

**IN THE FAIR WORK COMMISSION**

*Fair Work Act 2009*

s.156 – Four Yearly Review of Modern Awards

AM2015/1

**SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS**

**DATE:** 4 April 2017

**D No:** 32/2017

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1. These submissions are filed in response to the Statement of Justice Ross in *4 Yearly Review of Modern Awards – Family & Domestic Violence Leave Clause* [2017] FWC 1733.
2. The parties to the hearing of the review have been invited to address the following questions:
  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?
  2. 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?
  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?

### **Relevant legislative provisions**

3. Section 622 of the FW Act applies where a member of a Full Bench “*becomes unavailable to continue dealing with a matter before the matter is completely dealt with.*” If a member is unavailable within the meaning of s 622(1) of the FW Act, and s 622(2) does not apply (which it does not in this case), then the President “*must direct another FWC Member to form part of the Full Bench*”, after which the Full Bench “*may continue to deal with the matter without the unavailable member*”.
4. The following principles and considerations are relevant to the question of whether s 622 applies in this case.
5. First, a Full Bench consists of at least three members of the Fair Work Commission, including at least one member holding a presidential office: s 618(1).
6. Second, the Commission is required by s 156 to conduct the four yearly review of modern awards. The four yearly review must be conducted by a Full Bench, per s 616(2).
7. Third, a determination that varies or revokes a modern award made in a four yearly review must be made by a Full Bench: s 616(3).
8. Fourth, there is no requirement in the FW Act that the members of a Full Bench publish their reasons simultaneously.
9. Fifth, a Full Bench will not necessarily be *functus officio* simply as a result of handing down reasons.<sup>1</sup> It is common in modern award review proceedings for matters to arise after the publication of decisions that require the Full Bench to “continue to deal with” a matter (see paragraphs 17–18 below).

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<sup>1</sup> See *United Voice v Restaurant and Catering Association* (2014) 226 FCR 255, [28].

10. Sixth, reconstitution of a Full Bench for the purposes of completing the task of the Full Bench can only be done in the circumstances permitted by statute.<sup>2</sup>
11. Section 622 applies when a FWC Member, who forms part of a Full Bench, becomes unavailable to continue dealing with the matter. The FW Act does not define when a FWC Member “*becomes unavailable*” for the specific function of “*continuing to deal with the matter*”. This is by contrast to s 92 of the *Workplace Relations Act 1996* (Cth), which provided:

**Continuation of hearing by Commission**

(1) Where:

- (a) the hearing of a matter has been commenced before the Commission constituted by a single member; and
- (b) before the matter has been determined, the member becomes unavailable;

the President shall appoint another member of the Commission to constitute the Commission for the purposes of the matter.

(2) Where the hearing of a matter has been commenced before the Commission constituted by 2 or more members and, before the matter has been determined, one of the members becomes unavailable, the President:

- (a) shall if it is necessary for the purpose of establishing a Full Bench of the Commission under section 88; and
- (b) may in any other case;

appoint a member to participate as a member of the Commission for the purposes of the matter.

(3) A member of the Commission becomes unavailable where the member is unable to continue dealing with a matter, whether because the member has ceased to be a member of the Commission or is prevented from taking part in the proceeding by section 85 or for any other reason.

(4) Where the Commission is reconstituted under this section for the purposes of a matter, the Commission as reconstituted shall have regard to the evidence given, the arguments adduced and any award, order or determination made in relation to the matter before the Commission was reconstituted.

12. Section 621 applies where a single FWC member becomes unavailable to continue dealing with a matter. Section 623 provides that where a new member begins to deal with a matter pursuant to ss 621 or 622, the new member must take into account everything that occurred before he or she began to deal with the matter. Section 624 provides that a decision of the

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<sup>2</sup> See *Chua Chee Chor v Chua Kim Yong* [1962] 1 WLR 1464. The decision of Logan J in *Martinuzzi v Fair Work Ombudsman* (2012) 205 FCR 106 contains a useful discussion of the authorities dealing with the question of when a court must be reconstituted: see [8]–[23].

FWC is not invalid merely because it was made by a Full Bench “*constituted otherwise than as provided for by this Division*”.

13. Neither s 92 of the *Workplace Relations Act*, nor sections 621, 622, 623 and 624 of the FW Act, have been the subject of any detailed consideration by the Fair Work Commission or a Court, with the exception of the decision of the Full Court of the Federal Court in *Financial Services Council Ltd v Industry Super Australia Pty Ltd* (2014) 222 FCR 455, which is not directly relevant to this matter.

**Is Vice President Watson ‘unavailable to continue dealing with the matter’ for the purposes of s 622(1) of the FW Act?**

14. The facts in this case are unusual. One member of a Full Bench has issued a decision, and has subsequently become unavailable. The decision of the single member of a Full Bench, by itself, cannot be *the* decision of the Full Bench, per s 618(3) of the FW Act. It is relevant that the effect of the ‘unavailability’ in s 622 that triggers the need to reconstitute a Full Bench is the inability of the *individual member* to continue dealing with the matter.
15. Taking these matters into account, it is open to conclude that by publishing reasons in component parts, as has occurred in this case, the process of the Full Bench issuing, making, or publishing its decision has commenced, but has not concluded. If this is correct, then Watson VP is not ‘unavailable’ for the specific and confined purpose of continuing to deal with the matter by issuing a decision.
16. By contrast, it is clear that Watson WP is ‘unavailable’ for the purposes of taking any fresh step in the matter.
17. The necessity of the Full Bench to “*continue to deal with the matter*” could arise in a number of scenarios, including before a decision is published. For example, a relevant decision published by a different court or tribunal may be handed down about which the parties wish to make supplementary submissions; or a new piece of research or government policy may be published, and comment is sought from the parties by Deputy President Gooley and Commissioner Spencer.
18. Equally, the necessity for post-decision “dealing” is easily contemplated, particularly if the ACTU’s application for variation is granted and the Full Bench seeks to vary modern awards to give effect to the decision, or invites the parties to make submissions about award-specific matters.
19. In each of these scenarios, Watson VP is unavailable for the purposes of s 622(1) of the FW Act, and the President is required by s 622(3) to reconstitute the Full Bench.

## **Conclusion**

20. The ACTU submits that Deputy President Gooley and Commissioner Spencer are permitted to issue a decision in this matter, and that their decision, taken together with the decision of Vice President Watson, will constitute the Full Bench's decision in this matter. Vice President Watson is not unavailable for the purposes of completing the task of the Full Bench in handing down its decision.
21. However, any step in the matter other than issuing a decision, including but not limited to issuing draft determinations, seeking submissions from the parties, and listing the matter for further hearing, requires the President to direct another FWC Member to form part of the Full Bench. If this is necessary before Deputy President Gooley and Commissioner Spencer complete the function of the Full Bench in issuing its decision, then the ACTU is 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 (unless sought by the newly constituted Full Bench).

K Burke

4 April 2017