

Working for business.  
Working for Australia

# AM2015/1 Family & Domestic Violence Clause

Submissions in Response to  
Statement [2017] FWC 1733  
3 April 2017



Australian  
Chamber of Commerce  
and Industry

## 1. INTRODUCTION

- 1.1 On 27 March 2017 the Fair Work Commission issued a Statement [2017] FWC 1733 in Matter No. AM2015/1.
- 1.2 In addition to the Statement the Commission posed 3 questions.
- 1.3 The Statement and the questions posed require a consideration of relevant sections of the *Fair Work Act 2009* (the **Act**) primarily focused on Chapter 5.

## 2. THE WATSON VP DECISION

- 2.1 On 27 February 2017 Watson VP (a Deputy President of the Commission) issued a decision in Matter No. AM2015/1 (the **Watson VP Decision**).
- 2.2 The Watson VP Decision accords with the requirements of ss 598 and 601 of the Act.
- 2.3 Shortly after issuing the Watson VP Decision, Watson VP retired from the Commission.
- 2.4 As at this date the other members of the Commission had not issued a decision in Matter No. AM2015/1.

## 3. RELEVANT PROVISIONS OF THE FAIR WORK ACT 2009 (CTH)

- 3.1 Matter No. AM2015/1 concerns common claims made by the ACTU as part of the 4 Yearly Review of Modern Awards (s 156) (the **Review**).
- 3.2 The Review was initiated by the Commission which elected to proceed by way of receiving claims. This was an administrative approach rather than an approach specifically required by s 156.
- 3.3 Section 616 requires the Review to be undertaken by a Full Bench.
- 3.4 Section 618 sets out the number of members required to constitute a Full Bench and how a Full Bench makes decisions; by majority or if no majority the decision of the member of the Full Bench who has seniority.
- 3.5 Section 619 sets out the seniority of Full Bench members.
- 3.6 Section 621 sets out how the Fair Work Commission is reconstituted when it is constituted by a single member and they become "unavailable". It is not relevant for present purposes other than to say it adopts the same language as s 622 which is relevant.
- 3.7 Section 622 applies in the circumstances where a Full Bench is constituted and a member becomes "unavailable" to "continue dealing with the matter before the matter is completely dealt with".

- 3.8 Section 622(2) does not apply to the current scenario but allows a Full Bench to continue as long as the “unavailable” member does not reduce the Full Bench to less than 3 members one of which is a Deputy President.
- 3.9 Absent s 622(2) applying, s 622(3) obliges (“must”) the President to direct another member to be part of the Full Bench to continue to deal with the matter. As set out at paragraphs 4.22 to 4.32 below, there is no requirement for the new/replacement member of the Full Bench to issue a decision.
- 3.10 Section 623 requires the new member to take into account all that has happened in the matter so far.
- 3.11 Section 624 operates to ensure that any decision made by an improperly constituted Full Bench is not invalidated.

#### **4. POSITION OF ACCI**

- 4.1 Certain things should be uncontroversial:
- (a) Watson VP is now “unavailable” (s 622);
  - (b) the “Full Bench” has not yet made a decision (ss 598, 601 and 618);
  - (c) a single member of the original Full Bench has made their decision but given the wording of s 618 this does not constitute the decision of the Full Bench (at this stage);
  - (d) upon the retirement of Watson VP, the Full Bench ceased being properly constituted as such; and
  - (e) the purpose of s 622 (and s 621) is to ensure that the Commission does not have to rehear a matter because a member of a Full Bench becomes unavailable.

- 4.2 The gravamen of the issue is whether the “matter” has been “completely dealt with” (s 622 (1)).

##### **“Matter”**

- 4.3 The term “matter” is not defined in the Act.
- 4.4 It is referenced at least 206 times throughout the Act.
- 4.5 Throughout the Act, the term “matter” is used in two contexts:
- (a) in relation to claims brought before the Fair Work Commission - where the term “matter” is used synonymously with terms such as “application”, “claim”, “case” or “dispute”; and
  - (b) in a broader sense and in some instances as an abbreviation for the term “subject matter” or where it is used synonymously with the terms “considerations” or “criteria”.

- 4.6 A closer analysis of Part 5-1 of the Act (being the portion of the legislation in which section 622 is contained) and Divisions 3 and 4 of this Part (which deal with “Conduct of matters before the FWC” and “Organisation of the FWC”) suggest that the term “matter” as used in these parts and when considered in context, is synonymous with terms like “application”, “claim”, “case” or “dispute”.
- 4.7 Having regard to the above, the “matter” of relevance before the Commission is the common claims advanced by the ACTU in Matter No. AM2015/1.

**“Completely dealt with”**

- 4.8 The only judicial consideration of section 622 (3) that we have identified is *Financial Services Council Ltd v Industry Super Australia Pty Limited* [2014] FCAFC 92 (25 July 2014), which did not consider the meaning of the phrase “completely dealt with”.
- 4.9 Other than in s 622, there are only two other instances of the term “completely dealt with” in the Act. These appear at ss 621 and 716.
- 4.10 The use of the phrase in these three sections contextually should carry the same meaning.
- 4.11 It is the *matter* (in this case the common claims being considered in Matter No. AM2015/1) that must be completely dealt with. Notably, the use of the term “completely dealt with” in s 622 is different to the equivalent provision under the *Workplace Relations Act 1996 (WR Act)* - namely, section 92(2) which related to circumstances where a Commission member became unavailable “before the matter has been determined”.
- 4.12 This language is narrower than that used the Act, in that it requires the matter to have been determined - which has connotations of the publishing of a decision, determination, recommendation or otherwise by the Commission.
- 4.13 Having regard to the above, we consider that for the hurdle “completely dealt with” to be reached, the matter must be decided such that the role of the Full Bench is at an end (the Commission as constituted is *functus*) and there is no further power to exercise in the matter.
- 4.14 The present matter has not reached this hurdle.
- 4.15 In practical terms the matter will only be completely dealt with if the matter is dismissed or one or more modern awards are varied and all administrative elements of such variations at the Full Bench level are concluded. This has clearly not yet happened. As such, Matter No. AM2015/1 has not been completely dealt with.

- 4.16 Based on the state of Matter No. AM2015/1, s 622 applied as at the retirement of Watson VP.
- 4.17 Absent s 622(2) applying, the Commission was not properly constituted as a Full Bench as at that date.
- 4.18 As at that date, s 622(3) obliged the President to fill the position of the unavailable member (note the word “otherwise” in s 622(3)).
- 4.19 It can be implied from s 622(2) that the residual members of the original Full Bench should not continue to act until the Full Bench is reconstituted unless it meets the requirements of s 622(2).
- 4.20 Once the Full Bench is not properly constituted, they cannot meet the requirements of section 616(2) and thus cannot continue to exercise Modern Award Powers (ss 156, 134).
- 4.21 This said there is no express prohibition on the residual members of the Full Bench from continuing to act in the matter and relevantly if they had issued together or separately a decision/s in the matter following the unavailability of Watson VP, s 624 protects such decision/s from being invalid merely because the Full Bench is not properly constituted.

#### **The ‘role’ of the New Member**

- 4.22 The new member is required to comply with s 623.
- 4.23 In doing this they are required to “take into account” the current state of the matter.
- 4.24 The phrase “take into account” has a relationship with similar phrases such as “consider” and “have regard to”. Such expressions are frequently used in legislation that vests discretion in a body to condition the scope of the discretion otherwise vested in the body.
- 4.25 Such phrases have been consistently interpreted to mean that a body must take into account the matter to which regard is to be had and give weight to it as an element in exercising its function. However, the significance of the stated matters will depend upon their context<sup>1</sup>. The authorities referred to also make it clear that the weight to be given to a matter is, in this case, for the new member to determine, provided that the consideration of the matter is genuine. The fact that the new member is directed to have regard to certain matters that are specified does not preclude consideration of other factors thought to be relevant<sup>2</sup>.
- 4.26 Having regard to the above principles, the new member is required to “take into account” the current

---

<sup>1</sup> Barwick CJ in *Rathborne v Abel* (1964) 38 ALJR 293 at 295

<sup>2</sup> Kitto J in *Rathborne v Abel* (1964) 38 ALJR 293 at 301, *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 286; 25 ALR 497 at 504; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333; 44 ALR 63 at 67; *Haplin v Lumley General Insurance Ltd* (2009) 261 ALR 741 at 748; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145 at [57]-[67].

state of the matter including the Watson VP Decision and the advanced state of the matter.

- 4.27 Importantly, while not prohibited from making a decision, the new member is not required to issue their own decision, or be part of the decision, in the matter.
- 4.28 Once the Bench is reconstituted, Gooley DP and Spencer C can issue their decision(s) and should proceed to do so as expeditiously as possible.
- 4.29 This will allow the 'Full Bench' to make a decision in the matter that meets the requirements of ss 618 and 619.
- 4.30 This approach would accord with s 577 allowing those members who 'heard the case' to decide it.
- 4.31 This may lead to the matter being dismissed or to one or more Modern Awards being varied.
- 4.32 If the latter, the newly constituted Full Bench would then deal with the administrative elements of how such Modern Awards are varied in practice (i.e. solely with implementation).

## **5. QUESTIONS FROM [2017] FWC 1733**

### **QUESTION 1: ARE DEPUTY PRESIDENT GOOLEY AND COMMISSIONER SPENCER PERMITTED TO ISSUE A DECISION IN THIS MATTER? IF SO, WOULD THEIR DECISION, TAKEN TOGETHER WITH THE DECISION OF THE VICE PRESIDENT, CONSTITUTE THE FULL BENCH'S DECISION?**

- 5.1 It would have been highly desirable for the original members of the Full Bench in Matter No. AM2015/1 to issue one or more decision prior to Watson VP becoming unavailable.
- 5.2 Upon the Full Bench not being properly constituted however, the residual members are not permitted to proceed to issue a decision(s) or to otherwise exercise Modern Award powers or functions for the reasons discussed above in paragraphs 4.16-4.21.
- 5.3 Watson VP's Decision is still valid and operative in the matter having been made properly in accordance with ss 134, 156, 598, 601, 616.
- 5.4 As such, what will ultimately constitute the decision of the Full Bench will be determined after the President has reconstituted the Full Bench in accordance with s 622(3).
- 5.5 Whether that decision is unanimous, by majority or determined based on the decision of the member with seniority (s 618 and 619) is yet to be determined.

**QUESTION TWO: ALTERNATIVELY, DOES S.622 OF THE FAIR WORK ACT REQUIRE THAT THE PRESIDENT APPOINT ANOTHER MEMBER TO THE FULL BENCH IN ORDER FOR THE FULL BENCH TO ISSUE A DECISION?**

- 5.6 Based on our submission above it follows that the answer to this question is yes. Until the Full Bench is properly reconstituted it is not permitted to proceed further.

**QUESTION 3: IF THE ANSWER TO QUESTION 2 IS YES AND IF THE PRESIDENT APPOINTS A NEW MEMBER TO THE FULL BENCH, ARE THE PARTIES CONTENT FOR THE NEWLY CONSTITUTED FULL BENCH TO PROCEED TO DETERMINE THE APPLICATION AFTER REVIEWING THE MATERIALS FILED AND THE TRANSCRIPT OF THE HEARING, WITHOUT THE NEED FOR A FURTHER HEARING?**

- 5.7 There is no need for a rehearing of the matter and a rehearing would squarely offend s 577.
- 5.8 As set out in paragraphs 4.26 to 4.30 above, the decision in this matter can be concluded then by Gooley DP and Spencer C making a decision or decisions.

## Australian Chamber Members

**AUSTRALIAN CHAMBER MEMBERS:** BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF COMMERCE & INDUSTRY VICTORIAN CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY AGED AND COMMUNITY SERVICES **ANIMAL MEDICINES AUSTRALIA AUSTRALIA ARAB CHAMBER OF COMMERCE AND INDUSTRY AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION ASSOCIATION OF FINANCIAL ADVISERS ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL ASSOCIATION AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES AUSTRALIAN FEDERATION OF TRAVEL AGENTS AUSTRALIAN HOTELS ASSOCIATION AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP AUSTRALIAN MADE CAMPAIGN LIMITED AUSTRALIAN MINES & METALS ASSOCIATION AUSTRALIAN PAINT MANUFACTURERS' FEDERATION AUSTRALIAN RECORDING INDUSTRY ASSOCIATION **AUSTRALIAN RETAILERS' ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL INSTITUTE AUSTRALIAN TOURISM INDUSTRY COUNCIL AUSTRALIAN VETERINARY ASSOCIATION BUS INDUSTRY CONFEDERATION BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA CEMENT CONCRETE AND AGGREGATES AUSTRALIA CHIROPRACTORS' ASSOCIATION OF AUSTRALIA CONSULT AUSTRALIA CUSTOMER OWNED BANKING ASSOCIATION CRUISE LINES INTERNATIONAL ASSOCIATION DIRECT SELLING ASSOCIATION OF AUSTRALIA EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION HIRE AND RENTAL INDUSTRY ASSOCIATION LTD LARGE FORMAT RETAIL ASSOCIATION LIVE PERFORMANCE AUSTRALIA MASTER BUILDERS AUSTRALIA MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA MEDICINES AUSTRALIA NATIONAL DISABILITY SERVICES NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION NATIONAL EMPLOYMENT SERVICES ASSOCIATION NATIONAL FIRE INDUSTRY ASSOCIATION NATIONAL RETAIL ASSOCIATION NATIONAL ROAD AND MOTORISTS' ASSOCIATION NSW TAXI COUNCIL NATIONAL ONLINE RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION OUTDOOR MEDIA ASSOCIATION PHARMACY GUILD OF AUSTRALIA PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA RESTAURANT & CATERING AUSTRALIA RECRUITMENT & CONSULTING SERVICES ASSOCIATION OF AUSTRALIA AND NEW ZEALAND SCREEN PRODUCERS AUSTRALIA THE TAX INSTITUTE VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE********