



SENATE ESTIMATES COMMITTEE - 22 October 2015

ESTIMATES STATEMENT IN RELATION TO VICE PRESIDENT LAWLER

[1] This statement addresses some matters relating to Vice President Lawler that have recently been aired publicly. Because of the impact of these matters on public confidence in the Commission, I feel that I should place a response on the record.

Vice President Lawler's sick leave

[2] 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.

[3] Vice President Lawler is a former Presidential Member of the Australian Industrial Relations Commission (AIRC) who was deemed to be appointed to the Fair Work Commission (Commission) by transitional legislation.¹ Members of the Commission are not employees, rather they are statutory office holders, appointed to public office by the Governor-General. The transitional legislation has the effect that most terms and conditions of appointment under the former Workplace Relations Act continue to apply to former members of the AIRC and most terms and conditions of appointment of Members under the Fair Work Act do not apply to them.

[4] No statutory provision is made for sick leave for former Presidential Members of the AIRC who became Members of the Commission, such as Vice President Lawler. This means that there is no statutory regulation of the amount of sick leave available or of the process for approving it.

[5] I have been advised that one of the consequences of the statutory scheme is that such Members are entitled to remuneration whilst they remain in office. This means that there are no circumstances in which the Commission could withhold remuneration from such a Member, even, for example, if the Member was to absent himself or herself from the Commission without seeking leave.

[6] In accordance with longstanding practice, my approach as President has been to deal with requests for sick leave from Members on a case by case basis, on their merits.

¹ Cl.1 of Schedule 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[7] 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.

[8] The Four Corners program on 19 October 2015 included a recording of part of a phone conversation I had with Vice President Lawler in around March 2015 regarding his sick leave, which was transcribed in the program as follows:

IAIN ROSS (PRESIDENT OF THE FAIR WORK COMMISSION): Hey Michael

MICHAEL LAWLER: Oh g'day Iain how are you going?

...

IAIN ROSS (PRESIDENT OF THE FAIR WORK COMMISSION): I think um, your health is the first priority and there's no, um ... I mean I'll take responsibility for any amounts of sick leave you, you seek, there's no cap or anything like that.

MICHAEL LAWLER: Oh no no no I understand there's no cap on it.

[9] This conversation reflected my genuine concern about the Vice President's health and my willingness to approve the period of sick leave necessary for him to take in order to recover from his illness. It also reflected my concern about the potential impact of his illness on parties to Commission proceedings and on public confidence in the Commission were he to remain at work.

[10] In the recorded conversation I confirmed that there is "no cap" on a Member's sick leave, which reflects the legal position. However, at no stage did I suggest to Vice President Lawler that he had an unlimited entitlement to take whatever sick leave he wished and for whatever purpose he wished.

[11] Vice President Lawler subsequently asserted that I had told him he had an "unlimited entitlement" to sick leave in a self serving email to me of 16 June 2015. On 24 June 2015 I wrote to him responding to this assertion and to some, but not all, of the other assertions in his email.

[12] In my letter of 24 June 2015 I made it clear to Vice President Lawler that in my view, no Member has an unlimited entitlement to sick leave, and that my approach has been to deal with requests for sick leave on a case by case basis, according to their merits.

[13] Given my concerns about Vice President Lawler's wellbeing, in order to protect both his interests and the interests of parties to Commission proceedings, I required the Vice President to provide me with a written report from his doctor before his proposed return to work in July 2015.

[14] The Vice President apparently provided this report to Four Corners and extracts were shown in the Four Corners program. Those extracts included his psychiatrist's opinion that the Vice President has suffered from "a very significant Major Depressive Disorder" and that he had "definitely needed" time off work. The

report confirmed that the Vice President was being treated for his illness from July 2014, including a brief period of hospitalisation.

[15] The psychiatrist's report also confirmed that Vice President Lawler was fit to return to work as of 23 July 2015.

[16] The real issue of controversy is what Vice President Lawler was doing whilst he was on approved sick leave from the Commission.

[17] In the Four Corners program Vice President Lawler expressed the view that there is nothing wrong with taking leave to help your partner defend herself and that most Australians would regard that as an honourable and decent thing to do.

[18] If the Vice President was suggesting that there was nothing wrong with taking paid sick leave for the purpose of assisting your partner in legal proceedings, then I do not agree and I do not think that most Australians would agree. As I have said, I approved the Vice President's sick leave on the basis that he was medically unfit to perform his duties. The Vice President did not seek and I did not approve leave for the purpose of assisting his partner with her legal proceedings.

[19] As was widely reported in the media, Vice President Lawler participated in a mention of Federal Court proceedings involving his partner on 20 June 2014. On 7 July 2014 I wrote to the Vice President informing him of my view that any further participation in proceedings involving his partner would not be consistent with the principle that Commission Members should avoid involvement in matters of public controversy. I sought his assurance that he would not participate further in such proceedings, and he gave me that assurance in a letter to me of 22 July 2014.

[20] As mentioned earlier, Vice President Lawler made a number of assertions in an email to me of 16 June 2015. This included his view that accompanying his partner to her court proceedings ought not to be something that would cause damage to the Commission.

[21] In response, in my 24 June 2015 letter to Vice President Lawler I informed him of my view that the reputation of the Commission and his own standing as a Member was being damaged by his continuing public involvement in the proceedings involving his partner, and that he should cease attending the proceedings in any capacity.

[22] In July 2015 I wrote to Senator Abetz, as Minister for Employment, pointing out the difficulties associated with the lack of statutory provision for leave of absence for former Presidential Members of the AIRC such as Vice President Lawler. I also explained that, as President of the Commission, I have only very limited powers to address inappropriate conduct by a Member of the Commission.

[23] Under s.582 of the Fair Work Act (or the equivalent provision of the transitional legislation in the case of Members such as Vice President Lawler²) I can

² Cl.6 of Schedule 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

give a direction to a Member only “as to the manner in which” the Member is to perform his or her functions as a Member.

[24] This power cannot be used to direct a Member to cease private conduct that is not relevantly connected to performance of the Member’s Commission functions. Further, I have no powers to enforce such a direction or to sanction a Member for non-compliance.³

[25] In short, the Fair Work Act does not provide me as President of the Commission with powers to take disciplinary action against a Member. Under the Act, all Members are ultimately responsible for their conduct to the Parliament.

[26] I welcome the decision of the Minister for Employment to appoint the Hon Peter Heerey AM QC to undertake an independent investigation into matters relating to complaints against Vice President Lawler. The Vice President’s activities whilst on sick leave from the Commission are properly a matter for consideration in that investigation.

[27] I will cooperate fully with the independent investigation and I would encourage Vice President Lawler also to do so.

Covert recordings

[28] According to the Four Corners program on 19 October 2015, Vice President Lawler has “around 60 audio files, hours of top secret recordings” made since 2012, including recordings of conversations with me.

[29] To make it absolutely clear, I was not informed by Vice President Lawler that he was recording our phone conversations and I did not consent to them being recorded.

[30] I have had only a limited number of telephone conversations with Vice President Lawler, which could not account for 60 recordings. From the Four Corners program it appears that the Vice President has also recorded conversations with Mr David Rofe QC. I have been informed by another Member of the Commission that the Vice President also recorded a conversation with that Member in the Vice President’s Chambers without that Member’s knowledge or consent.

[31] I must also say that because of the nature of Vice President Lawler’s illness and the pressures upon him in his personal life, I have tried to treat him with care and understanding. Consequently, I am profoundly disappointed by his actions.

[32] This covert recording is obviously a very serious matter. I would expect it to be considered by the Hon Peter Heerey as part of the Minister’s independent investigation, and potentially also by New South Wales authorities.

³ The only course open under the statutory framework would be to make a complaint about the non-compliance to the Minister. The Minister might then handle that complaint for the purpose of considering whether the Member should be suspended or whether the Parliament should consider removal from office.