

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Budget Estimates 2017 - 2018

#### Agency - Fair Work Commission

Department of Employment Question No. EMSQ17-004109

Senator Abetz asked on 30 May 2017 on proof Hansard page 14

Relates to previous Employment Question No EMSQ17-001961, Hansard of 30 March 2017 at pages 11 – 17 and 20-23, and the President's statement about early departures by presidential members (tabled 30 March 2017)

#### Question

#### FWC - Correspondence regarding Judges pension

Senator ABETZ: .....I now turn to the issue of the commissioners' judicial pensions. The president and I had a bit of a discussion about this last time. At the last estimates, on 30 March, when the Fair Work Commission appeared, President Ross referred to a letter, made on behalf of 10 long-serving presidential members of the commission and its predecessor, which queried when they became entitled to the maximum judges' pension. This was in the context of me asking about the recent retirement of senior members—which President Ross confirmed were presidential members appointed under the former act. The letter that President Ross referred to was made on behalf of 10 presidential members, I am assuming—and can you take that on notice—those 10 to which I referred to at the previous hearing. Have any of those other members or any other member, either former or current, written to the commission, to you as the general manager or to the president in relation to that issue? Are you aware of any such correspondence?

Ms O'Neill: At any time?

Senator ABETZ: Since those retirements.

Ms O'Neill: No, I am not. But I am happy to take that on notice.

CHAIR: Is anyone else at the table aware?

Senator ABETZ: On notice, can you make inquiries within the commission and with the president and see if any correspondence from any of those members, current or former, has been received by the commission—that is, correspondence addressed or copied to any of the commission, to you the general manager or the president?

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Senator ABETZ: The suggestion was made that certain people were debunking because at a particular age certain pension entitlements cut in and, therefore, it was a factor of age and pension entitlements, as opposed to any concerns about the Fair Work Commission. I am just wondering whether any correspondence has been received by the Fair Work Commission, by you as general manager or by the president, taking issue with that assessment, and whether in fact there has been correspondence indicating that the reason for departure by one or more of those 10 named was related to dissatisfaction with the way the commission was being run as opposed to certain pension entitlements cutting in. So if you can take that on notice, please, whether any such correspondence has been received. And if we can date that from 2012—the commissioner since 2012—again either addressed or copied to the commission to you as general manager, Ms O'Neill, or to the president, raising any issue with the culture or operation of the commission as being one of the reasons commissioners were debunking. And then on notice can you set out the inquiries you made to do that and provide copies of any correspondence that was received

## Answer

On review of the Hansard record, the Fair Work Commission (Commission) understands the three questions raised by Senator Eric Abetz on 30 May 2017 to be:

1. whether the 10 Presidential Members of the Commission on whose behalf the letter from Vice President Watson was sent are the same as the 10 members to whom Senator Abetz is said to have referred on 30 March 2017;
2. whether any of those Presidential Members or any other Members of the Commission have written or copied correspondence to the Commission or the General Manager or President of the Commission, since the retirement of any of the 10 Presidential Members referred to in question one, in relation to the Division 293 taxation issue relating to the judges' pension; and
3. whether, since 2012, any of the 10 Presidential Members referred to in question one, have written or copied correspondence to the General Manager or President of the Commission raising any issue as to the culture or operation of the Commission as being one of the reasons Members were retiring from the Commission, or that the reason for departure by one or more of them was related to dissatisfaction with the way the Commission was being run as opposed to the operation of certain pension entitlements.

### Question 1

In addressing the first question, it is convenient first to note a few matters by way of clarification and in the interests of avoiding any misunderstanding.

At the hearing on 30 March 2017, the President of the Commission referred to 2015 correspondence from former Vice President Watson to the Minister for Employment, regarding concerns with taxation issues relating to the judges' pension payable to certain Presidential Members. The President did not describe the letter as one which "queried when they [Presidential Members] became entitled to the maximum judges' pension", but noted that the letter from Vice President Watson was written on behalf of a number of Presidential Members appointed under the *Workplace Relations Act 1996*.<sup>1</sup>

The first question is whether the 10 Presidential Members on whose behalf the letter from Vice President Watson was sent, are "those 10 to which [Senator Abetz] referred to at the previous hearing [i.e. on 30 March 2017]".

The Commission was not informed of the names of the Presidential Members who were the subject of Vice President Watson's letter. The email sent by former Vice President Watson to the President on 29 October 2015, which attached a draft of the letter, was copied to nine Presidential Members.<sup>2</sup> This suggests that the Presidential Members the subject of the letter from Vice President Watson, were the Vice President and those on that circulation list. The responses to questions 1 to 3 are provided on the assumption that this inference is correct.

A further matter by way of clarification is that, at the Senate Estimates hearing on 30 March 2017, it appears that Senator Abetz referred to eight rather than 10 Presidential Members.

On the assumption made above, seven of these eight Presidential Members were Members the subject of Vice President Watson's letter.

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<sup>1</sup> Commonwealth of Australia 2017, *Senate Education and Employment Legislation Committee: Estimates: official Hansard*, 30 March 2017 p.22 and see the Department of Employment's response to QON SQ17-001959.

<sup>2</sup> See the response to QON EMSQ17-001961.

## **Question 2**

The second question is whether any of the 10 Presidential Members referred to in question one, or any other Members of the Commission, have written to the Commission, the General Manager or the President of the Commission, since the retirement of any of the 10 Presidential Members referred to in question one, in relation to the Division 293 taxation issue relating to the judge's pension.

The General Manager is informed by the Chief Financial Officer of the Commission that he has received some communications that would fall within this description.

It may be understood from Senator Abetz's description of the evidence given by the President on 30 March 2017 that the President was suggesting that Members of the Commission were leaving because at a particular age certain pension entitlements commenced and, therefore, it was a factor of age and pension entitlements, as opposed to any concerns about the Commission.

In his evidence on 30 March 2017, the President did not assert that eligibility for the maximum judges' pension was the reason that every individual Presidential Member chooses to retire from the Commission. Rather, the President's statement noted the fact that since the commencement of the *Fair Work Act 2009* (FW Act), only two of the 12 Presidential Members who had qualified for the maximum judges' pension chose to stay until the statutory retirement age. This fact (together with other information provided to the President) meant the recent resignations were anticipated.

## **Question 3**

Senator Abetz's third question is whether, since 2012, any of the 10 Presidential Members referred to above wrote to or copied correspondence to the General Manager or President of the Commission "raising any issue with the culture or operation of the Commission as being one of the reasons Commissioners were debunking" or that "the reason for departure by one or more of them was related to dissatisfaction with the way the Commission was being run as opposed to certain pension entitlements cutting in."

Inquiries were made of the President and General Manager of the Commission. Two documents were identified as potentially falling within the scope of this question:

- an internal email from then Vice President Watson to the President of 1 December 2015; and
- a memorandum from then Senior Deputy President O'Callaghan to the President dated 27 April 2017.

The President and the General Manager do not recall any other correspondence that meets this description.

In his email of 1 December 2015, former Vice President Watson criticises the exercise by the President of various statutory functions and powers, including in relation to the allocation of matters. The former Vice President expresses his opinion that an unspecified number of unnamed Presidential Members have either left or are contemplating leaving the Commission prior to reaching statutory retirement age for reasons that include the allocation of matters, the Commission's standing and the President's management style.

The memorandum from Senior Deputy President O'Callaghan was provided shortly prior to his retirement. It asserts the Senior Deputy President's reasons for retirement, in particular his dissatisfaction with the work allocated to him, and makes various other criticisms of the Commission's operations, the exercise by the President of his statutory functions and powers and the performance of other Members.

For the reasons which follow, the Commission would be grateful if the Committee gave further consideration to whether it would in the public interest to require communications of

this nature to be disclosed and therefore available in the public domain. The Commission respectfully submits that there are strong public interest considerations weighing against the disclosure of such material.

The Senate has accepted that in certain cases it will not require the production of documents on the grounds of public interest.<sup>3</sup> This is a case where the Committee should decide that in the public interest, the Commission should not be required to produce the documents. The reasons for which the Commission holds this view are explained below, however in summary they are:

1. it could compromise the independence of the Commission if the Committee was to require the Commission to provide information about the allocation of management responsibilities and matters to individual Members or to engage in public debate about these matters;
2. it would disclose personal information (as defined in the *Privacy Act 1988*) about the former Vice President and the former Senior Deputy President; and
3. it would affect the willingness of other Members to engage in frank discussions concerning the Commission in the future.

### *Background*

Although the Commission is not a court, the FW Act plainly intends for the Commission to be independent of the other arms of Government. The maintenance of public confidence in the independence and impartiality of the Commission is crucial to the functioning of the Commission and depends on the capacity of the President and other Members to operate free of external pressure and influence in exercising their statutory powers and carrying out their statutory functions.

The statutory framework preserves the independence of the Commission and protects Commission Members from outside interference in the performance of their functions and exercise of powers:

- the President of the Commission is not subject to direction by or on behalf of the Commonwealth (s 583);
- a Commission Member has, in performing his or her functions or exercising his or her powers as a Commission member, the same protection and immunity as a Justice of the High Court (s 580);
- Commission Members have tenure of appointment (s 629);
- as with Federal Court judges, the appointment of a Commission Member may (subject to very limited exceptions) only be terminated by decision of both Houses of Parliament for proved misbehaviour or incapacity (s 641);
- the President may not issue a direction to a Commission Member relating to a decision by the Commission (s 582(3)); and
- the FW Act includes various offences relating to the Commission. For example, it is a criminal offence to publish a statement that implies or states that a Commission Member has engaged in misconduct in relation to the performance of functions or the exercise of powers as a Commission Member, where the Member has not engaged in that misconduct and the publication is likely to have a significant adverse effect on public confidence that the Commission is properly performing its functions and exercising its powers (s 674(7)).

The President has established a panel system for the allocation of work to Members, as an aspect of his statutory function to ensure that the Commission performs its functions and exercises its powers efficiently and effectively. The Commission's current panels are:

- Major resource/infrastructure projects panel

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<sup>3</sup> Odgers' Australian Senate Practice (14th ed, 2016), pp. 662-667.

- Government & recreational services industry panel
- Manufacturing & building industry panel
- Transport, agriculture, mining & services industry panel
- Termination of employment panel
- Anti-bullying panel
- Organisations panel.<sup>4</sup>

Expert Panels also have particular functions in relation to annual wage reviews and assessing superannuation default funds.

Except in the case of the Expert Panels, a panel head has the main administrative responsibility for the work of each panel. Applications are allocated to the relevant panel and dealt with according to established procedures under the administration of the panel head.

Information about the allocation of matters to appeal Full Benches is set out on the Commission's website at: <https://www.fwc.gov.au/disputes-at-work/how-the-commission-works/appeal-a-decision-or-order/appeal-benches>.

*Disclosure would compromise the independence of the Commission*

In *Fingleton v The Queen* (2005) 227 CLR 166 the High Court recognised that the allocation of magistrates to particular localities and the assigning of magistrates to particular work were not merely matters of internal court administration, but were "intimately related to the independent and impartial administration of justice".<sup>5</sup> Gleeson CJ noted that decisions that directly or indirectly determine how the business of the court would be arranged and allocated, such as the assignment of judicial officers to cases, concern matters which go to the essence of judicial independence:

"... As was pointed out in *Minister for Immigration and Multicultural Affairs v Wang*, where it is the function of a head of jurisdiction to assign members of a court to hear particular cases, the capacity to exercise that function, free from interference by, and scrutiny of, the other branches of government is an essential aspect of judicial independence."<sup>6</sup> (reference omitted)

Gleeson CJ also observed:

"If a Chief Magistrate could be called to account, in civil or criminal proceedings, for decisions about how Magistrates Courts arrange their business, or about the assignment of magistrates to cases, or classes of case, the capacity for the erosion of independence is obvious."<sup>7</sup>

Those observations apply with equal force to the exercise by the President of his statutory powers and functions in determining how the business of the Commission is arranged and allocated.

The President of the Commission does not accept a number of the assertions made in the documents, but it is inappropriate for him to contest these by engaging in public debate on these matters. However, if the President is compelled by the Committee to produce the documents then it may become necessary, in the public interest, to engage in public debate in order to correct the public record. This puts the President in an invidious position, and would seriously compromise the Commission's capacity to fulfil its functions independently of Government.

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<sup>4</sup> All panel matters in Western Australia are allocated to Deputy President Bull. Commissioner Saunders is available to all panels with matters in the Newcastle/ Hunter region.

<sup>5</sup> (2005) 227 CLR 166 at paragraph [52] per Gleeson CJ.

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

It follows that it would compromise the independence of the Commission if the Committee was to require the Commission to provide information about the allocation of management responsibilities and matters to individual Members, such as former Vice President Watson and former Senior Deputy President O'Callaghan, or to engage in public debate about these matters. This is because the conclusion might later be drawn, rightly or wrongly, that the powers have been exercised or functions carried out in a particular way, because of the Committee's questions.

It is noted that the former President of the Commission, the Hon. Geoffrey Giudice AO, has previously declined to provide information of this kind.<sup>8</sup> The former President provided general, aggregate information to the Committee about the arrangement of Commission business and the allocation of Commission matters. However, in response to questioning about the data on which he, as President, managed workflow for individual Members, the former President referred to s 580 of the FW Act and stated that it was inappropriate for him to be questioned about this as:

“[I]n terms of perceptions by people who might come into contact with the tribunal, in my view it is open to the quite reasonable construction that some political pressure is being put on me in relation to the way in which I carry out functions and exercise powers under the act.”<sup>9</sup>

Further, in circumstances where it would not generally be in the public interest for the Commission to enter into a public debate about the way in which statutory functions and powers are exercised, disclosure of information about individual Commission Members has the potential to undermine public confidence in, or unfairly damage the reputation of, particular Members or the Commission itself.

For example, at the Additional Estimates hearing on 23 February 2011, in response to questioning about the number of days that individual Members sat, the former President gave the following evidence:

“... From a budget and management point of view, aggregate information is obviously important about the amount of work that is generally carried out by the tribunal. Once you start to focus on individual members and differentiate between them, you inevitably raise the prospect that people will make judgments based on that differentiation. Somebody will say, ‘This member worked X number of days per year and this member worked Y number of days per year,’ and that there is some reason for that difference, which reflects the competence or otherwise of one or other of the members. That is the essential vice in producing individual information, which will really be quite damaging ...”<sup>10</sup>

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<sup>8</sup> Commonwealth of Australia 2010, *Senate Education, Employment and Workplace Relations Legislation Committee: Budget Estimates: official Hansard*, 1 June 2010 pp. 152-153.

Commonwealth of Australia 2010, *Senate Education, Employment and Workplace Relations Legislation Committee: Supplementary Budget Estimates: official Hansard*, 20 October 2010 pp. 100-102.

Commonwealth of Australia 2011, *Senate Education, Employment and Workplace Relations Legislation Committee: Additional Estimates: official Hansard*, 23 February 2011 pp. 91-95.

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<sup>9</sup> Commonwealth of Australia 2010, *Senate Education, Employment and Workplace Relations Legislation Committee: Supplementary Budget Estimates: official Hansard*, 20 October 2010 pp. 100-102.

<sup>10</sup> Commonwealth of Australia 2011, *Senate Education, Employment and Workplace Relations Legislation Committee: Additional Estimates: official Hansard*, 23 February 2011 pp. 93-94.

*Privacy considerations*

In addition to these concerns, the Commission is concerned that the documents include information as to the former Members' opinions and circumstances that is personal information within the meaning of the *Privacy Act 1988*, and that the former Members have not put into the public domain. The Commission understands that the Committee must conduct its Estimates proceedings in public. In particular, former Senior Deputy President O'Callaghan indicated in his memorandum that he had not publicised his views in the memorandum and had not circulated it further.

*Prejudice capacity for Commission Members to engage in frank discussions*

Production of the documents would also prejudice the capacity for Commission Members to engage in frank, confidential discussions with its President about the operations of the tribunal. This could reasonably be expected to affect the willingness of Commission Members to proffer advice and views fearlessly and candidly in the future. For this reason, there are strong public interest grounds for communications of this nature not being put into the public domain.

*Submission in relation to question three*

Accordingly, the Commission respectfully submits that the Committee ought not press for the Commission to provide it with a copy of the 27 April 2017 memorandum from then Senior Deputy President O'Callaghan to the President or the email of 1 December 2015 from then Vice President Watson to the President.

For the same reasons, the Commission respectfully submits that the Committee ought not decide that the circumstances warrant an order for the production of the documents, for the purpose of Resolution 1(2) agreed to by the Senate on 25 February 1988.