



AUSTRALIAN SENATE

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CLERK OF THE SENATE

D15/55588

23 November 2015

Senator Bridget McKenzie  
Chair  
Senate Education and Employment Legislation Committee  
Parliament House  
Canberra ACT 2600

Dear Senator McKenzie

On 22 November 2015, I received the attached correspondence from Ms Jane Carrigan concerning evidence given to the Senate Education and Employment Legislation Committee by the President of the Fair Work Commission, the Hon Justice Ross AO.

I indicated to Ms Carrigan that I would pass on her correspondence to the Committee for consideration.

Yours sincerely

(Rosemary Laing)

PRIVATE AND CONFIDENTIAL



22 November 2015

Dr Rosemary Laing  
Clerk of the Senate  
PO Box 6100  
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CANBERRA ACT 2600

By email: [clerk.sen@aph.gov.au](mailto:clerk.sen@aph.gov.au)

Dear Dr Laing

*Re: Appearance of the President of the Fair Work Commission (FWC), Hon Justice Ross AO before the Senate's Education and Employment Senate Legislation Committee on 22 October 2015 (Estimates).*

I write to you seeking advice on correcting the record of evidence given by Hon Justice Ross in the above matter.

By way of background, as you may be aware, on 19 October 2015 the Minister for Employment, Senator the Hon Michaelia Cash, appointed the Hon Peter Heerey AM QC to undertake an independent review of, amongst other matters: (1) the conduct of Hon Michael Lawler, a Vice President of the FWC, and (2) the handling of complaints (by Justice Ross) made against the Vice President ("Heerey Inquiry").

The full Terms of Reference of the Heerey Inquiry are as follows:

*The inquiry should consider:*

- 1. matters raised in Ms Jane Carrigan's complaints to the Minister for Employment of 6 July 2015 and 9 July 2015 about [FWC] Vice President Lawler and about the Fair Work Commission's management of her initial complaint to the President of the Fair Work Commission;*
- 2. the processes of the Fair Work Commission to investigate complaints and allegations made against members of the Commission, including those appointed under previous workplace relations legislation;*
- 3. the circumstances of Vice President Lawler's absence from duty at the Fair Work Commission during 2014 and 2015 including, but not limited to, the reasons behind the specific leave taken by Vice President Lawler that are related to the Fair Work Commission;*
- 4. any actual or perceived conflicts of interest on the part of Vice President Lawler that may affect the standing of the Fair Work*

*Commission, and the appropriateness of any process in the Commission to manage such conflicts;*

5. *whether there is a reasonable basis for both Houses of Parliament to consider requesting the Governor General to remove Vice President Lawler from the Fair Work Commission on the grounds of proved misbehaviour or incapacity;*
6. *any other matters considered relevant.*

I confirm that I am the "Jane Carrigan" identified in the Terms of Reference (par 1).

The President of the FWC, Hon Justice Ross, attended before, and was examined by, a Senate Estimates Committee on 22 October 2015. Much of the questioning of Justice Ross went directly as to how His Honour managed the complaint that I made concerning the conduct of Vice President Lawler.

**It is submitted that, for the reasons detailed below, unless significant parts of that evidence are corrected or otherwise properly explained by Justice Ross, Senators and others are likely to have been and will remain misled by the record as it now stands.**

***A. Discrepancies in the evidence as to approved sick leave***

A close examination of the dates submitted by Justice Ross to the Committee in relation to approved sick leave for Vice President Lawler (215 days) appears to show **considerable discrepancies between that leave and the Vice President's official engagements**. (The evidence also raises doubts whether Vice President Lawler was in fact unwell or incapacitated whilst he was purporting to discharge his official duties.) Examples of these matters are set out in **Schedule A**, attached to this letter.

Of particular importance is that, in relation to my own complaint to Senator Abetz of July 2015, referred to in par 1 of the Terms of Reference of the Heerey Inquiry (in relation to Vice President Lawler's inappropriate conduct when he presided over an industrial conference **on 27 May 2014**) he (i.e., Lawler) was, apparently, on approved sick leave.

This is because Justice Ross gave evidence to the Committee of approved sick leave that **started on 22 May 2014**. Justice Ross stated the sick leave was supported by medical certificates in addition to His Honour's own personal observations the Vice President was unwell (see **Schedule A**). Was Vice President Lawler sick, or on sick leave, when he presided over my industrial matter **on 27 May 2014**?

This discrepancy (i.e., the Vice President's status on 27 May 2014) is a matter that, it is respectfully submitted, must be rectified or explained by a correction to the Senate's record.

***B. Incorrect or misleading evidence of when Justice Ross received my complaints***

Of even more significance are the errors made by Justice Ross in his answers to Senators' questions on the topic of when His Honour received my complaints.



**The record shows, as a matter of undisputed fact, that on this issue his answers are incorrect.** Again, it is respectfully submitted, that this must be rectified or explained by a correction to the Senate's record.

Thus, at p 62, in response to a question from the Chair asking "... my question simply goes to the process that was undertaken, prior to the vice president going on sick leave, about the complaint, if he [Lawler] was informed", Justice Ross responds: "The complaint came in after he was on sick leave". Following further discussion with the Chair, Justice Ross then repeats this statement.

Justice Ross' evidence in this regard appears to be incorrect.

On 30 May 2015 (three days after the events complained of) I wrote, and sent by email (and registered post), a letter which was addressed to Vice President Lawler and to which Justice Ross was cc'd into. That letter clearly catalogues the Vice President's alleged misconduct at the industrial conference on 27 May 2014, mentioned above.

In this letter, I foreshadowed that I would be lodging a formal complaint about the Vice President's conduct. Implicit in that correspondence is that a complaint would be made to Justice Ross (who was cc'd into this letter). Separately, I notified Justice Ross that I would provide a formal statement concerning the matter by 14 June 2014.

On 13 June 2014, I sent, by email and registered post, the foreshadowed formal statement, setting out in detail the events of the 27 May 2014 industrial conference, to Justice Ross. **Vice President Lawler was apparently still at work when this arrived, as he did not cease work until, it appears, 18 June 2014 (see Schedule A).**

Similarly, the Chair asked Justice Ross "when did [Jane Carrigan] refer her complaint against Vice President Lawler and the complaint about the delay to the Minister?". At page 60 (proof copy of *Hansard*) Justice Ross states:

I do not know. I apprehended that it was early July, but I was not provided with a copy of it ...

**Justice Ross' evidence that he was not provided with a copy of my complaint to the Minister is plainly wrong.**

I sent my letter of complaint, by email, to Hon Senator Eric Abetz (the then Minister) on 6 July 2015. I cc'd Justice Ross into that correspondence. In fact, I had inadvertently emailed it to Justice Ross twice. On each occasion, I received the standard postmaster FWC response telling me:

Your message entitled:  
S 641A Fair Work Act  
**has been accepted for delivery and will be forwarded to the recipient's mailbox.**  
Details of the recipient(s):  
**chambers.ross.j@fwc.gov.au**  
Please do not reply to this email as this address is not monitored.

In fact, with the exception of two email messages to Senator Abetz's Chief of Staff, dated 9 July and 23 July 2015, Justice Ross has been included in all of my correspondence to the Minister's office.

***C. Incorrect or misleading evidence as to the contents of my complaints – whether I sought "removal" of Vice President Lawler***

Also at p 62, the Chair asks Justice Ross: "In terms of Ms Carrigan then taking her complaint to the Minister, did you provide her advice to do that?" Justice Ross responds: "No, I indicated [that] she had raised a range of questions including his [Lawler's] removal. I advised her that I did not have any powers in that regard ...".

**Justice Ross is incorrect to state that I had raised the Vice President's removal from office, as is suggested in this exchange. I have never asked for the Vice President's removal.**

The facts are that my original complaint to Justice Ross was about the Vice President's conduct and alleged misbehaviour at the industrial conference on 27 May 2014. At the time of my complaint to the Vice President (to which the Justice Ross was cc'd into), dated 30 May 2014, I had no idea who Vice President Lawler was (other than, of course, that he was a senior figure in the FWC).

When I sent my formal statement to Justice Ross on 13 June 2014, Vice President Lawler was clearly still working and he had not as yet, to the best of my knowledge, made his widely publicised and ill-judged "appearances" at the Trade Union Royal Commission or in the Federal Court; still less, of course, his controversial appearance on the ABC *Four Corners* program.

I would never, in any event, have requested the Vice President's removal until a full and proper investigation had been undertaken. In the event of such an investigation, should it have been undertaken, I presumed that Justice Ross would then be best placed to determine how the matter should be properly handled. This may have included, of course, Justice Ross referring the matter to the Minister to initiate the Vice President's removal from office. My position, in that regard, was clear on the face of my correspondence to Justice Ross.

I note, however, in the later period of my complaint, and with no evidence of Justice Ross doing anything about either my complaint or the Vice President's widely publicised other apparent misconduct or inappropriate behaviour, I requested that the Vice President be either "stood down" or restricted to "non-sitting" duties pending the outcome of a proper investigation of (by now) all of his conduct.

I made that request to both maintain public confidence in the work of the FWC and to prevent other parties being exposed to the alleged misconduct that my client and I had directly witnessed.

***D. Incorrect or misleading evidence of as to the contents of my complaints – communication with me***

At p 66, the Chair enquires about the external complaint handler that (unbeknown to me) Justice Ross states that he decided to appoint (13 months after I lodged my complaint) but



then did not proceed with, apparently because on 6 July 2015 I took the matter directly to the Minister. The Chair asks Justice Ross: "if [Jane Carrigan] was happy with that". Justice Ross replies: "I do not know; I have not spoken to Ms Carrigan". The exchange follows:

CHAIR: Or written to her?

Justice Ross: No, because I have not written to her since she transferred the complaint to the minister, bearing in mind the complaint to the Minister is about Vice President Lawler and my handling of her complaint ...

**Again, Justice Ross is quite incorrect to unequivocally state that he has not written to me since I transferred my complaint to the Minister.**

The facts are undisputedly as follows. I sent my complaint to the Minister on 6 July 2015. **Justice Ross wrote to me, on relevant points, on both 13 August 2015 and 20 August 2015.**

### ***E. Conclusions***

I respectfully request that *Hansard* and the other records of the Senate be corrected to clarify what I regard as erroneous and misleading answers given to, in effect, the Senate by Justice Ross. I shall leave it to others to speculate why Justice Ross' answers are so inaccurate.

**But, if I may say so, His Honour's answers, set out above and more generally, reflect my own dealings with His Honour on the topic of Vice President Lawler's alleged misconduct. I regret to observe that His Honour's approach exposes both a lack of transparency in the handling of the matter, and otherwise demonstrate a somewhat cavalier attitude to my complaint. The question is: should the Senate be treated in the same way?**

As these matters may find their way to the Hon Peter Heerey QC, could I take the liberty of obtaining your advice on quoting and/or the use of Justice Ross' tabled statement and the proof or final copy of the *Hansard* record? I am unclear whether, say, any privilege attaches to the use of such documents.

Thank you for your consideration of these issues, and I look forward to your advice in due course.

I give my authority for this document to be distributed, published, or used by the Senate and its officers as they see fit.

Yours faithfully



Jane Carrigan



## SCHEDULE A – unexplained discrepancies in sick leave approvals

1. Justice Ross made a number of references as follows: .... *Vice President Lawler's leave was supported by medical certificates. As well as these certificates, **my personal observations** of him led me to be concerned about the vice-president's wellbeing and his capacity to perform his duties. I approved the sick leave on the basis that the vice-president was medically unfit to perform his duties.*
2. Justice Ross lists those sick days as *215 days ... comprised of successive periods of approved sick leave that was taken during three periods: from **22 May 2014 to 30 November 2014**, from 5 to 9 January 2015, and from **13 April 2015 to 22 July 2015**, further confirmed to the Chair as periods of continuous leave (my emphasis).*
3. Vice President Lawler commenced sick leave, according to Justice Ross, on Thursday 22 May 2014. If this is so how, then, were the following tasks completed by the Vice President, when he was unwell?
  - On 26 May 2014, AUSTLII reports Vice President Lawler approved a s 185 Application for approval of *The Tangentyere Council Enterprise Agreement 2013-2016. FWCA 3315 (26 May 2014); and a s 185 Application to approve the Goodman Fielder Baking (Darwin) Enterprise Agreement 2013 -2016. FWCA 3473 (26 May 2014).*
  - Importantly, on 27 May 2014 Vice President Lawler presided over a 'general protection application conference' attended by the employer's lawyer/HR Manager and my client (the employee) and I (as her representative). Notably, this conference was un-reported. **It was the extraordinary conduct of the Vice President in that industrial conference that was the substance of my complaint made to both the Vice President and the President of the FWC.**
  - On 29 May 2014, AUSTLII reports Vice President Lawler approved a s 185 Application to approve the *Northern Cement (Darwin) Enterprise Agreement 2014 FWCA 3607 (29 May 2014).*
  - On 4 June 2014, AUSTLII reports Vice President Lawler approved a s 185 Application to approve the *Toll Marine Logistics AMOU and MUA Agreement 2013* for Perkins Shipping Pty Ltd [2014] FWCA 3741 (4 June 2014).
  - On 18 June 2014, AUSTLII reports Vice President Lawler handed down a decision in *Lavis v L & O Operations Pty Ltd* [2014] FWC 3932 (18 June 2014), a matter that appears to have been heard in Newcastle on 13 March 2014. (I observe that *The Australian* newspaper reported that the Vice President's own colleagues believed his sick leave commenced this day.<sup>1</sup>

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<sup>1</sup> Pamela Williams, *The Australian*, 13 June 2015 wrote: "*The decision itself was a minor unfair dismissal case regarding a bottle shop attendant in Foster who had objected to crude language by a manager. The one-day hearing was held on March 13, 2014; the decision was dated June 18, 2014 and published the next day. After this decision, Lawler's name did not appear in FWC case lists for six months. Colleagues believed he was on sick leave from that date. Regardless of the state of*



4. According to Justice Ross, Vice President Lawler returned to work from his extended sick leave on 30 November 2014. Other than 3 days off in January 2015, according to Justice Ross, Vice President Lawler recommenced sick leave on Thursday 13 April 2015<sup>2</sup> and remained on same until 22 July 2015. Again, this appears to be inconsistent with the following matters:
  - On 11 June 2015, AUSTLII reports the Vice President approved a s 185 *Application to approve the Muswellbrook Preschool Kindergarten Inc Teachers Collective Agreement 2014* - Independent Education Union of Australia [2015] FWCA 1531 (11 June 2015).
  - On 22 June 2015, AUSTLII reports the Vice President, sitting as the presiding Judge in a Full Bench s 604 -Appeal, handed down a decision in *Jeffrey v IBM Australia Limited* [2015] FWCFB 4171 (22 June 2015) which had been heard in a one day hearing on 24 March 2015.
5. In summary, the time frames that Justice Ross gave evidence to the Committee about as to the Vice President's sick leave do not appear to coincide with independent evidence held on public databases that show that Vice President Lawler was apparently "working" at numerous points. Nor does it sit well with my own industrial conference (27 May 2014), which occurred five days after Justice Ross says that he approved the Vice President's sick leave based on his (Lawler's) medical certificates **and the Judge's own views, that the Vice President was unwell.**
6. Given all that we now know (but even as would have been apparent then, especially after receipt of my complaint), it seems unlikely that Vice President Lawler was ever fit to preside (because of illness or otherwise) in industrial matters from 22 May 2014, if not earlier. He should have been transferred by Direction to other duties, not involving interaction with the public, until he was either rehabilitated or, after investigation, removed from office.

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*his health, Lawler was not idle. The day after the June 18 decision last year, he was photographed smiling, hand in hand with Jackson outside the royal commission into unions in Sydney. And one day after that, June 20, 2014, Lawler's colleagues were stunned by an online newspaper article reporting that Lawler had appeared in a hearing before the Federal Court in Melbourne that same day to represent his partner Jackson, then national secretary of the Health Services Union."*  
<http://www.theaustralian.com.au/news/inquirer/fronting-up-for-a-union-mate/story-e6frq6z6-1227395374946?sv=77f50ccbd00be88e3a5925cc8dc7a44a>

<sup>2</sup> Vice President Lawler also approved four separate s 185 Applications for approval of multi-enterprise agreements on 13 April 2015.