

Senate Standing Committee on Education and Employment - Employment

**QUESTIONS ON NOTICE
Supplementary Budget Estimates 2014-2015**

Agency - Fair Work Commission

Department of Employment Question No. EM1593_15

Senator McKenzie asked on 23 October 2014 on proof Hansard page 32

Question

FWC - Conduct of Mr Harcourt

CHAIR: Can I refer then on to some tweets by Mr Harcourt on 7 and 8 July. If the committee is not au fait with the code of conduct, it actually goes to members of the commission ping required under 4.1(iii) Political ties:

An appearance of continuing ties, such as might occur by attendance at political fundraising events, should be avoided.

So it is the appearance that we are worried about. Similarly, later under '(vi)

Participation in public debate':

> Members should avoid involvement in political controversy.

> Expressions of views on public or private occasions must also be considered carefully as they may lead to the perception of bias.

I think you would agree, Ms O'Neill, that the integrity of the commission and public confidence relies on members of the commission actually not displaying bias? Would you agree?

Ms O'Neill: I would certainly agree with that?

CHAIR: Thank you. So, further to the counselling by the president of Mr Harcourt, he tweeted on 7 July:

Rudd stimulus package best designed and timed in the world.

I cannot read the hashtag but I am happy to spell it out. And on 8 July:

No independent group supports Abbott on carbon tax replacement.

I have a view about the partisan nature of those comments and how they may be perceived in the Twittersphere about bias. Would you have a comment to make about whether they could be perceived as biased comments?

Senator CAMERON: Chair, you are asking for an opinion. This is an opinion you are asking for.

Senator Abetz: Ms O'Neill and I have just had a chat and if I might suggest, I half except what Senator Cameron is saying, it would be very difficult for Ms O'Neill to comment on that. However, it would be appropriate for her to take it on notice and refer it to the president for his answer on notice

CHAIR: Ms O'Neill, are you happy to do that?

Ms O'Neill: I am.

Answer

FWC Members Code of Conduct

Section 581B of the *Fair Work Act* 2009 (the Act) provides that, after consulting the other Members of the Fair Work Commission, the President may determine a Code of Conduct for Members of the Commission.

The President has published a Member Code of Conduct. The Code provides a guide to Members appointed to the Fair Work Commission, and to a significant extent is based on the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* (second edition).

The Member Code of Conduct does not purport to lay down a prescriptive set of rules to govern Member behavior. The primary responsibility for deciding whether a particular activity or course of conduct is or is not appropriate rests with the individual Member.

The Code includes guidance in relation to integrity and personal behavior, including matters to consider if Members choose to participate in public debate.

On 15 July 2014 the President wrote to Mr Harcourt expressing his view that certain previous tweets of Mr Harcourt were not consistent with the Member Code of Conduct and that such public comments had a very real potential to adversely affect public confidence in the Commission. In response, Mr Harcourt indicated to the President that he had taken this advice on board. The President's correspondence and Mr Harcourt's response both post-date the two tweets referred to by Senator McKenzie of 7 and 8 July 2014.

The *Fair Work Act* does not provide the President with powers to take disciplinary action against a Member for breaching the Member Code of Conduct. In these circumstances, the President has dealt with the matter so far as the statute empowers him to do so.

Under the Act Members are ultimately responsible for their conduct to the Parliament of Australia.

It would not be appropriate for the President to comment as to whether a Member might be perceived to be biased.

Members of the Commission, including Expert Panel Members such as Mr Harcourt, take an oath or affirm that they will faithfully and impartially perform the duties of their office. Members are bound to act in a judicial manner. They have adjudicative independence and are not subject to direction from the President or anyone else about decisions they make in matters allocated to them.ⁱ

The courts have laid down the tests for assessing whether judges and members of tribunals such as the Commission are affected by bias. The test for apprehended bias has been described by the High Court in the following terms:

First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.ⁱⁱ

The appropriate course is for any concern about bias to be put to the Member by an interested party in the proceedings concerned. The decision of the Member as to

whether or not to disqualify himself or herself from the proceedings, would be subject to the appeal mechanisms provided for by the statute.

Complaints process and disciplinary action

The Act sets out the process by which the President is to deal with “a complaint about the performance by another Member of his or her duties”.ⁱⁱⁱ Like the corresponding judicial complaints process, this process is confined to complaints about the performance of duties. It does not apply to complaints about a Member’s conduct in a purely private capacity.

The President’s powers under the Act in dealing with complaints are limited. Subsection 581A(1) provides that the President may: (a) deal [in the manner prescribed in subsection (2)] with a complaint about the performance by another FWC Member of his or her duties; and (b) take any measures that the President believes are reasonably necessary to maintain public confidence in the FWC, including (but not limited to) temporarily restricting the duties of the FWC Member.

The President has established a complaints process consistent with the statute. The process is published on the website at: www.fwc.gov.au/about-us/contact-us/complaints-feedback/procedure-dealing-with-complaints-about-members. If a complaint is found to be sufficiently serious, the Act requires the President to refer the complaint to the Minister. It is then a matter for the Minister whether the Parliament should consider terminating the Member’s appointment.

The Act also provides for the Minister to consider and deal with a complaint about a Member (for the purpose of considering whether the Parliament should consider termination of the Member’s appointment, or whether the Governor-General should be advised to suspend the Member).^{iv}

The Fair Work Commission plays no part in the appointment or termination of the appointment of Expert Panel Members.

The Act prescribes limited circumstances in which a Member can be suspended or have his or her appointment terminated: misbehavior or incapacity; bankruptcy; certain absences (sections 641-643). In addition, subsection 644(2) provides that the Governor-General must terminate the appointment of an Expert Panel Member if the Expert Panel Member engages in paid work that, in the President’s opinion, conflicts or may conflict with the proper performance of his or her duties.

No circumstances have arisen that have led to subsection 644(2) being invoked.

ⁱ Section 582(3), *Fair Work Act 2009*

ⁱⁱ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at p.345

ⁱⁱⁱ Section 581A, *Fair Work Act 2009*

^{iv} Section 641A, *Fair Work Act 2009*