of establishing an independent appeals jurisdiction for Fair Work Commission decisions, which AMMA strongly supports.

"We certainly believe that this is an idea worth considering," Senator Abetz said.

AMMA's support for the establishment of an independent appeals body

AMMA continues its support for the Coalition's active consideration for creating an independent appeal jurisdiction[1] to allow appeal of Fair Work Commission decisions, with such a move being in step with widespread international practice.

Around 20 other countries already have in place an appeal jurisdiction, including in the United States (the National Labour Relations Board), Austria, Belgium, Denmark, Finland, Hungary, Ireland, Israel, The Netherlands, Norway, Slovenia, Spain and Sweden. Clearly Australia would not be out of step with international practice if we moved to set up a separate appeals body.

In AMMA's view the case for an independent appeal jurisdiction is strong and we welcome its active consideration as outlined in the Coalition's stated *Policy to improve the Fair Work laws*.

AMMA would envisage the appeal body consisting of a small, experienced expert panel of three to five members, which could be part of the existing Fair Work Commission to avoid the expense of establishing a new tribunal and the associated infrastructure.

Excluding court matters such as general protections matters, the Fair Work Act currently allows two standards of appeal:

- Appeals from decisions of single members or the General Manager / Registrar, which are subject to leave being granted when it is in the public interest to do so. The Minister may also request a review of a single member / general manager decision which is subject to the same constraints and tests as an appeal;
- Appeals from single member unfair dismissal decisions which are restricted to cases where it is in the public interest to do so and they turn on significant errors of fact.

From 1 January 2014, dismissal-related general protections matters and unlawful termination matters (currently arbitrated by the courts) can be arbitrated by the Fair Work Commission with the consent of both parties. It is envisaged that where an unlawful termination / dismissal-related general protections dispute is determined by the Fair Work Commission, the appeal rights would be the same as those for unfair dismissal decisions.

AMMA envisages that all appeals and test cases could be heard by the independent appeals panel / bench of experts, helping enormously to move towards a system reflecting modern business practices and moving away from the recent politicisation of the role and functions of what should be an independent industrial umpire.

Appointments to the current tribunal under the former Labor government

The former Labor government made 26 appointments to the tribunal in the past six years, 18 that had union or Labor-affiliated backgrounds. Of those 26 appointments, nearly one third (8) were presidential appointments.

Of the now 46 members of the Fair Work Commission, half of them (23) are presidential members and the other half are commissioners.

[1] The Coalition's policy to improve the Fair Work laws released in May 2013 at page 4

Fair Work Commission – Current Structure

46 Members

23 Deputy Presidents and above

- Too many chiefs
- Role of Deputy Presidents and Commissioners are similar
- Two thirds of appointments made in past 6 years are union/ALP labour lawyer aligned

A Unified Voice Driving Effective Workforce Outcomes for the Resource Industry

In short, there are too many chiefs, not enough Indians.

Fair Work Commission - Current structure (cont)

President	(1)
Vice Presidents	(4)
Senior Deputy Presidents	(8)
Deputy Presidents	(10)
Commissioners	(23)
TOTAL	**46**

A Unified Voice Driving Effective Workforce Outcomes for the Resource Industry

In addition to the top-heavy constitution of the commission as it currently stands, we have recently seen an unedifying politicisation of the tribunal, one such example being the creation earlier this year of two new statutory Vice President roles.

This process included the effective demotion of two existing Vice Presidents. President of the commission Iain Ross was involved in the process leading up to the appointments and this became an issue in Senate Estimates.

In a Senate Estimates hearing on 3 June 2013[2], President Ross referenced a discussion he had with the Minister regarding the creation of new Vice President roles: 'I certainly advanced the idea of one position during that conversation,' he said.

On 4 June 2013, former Department of Education, Employment & Workplace Relations (DEEWR) deputy secretary John Kovacic gave evidence to the same committee that President Ross had "canvassed with me the appointment of two vice presidents" [3].

According to Kovacic, further conversations between President Ross and then-Workplace Relations Minister Bill Shorten saw the number of new vice presidents fluctuate between one and two over the course of the year.

Damage associated with the appointment of two new vice presidents

AMMA was at the time extremely vocal about its concerns with the Fair Work Amendment Bill 2012's proposals to create the two new positions, warning of the damage this would do to the perceived independence of the tribunal. These concerns were documented in AMMA's submission to the Senate inquiry into the bill in late 2012 and in a follow-up letter to former Attorney-General the Hon Mark Dreyfus QC in March 2013, where AMMA stated:

> *"The proposal is to have the legislation recognise those two roles once again and put two new people into those roles. It is a real pea-and-thimble trick. For those with long memories in industrial relations, we will go back to the late eighties when there was new legislation and everybody got appointed except one member of the tribunal, a fellow by the name of Justice Staples. I think this does give the opportunity … to really damage the independence or the perceived independence and impartiality of the tribunal."*

The Law Council of Australia voiced similar concerns in its submission to the Fair Work Amendment Bill 2012, noting that:

> *"Members of Fair Work Australia [now the Fair Work Commission] are appointed to a quasi-judicial position. The status of FWA depends upon the independence and impartiality of its members being maintained and being seen to be maintained."*

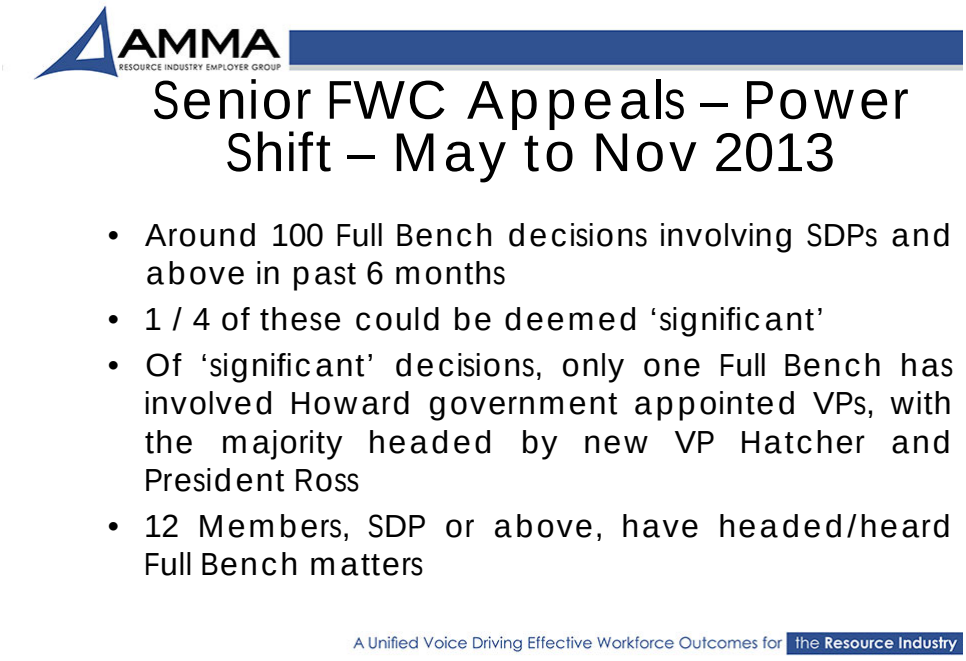
The Law Council noted that in appointing two new Vice Presidents to the statutory roles rather than appointing the two existing Vice Presidents, the effect of the Bill would be to "reduce the status" of the two existing VPs.

[2] Senate Education, Employment & Workplace Relations Legislation Committee, Budget Estimates Hansard, 3 June 2013 at page 112

[3] Senate Education, Employment & Workplace Relations Legislation Committee, Budget Estimates Hansard, 4 June 2013 at page 96

"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."

These concerns flagged by AMMA, the Law Council and others have since been validated, with newly elected Vice President Adam Hatcher ruling on demonstrably more appeals and full bench matters than previous existing VPs Michael Lawler and Graeme Watson combined; thus confirming the two existing VP's were effectively demoted.



In the six months from May 2013 to date in November 2013, there have been around 100 Full Bench decisions made by the Fair Work Commission. VPs Hatcher and Catanzariti were involved in 33 full bench matters during that time, eight of them significant matters. VP Hatcher was involved in more Full Bench matters than anyone else in that time, being involved in 24 Full Bench decisions.

Of the 24 significant Full Bench decisions of the around 100 Full Bench decisions overall, President Ross was involved in four and VP Hatcher was involved in seven. In contrast, VP Lawler was not involved in any, with VP Watson involved in just one significant Full Bench matter in that six months.

Inconsistency of current tribunal decisions

In addition to the politicisation of appointments to and the structure of the tribunal under Labor, including the demotion of existing members to make way for new Labor appointees, the inconsistent nature of some decisions being handed down by different members of the commission also signal the need for an independent appeal jurisdiction.

This would hopefully have the effect of bringing some much-needed rigour and accountability into the decision-making process by single commissioners.

In recent times, commission members have handed down conflicting decisions in areas including:

- The rights of employers to use onsite urine testing in their drug and alcohol testing policies;
- The ability for employees to be lawfully dismissed for distributing pornographic material on work computers;
- The ability for employees to be lawfully dismissed for physically assaulting other colleagues;
- The capacity for enterprise agreements to include provision for "loaded hourly rates" (ie incorporating annual leave into the up-front hourly wage rate); and
- Enterprise agreement approvals, particularly in relation to the requirement for commission members to ensure mandatory flexibility clauses are capable of delivering genuine flexibility for the parties.

Note: These conflicting decisions are a matter of public record. Another example of concern about the quality of decision making which is already the subject of past public comment is a member whose decisions have frequently been overturned on appeal.

While some will argue that the biased appointments to the tribunal under Labor have had no effect on outcomes, the latest statistics from the commission paint a different picture, particularly in relation to unfair dismissal outcomes.

In the latest quarterly statistical report released by the Fair Work Commission on 12 November, covering the period from 1 July 2013 to 30 September 2013 shows that the longstanding pattern of the majority of unfair dismissal cases being unsuccessful shows a radically different picture. In 2012-13, the success rate for unfair dismissal claims was around 36% whereas for the first time in the latest figures, that success rate is around 61%.

As experienced IR practitioners will be aware, the IR test in the Fair Work Commission in deciding cases is "on the balance of probabilities", not the "beyond reasonable doubt" threshold. But whichever way you cut it, these latest publicised unfair dismissal figures speak for themselves in terms of the uncertainty creeping into outcomes due to the strong influence of ex-union appointees.

For the purpose of this presentation, while identifying subject matters referenced above, AMMA, at this stage has chosen not to detail respective determinations and/or individual tribunal members involved in conflicting decisions; something easily accessible to independent review by the Department of Employment and any other relevant industrial relations stakeholder with an interest in such matters.

The way forward

We saw a lot of "politicking" around the functions and role of the federal industrial tribunal in the six years under the former Labor government. Much of this, such as the tribunal president publicly advocating for new vice president roles and for changing the name of the tribunal, was without precedent and viewed in some circles as inappropriate.

AMMA maintains it is not the role of members of the tribunal to advocate for specific appointments, policy or legislative outcomes. Any member wishing to preserve impartiality must be cautious about being seen to advocate for specific policy outcomes.

AMMA notes that the tribunal member code of conduct issued by President Ross which is published on the Fair Work Commission website makes statements about the appropriateness of tribunal members engaging in public debate. The relevant part of the code is reproduced below:

(vi) Participation in public debate

It is appropriate for Members to participate in conferences and other events in order to make presentations about aspects of the Commission's operations and processes. Such participation can contribute to the public's understanding of the work of the Commission and to public confidence in the Commission. Indeed, s576(2)(b) of the Act states that one of the Tribunal's functions is to provide 'assistance and advice about its functions and activities'. However, workplace relations can be a contentious area and it is generally advisable to avoid speaking or writing on politically sensitive topics.

Points to bear in mind when considering whether it is appropriate for Members to contribute to public debate on any matter include the following:

1. Members should avoid involvement in political controversy.
2. Expressions of views on public or private occasions must also be considered carefully as they may lead to the perception of bias.
3. Other Members may hold conflicting views and may wish to respond accordingly, possibly giving rise to a public conflict between Members which may bring the Commission into disrepute or could diminish the authority of the Commission.

In this context, it is AMMA's view that no current tribunal member should be engaged in lobbying or public debate about the relevance, establishment or otherwise of the Coalition's pre-election commitment to give active consideration to the creation of an independent appeal jurisdiction.

AMMA, along with other relevant industrial parties, has been invited by new Employment Minister, Senator Eric Abetz, to make a submission on this issue by mid-December 2013.

In doing so, AMMA will be supporting the establishment of such an independent appeal jurisdiction, not dissimilar to those operating in other countries. Further, AMMA will seek such a body to address what has in the past been referred to as 'test cases'.

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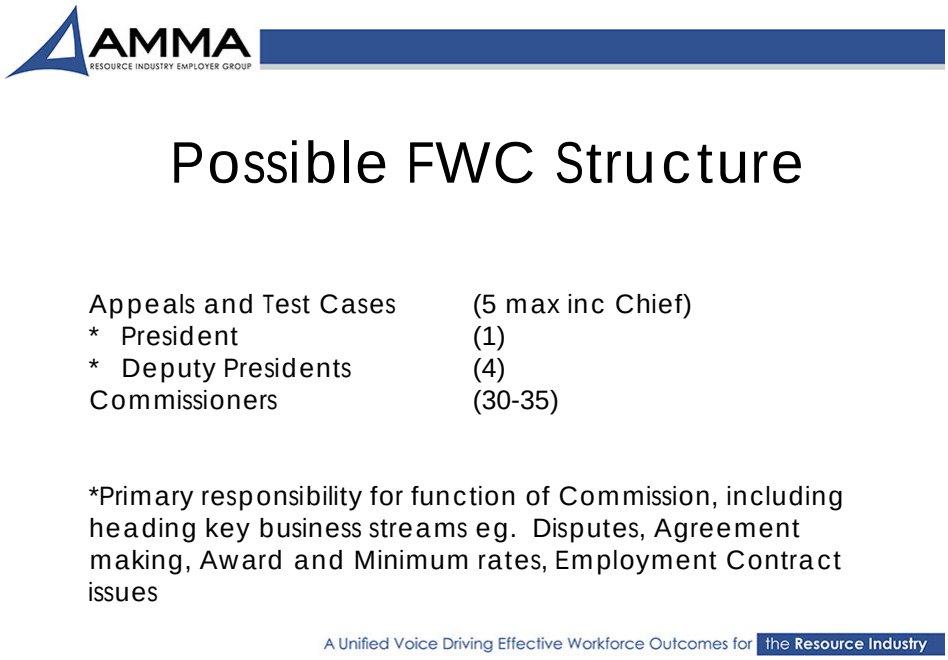
Independent/ Appeals / Test Cases / Jurisdiction

- A small experienced expert panel to hear FWC appeals (5 members max)
- Same body to consider test cases

It is AMMA's view such a jurisdiction can be created within the existing Fair Work Commission framework and it is arguable such appointments to such a body have judicial status.

A possible Fair Work Commission structure is depicted as follows:



Conclusion

A business, tribunal or judicial structure that runs with 50% of their establishment at managerial or presidential type levels is not reflective of modern day organisational structures.

The large number of Fair Work Commission members involved in appeal matters by itself lends to inconsistency and inefficiencies.

Add to this the recent politicisation of the Fair Work Commission both through appointments drawn from a narrow vocational pool and interference by the tribunal in political appointment and structural change processes are of concern.

This aside, the establishment of a small but experienced independent appeal/test case jurisdiction would be both in step with international practice in this area and allow some sense of independence and impartiality to be maintained and seen to be maintained.

It could also serve as a guide to Commission members in decision making and shine a light on members ignoring appeal determinations and associated precedents. In addition, having a competent and experienced panel review key test case matters of national significance may also be an improvement on the existing framework for such determinations.

In short, you can expect AMMA to be a passionate advocate for the establishment of such a new independent IR jurisdictional body and will provide further details on this issue in the weeks and months ahead.