

28 June 2018

The Hon. Craig Laundy MP
Minister for Small and Family Business, the Workplace & Deregulation
PO Box 6022
House of Representatives
Canberra ACT 2600

Email: Craig.Laundy.MP@aph.gov.au

Dear Minister,

The following correspondence seeks your review of two key Fair Work Commission issues relating to tenure and appointments:

1. 2015 Productivity Commission Recommendations – Fair Work Commission appointment terms and retirement age

Fair Work Commission

Australian Resources and Energy Group AMMA is seeking consideration be given to a further key recommendation of the Productivity Commission in relation to the Fair Work Commission (FWC).

Specifically, the recommendation that appointment terms of FWC members be limited to 10 years, and the retirement age be lifted to 70.

Appointment terms

Currently, the appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the FWC are until the age of 65.¹ Expert Panel members can be appointed for a maximum of five years.²

A number of current FWC members have had long-running appointments.

Data on FWC members as at 1 August 2015 suggested that the average duration of appointments for the Commission's (then) 41 primary appointments was 9.62 years, and the mode was 13.76 years.³

The Productivity Commission observed that given that most existing members can be expected to continue to serve for some time, the average duration of tenures at the FWC will be considerably longer.⁴ Indeed, a number of members who have been appointed in recent decades have had extremely lengthy appointments, including some whose terms have extended beyond 25 years.

In AMMA's view, a key concern with appointment terms of such length is that there is a real risk of members becoming disconnected with the modern business world.

Several participants in the Productivity Commission's Inquiry into the Workplace Relations Framework submitted that the very long possible appointment periods for FWC members entrenched problems, and were not consistent with current practice in other key public institutions.

¹ *Fair Work Act 2009*, s. 629.

² *Fair Work Act 2009*, s. 629.

³ Justice Iain Ross, Productivity Commission submission DR357, p. 26.

⁴ Final Report, *Productivity Commission Inquiry into the Workplace Relations Framework*, p. 163.

For example, Brendan McCarthy, a former Commission Deputy President, submitted that lengthy appointment tenures impinge upon accountability.

He said:

Another aspect of the absence of normal types of accountabilities for those that establish standards is the tenure of Members of the FWC. There are other bodies with a legislative or regulatory type role that have been given an independent role by parliament. Those bodies usually have persons appointed to them for a limited term.⁵

After consideration of the many submissions to the Inquiry, the Productivity Commission recognised that 'excessively long tenures must, by definition, limit the inflow of members with different perspectives and expertise'.

It went on to say:

In addition, in practice, it is hard to dismiss an underperforming member (and there is no organisation that is free of the risk of some underperformance). Limited tenures provide at least a vehicle for addressing this (albeit rather slowly).

The Productivity Commission recommended the following in relation to appointment terms:

The Australian Government should amend s. 629 of the Fair Work Act 2009 (Cth) to stipulate that the President, a Vice President, a Deputy President or a Commissioner of the Fair Work Commission, and the appointees of the proposed Workplace Standards Commission hold office until the earliest of the following:

- ***he or she reaches the tenth anniversary of their appointment;***
- *he or she attains the age of 70;*
- *he or she resigns or the appointment is terminated.*

It said this would provide for a 'balanced solution' which would 'provide for terms of long enough duration for the development of skills and knowledge, and for decision making which does not occur with an eye to possible reappointment, while also providing limits to ensure greater accountability and to provide options for other talented people to become commissioners'.⁶

Also such an approach would provide regular refreshing of the FWC with experience in new modes and methods of work. The speed of such change is ever intensifying, for example many students who graduate do so in the knowledge 65% of the roles they may be working in don't exist yet.

Accordingly, for these reasons, it is AMMA's view the recommendation of the Productivity Commission on FWC tenure is worthy of consideration.

Retirement age

The retirement age for FWC Members is currently 65.⁷ This is remarkably lower than the retirement age of members of the judiciary, with High Court and Federal Court judges having a retirement age of 70.⁸ Several state industrial tribunals also have 70 as the compulsory retirement age.

AMMA supports the Productivity Commission in its recommendation recommended the retirement age be lifted to 70.

⁵ Brendan McCarthy, Productivity Commission submission 43, p. 7.

⁶ Final Report, *Productivity Commission Inquiry into the Workplace Relations Framework*, p. 164.

⁷ *Fair Work Act 2009*, s. 629.

⁸ *Commonwealth of Australia Constitution Act* (The Constitution), s. 72.

Given the current trends of longer life expectancy, people remaining in the workforce for longer, and the quasi-judicial role of the FWC, AMMA is seeking your views as to whether the retirement age of FWC members should be lifted to better align with the retirement age of the judiciary, and the Productivity Commission's recommendation.

Further, by lifting the retirement age to 70, the government of the day can avoid an unsatisfactory situation whereby (and this has happened previously) a talented industrial relations practitioner may be appointed to the FWC aged in their late 50's or early 60's, perhaps after decades of valuable private sector real-life business experience, only to be forced to retire a short number of years later.

This is forced upon them despite potentially remaining in very good health and in-touch with relevant, modern day business and employee expectations. This situation contrasts starkly with the hypothetical scenario at the other end of the spectrum whereby a member of the FWC could have been appointed to the tribunal much earlier in their careers and spend more than 25 years at the FWC with little consideration to performance or awareness of evolving business and societal trends and practices.

Raising the statutory retirement age to 70 and limiting terms to a maximum of 10 years may assist solve both of these contrasting scenarios.

In AMMA's view, the Productivity Commission's recommendation has highlighted two matters worthy of consideration. AMMA is interested in the government's views on implementing reforms giving effect to these recommendations in the near future to safeguard the integrity and independence of the FWC or alternatively advise if it is the government's intention to review the Productivity Commission's recommendation at some future date or ignore it.

2. Fair Work appointments and resourcing issues

A further matter for consideration is the issue of resourcing challenges at the FWC.

In AMMA's view this could be addressed by the government making additional appointments to the tribunal.

The FWC currently comprises 39 tribunal members – 19 of which are at the Presidential level and 20 at the Commissioner level.

This is seven members fewer than the 46 tribunal members when the ALP left office on 7 September 2013.

Despite the FWC President and General Manager publicly asserting otherwise (note: both ALP appointees with union backgrounds), the diminished size of the tribunal does present a resourcing issue that is having a direct impact both on business and the FWC's effectiveness.

For instance, the 2018 Federal Budget paper on Employment Institutions shows the FWC is "not on track" to achieve the 32-day target for approval of enterprise agreements.

This is a significant problem for employers and the broader economy that could be addressed through appointing new tribunal members at the Commissioner level to satisfy assist with the FWC's workload.

Note: Notwithstanding the Coalition has been in Government for sixteen of the last twenty two years, 21 of the current tribunal members are ALP appointees and 18 are Coalition government appointees.

AMMA believes the government would be more than justified in appointing up to seven new tribunal members. This would bring the FWC's current resources in-line with the size of the tribunal in 2013 when the ALP left office.

In terms of the FWC savings, once such appointments are made, significant savings could be made by reducing the ever increasing number and ever expanding roles of Fair Work Conciliators.

These highly paid federal government public servants (31 in 2016, 36 in 2017) undertake work previously performed by FWC members such as unfair dismissal conciliations and general protection claims.

Forwarded for your consideration.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Steve Knott', written in a cursive style.

Steve Knott AM
Chief Executive