



*Australia's National Workplace
Relations Tribunal*

January 20, 2017

The Honourable
Graeme Watson
Vice President

Senator the Hon. Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Dear Minister

I advise that I have written to the Governor General, tendering my resignation as a member of the Fair Work Commission, effective COB February 28, 2017.

I have made this decision because it is increasingly clear to me that the operation of the workplace relations system is actually undermining the objects of the Fair Work legislation. I do not consider that the system provides a framework for cooperative and productive workplace relations and I do not consider that it promotes economic prosperity or social inclusion. Nor do I consider that it can be described as balanced.

The outcome of unfair dismissal cases, for example, has become very unpredictable. No clear and consistent guidance can be gleaned from decided cases. Dismissals for theft, breach of safety rules, misconduct and breach of policies have been held to be unfair. The high settlement rate of cases is the result of payments made to settle unmeritorious claims. Undergoing a defence of a claim, especially with an unpredictable outcome, has made the process a penalty in itself. The impact of an uncertain disciplinary regime on productivity and operational performance compounds the penalty on business. The operation of the remedy cannot be said to achieve fairer employment practices or fair and just results – whether the matter is settled or contested. There continues to be a very high number of claims each year, apparently fuelled by the operation of the remedy.

The adverse action provisions of the Act remain complex and confusing. They produce an increasing number of claims. Despite the complexity of the issues that arise for consideration, the conciliation function, vested by the Fair Work Act to members of the Fair Work Commission, has been delegated to staff conciliators. It appears that the complexity of the issues, the costs of defending a case through the courts, the reverse onus of proof and conciliation practices have led to a tendency to apply an “economic” approach to settlements as is common for unfair dismissal applications. It is unclear what social or economic purpose is served by the operation of the remedy.

The enterprise bargaining process is regarded by many as giving rise to damaging adversarial behaviour, not present in the enterprise outside the bargaining process. In order to avoid adversarial



processes, many parties have established long term alternative arrangements that operate outside the formal workplace relations system and do not give rise to regular episodes of adversarial behaviour. Enterprise agreements are increasingly limited to enterprises where protected industrial action is a threat to the business or variations to the award safety net are necessary for operational efficiency.

Enterprise Agreement approval provisions remain unduly complex and technical. By operation of the system, an agreement made directly with employees is more difficult to make, and more difficult to have approved, than an agreement made with the support of a union. Inconsistent approaches to approval and illogical technical requirements have caused significant frustration for parties, undue costs and further discouraged the use of enterprise agreements.

The wide application of enterprise agreement disputes procedures has permitted disputes and delays over managerial decision-making and unnecessary adversarial behaviour at many workplaces.

Remedies against unprotected industrial action have proven ineffective for short term action taken without notice. In some industries, this has led to the imposition of additional costs, operational delays and interference with managerial decision-making.

The award safety net, produced in an intensive 18 month period in 2008-09, is subject to a review process in which individual employers have difficulty participating, and has stretched the resources of organisations well beyond their means. The four yearly review concept was intended to provide access to award variations at limited times - with stability at other times. The review has become a continuous, open ended review and rewriting exercise. It is unlikely that the 2014 "4 yearly" review of awards will be completed prior to the time that the next 4 yearly review is due to begin in 2018. Employer organisations are calling for an end to the concept because of process exhaustion. It is doubtful that any workplaces have become more cooperative or productive as a result of the process.

The award safety net contains provisions that were introduced in fundamentally different social and economic times. They have persisted despite the absence of a contemporary rationale. By international standards, Australia has a high minimum wage. Unlike most Western countries, it also has higher minimum wage obligations for more skilled employees and additional monetary and leave obligations. The combination of these elements appears to discourage employment in industries that hire entry level employees. Safety net employment regulation appears to have contributed to Australia's high youth unemployment rate and its persistently high level after the Global Financial Crisis. There is no mechanism in the workplace relations system for expert consideration of the combined effect of the safety net provisions and their practical impact on employment opportunities and new business opportunities. Problems with various other legislative provisions, such as those dealing with union right of entry and transmission of business, are well documented.

In my view there is no doubt that the combined effect of the operation of these provisions is to discourage employment and investment. The workplace relations system is understandably regarded as a "danger zone" for business. It no longer plays a constructive role in modern workplaces. It does not foster cooperation or productivity. There is an increasing understanding in the business community that the Fair Work Commission is partisan, dysfunctional and divided.



For these reasons, most employers are travelling down quite a different path. A safe and fair culture, enlightened leadership and a commitment to employee engagement are the key ingredients of a cooperative and productive enterprise. Organisations that embrace the mutual exercise of discretionary effort are in a position to maximise cooperation, productivity and business success. Employees are generally supportive of such an approach. They wish to apply all of their skills to the best of their ability and to engage constructively with their employer for their mutual benefit. The workplace relations system provides no encouragement for this approach. It is not surprising that automation and foreign investment are key priorities for many businesses.

I wish to contribute towards cooperative and productive workplace relations and national prosperity in the most constructive and meaningful way possible. I have come to the firm conclusion that this cannot occur as a member of the Fair Work Commission. I intend to pursue my goals directly in the business community.

Yours sincerely

Vice President the Hon. Graeme Watson





A U S T R A L I A N
I N D U S T R I A L
R E L A T I O N S
C O M M I S S I O N

ON THE OCCASION
OF
THE COMMISSION'S WELCOME OF
VICE PRESIDENT WATSON
AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MELBOURNE
MONDAY, 19 JUNE 2006

PN1

JUSTICE GIUDICE: Vice President Watson.

PN2

VICE PRESIDENT WATSON: I have the honour to announce that I have received a commission from His Excellency The Governor General appointing me to be a Vice President of the Australian Industrial Relations Commission. I present the Commission.

PN3

JUSTICE GIUDICE: Mr Acting Industrial Registrar, I direct that the Commission be recorded. Mr Andrews.

PN4

MR ANDREWS: May it please the Commission. I am pleased to be here today to welcome Vice President Watson to the Commission, to congratulate you on your appointment and to wish you every success in your new role. As all present know, your appointment, sir, comes at a time of considerable change for over 100 years through different eras of social and economic and indeed cultural change in Australia's history, the Commission through its various manifestations has continued to serve Australia and its people and in this regard the Government recognises the continuing role of the Commission, and to paraphrase the American author, Mark Twain, reports of its death have been greatly exaggerated.

PN5

The Commission has responsibility for further simplifying and rationalising awards for regulating industrial action, for right of entry, for a range of other matters including the regulation of registered organisations and the Government's continued commitment to the Commission is reflected in the prompt appointment of yourself, sir, to replace your predecessor as Vice President in Melbourne and it's also pleasing to be able to accommodate the desire that a senior industrial lawyer fills this position.

PN6

Vice President Watson, you've obtained several degrees. You have a Bachelor of Arts from the University of Sydney in 1977 and a Bachelor of Laws from the University of Tasmania in 1980. In addition to that, in 1982 you obtained a Graduate Diploma in Industrial Relations from the Footscray Institute of Technology. You have been a specialist in workplace relations in employment law and have worked for many years as a leading barrister and solicitor in this area. In 1983 you joined the legal firm then known as Moules, now Freehills, as an articled clerk and became a partner in 1987.

PN7

I know that this firm has figured prominently in the careers of several other distinguished members of the Commission including you, Mr President, former Senior Deputy President Colin Polites and former President Barry Maddern. You have participated in a series of important cases before both the Commission and the High Court. You have advised major companies on workplace change and efficiencies on enterprise bargaining, on outsourcing and a series of other employment issues.

PN8

As such your Honour will appreciate that the history of Australia's economic and social development has in many respects been economic and social change prompting policy and institutional change that follows and it's I suspect for this reason that many of those involved in the field of workplace relations are so passionate with a broad variety of views about what they do. Your Honour, Vice President Watson is no exception to this rule. As I am advised, in your former capacity as a practitioner you were involved in one of the longest running cases before this Commission and notwithstanding your Honour's departure I'm told that the mud loggers file remains open. I am not sure whether it will still be open in another decade but it's certainly got a long history.

PN9

You are, sir, also a respected author and editor. You wrote the CCH Publication Guide to Victoria's Employee Relations Law and co-edited the Workplace Relations Handbook A Guide to the Workplace Relations Act 1996. Earlier in your career and as a native Tasmanian you worked as an Industrial Relations Officer with the Australian Mines and Metals Association and prior to that you were a Personnel Trainee and Industrial Officer with the company Comalco Ltd. In conclusion, sir, history shows us that as an important institution the Commission adapts to the challenges that change brings irrespective of the context in which it is operating.

PN10

I am certain that your depth of knowledge, your expertise, your wealth of experience along with your Honour's renowned quietly spoken manner will help you to contribute in a very significant way in which the Commission operates, particularly in this new era of its history here in Australia. I once again welcome you and I wish you the very best in this new role. May it please the Commission.

PN11

JUSTICE GIUDICE: Mr Anderson.

PN12

MR ANDERSON: Thank you, your Honour. President, members of the Commission, Minister, it gives me great pleasure on behalf of Australian employers to join with the Minister and others here today to welcome Vice President Watson to the Australian Industrial Relations Commission. Vice President, you are well known to Australian industry, amongst employer organisations and amongst their executives. You have considerable standing in the Australian legal profession as an elite practitioner in the area of workplace law. That is no mean feat in an area of law which is subject to unique and complex features and that bears so directly on economic and social policy.

PN13

Australian industry also holds a reasonable expectation that those charged with significant statutory responsibilities in our workplace relations system have a good working knowledge of workplaces and how they operate in our contemporary economy. Whilst the uninformed may wonder how a legal practitioner from a Collins Street law firm could fit that mould, we have every confidence that you, sir, do. Your work over 20 years in the legal profession has taken you close to some of the most significant global players in Australian industry and in some of the biggest disputes of our time.

PN14

You have seen at close quarters how these employers, their employees and the trade unions conduct themselves and what motivates them to provide productive and rewarding employment in an era of global competition and open markets. Your work in significant cases before this Commission, including the working hours case of 2002, has taken you into the realm where law is developed, not simply where law is enforced. You have considerable experience in advising on workplace reform and on workplace bargaining and in the management of industrial disputes. This provides a firm foundation for you to work in the Commission under its revised charter set out by recent changes to the Workplace Relations Act. That charter has an emphasis on dispute resolution through employer, union or employee initiated conciliation and mediation and in the legal enforcement of rights and obligations concerning industrial action.

PN15

Industry looks to the Commission to perform these important functions with its objectivity, independence and according to law. In my work on the Administrative Review Council which advises the Attorney on administrative law and policy I recently noted that in February of this year the council had issued a publication that set out seven established principles for the conduct of Tribunal members. They are, respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, and accountability and transparency.

PN16

These are principles that have been reflected in the many current and former members of this Commission that you now join. Notwithstanding the changes in the charter and jurisdiction of the Commission over the years these principles endure, indeed not just for the Commission but for all of us in positions that may influence the rights and obligations of others. These are principles that we have seen you exhibit in your professional life in your dealings with industry and unions as an advocate in this Commission and in the courts. Your patient and consultative manner in dealing with people equips you well in what is a senior leadership role in the Commission.

PN17

I should finally say on a more personal note that the officers and staff of the Australian Chamber of Commerce and Industry who have worked with you over the years also warmly welcome your new position. Past executives such as Bryan Noakes, OAM, and the late John Bates regarded you as a person of considerable standing and respect, as do our current advocates, Scott Barklamb and Chris Harris, who worked with you in the hours case to which I have referred. We are delighted the Minister recommended your appointment and that you accepted the role. We are confident that it will be positive for the Commission for its standing in the community and in the conduct of workplace relations amongst those persons who appear before you. So on a very cold Melbourne morning the Australian industry warmly welcomes you to the role.

PN18

JUSTICE GIUDICE: Mr Amendola.

PN19

MR AMENDOLA: If it please the Commission. I appear on behalf of the Law Institute of Victoria to congratulate you on your appointment to the Commission.

As the Minister has indicated, your Honour, you have travelled along the country in order to accumulate a number of educational qualifications, having got a BA from Sydney, an LLB from Tasmania and a Graduate Diploma of Industrial Relations in Victoria. Your Honour has the reputation of being one of the best industrial relations practitioners in the country and you are well known for both your tactical acumen and your technical capabilities having appeared and acted for employers in a number of major test cases.

PN20

I use the words technical and tactical at this point in time as we're in the middle of a World Cup and your Honour might be described as being the Ronaldinho of industrial relations practitioners, although perhaps not as quick on your feet. Your Honour has a very dry sense of humour. One of the recollections I have of having been involved in a matter with your Honour was when we were acting for two particular parties and the State of New South Wales intervened, represented by the then Attorney General, Jeff Shaw, QC, and the CFMEU was represented by Steven Crawshaw and just before the proceedings were about to commence you leaned over to me and said, "We have the Shaws today, Geoff and Craw".

PN21

As the Minister indicated, you are quietly spoken, what Seinfeld might describe as a low talker which might result in practitioners thinking that following a directions hearing before your Honour that they would be required to appear before you in a puffy shirt which might be embarrassing for them all if that was to take place, and just to show that there is no loyalty in law firms once you leave I've been advised by those who used to work with you that you would seize any opportunity to play the guitar in the workplace, singing in the style of Bob Dylan apparently, no matter what the song is apparently and that your version of Don't Go Breaking My Heart is really something to behold. In fact I could hardly imagine it myself.

PN22

In all seriousness though however, your Honour on behalf of the Institute I welcome your appointment to this Commission, congratulate you and wish you a long and rewarding service of this Commission. May it please the Commission.

PN23

JUSTICE GIUDICE: Mr Walton.

PN24

MR WALTON: Mr President, Deputy Presidents, members of the Commission, Minister, Mr Vice President, I can only imagine the pride you and your family have today being appointed to such a senior role, a leadership role of one of the greatest institutions of this country, an institution which over 100 years has played a critical role shaping Australia and influencing our way of life. Mr Vice President, no-one could doubt the wealth of industrial relations and legal experience you bring, expertise you bring to this role.

PN25

Those who have encountered you comment on your sharp intellect. The ACTU secretary, Greg Combet, recalls dealing with you while you were representing Patricks during the waterfront dispute. He notes you are not a person to hide your light under a bushel. You are up front with what you want to achieve, people

know where you stand, no doubt an important attribute considered in your appointment. You of course bring to the role a great knowledge of the law. No-one should have any doubt about your detailed knowledge of the law, your intimate knowledge of the new Act.

PN26

You're also an author of some note. You have long written and spoken and advocated about the need to reconsider the role of awards, your support for individual contracts and the need to remove third party intervention from the workplace. We note with interest your decision to join the so called third party. You have appeared before this Commission on many occasion representing companies as Comalco, coal industry employers, Patricks and Rio Tinto. Your long experience before this Commission has no doubt prepared you for the difficult role a member of this Commission faces. They must bring to bear the necessary balance between the corporate interest and those of workers. Their overall judgment must consider many dimensions, not least of which the public interest.

PN27

It must be with some sense of responsibility and gravity that you take on that role, the thought that literally millions of ordinary people and their families now rely on your wisdom and your balance. Take a retail worker on 13 to \$14 an hour, probably slightly more than a partner in a law firm, probably closer to an ACTU salary however. Past decisions of this Commission mean that the worker receives dome 50 to \$90 extra a week through penalty rates, leave loading, overtime, extra pay for working on a public holiday. That extra money and those conditions make a fundamental difference to that worker and that worker's family.

PN28

The decisions of this great institution literally change people's lives. Great decisions such as reducing working hours, four weeks annual leave, sick leave, maternity leave, termination change and redundancy, penalty rates for shift work and weekend work. Mr Vice President, the wisdom and decisions of this institution of which you are now a senior member have helped shape this country and ensure we do not become like the US, suffering a large under class and working poor. Next year is the 100 year anniversary of one of the most significant decisions of this Commission, the harvester judgment.

PN29

This Commission has played a role in setting minimum wages for 100 years. Be assured the ACTU will strive to ensure the minimum wage is once again set by this esteemed and respected institution, set utilising proper principles in a fair, open and transparent way, a capacity to actually hear evidence and challenge evidence and opinion, set with a requirement to consider fairness, recognising people are not simply economic units. Mr Vice President, we look forward to seeing you sitting on a Full Bench hearing a minimum wage case and given the level of opposition to the current law and the respect the community has for this esteemed institution we do not believe you will have long to wait. We welcome you and wish you well in your role.

PN30

JUSTICE GIUDICE: Vice President Watson.

PN31

VICE PRESIDENT WATSON: Mr Minister, Mr Anderson, Mr Amendola and Mr Walton, thank you for your kind words. I am acutely aware of the significance of the legislative changes which were passed by the Parliament last year. In my view these changes viewed in their totality effectively establish a new system of workplace relations in Australia and in many ways a new role for this Tribunal within that system. I consider it to be a great honour to be appointed to the Commission at this time and looking forward to working with my colleagues on shaping the new role of the Commission under the revised Act.

PN32

Throughout my professional career I have strived to understand my clients objectives and sought to achieve those objectives to the best of my abilities. In this role the closest thing to client objectives is the objects clause of an inanimate Act of Parliament, with due respect, Mr Minister. I consider that in the course of exercising my functions under the Act I look forward to doing everything I can to help achieve those noble objectives. The measure of success of that goal I think is less likely to be the result of carefully crafted decisions and more depend on the sense of empowerment felt by employers and employees at the workplace level to resolve employment disputes themselves in a constructive and cooperative manner. In many cases they will require assistance but that assistance under the new provisions of the Act is assistance provided with restraint.

PN33

A very special thanks to my wife Roz, without her love and support I would not have achieved what I have in my career. To our children, Andrew, Clare, Georgie and Mick, thank you for being constant reminders of what is really important. To my parents, and my mother was able to travel from interstate to be here today, I thank them. They sacrificed a lot to give me the tertiary education that they did not have, and to my many friends and colleagues from my working career I thank them for their friendship and support and it's great to see so many of them here today.

PN34

I have had some lucky breaks during the course of my career. Before entering the law I was coordinating the representation of a large number of employers in a case, a major case in the predecessor of this Commission. During the course of the case one of the barristers we had engaged for the case mentioned to his instructing solicitor that I had a law degree and perhaps should be considered for a vacancy in the major law firm that the instructing solicitor was then a partner. That conversation led me to joining the firm which I have just left after 23 years working with that firm and I am pleased to be now joining that barrister and his then instructing solicitor who are amongst my colleagues as fellows members of this Commission.

PN35

Amongst those that I have had the privilege to work with and learn from during the course of my career I would like to mention three only in a very special way. Firstly the Industrial Relations Manager of Comalco Ltd, the late Kevin Gregson, the former Managing Director of Comalco Ltd, the late Terry Palmer, and the former Senior Deputy President of this Commission, the late Colin Polites. Thank

you all for your kind messages, they are indeed a solid basis for the next chapter of my career.

PN36

JUSTICE GIUDICE: Before adjourning I should on behalf of all of the members of the Commission add our warm congratulations to you, Vice President Watson, and our very best wishes for your term of office. Adjourn the Commission.

<ADJOURNED INDEFINITELY

[9.31AM]