



Law Council
OF AUSTRALIA

Professor (Emeritus) Sally Walker
Secretary-General

14 November 2012

Committee Secretary
Senate Education, Employment and Workplace Relations Committees
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Canberra ACT 2600

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Dear Sir/Madam,

Fair Work Amendment Bill 2012

I am pleased to enclose a submission prepared by the Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia in relation the *Fair Work Amendment Bill 2012*. Commentary on the complaints process has also been considered by the Law Council's Judicial Issues Working Group.

Due to time constraints this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely,

Professor Sally Walker
Secretary-General

Fair Work Amendment Bill 2012

Senate Education, Employment and Workplace Relations Legislation Committee

**Submission by the Industrial Law Committee of the Federal Litigation Section of the
Law Council of Australia**

14 November 2012

This submission has been prepared by the Industrial Law Committee (the Committee) of the Federal Litigation Section of the Law Council of Australia. It identifies concerns held by the Committee in respect of three provisions of the *Fair Work Amendment Bill 2012* (the Amendment Bill). Commentary on the complaints process has been considered by the Law Council's Judicial Issues Working Group.

1. Proposed section 615C – Transfer to the President from a single Member or a Full Bench (Schedule 8, Part 3 of the *Fair Work Amendment Bill 2012*)

Under the *Fair Work Act 2009* (Cth) (the Fair Work Act), the President of Fair Work Australia (FWA) has the power to determine a matter himself or herself or allocate it for determination to a single Member of FWA (s 612) or to a Full Bench (s 615).

Proposed s 615A provides that upon an interested party making an application to the President for a matter allocated to a single Member to be transferred to a Full Bench, the President must reallocate the matter to a Full Bench if satisfied that "it is in the public interest to do so". The Committee considers that to be an appropriate provision.

Proposed s 615C provides that after the President has allocated a matter to a single Member or a Full Bench the President can decide "to perform the function or exercise a power" himself or herself. Upon that occurring, the earlier direction that the single Member or Full Bench determine the matter is revoked. There are no pre-conditions to that decision and it can occur at any time, even during a proceeding. The President does not need to have considered submissions, nor be satisfied that it is in the public interest to do so.

The Explanatory Memorandum says the provision is modelled on s113 of the *Workplace Relations Act 1996* (Cth) (the Workplace Relations Act). That section provided that in respect of a matter that had been allocated to a single Member the President could decide to either deal with it himself or herself or refer it to a Full Bench. It did not provide the President with a power to take over a matter that had been referred to a Full Bench.

The Committee considers it inappropriate that the Fair Work Act should include a provision that empowers the President to take over a matter allocated to a Full Bench and deal with it. Should such a power be exercised it would have the potential to reduce the standing of the Tribunal, given the potential for such an action to be characterised or perceived as an attack on the independence and/or competence of the Full Bench. That it might occur as a consequence of, or following submissions made by, a party would tend to emphasise the potential for the action to be portrayed as one intended to achieve a result or procedure different from that which the Full Bench might have expected to determine or adopt.

2. Schedule 8, Part 6 of the *Fair Work Amendment Bill 2012* – New Statutory Vice-Presidents

Members of FWA are appointed to a quasi-judicial position. The status of FWA depends upon the independence and impartiality of its Members being maintained and being seen to be maintained.

As a general principle, once a person has been appointed to sit on a Court or independent Tribunal with designated powers and privileges, any change that would have the effect of removing or reducing that particular person's powers or privileges while not affecting the powers and privileges of other Members of that Tribunal, has

a tendency to undermine the independence of the Court or Tribunal. That is so because such action can be portrayed as being done because the individual Member is not in favour with the Parliament or the Executive.

Under the Fair Work Act, FWA consists of a President, Deputy Presidents and Commissioners (s 575).

Under the previous Workplace Relations Act, the Australian Industrial Relations Commission (AIRC) consisted of a President, two Vice Presidents, Senior Deputy Presidents, Deputy Presidents and Commissioners.

Upon the commencement of the Fair Work Act, the existing Vice Presidents, Senior Deputy Presidents and Deputy Presidents of the AIRC were all appointed as Deputy Presidents of FWA. However, they remained entitled to retain their designation (ie title), respective status and remuneration: see *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), schedule 18, items 1, 2 and 4.

In particular, while the two incumbent Vice Presidents were appointed as Deputy Presidents to FWA they continued to be designated as Vice Presidents with status above that of all other Deputy Presidents. Consistent with their seniority they continued to be allocated senior functions within the Tribunal.

Proposed Part 6 of Schedule 8 in the Amendment Bill seeks to amend the Fair Work Act to provide that in addition to Deputy Presidents (including the two current Deputy Presidents who are designated Vice Presidents) there will be two Vice Presidents. The Vice Presidents are to be given additional responsibilities and have a higher status than existing Deputy Presidents.

Should the Government appoint the two individuals currently designated Vice President to the two statutory Vice President positions, then their status will not be reduced. However, if the two Deputy Presidents designated Vice Presidents are not so appointed, the effect of the Bill will be to reduce their status. Henceforth responsibilities that would have been capable of being delegated or given to them by nature of their senior status would instead be given to the new statutory Vice Presidents.

This would have the tendency to reduce the independence of the Tribunal in that it will reduce the role and privileges associated with particular individuals.

The Committee's concerns would not arise if those individuals currently designated Vice President are appointed to the new statutory Vice President positions, however given that applications are required for the positions, no such outcome could be regarded as certain even if intended.

3. Proposed section 581A – Dealing with a complaint about a FWC Member (Schedule 8, Part 7 of the *Fair Work Amendment Bill 2012*)

Part 7 of the Amendment Bill contains proposed amendments that provide for the manner by which complaints about FWC Members will be dealt with.

The Part provides for the President of the proposed Fair Work Commission (FWC) to deal with complaints. The Explanatory Memorandum states that the provisions in the Part are broadly modelled on provisions contained in the *Courts Legislation Amendment (Judicial Complaints) Bill 2012* (Cth).

The Law Council provided a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Courts Legislation Amendment (Judicial*

Complaints) Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 in April 2012.¹ In that submission the Law Council supported the establishment of a process to investigate complaints against judicial officers, as a means to enhance the transparency and integrity of the judicial system.

While the Law Council continues to support a judicial complaints process, including its application to FWC Members under the Amendment Bill, the Committee wishes to raise the following concerns.

Independence of Adjudicative Function

The Committee holds a general concern that vesting power in one Member of a Tribunal or Court to investigate complaints and make findings in respect of other Members of the same Tribunal or Court might create the impression that Members, while in fact all having an independent duty to hear and determine matters in accordance with their merits, are subservient to the FWC President and/or are required in some manner to comply with the President's views.

This concern is magnified by the Committee's view that as drafted, a 'complaint' about a FWC Member could include a complaint about the content or outcome of a decision or determination, a matter which properly should only be the subject of appeal rather than a complaint.

The President does not and should not have the capacity to direct, or even influence, other members in the discharge of their adjudicative powers and responsibilities: see for example, the observations of the High Court, in respect of the independence of judges in re: *Hermie Generosa Colina Ex parte: The President Trevor Donald Torney* (1999) 166 ALR 545 at [29].

That case involved a matter where an individual was before the Family Court for alleged contempt consisting of disparaging remarks made about the Court. The Chief Justice of the Court had given a speech defending the Court against criticisms generally. The individual before the Court argued that the publicly stated attitude of the Chief Justice would bias the individual judge dealing with his contempt matter and accordingly that a member of the Family Court could not deal with the contempt matter.

Gleeson CJ and Gummow J at [29] dealt with the argument as follows:

"The flaw in the argument is that it assumes a relationship between a Chief Justice and a member of his or her court which is contrary to fundamental principles of judicial independence. It is frequently overlooked that the independence of the judiciary includes independence of judges from one another. The Chief Justice of a court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibilities. The Chief Justice of the Family Court has, by virtue of s 21B of the Family Law Act, responsibility for ensuring the orderly and expeditious discharge of the business of the court. That administrative responsibility does not extend to directing, or influencing, or seeking to

¹ Law Council of Australia Submission to the Senate Legal and Constitutional Affairs Committee, *Courts Legislation Amendment (Judicial Complaints) Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012*, 30 April 2012. Available at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=05846C4A-CE5D-5A68-DC8B-A57BC786EB4D&siteName=lca.

direct or influence, judges as to how to decide cases that come before them.”

Proper avenues of appeal are provided for to correct error. The President should not have the power separately to take action against a Member who, for example, makes a decision or determination which is plainly wrong and thereby may create the impression of affecting public confidence in the tribunal.

While the Explanatory Memorandum states that ‘a complaint about the performance by another Member of his or her duties will not include complaints about matters in cases that are capable of being raised in an appeal’, there is no proposed provision that defines a ‘complaint’ in a manner that would ensure that is the case. Indeed the expression used in proposed s581A and s641A, namely ‘a complaint about the performance by [an] FWC Member of his or her duties’ is an expression that could include a complaint about the content or outcome of a decision.

The Law Council considers it to be very important to ensure that it is clearly expressed that nothing in the amending legislation could be taken to compromise the fundamental principle of judicial independence that (in the case of these amendments), the President does not and should not have the capacity to direct, or even influence, other members in the discharge of their adjudicative powers and responsibilities.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.