



SENATE ESTIMATES COMMITTEE 28 MAY 2012

Opening statement by Justice Ross

1. I have been President of Fair Work Australia since 1 March this year.
2. Over the past 12 months or so Fair Work Australia has been subjected to sustained criticism about the time it has taken to complete investigations into the HSU.
3. Two investigations have been undertaken.
4. An inquiry into the HSUA No. 1 Branch commenced on 23 January 2009 and an investigation commenced on 27 April 2010. The Delegate's investigation concluded some 20 months later, on 23 December 2011. The General Manager announced her decision in respect of the Delegate's report on 14 March 2012 and initiated Federal Court proceedings on 23 May 2012.
5. The inquiry into the HSU National Office commenced on 6 April 2009 and an investigation commenced on 27 March 2010. The Delegate concluded his investigation two years later, on 28 March 2012. On 7 May ~~2010~~ ²⁰¹² the General Manager announced her decisions in relation to the Delegate's report.
6. I accept that the HSU investigations are unprecedented in terms of size and complexity. However, for my part, I agree with the statement made by the General Manager before the Senate Estimates Committee in February 2012 in relation to the time taken to complete these matters. The inquiries and subsequent investigations have taken an unreasonably long time, raising legitimate questions.
7. KPMG is presently undertaking an independent review of the conduct of the investigations. The terms of reference of that review were announced by the General Manager on 7 May 2012 (Attachment 1).
8. There are significant lessons to be learnt and improvements to be made in relation to the conduct of such inquiries. The KPMG review will be an important part of that process and is expected to be completed by the end of July 2012.
9. One issue which must be addressed is already apparent. It is not generally understood that there are two arms to Fair Work Australia.
10. The adjudicative arm (the Tribunal) deals with matters such as the facilitation of bargaining; the prevention and resolution of industrial disputes; the maintenance of a safety net of fair minimum wages and a range of individual disputes, including unfair dismissals.
11. The administrative arm (the Administration) supports the Tribunal in carrying out its functions and also carries out a range of statutory functions in relation to registered organisations under the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act).

12. The HSU investigations were carried out by the administrative arm of Fair Work Australia pursuant to powers conferred on the General Manager by the Registered Organisations Act. The Tribunal arm of Fair Work Australia has nothing to do with such inquiries and investigations. As President, I have no power to direct the General Manager in the exercise of her powers to conduct an investigation under the Registered Organisations Act. Nor do I have power to disclose information obtained in such an investigation. In correspondence to Senator Abetz on 2 April 2012, I detailed my position in respect of these matters and a copy of that correspondence is attached to this statement.
13. Despite the fact that these investigations have nothing to do with the Tribunal, it is clear that the criticism made about the process has significantly damaged the Tribunal's reputation.
14. It is for those reasons that I have argued, publicly and in my oral submission to the Review into the Fair Work Act, that some legislative changes are required in order to clarify the Tribunal's role and its independence. The key legislative changes relate to the name of the Tribunal and the need to make clear the distinction between the adjudicative and administrative bodies which operate under the Fair Work Act.
15. The name of the adjudicative body established by the Act - Fair Work Australia - is problematic for two reasons.
 - (i) It undermines the independence of the Tribunal. The media and the community generally do not distinguish between the Tribunal on the one hand and the Fair Work Act on the other. Both are abbreviated to FWA. As a consequence, criticism of the Act is interpreted as criticism of the Tribunal. There is also considerable confusion between the functions carried out by the General Manager and those performed by the Tribunal. The media simply refers to FWA, in both contexts.
 - (ii) It creates confusion and is an impediment to access to justice. It is not uncommon for litigants in person to file applications with the Fair Work Ombudsman rather than with FWA. This is symptomatic of the confusion created by the 'badging' of the two organisations. (see *Warrell v Fair Work Australia* [2012] FCA 267).
16. The Tribunal should be re-named and that name should be different to the title of the Act.
17. In addition to renaming the adjudicative body there must be a clear separation between the adjudicative and administrative bodies established by the Act. The administrative body should be renamed the Registry and be headed by the General Manager.
18. The independence and standing of the Tribunal established by the Act is central to the operation of the Act and the attainment of Parliament's objectives.

19. Justice institutions rely ultimately on public confidence and the consent of the governed.
20. My task in the months and years ahead is to repair the reputational damage to the Tribunal. While the legislative changes I have referred to are important, I accept that they are not enough. The Tribunal must become more efficient and accountable.
21. In the coming weeks I will be holding a series of meetings with members to discuss the future direction of the Tribunal. In July this year I will release a document setting out the actions I intend to take. Those actions will include timeliness benchmarks; measures to improve access to the Tribunal and a greater level of engagement with industry.
22. I wish to make two observations about Mr Thomson's statement in the House of Representatives on 21 May 2012.
23. The first concerns the allegation that the delegate conducting the investigation, Mr Nassios, was 'selective and biased'. These are serious allegations, made against a career public servant. The appropriate forum to test such allegations is in a court of law.
24. The General Manager of Fair Work Australia has taken steps to file proceedings in the Federal Court in relation to the report of the investigation into the HSU National Office. Any allegation of bias can be tested in those proceedings. As I am a judge of that court it is not appropriate for me to comment on the merits of Mr Thomson's allegations and I do not propose to do so.
25. The second matter raised by Mr Thomson concerns a member of the Tribunal, Vice President Lawler. Mr Thomson refers to the fact that Vice President Lawler is Ms Jackson's partner and then states that there are 'questions to answer' in relation to whether the Vice President had any influence in Mr Nassios' report or in the time taken to complete the report. The implication being that the Vice President has engaged in misconduct in that he has sought to influence Mr Nassios' investigation. I wish to make two points in relation to this suggestion.
26. First, no one has provided me with any evidence to support the allegation that Vice President Lawler has sought to influence, in any way, the HSU investigations. I have made enquiries of the General Manager about this issue and have been informed that she is not aware of any such evidence.
27. Second, the Vice President has assured me that the imputations of misconduct by him arising from Mr Thomson's statement, are false. It needs to be remembered that the Vice President is a judicial officer who has taken an oath to faithfully and impartially perform the duties of his office.
28. For these reasons, I do not propose to investigate the matters raised by Mr Thomson.

29. Even had I been persuaded that there was some basis for the suggestion of misconduct, the Fair Work Act, like its legislative predecessors, does not confer any express power on the President to investigate complaints against members or to take any action in the event that a complaint is substantiated.
30. As is the case with Federal judges, the power to terminate the appointment of a member of the Tribunal lies with the Parliament. Such a power may only be exercised on the basis of proved misbehaviour or if a member is unable to perform the duties of their office because of physical or mental incapacity. It is appropriate that such powers are reserved for the Parliament and that they are only exercisable in limited circumstances.
31. Tenure is an important means of preserving the independence of the Tribunal.
32. For my part I think that a more effective complaints mechanism should be put in place to deal with complaints against members. Public confidence in a justice institution is enhanced by increased transparency and accountability. An effective complaints system plays an important part in that regard.
33. At present there are two bills before the Parliament which facilitate the adoption of a process for dealing with complaints against Federal judges [*Courts Legislation Amendment (Judicial Complaints) Bill* and the *Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill*.] In my view, the scope of those bills should be expanded to include Fair Work Australia.
34. Finally, I have limited my observations about the current legislative framework to those matters which affect the independence and standing of the Tribunal. Workplace relations is a contentious field. There are a range of views about the appropriate legislative balance between the interests of employers, employees and their representatives. Where that balance lies is a matter for Parliament. It is not appropriate for me, or any member of Fair Work Australia, to enter the public debate about such issues and I do not intend to do so.

JUSTICE ROSS

28 May 2012

Terms of Reference

Independent review of Fair Work Australia's HSU investigations

The investigation process followed by Fair Work Australia in relation to the investigations into the Victoria No. 1 Branch and National Office of the Health Services Union (HSU) will be reviewed to determine:

- whether the investigations have been conducted appropriately in terms of relevant investigation standards and operating procedures
- whether there are any opportunities for improvement to Fair Work Australia's investigation procedures, and
- whether the investigations have considered all reasonable lines of inquiry.

In considering the above, the review will include but not necessarily be limited to:

- reviewing the investigations' plans and compare to relevant investigation standards and operating procedures
- determining the appropriateness of the investigation teams' skills and whether sufficient people resources were applied to the investigations
- reviewing and assessing the overall quality of the investigations' files
- reviewing the investigations and analysing the cause of any delays in the completion of the investigations and whether such delays could have been avoided
- considering the overall integrity of the investigation process and whether there are any indications of potential interference, and
- reviewing all internal and external communications including, for example, deviations from the investigation plans, and restrictions or limitation that may impact the completion of the investigation plans



FAIR WORK
AUSTRALIA

2 April 2012

THE HONOURABLE JUSTICE ROSS AO
PRESIDENT

Senator E Abetz
Leader of the Opposition in the Senate
Shadow Minister for Employment and Workplace Relations
Liberal Senator for Tasmania

Parliament House
CANBERRA ACT 2600

Dear Senator,

I refer to your correspondence of 12 March 2012 relating to the investigation concerning the Health Services Union of Australia (HSUA) and whether Fair Work Australia (FWA) should provide certain information to the police. In that correspondence you state:

"I note that under section 655(2) of the Fair Work Act, there is a capacity for the President to disclose or authorize the disclosure of information where that information will assist the administration or enforcement of a law of the Commonwealth, a State or a Territory.

Unless you are of the view that such disclosure could not assist the NSW and Victorian Police Forces, I would invite you to immediately disclose or authorise the disclosure of the relevant materials to the NSW and Victorian Police Forces as you are empowered to do under section 655(2)."

I assume that the 'relevant materials' to which you refer comprise information obtained in the course of the investigation by the General Manager of FWA or her delegate concerning the HSUA. Your statement that I am empowered to release this material pursuant to s.655(2) is based on an opinion from Mr Stuart Wood SC, which is attached to your correspondence. Mr Wood's opinion relevantly states that the President of FWA has a broad power of direction over the General Manager, pursuant to s.582 of the Fair Work Act 2009 (the Act) and is empowered, under s.655, to disclose information if the President reasonably believes that such disclosure is likely to assist in the enforcement of a law of a State.

Given the context, the clear inference from Mr Wood's opinion is that I have the power to release the 'relevant materials to the police', under s.655, or to direct the General Manager to do so, under s.582. Both propositions are misconceived. The relevant investigation is being conducted pursuant to powers conferred on the General in Part 4 of Chapter 11 of the Fair Work (Registered Organisations) Act 2009 (the RO Act). In my view I have no power to direct the General Manager in the exercise of her powers to conduct an investigation under the RO Act and nor do I have power to disclose information obtained in such an investigation.

Turning first to the President's power to give a direction to the General Manager, s.582 of the Act states:

- (1) The President may give directions under subsection (2) as to the manner in which FWA is to perform its functions, exercise its powers or deal with matters.
- (2) The President may give a direction that is of a general nature, or that relates to a particular matter, to one or more of the following persons:
 - (a) an FWA Member;
 - (b) a Full Bench;
 - (c) the Minimum Wage Panel;
 - (d) the General Manager

The power to give directions in s.582(2) is clearly limited by s.582(1) to directions as to the 'manner in which FWA is to perform its functions, exercise its powers or deal with matters'.

When the General Manager or delegate is conducting an inquiry or an investigation in accordance with Part 4 of Chapter 11 of the RO Act, they are *not* performing functions or exercising powers as FWA. The various powers conferred under Part 4 of Chapter 11 of the RO Act are vested in the General Manager. In other words, the General Manager or delegate is performing a function conferred on the General Manager by a law of the Commonwealth (s 657(1A)(b) of the Act) rather than an aspect of the General Manager's function to assist the President in ensuring that FWA performs its functions and exercises its power (s 657(1) of the Act).

Accordingly, the power of the President to give directions to the General Manager under s.582(2) of the Act does not extend to directing the General Manager in relation to the conduct of inquiries under s.330 of the RO Act or investigations under s.331 of the RO Act.

In relation to the disclosure of information, s.655(2) of the Act provides:

655 Disclosure of information by FWA

Information to which this section applies

- (1) This section applies to the following information:
 - (a) information acquired by FWA, or a member of the staff of FWA, in the course of performing functions or exercising powers as FWA;
 - (b) information acquired by a person in the course of assisting FWA under section 672, or in the course of performing functions, or exercising powers, as a consultant under section 673.

Disclosure that is necessary or appropriate, or likely to assist administration or enforcement

- (2) The President may disclose, or authorise the disclosure of, the information if the President reasonably believes:
 - (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, of FWA; or
 - (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

Section 655(2) expressly authorises the President to disclose information in certain circumstances.

The question in the present context is whether 'the relevant materials' comprise information that can be disclosed under s 655(2).

The President's power to disclose or authorise the disclosure of information under s655(2) only applies to information of the type referred to in s655(1). Paragraph 655(1)(b) is not relevant for present purposes and s655(1)(a) only refers to information acquired 'in the course of performing functions or exercising powers as FWA.'

As mentioned above, when the General Manager or delegate is conducting an inquiry or an investigation in accordance with Part 4 of Chapter 11 of the RO Act, they are performing functions or exercising powers of the General Manager, rather than of FWA.

Accordingly, s.655(1) of the Act does *not* apply to information acquired by the General Manager or delegate in the course of performing functions or exercising powers under s 330 or s 331 of the RO Act and therefore s.655(2) does not authorise the President to disclose or authorise the disclosure of 'the relevant materials' to the NSW and Victorian police forces.

I regret the delay in responding to your correspondence but as you would appreciate I only commenced on 1 March and have been occupied with the management of the review of modern awards and the Annual Wage Review.

Yours sincerely

Justice Iain Ross AO
President