



FairWork
Commission

Memo

To: President Ross

Date: 7 April 2014

From: Deputy President McCarthy

Email:

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Subject: Future Directions

Background

The primary reason for the initiatives under Future Directions 2012-13 and the proposals for Future Directions 2014-15 were explained by you in the 2011-12 Annual Report as a means to gain public confidence in the Tribunal. You made the following observation that "Justice institutions rely ultimately on public confidence. While a name change is important, it alone is not enough. The tribunal must continue to innovate and improve its performance."

Public confidence in the Fair Work Commission

The initiatives proposed seem to be directed at users of the Fair Work Commission (the FWC) or regular visitors or users of the FWC's resources and information provision. However, public confidence is more influenced by views of those that are not actual users of the FWC. Public confidence is influenced more by the decisions of the FWC that appear out of step with community expectations. Community expectations include timeliness of dealing with matters and the integrity of outcomes of matters dealt with.

The decisions of Members of the FWC are the usual vehicles that influence public opinion about the FWC. Other vehicles include tardiness, especially in matters of intense public interest, such as the Health Services Union Investigation. Public confidence decisions by the FWC are influenced by factors such as views about the fairness of decisions, the soundness of the reasons and logic behind the decision and confidence in the integrity of the decision making process.

It is this last point that I consider is lacking in the Future Directions 2014-15, namely, confidence in the integrity of the decision making process. Clearly, there are already public rumblings about the FWC's decision making processes. **Whilst this has not yet lead to decisions being described as " dogs vomit" criticisms about the composition of and appointments to the FWC and its decisions that create concern.** Indeed, proposals for a different Appeals Body is another indicator of there being some public concern about the FWC.

Currently, it is unclear how decisions are made regarding the composition of Full Benches of the FWC. It is also unclear how Panel Heads, that are responsible for the allocation of work to Members of FWC, are appointed.

I therefore suggest that the Future Directions include the establishment of transparent and publicly available criteria and the procedures involved in making decisions regarding Panel Head appointments and Full Bench compositions. I deal with the reasons for and suggestions regarding this proposal below.

Full Benches

There are two broad types of matters that Full Benches generally deal with. Firstly, Full Benches are established for what are usually described as "significant cases". Generally, these types of Full Benches create or modify standards, usually for inclusion in awards.

Significant Case Full Benches

Significant cases involve such matters as Equal Remuneration and the Superannuation Funds Review. Another standards type variant of usual Full Benches is the Annual Wage Review. The most activity, however, has been Full Benches established to consider Modern Award matters. This has included different Full Benches established to consider Apprenticeship Rates and Junior Rates, Penalty Rates in the retail and hospitality sectors, Annual Leave, Public Holidays, Work Health and Safety and Award Flexibility.

How these Full Benches are established and the expertise of the members for those specific issues is unclear. What is clear is that with the exception, no Perth or Brisbane based member has been appointed to any Award Modernisation Full Bench. What is also clear is that no Perth based Member has been appointed to any significant case Full Bench. Indeed it seems no Perth based member has been appointed to any significant case Full Bench of any type since 1989.

Appeal Full Benches

I have not researched all appeal Full Benches but from my observations there appears to be some Members that are regularly appointed to Appeal Full Benches and some that are rarely appointed.

However, I have examined the Perth Full Benches for the last two years. It shows that of the Full Benches that Member could have been appointed to (i.e. not an appeal against that Member) of the three Perth Members one has been appointed to about one of a potential twenty, another member about one of a potential ten, and the third member one if a potential three.

I suspect the Perth example is similar elsewhere. In Perth's case, it seems to not support the observance of any objective of minimizing travel costs.

Suggestion regarding Full Bench compositions

I suggest that Future Directions include a commitment to establish transparent processes and criteria for appointment to Full Benches. Criteria could include matters such as diversity, experience and regional knowledge.

Panel Heads

The role of panel heads is unclear but it seems to be two-fold. Firstly, panel heads are responsible for the allocation of work to members in various industry or functional panels. Secondly, panel heads seem to act as an Executive a Committee to the President?

Until the last few years Panel Heads appeared to be selected on seniority. Seniority was most likely a transparent proxy for experience. In recent years it is clear that panel head selections have not been based on seniority.

The issue that arises if selections for panel heads are not based on seniority then are what criteria have been used?

I suggest that you include an Initiative of Transparency of the process and criteria used in the selection of panel heads. The process should include the calling of expressions of interest from all members and an identification of criteria to be used.

Without a transparent process and clear selection criteria the FWC is exposed to the risk of criticism of panel heads not being selected on merit.