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Australia's National Workplace
Relations Tribunal

31 July 2014

Senator Bridget McKenzie, Senator for Victoria
PO Box 6100
Senate
Parliament House
CANBERRA, ACT 2600

The Honourable
Justice Iain Ross AO
President

Dear Senator

Correspondence from Senator Kroger regarding Expert Panel Member Harcourt

I write to you in your capacity as Chair of the Education and Employment Legislation Committee (Committee) in response to correspondence to me from Senator Kroger regarding Expert Panel Member Tim Harcourt. As Senator Kroger first raised her concerns with me in the Committee meeting on 2 June 2014 and I understand that the Senator's term of service has now expired, I thought it appropriate to direct my response to you.

As you are aware, Senator Kroger's correspondence of 3 and 19 June 2014 drew to my attention her concerns that Mr Harcourt:

- had made "politically partisan comments" on his Twitter account on 13 and 14 May 2014, and in a television interview on Sky News on 26 September 2013; and
- as reported in the *Australian Financial Review* on 19 June 2014, had participated in a "political fundraising lunch" on 20 February 2014.

Senator Kroger was concerned that these activities "may breach section 4.1(iii) of the Fair Work Commission's *Member Code of Conduct*" and "accordingly, undermine the maintenance of public confidence in the Commission".

Section 4.1(iii) of the *Member Code of Conduct* provides that:

Although active participation in or membership of a political party before appointment would not of itself justify an allegation of bias or an appearance of bias, it is expected that, on appointment, a Member will not continue such involvement with political parties. An appearance of continuing ties, such as might occur by attendance at political fundraising events, should be avoided.

As I indicated during my discussion with Senator Kroger in the Committee meeting, the *Member Code of Conduct* was drawn from the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* and, like that Guide, is intended to provide guidance to Members of the Commission as to the conduct expected of them, but is not legally binding.

While the *Fair Work Act 2009* provides for the President of the Commission to determine a Code of Conduct, the Act does not require Members of the Commission to comply with the Code of Conduct or provide the President with powers to take disciplinary action against a Member for breaching it. As is appropriate for public office holders performing quasi-judicial functions, Members are ultimately answerable for their conduct to the Parliament.

After receiving each of Senator Kroger's letters, I wrote to Mr Harcourt conveying the Senator's concerns and expressing my own views on these matters. I advised Mr Harcourt that in my view the comments made in the tweets complained of and in the Sky News interview were not consistent with the *Member Code of Conduct*. I also advised him that public comments of that nature have a very real potential to adversely affect public confidence in the Commission.

In relation to Mr Harcourt's apparently unwitting participation in a political fundraising event, I urged him in future to more fully investigate the nature of any public event he is invited to participate in and to carefully consider whether participation might put public confidence in the Commission at risk.

Mr Harcourt has indicated that he has taken my advice on board and also that in future he will check the nature of functions he is invited to participate in to ensure that his participation is consistent with the *Member Code of Conduct*.

Yours sincerely



JUSTICE IAIN ROSS AO
President