

# COMMENTARY

## THE FIX IS IN AT FAIR WORK AGENCY

*Its rulings are bizarre and its impartiality is questionable*



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PUBLIC trust in institutions is an important ingredient of social harmony and economic efficiency. In the absence of confidence in the workings of governments, courts, tribunals, regulators and public bodies generally, compliance with rules and laws can break down and order can crumble.

Luckily, in Australia, there is widespread support for most of our public institutions, support which is generally deserved. But there are exceptions. One obvious example of an institution of which the public has every right to be suspicious is the Fair Work Commission, a successor body to the Australian Industrial Relations Commission.

Misleadingly referred to as the “independent umpire”, the staffing of the FWC was so distorted by the Labor government in favour of former union officials and Labor-affiliated persons that the public should doubt its impartiality — indeed, the common sense of its decisions.

And the performance of the organisation in dealing with clear regulatory breaches by a registered trade union suggests that some of the staff are more motivated by pleasing their (Labor) political masters than actually complying with the law.

Needless to say, these are serious accusations. But the weight of evidence from the past

four-or-so years confirms the picture of an organisation that is stuffed to the gills with appointments based on political affiliation and decisions that are influenced by partisan bias.

When the new tribunal was established by the Fair Work Act 2009, both the then-prime minister, Kevin Rudd, and the workplace relations minister, Julia Gillard, ruled out any stacking.

“I will not be the prime minister of this country and appoint some endless tribe of trade union officials and ex-trade union officials to staff the key positions of this body,” declared Rudd.

But this is precisely what happened. Of the 27 appointments made by the Labor government, 18 were either union officials or Labor affiliates. And of these appointments, nearly one-third were at the presidential level. The FWC is now a ridiculously top-heavy organisation, with half of all the members at the presidential level.

And just take a look at the salaries. The total annual remuneration of a vice-president is \$534,000 and of a deputy president, it is \$435,000. Even the more junior commissioners earn \$358,000. In other words, nice gig if you can get it, particularly as most senior union officials, unless you are from the Health Services Union, earn considerably less than \$200,000.

There is, of course, the possibility the appointees to the FWC will act in a detached and even-handed way. But, alas, it has not been the case. One member of the tribunal is so inclined to hand down lop-sided and prejudiced decisions that many of them are appealed. And as many members seem to take only a passing notice

of the legislation that is intended to govern their decision-making, a large number of inconsistent decisions have been handed down, causing havoc for those parties that are bound by incoherent rulings.

The Australian Mines and Metals Association, the resources industry employer group, has outlined a number of areas of significant inconsistency. These include: whether employers have the right to test for drug and alcohol use by workers; whether accessing pornographic material is the basis for justified dismissal; whether assaulting a fellow worker is the basis for justified dismissal; whether annual leave can be cashed out; and whether individual flexibility agreements must actually deliver on their promise.

If that is not bad enough, take the performance of the FWC in relation to the handling of the misuse of funds by officials of the HSU. Given the political sensitivities of the case — Craig Thomson, former HSU national secretary, was by then a critical member of parliament keeping Labor in power — the lack of urgency applied to the case is malodorous, nay, shocking. And when we learn that the prime minister’s chief of staff contacted relevant persons within the FWC, the reputation of the tribunal is further undermined. There can be no legitimate reason, even information gathering, for this person to have contacted FWC staff.

And when the heat was soaring in the kitchen and there was a possibility that the general manager of the tribunal might be called before a Senate committee to explain the course of events in relation to the HSU investigation, the Labor government con-

veniently appointed this person a commissioner of the tribunal, thereby preventing him from answering any questions.

If there is one event that should seriously alarm the public and completely undermine its trust in this institution, it is this one.

But there's more and we can thank then workplace relations minister, Bill Shorten, for completing the destruction of the integrity of the FWC. There are a number of parts to the story, but the most egregious is the appointment of two vice-presidents, positions that had previously not existed. Egged on by the president of the FWC, who by rights should

have expressed no opinion on the matter, the Labor government appointed two friendly vice-presidents to quash the two Coalition-appointed vice-presidents with (lower) deputy president status. It was this brazen. Even the Law Council of Australia was unimpressed.

The two Coalition appointees have been effectively marginalised by the president, with one of the new vice-presidents, in particular, being allocated a disproportionate number of significant full bench cases.

The reputation of the FWC has hit rock bottom. It has become a machine for approving unfair dismissal claims. Its handling of the recent penalty rates and apprentice pay cases underscores its complete lack of understanding of economics. More generally, many of its decisions are quite bizarre and anti-business.

I'm just pleased that the overpaid members of the FWC will increasingly find themselves overwhelmed by individual grievance cases as bullying is shifted into its jurisdiction. Of course, most members of the public have no knowledge of the operations of the FWC. If they did, it would make their hair curl — like mine.