

6 May 2014

Mr Anthony Cole
Expert Panel Member
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3001

Via email: awr@fwc.gov.au

Dear Mr Cole

Re: The “Towards Responsible Government” Report

I refer to the “Towards Responsible Government” report, which is phase one of the report of the National Committee of Audit (hereafter, “the Report”). Since its public release on 1 May 2014, there has been and continues to be a high degree of public debate and awareness of the Report and its recommendations.

Your signature appears on the letter of transmittal of the Report, dated 14 February 2014. The Report otherwise confirms your membership of the National Commission of Audit without qualification.

Recommendation of 28 of the Report is as follows:

“Australia's minimum wage is high by international standards. The Commission recommends that future growth in the minimum wage be contained to improve job opportunities. A degree of variation in the minimum wage should also be introduced across the States to better reflect local labour market conditions and the cost of living. This should be achieved by:

- a. establishing a 'Minimum Wage Benchmark', set at 44 per cent of Average Weekly Earnings;
- b. transitioning to this new benchmark by indexing the current national minimum wage to grow in line with the Consumer Price Index less 1 percentage point for a period of 10 years; and
- c. transitioning the minimum wage in each State and Territory to the lower of the 'Minimum Wage Benchmark' or 44 per cent of Average Weekly Earnings in that jurisdiction by 2023, noting that should this imply a reduction in the nominal minimum wage, the wage would instead be kept constant until aligned with 44 per cent of Average Weekly Earnings in that jurisdiction.”

Recommendation 28 is made at the conclusion of section 7.11 of the Report. Section 7.11 also includes the following statements:

“Containing growth in the minimum wage would improve job opportunities and the effectiveness of the Government’s employment policy programmes.”

“In transitioning to new arrangements that contain growth in the minimum wage, it is important to consider its objectives. It should have regard to community standards but also maintain the incentive to work in terms of the relativity between unemployment benefits and financial benefits of working.”

“The Commission proposes that growth in the minimum wage be slowed by applying an indexation factor of CPI less 1 percentage point for a period of 10 years (growth of around 1.5 per cent per year) until it reaches 44 per cent of National Average Weekly Earnings”

“Having a uniform national minimum wage ignores substantial differences in local job markets. The demand for labour and the price employers are willing to pay for unskilled or inexperienced labour varies markedly across the country.”

“Having a single national minimum wage disadvantages workers attempting to gain a job in states like Tasmania and South Australia where wages and the costs of living are generally lower than in other States”

“The Commission recommends that a different minimum wage apply in each jurisdiction, with a transition period over the next 10 years. In particular, the Commission proposes the minimum wage in each jurisdiction be equal to the lower of the Minimum Wage Benchmark described above, or 44 per cent of Average Weekly Earnings in that jurisdiction by 2023. The wage would then increase in line with growth in that jurisdiction’s Average Weekly Earnings.”

The purpose of this correspondence is to respectfully request that, in light of the above matters, you disqualify yourself from the Expert Panel constituted to conduct the 2013-14 Annual Wage Review. This request is made to you on the grounds of apprehended bias as described below. We strongly object to your continued membership of that Expert Panel on those grounds.

A Full Bench of the Commission recently described the requirement of Commission members to disqualify themselves on account of apprehended bias in *Viavattene v. Health Care Australia* [2013] FWCFB 2532, as follows:

“The impartiality of the Commission is central to a fair hearing. Bias, whether actual or apprehended, connotes the absence of impartiality. Applied to Commission members the governing principle is that a member is disqualified if a fair minded observer might reasonably apprehend that the member might not bring an impartial mind to the resolution of the question that the member is required to decide. The principle gives effect to the requirement that justice should both be done and be seen to be done.”

It has been recognised at least since 1969 that the requirements of natural justice in the Commission’s predecessor institutions applied so as to require (or provide grounds to compel) a Commission member to cease hearing a matter when “..a suspicion may

reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds.” (*R v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546).

We submit that your authorship of the Report and its recommendations (including section 7.11 and recommendation 28) are sufficient to establish that it might reasonably be suspected by fair-minded persons that you might not resolve the questions before you in the 2013-14 Annual Wage Review with a fair and unprejudiced mind.

Further, we submit that section 7.11 of the Report and the attendant recommendation:

- (a) Set out a precise, fixed and unambiguous view of what the level of and adjustment of the Minimum Wage should be now and in the next 10 years; and
- (b) Express views about specific matters that Expert Panel is required to have regard to and which form part of the *minimum wages objective* in section 284 of the *Fair Work Act* 2009, including “the performance of the national economy, including...inflation and employment growth”, “promoting social inclusion through increased workforce participation” and “relative living standards and the needs of the low paid”.

These specific considerations in our view both amplify and provide additional grounds to engender a reasonable suspicion among fair-minded persons that you might not resolve the questions before you in 2013-14 Annual Wage Review with a fair and unprejudiced mind.

We remind you that the letter of transmittal within the Report indicates that the Report was provided to the Treasurer (hence, the views were expressed) in advance of any preliminary consultations on the Annual Wage Review or the lodgment of written submissions.

As the public release of the report did not occur Thursday of last week, we were not in a position to raise this matter with you at any earlier opportunity.

We note that section 622 of the *Fair Work Act* 2009 provides for the continued progression of the Annual Wage Review in your absence, should you agree or otherwise be compelled to disqualify yourself as we seek.

We would be pleased if you could give this matter your urgent consideration and advise of your response no later than close of business on Monday 12th May 2014.

Yours sincerely



Tim Lyons
Assistant Secretary