



Australia's National Workplace  
Relations Tribunal

18 December 2015

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

The Honourable  
Justice Iain Ross AO

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

Dear Senator

### **Letter from Ms Jane Carrigan**

I write in response to your correspondence of 26 November 2015, written in your capacity as Chair of the Education and Employment Legislation Committee, regarding a letter dated 22 November 2015 from Ms Jane Carrigan to the Clerk of the Senate.

You write that Ms Carrigan's letter suggests that parts of my evidence in the Supplementary Estimates hearing on 22 October 2015 "require correction or explanation as it may otherwise be misleading."

Having reviewed the proof Hansard for the Estimates hearing and Ms Carrigan's letter, I agree that there are some matters that would benefit from clarification or that should be corrected, and I do so in the **attachment** to this letter. Plainly, any errors in my evidence were unintentional.

I have also taken the opportunity at the end of the attachment, to clarify or correct some further minor issues that were identified in reviewing the proof Hansard.

As the Committee is aware, the Minister for Employment, Senator Cash, has appointed the Hon Peter Heerey AM QC to conduct an independent investigation into matters relating to complaints against Vice President Lawler. The terms of reference for Mr Heerey's inquiry encompass the matters that Ms Carrigan raises in

her letter to the Committee regarding Vice President Lawler and the Fair Work Commission's (Commission's) handling of her complaints against the Vice President.

The Committee will also be aware of the Commission's serious concerns about the Committee examining matters that are before Mr Heerey. Those concerns were set out in question on notice EMSQ15-000333, a copy of which is **enclosed** for the Committee's convenience. To reiterate, the Commission is particularly concerned about the potential for prejudice to Mr Heerey's investigation and an appearance of pre-judgment by senators, and the potential for revelation of sensitive personal information about Vice President Lawler to affect him detrimentally, without any corresponding public benefit.

In light of those concerns, the attachment to this letter makes quite confined responses to the matters raised in Ms Carrigan's letter. If Mr Heerey seeks information about any of those matters in addition to the information already before him, I will of course provide it.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Iain Ross'.

**JUSTICE IAIN ROSS AO**  
President

## 1. Dates of approved sick leave

In my statement to the Estimates hearing on 22 October 2015, I said (proof Hansard at p.53):

“Justice Ross: ... During 2014 and to July 2015, I approved a total of 215 days sick leave, approximately 9½ months, for Vice President Lawler. This comprised multiple 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.”

In her letter, Ms Carrigan asserts that there are “considerable discrepancies between that leave and the Vice President’s official engagements ... of particular importance is that, in relation to my own complaint ... when he presided over an industrial conference on 27 May 2014 ... [Vice President Lawler] was, apparently, on approved sick leave.”

The dates in my statement, identifying the periods for which I approved sick leave for Vice President Lawler, are taken from leave records maintained by the Commission’s human resources unit. I am informed that those dates reflect the periods covered by a succession of medical certificates provided to my chambers, subject to one exception. The exception is that the commencement date of the last of those periods of approved leave (13 April 2015) was after the start of the period covered by the corresponding medical certificate. I am informed that this later date was notified to the human resources unit by my chambers because Vice President Lawler had informed my chambers that he had continued to work during part of the period covered by the medical certificate.

As is apparent from the matters referred to by Ms Carrigan in Schedule A to her letter, Vice President Lawler performed Commission work on some of the 215 days for which sick leave had been approved. That included, on 27 May 2014, conducting the telephone conference which gave rise to Ms Carrigan’s complaint against the Vice President.

In correspondence to me of 11 September 2015 the then Minister for Employment, Senator Abetz, sought information as to work allocated to or listed before Vice President Lawler during periods for which sick leave had been approved. I provided that information in my response to the Minister of 17 September 2015.

I am informed that searches of the Commission’s case management system and public databases of decisions have identified that matters were listed before Vice

President Lawler for conference or hearing on four of the 215 approved leave days. These comprised a conference on 26 May 2014, the conference giving rise to Ms Carrigan's complaint on 27 May 2014, an unfair dismissal hearing on 14 April 2015 and two unfair dismissal hearings on 15 April 2015. These searches also identified that the Vice President issued decisions with decision dates coinciding with seven of the 215 approved leave days (including one of the four on which matters were listed), although I note that the date of a decision often will not reflect the date(s) on which the work of drafting the decision was actually performed. I am further informed that all of the above matters were allocated to Vice President Lawler before he commenced the relevant leave period.

In his correspondence of 11 September 2015, the Minister for Employment also sought information as to the circumstances in which Vice President Lawler presided over the conference giving rise to Ms Carrigan's complaint, during a period for which sick leave had been approved. Those circumstances were as follows:

- on 7 May 2014, the matter involving Ms Carrigan was allocated to Vice President Lawler by his Panel Head;
- once a matter has been allocated to a Member, listings are the responsibility of the Member's chambers;
- on 15 May 2014, Vice President Lawler's chambers listed the matter for telephone conference before the Vice President on 27 May 2014;
- on 26 May 2014, the Panel Head's chambers forwarded to my chambers a medical certificate which stated that the Vice President was suffering from a medical condition and would be unfit for normal work from 22 May 2014 to 4 June 2014, and I subsequently approved sick leave for the period covered by the medical certificate;
- on 27 May 2014, Vice President Lawler proceeded with the telephone conference as listed, despite having provided a medical certificate covering that date.

As you no doubt appreciate, the chambers of each Member are run relatively autonomously (as is appropriate, given the nature of the office and responsibilities of each Member) and it is not the President's responsibility to supervise the operation of each Member's chambers on a day to day basis.

All of my correspondence with the then Minister for Employment was provided to the Hon Peter Heerey AM QC for the purposes of his independent investigation into matters relating to complaints against Vice President Lawler.

## **2. Circumstances at the time I received Ms Carrigan's complaint**

Proof Hansard of the Estimates hearing on 22 October 2015 records the following exchange (at pp.61-62):

"CHAIR: ... My question simply goes to the process that was undertaken, prior to the vice president going on sick leave, about the complaint, if he was informed-

Justice Ross: The complaint came in after he was on sick leave."

Ms Carrigan's complaint about Vice President Lawler's conduct in the telephone conference held on 27 May 2014, was made by letter to Vice President Lawler (copied to me) on 30 May 2014 and by letter to me of the same date. Ms Carrigan provided further details of her complaint in a statement with a covering letter that was sent to my chambers on 13 June 2014.

Ms Carrigan asserts in her letter that "Vice President Lawler was apparently still at work when this [her statement] arrived, as he did not cease work until, it appears, 18 June 2014 (see Schedule A)."

As related above, I approved sick leave for Vice President Lawler for the period covered by a medical certificate he had provided to his Panel Head. I subsequently approved sick leave for a succession of periods covered by further medical certificates up to 30 November 2014.

I was not aware until I received Ms Carrigan's complaint that Vice President Lawler had conducted a conference on 27 May 2014. While it appears that the Vice President performed some work in May and June 2014, I regarded the Vice President as being "on sick leave" at the time I received Ms Carrigan's complaint and consider that this remains an accurate description of the situation.

I also note that, as I related in the Estimates hearing, Ms Carrigan was informed in early June 2014 that Vice President Lawler had commenced an extended period of absence due to illness (proof Hansard at p.59). This was noted by Ms Carrigan in her letters to me of 13 June 2014 and 13 March 2015.

## **3. Ms Carrigan's complaint about the handling of her original complaint**

Proof Hansard of the Estimates hearing on 22 October 2015 records the following exchange (at pp.59-60):

"CHAIR: Well, we end up here-the Jane Carrigan complaint. When did she first make a complaint?

...

Justice Ross: ... Ms Carrigan then referred the complaint to the minister, including a complaint about the delay-

CHAIR: What date did she refer that to the minister?

Justice Ross: I do not know. I apprehend that it was early July, but I was not provided with a copy of it. Part of her complaint was also the delay in my handling of her complaint. I took the view that, as the minister had carriage of it, I would not take any further steps to investigate the matter and I informed the minister of that."

In her letter Ms Carrigan asserts that "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."

On reviewing Ms Carrigan's correspondence, I have found that, on 6 July 2015, Ms Carrigan emailed to my chambers a copy of her complaint to the then Minister. While I have no independent recollection of seeing that document, in the usual course of events my Associate would have brought such correspondence to my attention. Consequently, it seems likely that my recollection in the Estimates hearing was incorrect.

Again, all of the relevant correspondence has been provided to the Hon Peter Heerey AM QC for the purposes of his investigation.

#### **4. Content of Ms Carrigan's original complaint**

In the hearing on 22 October 2015, proof Hansard records the following exchange (at p.62):

"CHAIR: In terms of Ms Carrigan then taking her complaint to the minister, did you provide her advice to do that?

Justice Ross: No, I indicated she had raised a range of questions including his removal. I advised her that I did not have any powers in that regard ..."

In her letter Ms Carrigan asserts that "Justice Ross was incorrect to state that I had raised the Vice President's removal from office, as is suggested by this exchange. I have never asked for the Vice President's removal."

My statement above is accurate. I understood Ms Carrigan's correspondence to me to have raised questions as to whether Vice President Lawler should be removed from office, and in correspondence responding to her I have indicated that I have no powers to remove a Member from office.



I also note that, in her letter referring her complaint to the then Minister for Employment on 6 July 2015, Ms Carrigan stated that she was writing “to request you exercise your statutory powers pursuant to s.641A of the *Fair Work Act 2009*.” Section 641A provides for the Minister to handle a complaint about a Commission Member for the purpose either of considering whether Parliament should consider removal of the Member from office, or of considering whether to advise the Governor-General to suspend the Member from office. Pursuant to s.642(4), the suspension of a Member terminates if a House of Parliament does not subsequently resolve that the appointment of the Member should be terminated.

Again, all of the relevant correspondence was provided to the Hon Peter Heerey AM QC for the purposes of his investigation.

## **5. Communication with Ms Carrigan**

In the hearing on 22 October 2015, proof Hansard records the following exchange (at p.66):

“Justice Ross: ... I indicated to the minister that I would be taking no further action while the complaint was in his hands, and now Mr Heeley [sic] has been appointed to investigate all of these matters. So I have not taken any further steps. It would be completely inappropriate to have two investigations into one matter by two different people.

CHAIR: Is Ms Carrigan okay with all that?

Justice Ross: I do not know; I have not spoken to Ms Carrigan.

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.”

Later in the hearing, proof Hansard records the following (at p.78):

“Justice Ross: Chair, can I correct one matter. In checking the chronology during one of the breaks I think I had indicated to you that I had not corresponded with Ms Carrigan after she had referred the complaint to the minister. I think there was a letter shortly after; I am not sure of the timing, and I think the date of referral of her complaint to the minister was 7 July.”

In her letter Ms Carrigan asserts that “Justice Ross is quite incorrect to unequivocally state that he has not written to me since I transferred my complaint to the Minister ... 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.”

The first of my statements set out above was incorrect. On reviewing my correspondence with Ms Carrigan, I have found that my attempt later in the hearing to correct my first statement also failed fully to convey what had occurred.

By letter copied to my chambers on 6 July 2015, Ms Carrigan referred her complaint about Vice President Lawler's conduct in a conference held on 27 May 2014, to the then Minister for Employment, Senator Abetz. On 30 July 2015 Ms Carrigan wrote a letter addressed to both the Minister and me. I responded to this letter by letter to Ms Carrigan dated 13 August 2015 indicating, amongst other matters, that it was not appropriate for me to take further steps in relation to her original complaint while the Minister was considering her complaint and the Commission's handling of it.

Ms Carrigan again wrote to me on 18 August 2015 and I responded by letter dated 20 August 2015. Ms Carrigan then wrote to the then Minister for Employment on 11 September 2015, copying her letter to my chambers. Ms Carrigan also wrote to me on 11 September 2015, copying her letter to the Minister, and I responded to her by letter dated 16 September 2015.

For completeness, I note that after the Estimates hearing on 22 October 2015, Ms Carrigan again wrote to me on 25 October 2015 and on 29 October 2015 and I responded by letter dated 10 November 2015. In that letter, amongst other matters, I indicated to Ms Carrigan that I would be providing Mr Heerey with all of our correspondence so that he would be aware of all of her concerns and her views, and that I did not propose to correspond further with her in relation to those matters while Mr Heerey was conducting his investigation.

Again, all of the relevant correspondence was provided to the Hon Peter Heerey AM QC for the purposes of his investigation.

## **6. Further corrections/clarification**

In addition to the points above, I take this opportunity to clarify or correct the following further matters as recorded in the proof Hansard:

- At proof Hansard p.55, I identified the correspondence I had tabled with my statement as including "a letter from me of 29 May 2014".

The correct date of the letter is 29 May 2015.

- At proof Hansard p.58, I indicated that sick leave for Members of the Commission who are not former AIRC Members is regulated by the *Fair Work Act 2009* (FW Act) and the Remuneration Tribunal. I then took on notice to provide a more comprehensive response.



The correct position was set out in the Commission's more comprehensive response, in question on notice EMSQ15-000334. In brief, sick leave for such Members may be granted pursuant to s.639 of the FW Act. Remuneration Tribunal determinations regulate the recreation leave of such Members, but not their sick leave.

- At proof Hansard pp.59, 61 and 63, I refer respectively to my chambers referring Ms Carrigan's complaint to Vice President Lawler: "in March"; "when he resumed from sick leave in early 2015", and "when he returned from sick leave".

To be clear, the timing was: Vice President Lawler returned from sick leave in December 2014; he took further sick leave from 5 January 2015 to 9 January 2015, and my chambers referred Ms Carrigan's complaint to him for response in March 2015.

- At proof Hansard pp.59 and 66, I refer respectively to Vice President Lawler providing his response to Ms Carrigan's complaint on "8 April" and on "7 April".

The correct date is 8 April 2015.

- At proof Hansard p.78, I said that "I think the date of the referral of her [Ms Carrigan's] complaint to the Minister was 7 July".

To be clear, Ms Carrigan referred her complaint about Vice President Lawler to the then Minister for Employment on 6 July 2015.

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

**Agency - Fair Work Commission**

**Department of Employment Question No. EMSQ15-000333**

**Senator McKenzie asked on 22 October 2015 on proof Hansard page 57**

#### **Question**

#### **FWC - Correspondence between Justice Ross and Vice President Lawler**

CHAIR: Thank you very much for your comprehensive statement, Justice Ross, and for tabling some of the correspondence between you and Vice-President Lawler. You did make comment that it was not the complete record of your correspondence. On notice I seek for you to table full correspondence between you and the Vice-President.

Justice Ross: I do not think I will be doing that. I will provide all the correspondence to the independent inquiry. Some of it relates to personal matters associated with his illness.

Senator McKENZIE: We do have capacity to receive documents in a variety of ways.

Justice Ross: I will take it on notice and take some advice. To be clear, I will provide all of the correspondence to Mr Heerey.

#### **Answer**

The Fair Work Commission (Commission) appreciates that the Committee has the power to require the production of the correspondence, but nevertheless wishes to raise the Commission's serious concerns about providing the correspondence at this time.

From the context of the question, we understand Senator McKenzie's request to be for provision of all correspondence between the President of the Commission and Vice President Lawler during 2014 and 2015 relating to the Vice President's sick leave and his activities whilst on sick leave from the Commission.

We understand that the Committee must conduct its Estimates proceedings in public.

The Commission has two major concerns about provision of the requested correspondence to the Committee at this time.

First, the subject matter of the requested correspondence falls squarely within the terms of reference of the independent investigation into complaints against Vice President Lawler, which is presently being conducted by the Hon Peter Heerey AM QC. Mr Heerey has also requested the correspondence and the Commission will provide it to him shortly.

We are concerned that Mr Heerey's investigation may be prejudiced if material being considered by Mr Heerey was to be made public before the completion of his inquiry, or if the Committee was to conduct an inquiry of its own in parallel to Mr Heerey's inquiry. It is important to protect the integrity of Mr Heerey's investigation, and to ensure that there is a proper basis for any subsequent consideration by the Parliament of the Vice President's position, should that become appropriate, as well as to ensure that any such consideration is not compromised by the appearance of pre-judgment.

Secondly, the requested correspondence includes sensitive personal information about Vice President Lawler that is not presently in the public domain, including the full content of a report from his treating psychiatrist.

In a context where the issues of public concern are to be considered fully by Mr Heerey, we are concerned that the revelation now of sensitive personal information about the Vice President could be very damaging to his health, without any corresponding public benefit. We are also concerned about the risk of making a spectacle of the Vice President's mental illness.

Senator Cash indicated in the hearing that she will decide whether to make Mr Heerey's report public once she receives it, but that her understanding is that she will make Mr Heerey's findings public by tabling them in the Senate at an appropriate time.

The possibility that Mr Heerey's report and/or findings may ultimately be published does not affect the potential prejudice to his inquiry, or to Vice President Lawler, by making the correspondence public at this point. Further, Mr Heerey's report and/or findings may in fact involve little or no further disclosure of Vice President Lawler's sensitive personal information.

The Commission respectfully submits that the Committee ought not press for the requested correspondence to be provided at this time, in the circumstances set out above.

For the same reasons, the Commission respectfully submits that the Committee ought not decide that the circumstances warrant an order for the production of the correspondence, for the purpose of Resolution 1(2) agreed to by the Senate on 25 February 1988.