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18 October 2016

The Hon Senator Michaelia Cash
Minister for Employment, Minister for Women
PO Box 6100
Senate Parliament House
Canberra ACT 2600

Dear Minister

Serious concerns about the operation of Australia's workplace relations tribunal and workplace relations laws

AMMA and its members across all facets of Australia's resource industry are impacted by the provisions of the Fair Work Act 2009, and by the decisions of the Fair Work Commission (FWC) in applying that Act.

Minister, as you may be aware, I have been in and around Australia's workplace relations (WR) system for nearly four decades, am currently the longest-serving member of the National Workplace Relations Consultative Council, AMMA CEO since 1997 and currently an ACCI Board member.

Issues raised in this correspondence highlight the need for an independent review of the Fair Work Commission (FWC) as it is highly dysfunctional, not serving users well and appears to be pursuing political agendas as opposed to assisting constructive workplace relations outcomes for employers and employees.

The FWC is an administrative body, not a court. There are countless examples of where the FWC is not approving agreements based on technicalities; something the tribunal in the past has attended to in a practical sense to assist enterprise agreement making that has been subject to genuine agreement by employees and employers.

Further, in recent months, several senior FWC members have contacted me personally to advise that they will be retiring early due to the dysfunction and politicisation referenced herein.

Issues raised in this correspondence, and I can add to verbally when we next meet, require review and immediate address.

The following examples and detailed reference material is attached for your review. We intend to make this correspondence available to our members early next week.

As you will be aware, AMMA wrote to all members of parliament in May this year highlighting the resource industry's reform priorities for the next Federal Government. AMMA developed its "*5 reforms over 5 years*" advocacy campaign to emphasise the most urgent areas for reform of our workplace relations system in the lead-up to this year's federal election.

The July 2016 election has been and gone, yet the newly re-elected government remains silent on what it will do to fix the problems with the Fair Work system that AMMA has highlighted over recent years.

Many of the problems that so concern AMMA members arise from the strategy of the previous Labor government to deliberately re-regulate and re-centralise workplace relations, and to ignore the benefits that genuine workplace reform has delivered for employees, employers and the wider Australian community under both Labor and Coalition governments.

It is a reality of our political system that current governments assume responsibility for the legislative decisions of their predecessors, and that governments are judged upon the performance of the system they administer, regardless of the extent to which they may have shaped that system.

It is in this context that we raise with you our ongoing serious concerns on two fronts – the structure and operation of our "independent industrial umpire", the Fair Work Commission (FWC), and the continuing damage being caused by our federal workplace relations laws (the Fair Work Act 2009).

In highlighting problems in these two areas, AMMA puts a number of important questions to government that we say need to be addressed to provide essential clarity, confidence and certainty to all users of our workplace relations system, and to continue to deliver jobs, income and opportunities throughout the Australian community. These questions are explored in more detail in the attachment to this letter.

1. What has happened to our federal industrial tribunal?

In the six years of the previous Labor Government, division and dysfunction was allowed to fester within the ranks of the FWC and, regrettably, grows more overt and undignified each day. We ask the government to consider and address the following very serious questions.

The structure and functions of our independent industrial umpire

- **What is happening** inside the ranks of the FWC and when will the infighting stop?

- **Under what authority** does the president of the FWC continue to become involved in industrial disputes outside the processes and procedures of the FWC?

- **What are** the implications of the former Labor government's unprecedented manipulation of the appointments and standing of members of the tribunal, and the FWC President's involvement in that process, and how is that to be addressed in future?

- **On what grounds** are individual tribunal members ignoring and overturning established Full Bench principles and approaches?

- **Why should** the Australian taxpayer foot the bill for growing numbers of successful appeals against particular tribunal members?

- **When will** the government establish an appropriately independent appeals jurisdiction to provide greater certainty and consistency?

- **Why are** FWC conciliators being given ever-greater powers and responsibilities with so little public scrutiny and accountability?

- **Why can** the FWC make changes to industrial awards on its own motion without any application from employer and employee representatives?

- **On what basis** and with what oversight does the FWC president implement his *New Approaches* program?

In AMMA's view, the FWC is:

- Failing to support the interests of employers and employees in contemporary Australian workplaces.

- Operating outside of long-standing conventions.

- Issuing decisions at odds with long-standing industrial principles.

- Expanding its remit and allocating increasing responsibilities to registry staff rather than properly sworn FWC members.

2. When can we expect the promised changes to our industrial laws?

The serious problems the Fair Work Act is causing for business have been well-documented, particularly by AMMA, since the legislation took effect in 2009. However, there have been very few improvements to our workplace laws since that time to address these problems, and in fact further deteriorations during the final months of the former Labor government, and in the Act's ongoing interpretation by the FWC. This is despite two major reviews having reinforced the

need for urgent and meaningful change to address very real problems with Australia's principal workplace relations statute.

We ask the government to address the following questions and act on these very real concerns:

- **How long** will Australia's international reputation and rating be allowed to deteriorate before we act to address the inefficiencies and disincentives to employment being created by our workplace relations laws?

- **When will** promised changes to the Fair Work Act be progressed?

- **When will** the government respond to the recommendations of the Productivity Commission (PC) to address real problems in the operation of the Fair Work Act that are damaging enterprises, employees, job seekers and the wider Australian community?

Unfair dismissal and adverse action laws

- **Why can't** employers dismiss employees for serious misconduct without fear of them winning their jobs back?

- **Why do** employees need to be told it is unacceptable to download pornography on work equipment?

- **Why should** companies be exposed for up to six years to expensive, unfounded claims from disgruntled employees?

Trade union access to business premises

- **Why do** trade unions have the right to insist on meeting with workers in potentially dangerous and hard to access locations?

- **Why can't** employees eat their lunch in peace without being badgered by militant unionists?

Agreement making

- **Why can** a union interfere with the approval of an industrial agreement that has already been made by an employer and their employees?

- **Why are** identical industrial agreements approved by some FWC members but not by others?

- **Why can't** new business owners employ people on appropriate terms and conditions without being afflicted with the terms and conditions of a

preceding era, in which product and labour market conditions may have been materially different?

Strike action

- **Why is it** so easy for unions to inflict costly and damaging strike action on businesses, or threaten such action, with the full support of our WR laws?

In relation to the right to strike, other considerations for the government might include - how does the presumption of a right to strike help to create jobs, and why is a right to strike necessary when the safety net now provides substantial terms and conditions for workers.

If the government does not take decisive action immediately in the above areas, businesses will find it increasingly difficult, if not impossible, to navigate the economic headwinds coming their way. This would have very real consequences for employment in Australia and for the health of our economy, which has the potential to negatively impact on all Australians.

Solutions

AMMA has identified a number of immediate solutions to these problems:

The structure and functions of our independent industrial umpire

The government should:

- Immediately review the structure of the FWC and, if necessary, make new appointments that have substantial business backgrounds, something wantonly absent under the current structure.

- Conduct a thorough review of FWC decisions and ensure members are aware of the need for consistency.

- Ensure individual FWC members pay due respect to established Full Bench principles and approaches and deliver consistent and predictable decision-making.

- Create an independent appeals tribunal to ensure greater rigour and consistency in FWC decision-making.

- Examine scope to improve the performance of particular FWC members whose decisions are consistently overturned, which could include capacity building and training.

- Put a freeze on the use of paid conciliators within the FWC with an instruction to the tribunal to revert to pre-trial conciliation of employment claims by sworn members of the FWC.

- Bring automatic four-yearly reviews of industrial awards to an end by implementing PC Recommendation 8.1, which has widespread support.

Unfair dismissal and adverse action laws

The government should:

- Reduce, via legislative change, the six-year time limit for individuals to bring adverse action claims against a business, replacing it with 21 days for all claims.

- Immediately adopt the PC's recommendations to reform adverse action / general protections.

- Amend the unfair dismissal laws to specify that if there was a valid reason to dismiss an employee, that is the end of the matter and reinstatement or compensation are not available. It should be further clarified that if serious misconduct occurred / is proven, that is a valid reason for dismissal and no further considerations apply.

Trade union access to business premises

The government should:

- Immediately re-table the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* and make every effort to pass it through the new parliament to:

    - Remove unions' "default" access to employee lunchrooms.

    - Remove requirements for employers / occupiers to transport and accommodate union officials to remote worksites.

    - Limit union access to worksites to cases where the union is covered by an onsite industrial agreement or bargaining to make one.

- Immediately implement the PC's recommendation 28.1 which would allow employers to push back against excessive multiple union entry requests.

Agreement making

The government should:

- Enact legislative change so that new business owners (following a business sale or contract exchange) do not have to take on indefinitely the transferring employees' industrial agreements where those agreements are irrelevant to the character of the new business or would lead to reduced offers of employment.

- Allow employees and employers to negotiate terms and conditions directly with each other, on a group or individual basis, subject to appropriate tests, but without interference from trade unions.

Strike action

The government should:

- Set a higher bar for legally protected strike action so that bargaining must be exhausted, or there be no reasonable prospect of securing a negotiated outcome, before such action can be taken.

- Adopt the PC's Recommendation 25.2 to outlaw agreement clauses that seek to restrict a business's ability to hire contractors and labour hire workers, and also ensure that strike action cannot be taken in pursuit of such clauses.

- Adopt the PC's Recommendation 20.2 that industrial agreements can only include matters relevant to the direct employment relationship, not matters about union rights (also ensuring that strike action cannot be taken in pursuit of such clauses).

In addition to the PC recommendations identified above, the government should immediately legislate to enact the majority of further recommendations from the PC which would improve productivity and flexibility at Australian workplaces, better support AMMA members in creating jobs and provide working Australians and job seekers with improved access to work opportunities, higher job security and improving living standards.

We appreciate that the government acted swiftly following its return to office in tabling / re-tabling legislation to: restore the Australian Building & Construction Commission (ABCC); protect the industrial rights of emergency services bodies and their volunteers; and increase the accountability of registered organisations. AMMA wishes the government every success in passing the remaining such Bills into law.

AMMA also acknowledges that, in its previous term, the government sought to make changes to the laws around union access to workplaces and introduce

much-needed workplace flexibility, but was forced to remove those provisions to get legislation through the Senate.

We recognise that, were the government to pursue each solution outlined here, the parliament may not pass new laws or prove itself capable of amending existing legislation where it is manifestly not working.

However, that should not deter the government from doing what is necessary, nor from properly articulating and pursuing the workplace relations system Australia needs in order to maximise employment, make Australia as positive and rewarding a place to do business as possible, and ensure employment lies at the heart of the growth of our economy and community.

For all the strengths of the Australian economy and all that we have achieved in recent decades, the risks to our economy, our jobs and our living standards are considerable, and jobs and the world of work will lie at the heart of Australia's capacity to successfully navigate the challenges we face.

The government now faces a choice – do nothing beyond the specific changes foreshadowed at the election and continue to foster even greater levels of dysfunction in our federal institutions and workplace relations system which will increasingly start to harm employment, competitiveness, productivity and the living standards enjoyed throughout the Australian community, or get back into the business of equipping Australia to be competitive and efficient on the world stage, and pursue the workplace laws Australia needs.

Yours sincerely

Steve Knott
Chief Executive

ATTACHMENT A

1. The structure and operation of our independent industrial umpire

Some disturbing trends in the recent decision-making and operation of the FWC that are of concern to resource industry employers and other users of our national WR system should also be of concern to government and must be acted on as a matter of urgency.

The Turnbull Government should immediately review the operation of the FWC and in doing so address the following important questions.

What is happening inside the ranks of the FWC and when will the infighting stop?

Recent decisions suggest deep and unhealthy divisions within the FWC and point to entrenched dysfunction that is blurring the line between respectful, constructive, collegiate differences of opinion and outright denigration and hostility.

The examples below not only challenge the credibility of the tribunal in its role as independent umpire, but threaten to further diminish employer confidence in our workplace relations system. They also risk further undermining the FWC's relevance to the shared challenges that enterprises and employees increasingly face in doing business competitively and retaining jobs.

Uniline decision[1]

This August 2016 decision saw a Full Bench of respected FWC members clearly divided and making pointed written criticisms of each other.

One Vice President (VP) member, dissenting, described the logic applied by the majority of his Full Bench colleagues as leading to an "*absurd*" outcome, and as "*subjecting the workplace relations system to ridicule*".

In his view, the majority decision provided "*those opposed to an agreement with the means to dismantle an agreement otherwise genuinely agreed*".

The VP concluded that an earlier decision by a Full Bench led by another VP:

- "*is demonstrably inconsistent with the statutory scheme*".
- "(is) *the very antithesis of a simple, flexible and fair framework*".

[1] *Uniline Australia Ltd* [2016] FWCFB 4969. 25 August 2016

- "*produces a nonsensical outcome*".

- (would require the parties to) "*enter the theatre of the absurd*".

***Patrick Stevedores* decision**[2]

This Full Bench decision followed an earlier appeal of a VP's decision to a Full Bench headed by a different VP.

In the appeal decision, the Full Bench describe the original VP's factual conclusions as:

- "*unsustainable on the evidence*".

- "*plainly wrong*".

- mistaking "*the relevant facts entirely*".

***Donau* decision**[3]

In this August 2016 decision, two members of a three-member Full Bench reached a conclusion completely at odds with decades of practice on casual service and redundancy.

The majority effectively acknowledged that the decision they reached was extraordinary, observing that "*industrial justice might suggest that it is unfair for an employee who has received a casual loading for a period of employment to have that period of employment also count towards the accrual of severance payments*", before reaching precisely that conclusion.

Also noteworthy was the dissenting decision from another commissioner who described the approach taken by the majority as requiring an "*artificial contrivance*", and their ultimate interpretation as a "*folly*". He also described some of the logic the majority applied as leading to outcomes that cannot be seriously contemplated.

The picture these public exchanges paint is of an increasingly misaligned and divided industrial tribunal, rife with significant legal and personal divisions.

Such divisions are of themselves serious concerns, and appear indicative of a divided organisation whose leadership is failing to deliver sufficient unity and shared clarity of purpose. Of greater concern is the impact of such a divided, internally-riven tribunal on employers and employees brought before it.

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[2] *MUA v Patrick Stevedores Holdings Pty Ltd* [2016] FWCFB 711. 8 February 2016
[3] *AMWU v Donau Pty Ltd* [2016] FWCFB 3075. 15 February 2016

AMMA recognises that judicial and quasi-judicial officers can and should disagree on matters of law, and that respectful, constructive dissent is a healthy part of the evolution of any legal system within the common law tradition. However, there are genuine grounds to be concerned that the level and tone of dissent between FWC members exceeds the collegiate and respectful, and has degenerated into a level of disrespect that ill serves the institution and is of serious concern for its effective and sound operation, not to mention the unpredictable outcomes this delivers for parties.

Under what authority does the president of the FWC continue to become involved in industrial disputes outside the processes and procedures of the FWC?

AMMA is concerned at the extent of FWC President Justice Iain Ross's intervention in a number of high-profile matters.

2012 Grocon dispute

The apparent willingness of the president to intervene in disputes beyond what some would see as the accepted precepts of judicial non-intervention first came to light during the 2012 Grocon dispute, approximately six months after he became FWC President.

As reported at that time:

> *Workplace Relations Minister Bill Shorten ... thanked Fair Work Australia President Iain Ross for helping in the talks, even though Justice Ross did not have the jurisdiction*.[4]

Specifically, President Ross convened a conference in an attempt to settle a matter upon which the Victorian Supreme Court had already issued orders.

It is also understood that at this time the president recommended that Grocon adjourn court action against the CFMEU, take no further steps in any such proceedings, and not initiate any new proceedings. This was an intervention in a highly political issue during the course of a federal election campaign.

2016 Country Fire Authority dispute

It is also a matter of record that President Ross made a further intervention into the recent high profile Country Fire Authority (CFA) dispute. As reported:

> *On June 9 [2016] – the day before the CFA board was sacked by the Andrews government, CFA chief executive Lucinda Nolan quit and former emergency services minister Jane Garrett resigned from cabinet*

[4] *Union won't rule out more protests*, The Age, 7 September 2012

> *in protest – Mr Ross interrupted his leave from the commission to dial into a meeting with CFA executives and the state's most senior bureaucrat.*[5]

AMMA can find no point at which President Ross justified his intervention in the CFA dispute, nor an indication of the powers he exercised in doing so. It is remarkable, but thus far unremarked upon, that he seems to have spoken only to the employer in its strategising around the proposed agreement and not to the United Firefighters Union or Volunteer Fire Brigades Victoria.

The ambiguity around when President Ross became involved in the CFA dispute underscores why heads of courts and quasi-judicial tribunals need to be very cautious in engaging with matters that may come before their tribunal outside of formal hearings and conferences.

As reported in *The Australian*[6]:

> *Ms Hutchins told Parliament she had contacted Fair Work Commissioner Iain Ross and he had endorsed the government's preferred proposal to settle the dispute.*
>
> *The Minister had said Mr Ross had assured her the agreement would improve diversity in the CFA, the dispute resolution clause was not a veto and the deal did not hurt the role of volunteers.*
>
> *But the Opposition said in discussions it had had with Mr Ross he had rejected that account.*
>
> *"We read out the transcript of Minister Hutchins' comments to the house and Mr Ross made it clear to us he never said those things,'' Coalition industrial relations spokesman John Pesutto said.*

Whilst there was subsequent debate and correction in the Victorian Parliament, it remains unclear at what point President Ross saw copies of the draft CFA agreement and whether he offered any advice or opinion on them, their capacity to be improved and how best they could secure approval from the tribunal he heads.

It does, however, appear clear there was dialogue between the President and the Victorian government on an increasingly contentious and difficult political and industrial matter, preceding any application to the FWC for agreement approval. It also appears clear that President Ross chose to involve himself in the CFA dispute outside of the transparent requirements of a properly listed matter, directions,

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[5] *FWC boss Iain Ross intervened in Country Fire Authority row*, The Australian, 30 June 2016 http://www.theaustralian.com.au/national-affairs/industrial-relations/fwc-boss-iain-ross-intervened-in-country-fire-authority-row/news-story/f70da58f47172fd9253dff82561b7d7f

[6] *CFA dispute: Opposition calls for dismissal of Industrial Relations Minister*. The Australian, 9 June 2016. http://www.theaustralian.com.au/national-affairs/state-politics/cfa-dispute-opposition-calls-for-dismissal-of-industrial-relations-miniser/news-story/12db3ad38093cda366e859831a7d1216

hearings, conferences and the like (i.e. the usual business of the FWC that is publicly listed, transcribed, etc).

Such events raise questions of extra-judicial intervention contrary to the hands-off approach that our principal industrial relations tribunal has traditionally adopted, and must adopt for its continued effective operation and reputational standing.

2005 AWU rally

It is also a matter of public record that then-AIRC Vice President Ross in late 2005 spoke at an Australian Workers Union (AWU) rally in Melbourne. As reported[7]:

> *AIRC Senior VP Iain Ross this morning slammed key aspects of Work Choices legislation that will affect unions, at an AWU rally in Melbourne. About 1,000 people attended the rally for what AWU national sec Bill Shorten called the "curtain raiser to the union fight against Work Choices". VP Ross said the removal of [then] s166A meant an employer could now sue without conciliation … "I'm sure he'll get into trouble for even speaking today," Shorten said.*

AMMA has consistently maintained that the Vice President Ross's very public political intervention in 2005 was entirely inappropriate, particularly given it centred on the form and substance of a piece of legislation that the tribunal he was a senior member of had principal carriage of applying.

In the context of the political area of workplace relations, it is also highly inappropriate that a very senior member of what must be seen to be an independent tribunal would allow himself to be seen as supporting not only one side of political argument, but also as supporting a point of union political advocacy that was directly opposed by employers. It is precisely the prospect of becoming politicised and being associated with the political advocacy of one set of industrial interests over another that has seen both our judges and quasi-judicial officers scrupulously eschew and avoid becoming entangled in political and legislative debates.

What are the implications of the former Labor government's unprecedented manipulation of the appointments and standing of members of the tribunal, and the FWC President's involvement in that process, and how is that to be addressed in future?

In a March 2013 letter to the then-Attorney-General, AMMA raised concerns about the proposed appointment of two new statutory Vice Presidents to the FWC. Schedule 8 Part 6 of the Fair Work Amendment Bill 2012, which had at the time

[7] *VP Ross speaks at union curtain raiser*, published in Workforce, 4 November 2005

recently passed into law, created two new statutory vice presidential positions on the FWC, notwithstanding that:

- The tribunal already had two existing VPs in place, well experienced in administering the Fair Work Act 2009 and discharging all the responsibilities of the VP strata of the tribunal (one of those VPs remains on the FWC).

- The two pre-existing VPs enjoyed the confidence of the workplace relations community and were some years off retirement age.

- There had never been a suggestion at that point that the FWC required more than two VPs.

The impact of the changes implemented by the then-Minister for Workplace Relations, Bill Shorten, was the effective demotion of incumbent quasi-judicial officers of a Commonwealth tribunal and their replacement with new VPs chosen by the government of the day, displacing those properly appointed by the preceding government.

The threat to the independence of the tribunal's decision making, and the risk of future political interference in then-Minister Shorten's actions is manifest and highly concerning. AMMA's previously voiced concerns were reiterated to the Attorney-General at the time.

AMMA cautioned back in 2012 and 2013 that the two new VP roles were likely to undermine the perceived independence of the tribunal and risked damaging its good standing and capacity to engage with employers.

Those concerns were also voiced in AMMA's written[8] and oral[9] submissions to a Senate inquiry on the Fair Work Amendment Bill 2012. AMMA pointed out that the previous legislation, the Workplace Relations Act, had recognised the statutory role of the two existing VPs but the Fair Work Act at that time did not:

> *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 80s 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.*

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[8] AMMA submission to the Senate Committee on Education, Employment and Workplace Relations on the Fair Work Amendment Bill 2012, November 2012

[9] Hansard of Senate Education, Employment and Workplace Relations Legislation Committee hearing into the Fair Work Amendment Bill 2012, 21 November 2012

AMMA said at the time that the two existing VPs should be appointed to the two new VP roles to preserve their status and protect the perceived independence and reputation of the tribunal.

It appeared to AMMA that all the members of the former Fair Work Australia (FWA), other than the two targeted existing VPs, were transferred over to the new FWC with their seniority intact. This exercise was and remains little short of a scandalous interference with the independent operation of a quasi-judicial tribunal.

AMMA also drew the Attorney-General's attention to the Law Council of Australia's written submission to the Senate inquiry into the 2012 changes[10] which said the status of the tribunal "depends upon the independence and impartiality of its members being maintained and being seen to be maintained".

Once a person had been appointed to an independent tribunal with designated powers and privileges, any changes that would remove or reduce that person's powers or privileges while not affecting the powers and privileges of other members would have a tendency to undermine the independence of the tribunal.

> *That is so because such action can be portrayed as being done because the individual member is not in favour with the Parliament or the Executive.*

The two new VP appointees would go on to be given additional responsibilities and have a higher status than the tribunal's existing deputy presidents, including the two existing VPs at that time (one of whom remains). The effect of the Bill would therefore be to "reduce their status", the Law Council said.

As to where the idea for those two new positions came from, it is a matter of public record that the idea of a new VP position or positions came from President Ross himself. In answer to a question from Senator Eric Abetz at a Senate Estimates hearing in 2013[11], President Ross said:

> *"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."*

The following day during hearings by the same committee[12], Senator Abetz asked a senior Department of Education, Employment and Workplace Relations (DEEWR) officer at the time, John Kovacic (now a Deputy President of the FWC), about the VP roles. His answer was:

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[10] Law Council of Australia's written submission to the Senate, Education, Employment and Workplace Relations Legislation Committee inquiry into the Fair Work Amendment Bill 2012

[11] Senate Budget Estimates - Education, Employment and Workplace Relations Legislation Committee Hansard (p111-114), 3 June 2013

[12] Senate Budget Estimates - Education, Employment and Workplace Relations Legislation Committee Hansard (p94-97), 4 June 2013

> *"… as to the number of vice president positions that have been created, it did fluctuate across the course of the year … the president canvassed with me the appointment of two vice presidents".*

Putting to one side the appropriateness of the president of the tribunal campaigning for two new roles which would displace established, tenured members of the tribunal he headed, the effect of the two new statutory VPs since that time has unquestionably been to downgrade the status of the now remaining original VP.

At a number of points above we express concern about the deliberate demotion of statutory members of a quasi-judicial tribunal in 2013, and the former government making replacement appointments which served to displace and demote incumbents. To some people, at least one of those appointments may be viewed as replacing someone non-aligned or nominally aligned to employers with someone linked to the industrial wing of the labour movement by the political wing of the labour movement.

On what grounds are individual tribunal members ignoring and overturning established Full Bench principles and approaches?

AMMA has observed concerning incidences of individual FWC members handing down decisions which are in direct contradiction to established Full Bench principles and approaches. If left un-actioned, such inconsistent decisions risk making a mockery of the standing of Full Benches and adding to the already high levels of confusion being experienced by users of the system.

BRB Modular case

In a March 2015 decision[13], a Full Bench of the FWC overturned a single commissioner's decision and in doing so expressed concern that "the Commissioner expressly decided not to follow an earlier Full Bench authority".

In his original October 2014 decision[14], the commissioner had openly criticised a previous Full Bench principle / approach which he said he decided to ignore. Acknowledging it was a "brave or foolish" FWC member who refused to follow a Full Bench ruling, the commissioner proceeded to do just that.

In his overt criticism of the Full Bench, the commissioner said their earlier decision:

- Was "*too much at variance with the language in fact used by the legislature*".

[13] *BRB Modular Pty Ltd v AMWU* [2015] FWCFB 1440, 27 March 2015
[14] *AMWU v BRB Modular Pty Ltd* [2014] FWC 6388, 7 October 2014

- Introduced a "*moveable feast as the standard will be different in every single application for a scope order*".

- Established a standard for comparing "*fair*" and "*fairer*" and "*efficient*" and "*more efficient*" that appeared to lack "*any sense of objectivity*".

- Had redrawn the relevant section of the Fair Work Act in an "*impermissible manner*".

While the Commissioner's decision was itself later overturned by a Full Bench, such transgressions should, in AMMA's view:

- Be the trigger for improving the performance of individual commission members through additional training and capacity building.

- Support an improved process for rectifying inconsistent decision-making, such as the creation of a dedicated appeals body, separate from the FWC. By way of example, the United Kingdom (UK) has a system based on an Employment Tribunal and an Employment Appeals Tribunal.

***Leighton Boral* case**

In 2008, a majority Australian Industrial Relations Commission (AIRC) Full Bench overturned[15] the reinstatement of a Telstra employee, Ms Streeter, who was dismissed after having sex in the presence of colleagues following a work-related party, and subsequently being dishonest about it.

The Bench found the worker's dishonesty had destroyed her relationship of trust and confidence with the company, overruling an earlier decision in which an AIRC member had given the woman her job back.

What is little known about this case is that during the appeal, Adam Hatcher acted as co-counsel for Ms Streeter where it was unsuccessfully argued on appeal that after-hours conduct was not sufficiently connected to the employment relationship and did not provide grounds for dismissal.

In the original decision, Telstra was ordered to reinstate the former sales officer.

While Hatcher (now a VP of the FWC – one of the two new VPs "superimposed" on the tribunal by the former Labor government as set out above) was unsuccessful in the *Streeter* appeal, a recent decision of his as a FWC Vice President in essence overturns the Full Bench reasoning in the *Streeter* case.

[15] *Appeal by Telstra Corporation Ltd* [2008] AIRCFB 15. 24 January 2008

In a June 2015 decision[16], VP Hatcher found it was unfair to dismiss a team leader for his "aberrant" behaviour at and following a work Christmas function.

This was despite the manager spending his work Christmas party intimidating and sexually harassing colleagues and telling his superiors to "f off". VP Hatcher found the man was unfairly dismissed and should get his job back, although the VP did concede that a female colleague should not be required to work with him permanently on night shift in the event he was reinstated (which of itself imposes costs and imposts on any employer).

Among other things, VP Hatcher questioned whether companies could insist on compliance with conduct standards at functions where they provided "unlimited service of free alcohol"[17].

After this particular work party ended, the manager accompanied some female colleagues to a public bar, called one of them a "bitch" and kissed another on the mouth saying he was going to go home and "dream" about her.

On the way to another venue he told another colleague it was his "mission" to find out the colour of her underwear.

While noting it was "abundantly clear" that kissing his colleague fell within the federal Sex Discrimination Act's s28A definition of sexual harassment, VP Hatcher said the incident did not occur "in connection" with the team leader's employment.

Those who gathered at the public venue did so entirely of their own volition and there was nothing in the company's policies to suggest they applied to "social activities" of that nature, he said.

Aside from appearing contrary to Full Bench principles and approaches on the relevance of out of hours conduct to the employment relationship, this decision will be of particular concern to the Minister for Women given the signal it sends about the acceptability of sexual harassment in the workplace.

***Bluestar Global Logistics* case**

Things get even more confusing when one looks at a more recent October 2016 decision[18] where VP Hatcher found that it was fair for a business to dismiss a manager who had been jailed for child sex abuse.

In this case, the VP found the dismissal was a proportionate response because the employment contract requiring the man not to engage in conduct that might

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[16] *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156. 26 June 2015

[17] *Unfair to dismiss manager for 'aberrant' behaviour on night of Xmas function*, published in Workplace Express, 30 June 2015

[18] *Wakim v Bluestar Global Logistics* [2016] FWC 6992. 7 October 2016

adversely affect the reputation of the company "clearly applied to conduct outside of working hours as well as conduct at work".

While we do not disagree that the manager should have been dismissed and that dismissal upheld, one can see how employers appearing before the tribunal might be confused about where the line truly is between work and after-hours conduct given this recent series of contradictory decisions.

Why should the Australian taxpayer foot the bill for growing numbers of successful appeals against particular tribunal members?

In 2011, Senator Eric Abetz questioned former Fair Work Australia (FWA) president Justice Geoffrey Giudice on the issue of some tribunal members' decisions being appealed more than others.

During a May 2011 Senate Estimates hearing[19], Senator Abetz said he had sought advice from the Parliamentary Library and, at that point in time, one particular FWC member had six appeals against them and all six had been upheld.

The Senator asked Justice Giudice if there had been discussions internally within FWA with those who had "an unfortunate record in relation to appeals", adding:

> *"If a commissioner, or indeed, in another jurisdiction, a judge or a magistrate, started getting a record or a reputation that, before you even go to the initial hearing you start preparing the appeal papers because you know that there is a fair chance that, if he or she comes down on the wrong side, you will be able to appeal it and the success rate has been pretty high, I would have thought for the robustness and reputation of the tribunal you would be interested in trying to minimise that.*
>
> *"Whilst I do not want to know about particular commissioners or particular cases, I was wondering whether, in general terms, that is something that is discussed, be it over morning coffee from time to time with individual commissioners, or you invite an individual commissioner to have a cup of coffee with you or even later in the day something a bit stronger to discuss the time taken to deliver decisions or the number of appeals that are upheld against a particular commissioner."*

Justice Giudice declined to comment on the issue but said errors in decision-making were dealt with through the appeal system.

AMMA maintains that the Australian taxpayer should not continue to foot the bill for these kinds of "errors", and where these errors arise from a deliberate, belligerent or persistent unwillingness to follow established principles and

[19] Senate Budget Estimates - Education, Employment and Workplace Relations Legislation Committee Hansard (p46-47), 30 May 2011

approaches (as opposed to distinguishing matters in a constructive or illuminating manner), there should be scope to address this.

When will the government establish an appropriately independent appeals jurisdiction to provide greater certainty and consistency?

An independent appeals tribunal is the appropriate way to deal with the sorts of issues outlined above.

In the meantime, perhaps options could be examined to improve performance by providing further training to those members whose decisions are consistently overturned.

The fact is the existing FWC infrastructure is not providing essential clarity and consistency to stakeholders on key issues and is not meeting the fundamental expectations of users and the wider community.

Existing appeals mechanisms within the FWC are not delivering sufficient certainty and reliable signals, especially given the increasing incidence of members ignoring Full Bench principles and approaches.

This is poor regulation and indicative of an area of the law which has an increasing structural problem that must be addressed at the structural level.

A separate, specialist appeals body is a more appropriate manner in which to deal with the appeal process and would be consistent with the process in many other courts and tribunals. This would also reflect wider contemporary trends and practices in the administration of law in Australia.

Specialist appellate bodies (or separate appellate divisions) are utilised in a number of states, separating the specialist task of determining appellate matters from the exercise of the original or trial jurisdiction of courts and tribunals.

The UK has a specific Courts and Tribunals Service which articulates the roles that the appellate tribunals generally can play very neatly and relevantly for the current review[20]:

> *Appeals to the First-tier Tribunal are against the decisions from government departments and other public bodies. The Upper Tribunal hears appeals from the First-tier Tribunal on points of law, ie. an appeal made over the interpretation of a legal principle or statute. Further appeals may be made, with permission, to the Court of Appeal.*

[20] https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about

It is towards such a system the Australian government should look. Relevantly the UK also has both an Employment Tribunal and an Employment Appeals Tribunal which could be a model for an improved process of appeals from the FWC.

Why are FWC conciliators being given ever-greater powers and responsibilities with so little public scrutiny and accountability?

AMMA has noted, particularly in recent years, that FWC conciliators who are not fully-fledged members of the FWC are being given greater and greater powers and responsibilities. We understand those responsibilities are also now being allocated to the associates of FWC members, who are often more junior, or administrative registry employees.

The competency of the conciliators, in AMMA's experience, is varied. Some are excellent commercial conciliators, some are more akin to pen pushers, some are juniors. This is not good enough and employers and employees should be entitled to conciliation before a sworn member of the FWC, or else the Australian Council of Trade Unions (ACTU) or Australian Chamber of Commerce and Industry (ACCI) should be consulted on who can conciliate matters.

These increased powers and responsibilities of conciliators are something the users of the system may not necessarily support or even be aware of, and nor would many be aware of the Labor and union-affiliated backgrounds of many current conciliators.

Employers are also concerned about the apparent vast variability in the life and professional experience and competency of the conciliators, and the risks this poses for employer and employee users of the system. The prospect of settling claims or appropriately finalising them is a significant matter of cost and personal / business impact. It should not rely on the luck of the draw in terms of which conciliator is allocated.

As with FWC members themselves, the backgrounds of conciliators can and do have an impact on their stance on certain issues and towards certain parties, and this is something warranting greater scrutiny, along with the powers those conciliators actually have.

AMMA calls for a freeze on the use of paid conciliators and an instruction to the FWC to revert to pre-trial conciliation of employment claims by sworn members of the FWC.

Why can the FWC make changes to industrial awards on its own motion without any application from employer and employee representatives?

The challenges and dissatisfaction that the current four-yearly award review process is creating throughout the industrial relations policy community is

something of which users of the system are well aware, and has been raised with government and reviewers such as the PC on multiple occasions.

The automatic award review process programmed into the Fair Work Act by former Workplace Relations Minister, Julia Gillard, is proving a considerable and widespread drain on resources and enjoys little or no support from unions or employer organisations. The one recommendation from the PC that seems to enjoy almost universal support is Recommendation 8.1, to bring the automatic award review process to an end.

That issue aside, the former Labor government's fundamental errors of system design are being exacerbated by how the FWC, and specifically President Ross, is going about the award review process.

A number of matters have been seized or initiated by the President to change awards without the instigation or support of either the unions with membership in the industry concerned, or the employers who must observe the award. Employer organisations and unions are being forced to respond to FWC-initiated changes that have not been sought by either their members or those of the relevant unions. The extrapolation of a review into the annualised salary arrangements in one award into a review for all awards that contain such clauses is but one recent example.

While some union or employer parties have made applications to vary particular awards in respect of annualised salaries, President Ross in a May 2016 statement[21] said the current four-yearly review was "broader in scope" than previous transitional reviews and provided "an opportunity to comprehensively review such terms", not just on application by the parties.

President Ross said he was "satisfied that a broader review of all annualised salary terms is required".

President Ross' willingness to seize award review matters and act without matters being triggered by employer organisations and unions that have overseen awards for decades risks making an already difficult and unnecessary task even harder and more protracted.

The costs being imposed on unions and employer representatives are significant, and are incurred with little or no discernable improvement to the system from either employee or employer perspective (particularly where employment in a particular industry is dominated by enterprise agreements).

Former Workplace Relations Minister, Julia Gillard, may have made a fundamental error in pre-programming four-yearly modern award reviews. However, those

[21] Statement, *4 yearly review of modern awards – Annualised salaries* [2016] FWC 3520, 31 May 2016

problems are being exacerbated by the expansionist manner in which the FWC is approaching the task.

On what basis and with what oversight does the FWC president implement his *New Approaches* program?

President Ross' New Approaches initiative seeks to change the FWC from a reactive tribunal that addresses matters brought before it, to a proactive body that works with interested employers and unions to build their relationships as a foundation for consensual and constructive bargaining.

Section 576(2)(aa) of the Fair Work Act identifies one of the functions of the FWC:

> *(2) The FWC also has the following functions:*
>
> *(aa) promoting cooperative and productive workplace relations and preventing disputes;*

This provision was included in the Fair Work Act as part of the final tranche of amendments under the former Labor Government. These were the amendments pushed through by then-Minister for Workplace Relations, Bill Shorten, during the final sitting days prior to the 2013 federal election.

The FWC has recently released a new statutory form (F79) inviting applications for the FWC to assist in "promot(ing) cooperative and productive workplaces and prevent(ing) disputes".

Some elements of President Ross's *New Approaches* may be positive for particular workplaces, including assistance with interest based-bargaining, which is being considered by some AMMA members.

However, we are concerned that the President is forging a substantial new function for the FWC without sufficient resources or licence to undertake it. We are concerned the FWC is spending significant money to deliver services beyond its traditional remit.

Section 576(2)(aa) of the Fair Work Act as outlined above was intended to be explanatory in nature, consistent with other comparable generalised guidance provisions (otherwise known as "objects") which appeared in the pre-Fair Work Act legislation. At no point did AMMA understand during the passage of the 2013 amendments that this provision was going to be used to create an additional new jurisdiction for the FWC.

Even if the purpose of the legislative provisions was to give some sort of proactive dispute settling powers to the FWC, this would presumably still have to be exercised in a way that is made explicit in the legislation.

Were the current usage of s.576(2)(aa) intended, it would have been made clearer and more explicit in the drafting as were comparable changes throughout the 2009 Fair Work amendments.

Nevertheless, President Ross has forged ahead with his *New Approaches* services, events, research and publications at some additional cost, which then demands of government that it be funded. It is concerning that in circumstances where there are limited resources available to the tribunal to obtain extra appointments, that money should be spent on these non-application based functions.

This area may warrant examination in Senate Budget Estimates hearings in the coming months. AMMA also urges the government, when making future budget allocations, to consider restricting the FWC's funding to its core functions. This may specifically mean defunding President Ross's *New Approaches*, which appears to be an administrative exercise, not the delivery of a statutory requirement of the FWC as an agency.

How to address concerns with the FWC

The preceding concerns point to an FWC operating at odds with the traditional boundaries for the conduct of quasi-judicial bodies, but also at odds with the changing nature of work and workplaces, and the changing needs of employers, employees and organisations.

The FWC's calculated expansionism, contradictory and inconsistent decision-making and willingness to abandon historical industrial practice risks a profound and widespread loss of confidence in the system - confidence that was already severely tested following the former Labor government's deliberate re-regulation and extensive rewriting of our workplace relations legislation and overt bias towards appointing union / Labor-aligned members to the FWC.

AMMA and its members support the measures the Coalition has already taken to expand the expertise and capacities of the FWC, and restore credibility through appointments. We support the ongoing improvement of the FWC through further high-quality, transformational appointments.

However, appointments alone cannot remediate the range of areas in which the FWC is:

- Failing to support the interests of employers and employees in contemporary Australian workplaces.

- Operating outside of long-standing conventions.

- Issuing decisions at odds with long-standing industrial principles.

- Expanding its remit and allocating increasing responsibilities to registry staff rather than properly sworn FWC members.

As mentioned, senior and experienced members of the FWC are effectively acknowledging their decisions are contrary to "industrial justice". When members of a tribunal are characterising the decisions of their peers as "outcome(s) (that) can(not) be seriously contemplated" and as "folly" and "illogical", this points to an institution that is not properly and effectively led and is in need of personnel and statutory modernisation.

Similar developments led AMMA to advocate for a system of Employment Tribunals including a new, specialist IR jurist type independent appeals body separate to the FWC. We maintain this would significantly improve the Australian workplace relations system.

We request the government investigate the matters raised above and give consideration to a range of statutory, administrative, and budgetary options to ensure our workplace relations institutions not only operate more consistently and in line with user expectations and the intentions of legislation, but are also properly structured to operate as effectively and beneficially as possible, as well as being equipped to support employment, employers and employees as the future of work and workplaces changes.

2. Damage being caused by our federal industrial laws

How long will Australia's international reputation and rating be allowed to deteriorate before we act to address the inefficiencies and disincentives to employment being created by our workplace relations laws?

In August 2016, *The West Australian* newspaper published an editorial[22] in which AMMA highlighted the seriousness of all three global ratings agencies putting Australia's AAA credit rating on notice. As the editorial pointed out:

> *"While the loss of our AAA rating, which appears almost inevitable, of itself doesn't present a major danger to the Australian economy, without significant micro and macro-economic reforms the momentum for further downgrades will. Unless there is immediate and sustained change from the current domestic political and reform creative inertia, Australia can expect upwards pressure on borrowing rates with consequential adverse effects on both consumer spending and living standards."*

[22] *Workplace relations reform sorely needed*, The West Australian, by AMMA's Steve Knott, 4 August 2016

AMMA emphasised the need to amend our national workplace relations legislation to make Australia a more attractive place to do business, invest and create jobs:

> *"We're the only nation in the world with an award system, a system that interlinks with other forms of excessive and uncompetitive workplace over-regulation. On any measure, including the increasing demand for employment lawyers and employer organisation advice, Australia's IR over-regulation fails to keep up with the requirements of modern, mobile and globalised workforces.*
>
> *"The Government's commitment to combating union lawlessness and corruption is a positive starting point, but there is much about our workplace relations system that needs improvement."*

As yet there are no indications when government will take action to address the very real problems being created by the Fair Work Act 2009, an Act which remains, in terms of addressing industry concerns, almost entirely unchanged from the Rudd / Gillard era blueprint.

AMMA members strongly support the government's planned reforms in areas such as registered organisations, the restoration of the ABCC, and giving effect to the Heydon Royal Commission recommendations, along with implementing a public interest test for future trade union amalgamations.

Positive as those changes will be, they cannot represent the extent of workplace relations change for this parliamentary term. To take no action beyond the Bills already introduced into the current parliament, plus those specifically foreshadowed during the recent election, will do nothing to alleviate pressures on Australia's AAA credit rating. Failing to fix clear problems with the Fair Work Act 2009 will also fall well short of what is required for job creation and budget repair.

When will promised changes to the Fair Work Act be progressed?

The government in its previous term tabled the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015,* which subsequently failed to pass through the last parliament.

All the provisions of that Bill are important and should now be re-tabled and passed as a matter of urgency, including provisions relating to:

- Annual leave loading on termination;
- Accrual of leave while on workers' compensation;
- Individual flexibility arrangements (IFAs);

- Transfer of business;
- Union access to business premises; and
- Unfair dismissal hearings and conferences.

Another government Bill, the *Fair Work Amendment (Bargaining Processes) Bill 2014*, also failed to be passed by the previous parliament. If re-tabled and passed in the current term, which AMMA maintains should happen, the Bill will deliver some small but important changes to the Fair Work Act by requiring the FWC to:

- Refuse to approve a union's strike application if its claims are "manifestly excessive"; and
- Before approving a strike action ballot, take into account the steps taken by each party and the extent to which bargaining has progressed, along with the extent to which each party has communicated its claims before moving to take strike action.

AMMA notes that neither of the above Bills has been re-tabled in the current parliament since it began sitting in late August 2016.

While the above two Bills do not go nearly far enough in terms of meaningful WR reform, and in some ways merely undo some of the damage created by the former Labor government since the Fair Work Act was implemented, they should be re-tabled and passed as a matter of priority. This should, however, only be a precursor to the more significant and meaningful reforms necessary to start to make a positive difference on incentives to employ, invest and do business in Australia.

When will the government respond to the recommendations of the PC to address real problems in the operation of the Fair Work Act that are damaging enterprises, employees, job seekers and the wider Australian community?

The PC released its final report[23] following its extensive review of Australia's workplace relations system in December 2015. Despite the significant resources devoted to this review by a range of stakeholders, including AMMA, the government has yet to indicate which, if any, of the PC's reform recommendations it will adopt, and when.

AMMA again calls upon the government, in line with industry priorities determined in AMMA's 2016 Federal Election Survey[24], to implement those PC recommendations that would improve productivity and flexibility at Australian workplaces and better support AMMA members in creating jobs. This means giving

[23] *Productivity Commission Inquiry Report – Workplace Relations Framework*, 21 December 2015

[24] *AMMA 2016 Federal Election Survey – Policy priorities of the Australian resource industry*, April 2016

effect to the vast majority of the PC's recommendations, save for a harmful few which the business community opposes.

UNFAIR DISMISSAL AND ADVERSE ACTION LAWS

Why can't employers dismiss employees for serious misconduct without fear of them winning their jobs back?

Businesses need to be able to take action to protect their employees, customers and the general public, and they need the powers to meet the substantial obligations and liabilities attached to doing business in contemporary Australia.

There should be no question of reinstatement where an employee's employment is terminated for serious misconduct. This would include, for example, after operating heavy machinery whilst under the influence of drugs, or for proven allegations of sexual harassment or violence in the workplace.

Where a business has made the decision to terminate an individual's employment based on the facts and circumstances at hand in the wake of serious misconduct that decision should stand. The FWC should not, as it did in the examples below, substitute its own decision for that of the employer.

Sargeant Transport case

In an August 2014 decision[25], a man was compensated financially (though not reinstated) after he urinated on client property. The employer was ordered to pay $16,000 to the man after "unfairly" dismissing him. That is, an employee urinates on client property and the employer is forced to financially compensate him in addition to incurring substantial litigation costs.

As AMMA pointed out at the time, it beggars belief that an employer could be found to have a valid reason to terminate someone's employment for clear misconduct, as happened in this case, and then be slapped with a $16,000 penalty and a finding of unfair dismissal.

As AMMA recommended in its September 2015 submission[26] to the PC review:

- The question of whether an employer had a valid reason to dismiss should be the FWC's primary consideration and issues of procedural fairness should not overturn that decision;
- In all cases where a valid reason for termination exists, the FWC should be prevented from ordering reinstatement or ordering compensation;

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[25] *Cowan v Sargeant Transport Pty Ltd* [2014] FWC 5330. 18 August 2014

[26] Submission *in reply to the Productivity Commission's draft report on Australia's workplace relations framework*, AMMA, 18 September 2015

- The FWC should not be empowered to reinstate employees dismissed for breaches of work health and safety procedures; sexual harassment; bullying; serious misconduct; or acts of violence (this type of conduct should automatically be seen as a valid reason for dismissal);

- Issues related to the impact of the dismissal on the applicant and their family should have no bearing on the tribunal's decision making, with each case resting on its merits alone not the purported circumstances of the applicant.

Does an occupational accident or injury hurt, maim or kill any less based on a negligent employee's age and lack of prospect of alternative employment?

Does someone who is sexually harassed or intimidated incur any less psychological damage based on an offending employee's age and lack of prospect of alternative employment? Of course not. The FWC should never have created such false distinctions and the government needs to act to stamp them out.

***Harbour City Ferries* case**

In April 2014, the FWC found[27] there was a valid reason for Harbour City Ferries Pty Ltd to terminate the employment of a ship master for breaching the employer's "zero tolerance" policy for positive drug tests in the workplace. He crashed his ferry into a Sydney Harbour wharf after which cannabis was detected in his system.

In a concerning decision, a member of the FWC ruled the man should get his job back because there was no evidentiary link between his positive drug test and impairment. There was no evidence the man was actually impaired, the FWC found.

That decision was later overturned[28] on appeal to the Federal Court but should never have been made in the first place. Why should the Australian taxpayer foot the bill for that type of decision just to have it overturned by a higher court? Not to mention the expense for the employer of defending the initial unfair dismissal claim and running the appeal. Why should an employer incur costs throughout such a process where that employee's actions have, when you boil it down, damaged a ferry and a wharf, endangered passengers and seriously breached the employer's operational and staffing policies?

This decision at first instance is just one of a worrying series where adventurous commission members are extraneously taking undue account of the personal circumstances of employees whose employment is legitimately being terminated for gross misconduct and for breaching either express or implied employment policies.

[27] *Toms v Harbour City Ferries Pty Ltd* [2014] FWC 2327, 16 April 2014
[28] *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35. 16 March 2015

Why do employees need to be told it is unacceptable to download pornography on work equipment?

In a September 2016 decision[29], a general insurance manager was reinstated after being dismissed for poor performance, despite later being found to have downloaded pornography repeatedly on work equipment.

The FWC member found the dismissal to be harsh, unjust or unreasonable, in part because while the downloading of pornography would otherwise provide a valid reason for termination, the employer had no explicit policy telling employees they should not access pornography on work equipment. By way of the man's grossly inappropriate behaviour at work, the company cited interactions with company directors constituting a "personality clash almost from day one".

The FWC heard the man had failed to treat others with respect, failed to organise his time and concentrate on his work while at work, failed to ensure compliance with regulatory requirements, and failed to ensure the workplace was free of sexual discrimination and harassment. His former employer said he appeared not to know the boundaries between appropriate and inappropriate conduct in the workplace.

Following his termination, he was found to have downloaded "hard core" pornographic material on his work mobile and laptop. He admitted to doing so but said he was "on a lunch break or outside of work hours and work premises" at the time. He admitted he probably downloaded some of the material while "walking the streets" of Port Macquarie. His laptop also contained various images and a video of himself performing sex acts.

The FWC ordered that the man be reinstated, saying "in this case there was no evidence that the employer had promulgated any particular policy regarding the use of its equipment being confined to work-related activities".

You would think this would be a given in a modern workplace relations system.

While there may have been some breaches of procedural fairness leading up to this dismissal, the dismissal itself was for valid reasons. In AMMA's view, that should be the end of the matter.

The employers of Australia cannot be expected to hand each and every employee a phone book-sized document listing every possible scenario that would constitute misconduct, and which would justify dismissal. Any reasonable person should know what is allowed at work and what is beyond the pale, and the infantilisation of employees does employers, employees and the wider community a disservice.

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[29] *Croft v Smarter Insurance Brokers Pty Ltd* [2016] FWC 6859, 28 September 2016

However, even where employers do seek to set clear standards on employee conduct and expressly set out what is and is not acceptable, this too often carries little weight with the FWC. Too often the FWC finds every possible contrivance and seizes on petty nit-picking to undo employer decision-making to address serious misconduct or for failing to work as directed. The employers of Australia are too often damned if they do and damned if they don't in terminating employment.

Why should companies be exposed for up to six years to expensive, unfounded claims from disgruntled employees?

Under the Fair Work Act as it stands, an employee can bring an "adverse action" claim for alleged employer conduct up to six years' into the future. AMMA has long argued this is an inappropriately long time for employers to face the spectre of Federal Court action.

People's memories and records of what may have occurred will have dimmed during that time and those involved may well have left the workplace. Indeed, litigation is entirely possible from former employees of whom current managers have no knowledge or familiarity. Still, the company is expected to actively defend such claims because the system deems them guilty until proven innocent.

Employers are forced to defend those claims, even where there is no merit and the allegations show no nexus between a workplace right purportedly being breached and any alleged adverse or disciplinary action taken by an employer.

As an example of the types of claims employers face and have to defend up to six years down the track, the following was reported by AMMA members in a 2011 survey[30]:

- One employee claimed it was "adverse action" for a prohibited reason for the employer to ask him to work a night shift going into their rostered day off.

- Another employee claimed it was adverse action for their employer to manage their performance for not ringing in when absent. The person claimed that disciplinary action flowing from that was adverse action because he was taking sick leave to which he was entitled (ie. it was a breach of his workplace rights to counsel him for failing to notify his employer that he was absent).

The scope for abuse and creative litigation in this jurisdiction, illustrated by the above and other examples, is reason enough for the six-year time limit for all adverse action claims to be reduced to 21 days, and for wider reform of the general protections/adverse action regime.

[30] AMMA *Workplace Relations Research Project* Report 3, Dr Steven Kates - RMIT University, June 2011

Employers do not advocate the removal of protections against discriminatory dismissals or actions from employers on prohibited grounds nor, for example, the removal of protections against detriment based on union membership or non-membership. However, Australia had an entirely viable and robust body of such protections prior to the 2009 Fair Work laws, and could viably return to the previous system of prohibitions on unlawful termination / action, which would be an improvement on the status quo of Labor's gift to Australia's applicant law firms.

As a first step in reforming this jurisdiction, the government should immediately adopt the PC recommendations relating to adverse action / general protections.

TRADE UNION ACCESS TO BUSINESS PREMISES

Why do trade unions have the right to insist on meeting with workers in potentially dangerous and hard to access locations?

Labor's extension to union access laws that took effect on 1 January 2014 (laws that back in 2009 both Kevin Rudd and Julia Gillard had expressly promised would not change), need to be rescinded.

This extension gives unions the right to enter employee lunchrooms, including lunchrooms in remote locations.

"Lunchrooms" in the resource industry can be offshore, an hour's drive underground, or in the back of a high-sophisticated piece of operating equipment such as a dragline, as long as there is some capacity for a person to eat a meal there.

In a series of decisions culminating in a Full Bench ruling, the FWC in February 2016 awarded the CFMEU the right to hold discussions with employees in a kitchenette attached to a moving piece of machinery.

In the original November 2015 decision[31], the FWC refused to give the CFMEU permission to hold talks in a 4.4m by 1m kitchenette attached to a dragline - a large excavator used in mining with a bucket pulled by a wire cable.

The original sensible decision found the dragline was in fact a "functional work area" and the "lunch room" attached to it, despite being fitted with a kitchenette, was not an appropriate place to hold a meeting and did not enliven the Fair Work Act's "default" lunchroom access provisions for the union.

As the FWC Deputy President said in the original decision:

> *"The fact that draglines are very substantial pieces of equipment of such proportions that they contain an area of the kind in dispute in these*

[31] *CFMEU* [2015] FWC 3694. 2 November 2015

> *proceedings, does not make draglines any the less pieces of operating equipment."*

Unfortunately, that decision was overturned by a Full Bench in February 2016, with the appeal decision[32] granting the CFMEU access to dragline crib rooms to hold discussions with employees (employees who had not necessarily indicated they wanted to meet with the union). Despite the enormous logistical difficulties associated with having a union official travel underground to arrive at the dragline location, this decision stands.

As set out below, this is merely one high-profile manifestation of fundamental problems with the default lunch room access rights that former Workplace Relations Minister, Bill Shorten, gifted to Labor's union affiliates.

These laws are an unnecessary overreach, expensive, take operating personnel away from their main duties, and do nothing to assist employee safety, company productivity or investment in our sector.

Accordingly, AMMA seeks these laws to revert back to an employer making a suitable meeting place available such as a helipad, conference room, above-ground meeting facility, etc. Where a union disputes the suitability or practicality of a proposed meeting place it should, as it has always had the power to, raise a dispute with the FWC.

Why can't employees eat their lunch in peace without being badgered by militant unionists?

In one of his final acts as Workplace Relations Minister, Bill Shorten pursued legislation to gift unions expanded powers to insist not just on rights to enter workplaces to meet with employees, but also to insist where they would meet with them on the employer's premises, which had previously been up to employers.

There has since been substantial case law on micro issues such as whether unions are able to approach employees in lunch rooms or must wait for the employee to show interest.

In a 2014 decision[33], the FWC recommended that a company remove conditions it had placed on union officials when entering lunchrooms to hold discussions with employees. The company had, quite reasonably, required union officials to remain at a particular table in the lunch room and not to "roam around" or approach workers.

The FWC recommended that no such conditions be placed on union officials and they be free to approach workers during their meal breaks. In AMMA's view, that could facilitate harassment via multiple visits or repeat requests when an

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[32] *CFMEU v Central Queensland Services Pty Ltd T/A BHP Billiton Mitsubishi Alliance* [2016] FWCFB 288, 5 February 2016

[33] *NUW v Coles Group Supply Chain Pty Ltd* [2014] FWC 1674. 12 March 2014

employee has expressed no desire to meet with the union. Employees should have a right to eat their lunch in peace, free from unwanted political sales pitches.

AGREEMENT MAKING

Why can a union interfere with the approval of an industrial agreement that has already been made by an employer and their employees?

At the present time, three recent FWC approvals of agreements negotiated directly between offshore services companies and small groups of employees are subject to challenge before a Full Bench.

As reported[34]:

> *The union complains that [the three companies involved] have "attempted to pursue non-union agreements as part of a protracted campaign" led by the Australian Mines and Metals Association.*

As AMMA highlighted in commentary on the issue, employees are increasingly working directly with their employers toward mutually beneficial terms and conditions that will best sustain business and employment:

> *That any group of employees would choose to take their job security into their own hands and vote in support of their employer's proposed agreements says a lot about their union's approach to bargaining during difficult times.*

The MUA has taken it upon itself to intervene in the agreement approval process, where all three agreements were approved by separate members of the FWC and all had the consent of both employers and employees. Among the union's arguments are that the group of employees the employer negotiated with were not "fairly chosen".

It remains AMMA's view that if employers and employees want to strike a deal for an industrial agreement without the consent of trade unions, they should be able to do so.

Why are identical industrial agreements approved by some FWC members but not by others?

It should be noted that one of the objects under s3F of the Fair Work Act is "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".

[34] *MUA appeals non-union offshore deals*, published in Workplace Express, 31 August 2016

Further, s171A states that the objects of that part of the Act include (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements.

Unfortunately, recent agreement approval decisions display not only the same infighting between FWC members playing out publicly as is seen in other types of decisions (as outlined earlier), but also show a failure to facilitate agreement making.

In an October 2016 decision[35] approving an agreement for the Australian Rail Track Corporation (ARTC) in NSW, an FWC Deputy President referred to an earlier Full Bench decision about how to apply the Better Off Overall Test (BOOT) to enterprise agreements as "illogical".

In approving the ARTC agreement, the DP said it was not, contrary to the Full Bench decision relating to a Coles Supermarket agreement[36], the FWC's task to examine and analyse each employee's current or prospective circumstances.

"*To do so would be an illogical and impossible nightmare resulting in unacceptable delays in approving enterprise agreements*," the DP said in the ARTC decision, going on to say:

> *"The BOOT exercise is not a line by line comparison between a term in the agreement and its corresponding term in the award. The Commission's task is to consider the more beneficial and less beneficial terms and decide if employees are 'better off overall'."*

The Coles agreement was rejected by a Full Bench because it was not satisfied that each employee and each prospective employee would be better off overall.

The DP, however, approved the ARTC agreement without applying the Full Bench reasoning.

In addition to the above, there have been numerous anecdotal examples, not exclusively in the resource industry, where the FWC has approved a competitor's enterprise agreement containing certain terms and conditions but then has failed to approve another company seeking to make exactly the same agreement.

This issue was starkly demonstrated for all to see in February and March 2010 when the approval of the same enterprise agreement was allocated to two separate commissioners[37]. Both commissioners independently reached different conclusions on the same agreement / facts. Both conclusions were within the remit of the tribunal's discretionary powers but hardly provide certainty to industrial

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[35] *Australian Rail Track Corporation NSW Enterprise Agreement 2016* [2016] FWCA 7012, 7 October 2016

[36] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd (T/A Coles and Bi-Lo)*[2016] FWCFB 2887, 31 May 2016

[37] *Riverina Division of General Practice* [2010] FWA 2170, 15 March 2010, McKenna C. *Riverina Division of General Practice* [2010] FWA 1185, 19 February 2010, Thatcher C

parties. They illustrate a tribunal with problems delivering consistent outcomes and failing its clients / users.

These outcomes make it extremely confusing, as well as difficult to compete, for businesses when producing an enterprise agreement to the FWC for approval. While we understand there is an element of commissioner "discretion" in approval of agreements and the application of the BOOT it would not be difficult to ensure greater consistency in this area. To that end, the government should ask the FWC President to review decisions for inconsistencies, particularly regarding agreement approval, and if necessary, train FWC members in how to apply the BOOT consistently.

Why can't new business owners employ people on appropriate terms and conditions without being afflicted with the terms and conditions of a preceding era, in which product and labour market conditions may have been materially different?

As a direct response to provisions inserted into the Fair Work Act by former Workplace Relations Minister, Julia Gillard, many employers are now unwilling to take on the existing employees of a company they purchase or whose contract for service they take over.

The transfer of business provisions of the Fair Work Act are acting as a deterrent to employment by encouraging new business owners to terminate the employment of existing / transferring employees who may be highly experienced and whom the business would otherwise take on.

Under the current laws, any existing / transferring employee brings their industrial agreement with them into the new business in an open-ended way. This creates not only considerable expense for employers in operating two payroll systems and administering two separate agreements and the like, but creates industrial disharmony by having workers working side by side under different industrial arrangements.

For these reasons, many AMMA members have strict policies in place about not taking on transferring employees because of these detrimental impacts.

The government should act to ensure employers are not afflicted with a previous employers' industrial agreements when taking on new staff - agreements that may well have been negotiated at a different point in the economic cycle or when the contract was serviced by a public sector rather than private sector entity, and which have nothing to do with the current character of the business and which will lead to adverse employment outcomes.

To fail to act on these concerns will perpetuate a perverse disincentive in our workplace relations system that sees experienced and skilled employees unnecessarily and damagingly being churned out of work.

STRIKE ACTION

Why is it so easy for unions to inflict costly and damaging strike action on businesses, or threaten strike action, with the full support of our WR laws?

In the resource industry, it is well documented that strike action can cost millions of dollars a day. In a 2010 FWC decision[38], Woodside Burrup Pty Ltd applied to the tribunal for relief from CFMEU strike action as an affected third party experiencing significant harm as a result of action taken against a contractor.

Woodside indicated that the potential cost for each day of strike action would be in the realm of $3.5 million. The FWC indicated those amounts were not "significant" given the billion dollar value of the project, and declined to order the strike action be suspended. Think how many schools could be built or other good that could be done with that money if it flowed into our economy.

This and other examples show the high bar the Fair Work Act's provisions impose on businesses, rendering useless the legislation's remedies for significant harm sustained by businesses. This bar must be lowered to meet community expectations for "significant harm" rather than the subjective notions applied by the FWC.

In a more recent decision[39], a single member of the FWC rejected a union's application for a strike ballot, finding the union was "not genuinely trying to reach an agreement".

While the decision was appealed to a Full Bench, which found no error in the original decision, the Bench said if the union had another go, its application would probably get up.

This tacit endorsement of the union and its members taking strike action occurred despite the union pursuing an industrial agreement:

- covering employers that had never agreed to or initiated bargaining;
- with claims for non-permitted matters which were only withdrawn at the eleventh hour;
- in relation to which the union had orchestrated the involvement of extra individual bargaining representatives which had the effect of slowing negotiations down; and

[38] *CFMEU v Woodside Burrup Pty Ltd and Kentz E&C Pty Ltd* [2010] FWAFB 6021, 6 August 2010
[39] *CFMEU v AGL Loy Yang Pty Ltd T/A AGL Loy Yang* [2016] FWCFB 6332, 21 Sept 2016

- in relation to which the union took a combative and non-conciliatory stance in negotiations.

Whilst there should be some rights to strike under our system, it is now far too easy under the Fair Work Act for unions to ballot their members to endorse damaging and costly strike action, and the broad scope to do so works against settling more matters by negotiation and without actual or threatened strikes or bans.

The laws need to change so that bargaining has to have been exhausted / not be in its very earliest stages, before legally protected strike action can be voted up and taken by employees.