DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Watpac Construction Pty Ltd T/A Watpac Construction
v
Construction, Forestry, Maritime, Mining and Energy Union; Mr Steven Amies; Mr Kurt Pauls
(C2018/6736)

COMMISSIONER HUNT BRISBANE, 2 JULY 2019

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] – application for administrative reallocation to another Member of the Fair Work Commission – consideration of matters not detailed by Full Bench – preservation of adjudicative independence of Members

[1] On 29 November 2018 Watpac Construction Pty Ltd (Watpac) filed an application under s.739 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (Commission) to deal with a dispute in accordance with a dispute settlement procedure contained within the *Watpac Construction Qld and NT and CFMEU Union Collective Agreement 2015 – 2019* (the Agreement). The Agreement provides for conciliation and arbitration by the Commission of disputes.

[2] On 20 December 2018 the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) sent correspondence to my chambers seeking that I recuse myself from hearing any arbitration of this matter on the grounds of apprehended bias. Both parties filed material relevant to the application of apprehended bias and that matter was heard before me on 23 January 2019.

[3] On 15 February 2019 I issued my decision on the CFMMEU's recusal application and determined that it was not necessary or appropriate to recuse myself from continuing to deal with the application.

[4] On 26 February 2019 the CFMMEU lodged a notice of appeal against my decision of 15 February 2019, together with an appeal against my decision not to further recuse myself in light of correspondence sent from my chambers on 26 February 2019.

Request for SDP Hamberger to recuse himself

[5] The parties were informed that Senior Deputy President Hamberger would be the Presiding Member of the Full Bench in the two matters. The CFMMEU made applications that SDP Hamberger recuse himself from being a member of the Full Bench. The following is the decision of SDP Hamberger refusing to recuse himself:[1]

> **"[1]** The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) has made two applications to appeal decisions by Commissioner Hunt.[2] The CFMMEU has applied for me to recuse myself from being on the Full Bench that is scheduled to consider those appeals.
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> **[2]** The CFMMEU's application that I recuse myself was heard on 13 March 2019. The CFMMEU was represented by L Doust of counsel.
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> **[3]** The decision under appeal concerns a dispute involving members of the Construction and General Division of the CFMMEU. The basis for the recusal application is that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the determination of the issues in the appeals.
>
> **[4]** The matters relied upon by the CFMMEU in making the application have already been dealt with by a Full Bench of the Commission (the Full Bench decision).[3] The subject matter of the recusal application dealt with in the Full Bench decision was my retweet of a tweet that had originally been published by then-Minister for Employment, Senator Cash. I also note that the CFMMEU has applied to the Federal Court of Australia for a writ quashing the Full Bench decision.
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> **[5]** The principles applicable to an application for recusal based upon a reasonable apprehension of bias were comprehensively stated by Gleeson CJ and McHugh, Gummow and Hayne JJ in *Ebner*.[4] They involve a two-step process:
>
> 1. Identification of what is said might lead the decision-maker to decide a case other than on its legal and factual merits; and
>
> 2. An articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[6] The Full Bench decision assumed (without deciding) that the act of retweeting Senator Cash's original tweet constituted an endorsement of the opinions in the original tweet. The Full Bench stated in relation to the original tweet:

> 'The headline ["*CMEU notches up 100 members before the courts*"] relates to the fact that a large number of the CFMMEU's officials and members had been subject of proceedings in the courts for contraventions of civil remedy provisions of the FW Act and other Commonwealth legislation.'

[7] The Full Bench noted that in this context the reference to '*a Century of Shame*' at the bottom of the tweet '*may be regarded as targeted in a subsidiary way at the CFMMEU*' and possibly to those officials and members who constituted the '*100 members before courts*'.[5]

[8] The Full Bench rejected the claim that there was a '*logical connection*' between the retweet and the matters to be determined in the substantive application before me at the time – being whether certain officials of the CFMMEU were fit and proper persons to be issued with entry permits.

[9] The Full Bench did this partly on the basis that the '*fit and proper person test*' is necessarily concerned with the personal characteristics of the person for whom the entry permit is sought.[6] However, it continued:

> "**[19]** Our conclusion on that score is fortified by the fact that the Senior Deputy President has, since the "retweet" was taken down, decided a number of matters concerning the CFMMEU and/or its officials without any complaint about his impartiality. Although, as the CFMMEU submitted, many of these matters were not contentious and were merely administrative in nature, a number of them were not. The schedule of matters annexed to the CFMMEU's written submissions shows, for example, that the Senior Deputy President sat as a member of Full Benches in a number of significant and highly contentious appeals which were decided in favour of the CFMMEU. The Senior Deputy President has also sat alone on a number of contentious matters involving the termination of enterprise agreements… No recusal application was made by the CFMMEU in respect of any of these matters, nor did the CFMMEU appeal or seek judicial review in respect of any of these decisions which were decided adversely to its interests on the grounds that there was any actual or perceived lack of impartiality on the part of the Senior Deputy President. We consider that the fair-minded observer, who would be taken to be aware of the objective background history, would not reasonably apprehend that the Senior Deputy President might not impartially decide the current matters…" [7] [references omitted]

[10] I am satisfied that even if one were to take the view that the retweet could have created a reasonable apprehension of bias, that apprehension would have been eradicated by my subsequent conduct, as observed by the Full Bench. I do not consider that, in the light of all the relevant circumstances, a fair-minded observer would have a reasonable basis to fear that I might not deal with the appeals against Commissioner Hunt's decision in an impartial manner.

[11] Accordingly, I refuse the CFMMEU's recusal application. I do not consider there are any other grounds on which I should decline to sit as a member of the Full Bench that will consider the CFMMEU's applications to appeal Commissioner Hunt's decision."

Full Bench decision

[6] The CFMMEU's two appeals were heard by a Full Bench on 15 April 2019 and the Full Bench's decision was handed down on 4 June 2019. The Full Bench dismissed the CFMMEU's appeal and held, "*...we are not satisfied that the Commissioner made any appealable error in refusing to recuse herself on the grounds of a reasonable apprehension of bias*"[8]. The application, as a matter of practice returned to me.

[7] However, the Full Bench went on to make observations about the further conduct of the present matter. Those observations are extracted below:

> "**[33]** However we wish to make the following observations.
>
> **[34]** For many years, the *Conciliation and Arbitration Act 1904* (Cth) contained s.22(2), which provided that a Member of the Commission who had conciliated an industrial dispute could not arbitrate that dispute if a party to the arbitration proceedings objected. This enabled a party to object to a given arbitrator if it thought

that the arbitrator might have formed an opinion in the conciliation proceedings which could prejudice its case in arbitration.

[35] The 1985 *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (the Hancock Report) considered whether that provision should be retained. It concluded that:

> '…the right of objection should be retained. …we do not agree with the view that parties should have a choice of arbitrator; but we think it fundamental that a party should be able to object to having its case arbitrated upon by a person who, by reason of his earlier involvement in conciliation proceedings, may have formed an opinion which is prejudicial to its case. We understand Sir John Moore's point that conciliation and arbitration cannot, in practice, be put neatly into separate boxes but… the processes are distinctive and need to be expressed as such in the legislation.'

[36] The provision was retained in the *Industrial Relations Act 1988* (Cth) (IR Act) as s.105. It remained unchanged through all the various iterations of the federal industrial and workplace relations legislation until the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). At that time, most of the specific provisions governing the role of the Commission in the conciliation and arbitration of industrial disputes were removed.

[37] The current FW Act does not contain provisions equivalent to s.105 of the IR Act. The role of the Commission in dealing with disputes that arise under DSPs is dealt with in s.739. That provides as follows:

> '**739 Disputes dealt with by the FWC**
>
> (1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
>
> (2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:
>
> (a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or
>
> (b) a determination under the *Public Service Act 1999* authorises the FWC to deal with the matter.
>
> Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).
>
> (3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

> (4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.
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> Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).
>
> (5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.
>
> (6) The FWC may deal with a dispute only on application by a party to the dispute.'

[38] This section mainly sets the scope of the Commission's jurisdiction with regard to disputes under DSPs. It says little about how the Commission should deal with such disputes. For that, one must look to certain provisions of Divisions 2 and 3 of Part 5-1 of the FW Act, which deal with the establishment and functions of the Commission and the conduct of matters before it. These include the requirements in s.577 for the Commission to perform its functions and exercise its powers in a manner that is fair and just, is quick, informal and avoids unnecessary technicalities, is open and transparent, and promotes harmonious and cooperative workplace relations.

[39] While the provisions of s.105 of the IR Act no longer form part of the FW Act, the public policy considerations underlying those provisions remain relevant. In particular, there are good reasons why it will often be inappropriate for a member of the Commission to arbitrate a matter where he or she has previously been involved in conciliation proceedings about the same matter.

[40] While the circumstances of this case focus on comments made by the Commissioner which allegedly gave rise to a reasonable apprehension of bias, a number of concerns can arise where a member of the Commission arbitrates a matter after having been involved in conciliation. This is so even where the member has given no indication of any view he or she may have formed. It would be common, for example, for conciliation proceedings to include offers and counter-offers by parties to settle a matter. Even if the member makes no comment about any such offer or counter-offer, it is conceivable that a member who subsequently has to arbitrate a matter might be influenced by being aware of the content of such negotiations.

[41] Similarly, parties may be willing privately to concede points in conciliation that they would not be willing to concede in an arbitration. Again it is conceivable that knowledge of any such concession might influence a member who subsequently has to arbitrate the matter.

[42] During conciliation conferences, members also commonly have private discussions with one party in the absence of the other. While this is often a very effective mechanism in helping resolve matters by consent, it also means that the absent party does not know what has been said in any such discussion.

[43] These are just some of the considerations that might make it inappropriate for a member to arbitrate a matter that he or she has conciliated.

[44] It is not just a matter of avoiding a reasonable apprehension of bias. Conciliation is a vital function of the Commission. Indeed, most disputes referred to the Commission under the terms of a DSP are resolved by conciliation. Not only is this often the parties' preference, but it is also consistent with the Commission's general obligation to promote harmonious and cooperative workplace relations.

[45] It is essential for the proper functioning of the Commission that parties feel they may speak openly in conciliation, either in plenary session or in private with the member, without fearing that what they say might subsequently adversely affect their interests in arbitration if the matter does not settle. That is one reason why conciliation proceedings are confidential and not recorded.

[46] This is not to say that there will not be cases where the parties themselves prefer a matter to be arbitrated by a member who has been involved in conciliation. However, either party should be free to object to a member subsequently arbitrating a matter which he or she has conciliated.

[47] In our view, once a party to a dispute objects to a member of the Commission who has been involved in conciliating that dispute from undertaking arbitration, that by itself should generally be enough to persuade the member to arrange for the matter to be reallocated to another member for arbitration. This is particularly the case where the member has participated in private discussions separately with the parties in conciliation, the member has expressed views in conciliation about the merits of the dispute, the member has been made aware of without prejudice settlement offers made in conciliation, or one or more parties have made concessions in conciliation which they are not willing to make in a subsequent arbitration.

[48] This can occur without holding the sort of recusal hearing the Commissioner conducted in this case. We note that such hearings are fraught with difficulty.

[49] First, such hearings pose obvious evidentiary challenges. Conciliation proceedings are not recorded, for good reasons. This means, as in this case, that the member has to make findings on what he or she has said or done, based largely on personal recollection.

[50] Perhaps even more fundamentally, such hearings run the risk of undermining the effectiveness of the conciliation process. Hearings such as the one conducted by the Commissioner inevitably expose in open court the content of supposedly private and confidential discussions designed to settle matters by consent. The risk that such a hearing might occur has the potential to discourage the parties from being frank and open in conciliation. This is clearly undesirable from a public policy perspective.

[51] In relation to the matter currently under appeal, it follows that once the Commissioner had finished conciliating the matter (and assuming the matter did not settle), it would be preferable, in our view, for another member of the Commission to conduct any arbitration, including the resolution of any jurisdictional questions.

Conclusion

> **[52]** Because of the important issues these appeals raise in relation to public policy and the Commission's practices, we grant permission to appeal in relation to both matters. We dismiss the appeals against the Commissioner's decisions not to recuse herself and refer the dispute back to the Commissioner. We would encourage the Commissioner however to have regard to the observations we have made in considering whether it would be preferable to arrange for the matter to be reallocated to another member of the Commission for arbitration. [original emphasis retained; footnotes removed]"

CFMMEU request for reallocation

[8] On 6 June 2019 I informed the parties that I had determined to retain carriage of the application for arbitration. I noted that the material relevant to arbitration of the matter had been filed and served in accordance with directions set by me in December 2018. I indicated to the parties that I had availability to arbitrate the matter over specific dates in June or early July 2019, and sought availability.

[9] On 7 June 2019, Hall Payne Lawyers representing the CFMMEU corresponded, referring to the Full Bench decision, and stated that the CFMMEU objected, as contemplated in [46] of the reasons of the Full Bench to me proceeding to arbitrate the matter. The following was sent:

> "Our client would wish to be heard against any argument as to why the Full Bench's reasons do not, in the present matter, warrant the matter being reallocated.
>
> In light of the above, please advise whether the Commissioner is still proposing to conduct the arbitration. If so, please advise whether the Commissioner will give reasons for that decision."

Hearing

[10] The matter was listed for hearing before me on 13 June 2019. Ms Doust of Counsel, instructed by Mr Tiley of Hall Payne Lawyers represented the CFMMEU. Mr Spence of Counsel, instructed by Mr Giles of DWF Australia represented Watpac. Leave was granted to both parties to be represented by a lawyer.

Submissions of the CFMMEU

[11] The CFMMEU made the following written and oral submissions. The CFMMEU submitted that the legislative predecessors to the Act included a right to object to a Member of the Commission arbitrate a dispute where that Member had exercised conciliation functions in respect of a dispute.[9] The CFMMEU noted that such a right is not explicitly expressed in the Act, as provisions dealing with the Commission's functioning have been greatly truncated. The CFMMEU noted paragraph [39] of the Full Bench's decision wherein it was stated:

> "**[39]** *...the public policy considerations underlying those provisions remain relevant. In particular, there are good reasons why it will often be inappropriate for a member of the Commission to arbitrate a matter where he or she has previously been involved in conciliation proceedings about the same matter.*"

[12] The CFMMEU submitted that the Full Bench recognised that where a Member of the Commission retains carriage of a matter following conciliation and after a party has objected to that Member continuing to hear the matter it has the tendency to diminish the confidence of parties and to undermine the conciliation process itself. Those circumstances can lead to disputes about what was said during conciliation, which can directly undermine the confidentiality of conciliation, which is fundamental to the efficacy of that process.

[13] The CFMMEU noted the Full Bench's views, at [47], that a party's objection to a Member who has been involved in conciliating a dispute from undertaking arbitration:

> "**[47]** *...that by itself should generally be enough to persuade the member to arrange for the matter to be reallocated to another member for arbitration. This is particularly the case where the member...has expressed views in conciliation about the merits of the dispute...*".

[14] The CFMMEU submitted that although the Act does not include specific provisions regarding the exercise of arbitration powers following conciliation as its predecessor legislation did, the Full Bench nevertheless articulated generally applicable principles, which operate independently of jurisprudence on reasonable apprehensions of bias, regarding when a Member that has conciliated a matter should not proceed to arbitrate that matter.

[15] The following discussion occurred between myself and Ms Doust relevant to the scope of the Full Bench's observations during the hearing of this matter:

Commissioner: What are your views on the observations of the Full Bench extending beyond industrial disputes and applying all matters before the Commission?

Ms Doust: It, we say, must certainly have application where conciliation is a part of the process. Those considerations about ensuring public confidence in the conciliation process are equally applicable to matters that don't arise here under a dispute settlement procedure in an agreement but that go through some sort of conciliation in some other way.

…

Commissioner: So it's true then that it could be asserted by a party on the doorsteps of an arbitration for an unfair dismissal and we could be in Brisbane or Townsville or anywhere that we no longer - 'There's been a conciliation by you, Fair Work Commission member, and we no longer request that you have carriage of the matter and we ask it be reallocated because there were offers made at the conciliation conference two months ago.'

Ms Doust: Could I say in answer to that scenario, Commissioner, the processes of the Commission now involve in my experience as a matter of course conciliation not being conducted by a member of the Commission but by another experienced conciliator and can I say in that scenario the question of costs might arise to deal with

any inconvenience caused by not having raised the question earlier on. But these principles we say would still be principles that should inform the approach of the Commission and as a matter of common sense one might think that this question might be addressed at an earlier stage as it commonly is in dispute settlement matters where the member - - -

Commissioner: But there's no guidance from the Full Bench, is there, as to when somebody can [wave] this decision and say 'We ask it to be reallocated.'

…

Ms Doust: Might I deal with that scenario. First of all in that situation your Honour's own experience will - I'm sorry, Commissioner, your experience will inform you about the likelihood of that sort of situation arising and I would have thought your experience, Commissioner, would be that that is an issue which arises infrequently in those unfair dismissal types of matters.

Commissioner: I can say it has never arisen before me but might it in light of this decision? It's not a decision rule that the Full Bench has put out.

Ms Doust: It might, but we say that that might well be a function simply of the Full Bench taking a proper principled approach to this question. It may well have consequences for the way in which matters are dealt with but we say that what should drive the approach of the Commission is a proper analysis of principle as the Full Bench displays, rather than in this scenario - I say without any disrespect to you, Commissioner - sort of a hypothetical about what might unfold as a consequence of this sort of approach. And we say any inconvenience might be dealt with by the members of the Commission being particularly alive to this issue and raising the matter at an early stage to have it addressed, and to ascertain the approach of the parties before any programming is done as to whether or not - - -

Commissioner: We do that now, I can assure you - - -We inform the parties - - - That if they wish to make without prejudice offers then we will not have any regard to them at all.

Ms Doust: And in different matters the concerns might be dealt with in a different way. But this is a matter, Commissioner, where we've indicated firmly from an early stage our approach to the matter proceeding in light of the conciliation that's occurred, and this is a matter perhaps unlike some others that you've dealt with. And can I say when I make some observations about the approach the Commission might take I don't say that at all as any criticism of the Commission's current practices in running the unfair dismissal matters before it, which I appreciate are voluminous.

Commissioner: I mean wouldn't that be the case then? Wouldn't there be a direction that members cannot arbitrate any matter that they conciliate? There would be a direction from Parliament or a direction from the President.

Ms Doust: I don't think that that is what one would take from the amendments to the legislation. What I take from the amendments to the legislation so far as those provisions about the operation of the Commission are concerned, that what used to be very detailed provisions have now been very much streamlined. But the fact that it has been streamlined doesn't mean that the exercise of powers by the Commission isn't informed by principle. Principle will move in and take the place of what was once codified and that's what the Full Bench has done here.

[16] I discussed with Ms Doust the CFMMEU's view of how the Full Bench's decision could apply in the scenario were a Member participated in a conciliation where offers to resolve a matter were exchanged and the Member was made aware of such offers:

Commissioner: Now, how could you say that where offers are made and parties do not object, that we are more likely to perform the duties impartially and faithfully and less likely where there is an objection?

Ms Doust: I don't say that. What I say is that the Full Bench has, I think, made the unarguable observation that the exchange of those offers might impact a member. There will be occasions when the exchange of offers does and there may be occasions when it does not, but what the Full Bench points to is the very fact that that is conceivable and a real likelihood, is something that can diminish the confidence of parties in conciliation.

It's the concern that participation in that process of exchange might have influenced the member, but also it's a concern that a party thinking that a member may well proceed on to hear the matter will approach that conciliation with a lesser degree of openness, transparency, willingness to make concessions, willingness to expose their real or true position; that the parties will come to conciliation in a guarded way rather than in a confident way.

That's really what the Full Bench points to, in my submission, in their reasoning. It's about ensuring the confidence of the parties rather than, if I may say, ensuring that the Commissioner's mind is always a blank slate.

[17] The following exchange between myself and Ms Doust is also relevant:

Commissioner: So this is a general rule, is it, that if an applicant requests the matter to be administratively reallocated, the member is obliged?

Ms Doust: Well, I think the words - that by itself should generally be enough. I accept that it doesn't go to say that as a matter of absolute compulsion or as an automatic outcome that the matter will be reallocated, but what the bench is saying there is that this should be enough. One party says, "No, I don't wish to proceed with this member of the Commission arbitrating;" that would ordinarily be enough to determine the course that's followed then.

So we say that rule that's established in paragraph 47 is not one that invites a consideration of whether or not any of the factors that are set out in paragraphs 40 to 42 are present; have there been offers or have there been concessions and so on. That's not an approach that invites the Commission to weigh up those matters, because the bench makes clear subsequently that it's not about those matters and it's not about bias. It's about the confidence of the parties in the conciliation process and about them fully participating in that process. That can only be achieved by ensuring that they know they have that capacity after that process is played out - - -

…

Commissioner: Do you think this observation will mean that all members of the Commission all administratively reallocate their files?

Ms Doust: No, I certainly don't think it will mean that, because an objection won't necessarily be taken by the parties and a great number of the matters - as the Full Bench observed - are resolved at the conciliation stage. The Full Bench is keen to ensure that people come to that process and commit fully to it to avoid the need for arbitration. That's obviously always a preferred outcome.

The Full Bench wants to see matters resolved in conciliation rather than proceed on to arbitration, but, in order to continue to achieve that, the parties need to have more confidence in the conciliation process rather than entering that process with a concern about how the arbitration may play out. That's really what drives, in my submission, the approach that the Full Bench takes.

[18] The CFMMEU acknowledged that the Full Bench did not make orders binding me to reallocate this matter to another member of the Commission, and that I am not bound to follow the Full Bench's observations. However, the CFMMEU submitted that it has been recognised in numerous decisions of the Commission and its predecessors that it is appropriate for single Members of the Commission to follow approaches preferred by the Full Bench of the Commission.[10] The CFMMEU submitted that I *should* follow the observations of the Full Bench in this instance and *should* reallocate this matter to another Member of the Commission for arbitration. (my emphasis)

Submissions of Watpac

[19] The applicant submitted that there was a watershed moment in industrial relations in Australia on 27 March 2006 when the Work Choices legislation was introduced by the Coalition Government. The legislation, once in force, created a different role for the Australian Industrial Relations Commission, as this institute was then. The statute introduced a private arbitration function, borne from the terms within parties' certified agreements, as they were then known.

[20] On 1 July 2009 the *Fair Work Act 2009* was introduced by the Labor Government. The Full Bench has dealt with the powers of settling disputes in [37] of its decision.

[21] It was submitted by the applicant that upon the corporations power being the source of constitutional power to allow the Commission to deal with industrial disputes, the powers then exercised under the *Fair Work Act 2009* are those that are stated within the relevant enterprise agreement. There is no legislation, nor is it stated within the dispute resolution term that in determining a dispute by arbitration, a party may object if a Member of the Commission has earlier conciliated the matter.

[22] The applicant submitted that the terms of the disputes procedure within the enterprise agreement do not demonstrate a mutual intention of the parties to have the situation that has arisen, where one party objects the Member who has conciliated the matter to no longer arbitrating the matter. If it had been the mutual intention of the parties to provide such a provision, the terms of the enterprise agreement would have so stated, as per the authority in *AMWU v Berri* [2017] FWCFB 3005 (*Berri*).

[23] Relevant to whether, during the conference held on 14 December 2018, and the further site visit on 21 December 2018 there were any concessions made by the respondent, the following was submitted by the applicant:[11]

> "The point here is very simple: the first conciliation conference that we had before you, Commissioner, did not involve any private discussions between the parties and yourself. Primarily it was based on, first of all, submissions made by myself about the applicant's position regarding this particular matter and then submissions made by Mr Borg which predominantly focused on safety concerns in relation to the site.
>
> The next function that you performed was to attend a site visit, where all parties were present at the particular time. We looked at a range of safety issues and then we had a discussion at the end of that particular site visit. Once again, there were no concessions made by either party in relation to those discussions, nor was there anything said, I would submit, that would bring someone to the view that that may have prejudiced their position in terms of a potential decided arbitrationary outcome.
>
> The Full Bench gives examples but, once again, as my friend has outlined, there's no precedent basis on those - what I'd define as obiter observations. Also, as I said, those matters articulated from paragraphs 40 through to 43 we say don't apply in this instance and in fact as part of the process of the Full Bench appeal we weren't asked in any way to really detail the process of the conciliation that occurred on 14 December.

> Had we been asked to do that, the submissions would have been that that particular conciliation didn't have those hallmarks that are talked about in terms of private meetings, private shuttling, concessions made by either party. In fact the positions of the parties as they entered the room, I can safely say, were the same as the positions of the parties when they left the room on that particular day."

Consideration

[24] Members of the Commission are statutory office holders, appointed by the Governor-General by written instrument.[12] Before beginning to discharge the duties of a Member's office, a Member must take an oath or affirmation in accordance with the regulations.[13] The regulations currently provide for the following oath or affirmation:

> **Oath:** I, [*name*], do swear that I will bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the office of [*name of office*] and that I will faithfully and impartially perform the duties of the office. So help me God!
>
> **Affirmation:** I, [*name*], do solemnly and sincerely promise and declare that I will bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the office of [*name of office*] and that I will faithfully and impartially perform the duties of the office.

[25] Members are required to undertake their duties in accordance with the Act and are allocated applications to determine or proceed with. The application, or 'matter' remains the responsibility of the Member. No other Member of the Commission, other than the President pursuant to s.582(2) of the Act may provide to a Member a direction, and the direction must not relate to a decision by the Commission. This is to preserve the adjudicative independence of Members. It is at a Member's discretion whether they should continue to hear the matter, or have it reallocated.

[26] If a party makes an application that the Member recuse themselves on the basis of apprehension of bias, or actual bias, it is necessary for the Member to make a decision on that application. In that circumstance, the Member may:

(a) exercise discretion and administratively request of their Regional Allocator (formerly Panel Head) to have the matter reallocated;
(b) determine that they should recuse themselves and request their Regional Allocator have the matter reallocated; or
(c) determine that they should not recuse themselves and continue to deal with the matter.

[27] If a Full Bench is required to determine on appeal any matter that has been decided by the Member, the Full Bench may grant the appeal and quash the Member's decision before reallocating the matter (if necessary) to the Member or to another Member.

[28] As is clear in the Full Bench decision the basis of the application before me, there vested no authority in the Full Bench to reallocate the matter. The Full Bench refused the appeal on the recusal application and then went on to make *observations.* With respect, the Full Bench could not decide that I *could* no longer hear the matter. The Full Bench observed

that in its view, I should have regard to its decision in considering whether it would be preferable to arrange for the matter to be reallocated to another Member.

[29] There are many reasons why a Member may, in the absence of a recusal finding against them continue to hear a matter. In my respectful view, these were not openly canvassed by the Full Bench above, and I have given appropriate consideration to them in coming to my decision. It is clear that the observations made by the Full Bench are not limited to industrial disputes, and appear to be wide-reaching across many applications that may be made under the Act.

Industrial disputes

[30] The Commission's Annual Report 2017 - 2018 at Table 28 details that there were 1,576 section 739 applications to deal with a dispute made in the 2017 – 2018 year, with as many as 2,078 applications in the 2014 – 2015 year. The information is not broken down in to how many applications were made by applicants representing employees (individuals and unions representing employees), as opposed to employer applicants.

Table 28[14] No. lodged

Matter type	**2017–18**	**2016–17**	**2015–16**	**2014–15**
FWA s.526—Application to deal with a dispute involving stand down	9	10	17	17
WRA s.699—Application to Fair Work Australia to have an alternative dispute resolution process conducted	0	0	1	2
WRA s.709—Application to Fair Work Australia to have a dispute resolution process conducted under a workplace agreement	4	6	11	37
FWA s.739—Application to deal with a dispute	1,576	1,888	2,001	2,078
FWA s.739—Application to deal with a dispute in relation to flexible working arrangements	41	52	32	41
Total	**1,630**	**1,956**	**2,062**	**2,175**

FWA = Fair Work Act, WRA = Workplace Relations Act 1996 (repealed).

[31] In my experience, industrial dispute applications are made not only by employees, or only by employers; that is, on some occasions employees (and their union representatives)

will make an application for an industrial dispute to be dealt with; and on other occasions an employer will make an application. It is not, as one might think, solely an employee-applicant jurisdiction.

[32] As was observed by the Full Bench, there has been predecessor statute requiring a Member, when dealing with an industrial dispute, to no longer arbitrate where the Member had conciliated the matter where an objection has been made. The corporations' power was used to bring into the federal arena far more matters than there had been under the earlier constitutional power of an industrial dispute extending beyond more than one state. The following table details the amount of industrial dispute applications made in the years 1999-2000 to 2003-2004.

Application	99-00	00-01	01-02	02-03	03-04
Notification under dispute settling procedures of agreements (ss.170LW, 170VG, 293F, 520)	326	403	555	679	764

[33] As it is, since the introduction of the *Fair Work Act 2009*, Members have, at their discretion, conciliated and arbitrated the same matters. It has always been open to a Member to use their discretion to have the matter reallocated either because of the Member's own preference, or if a party expressed a desire for reallocation. It has always been open to the Member to use their own good sense, even in the face of a request to have the matter reallocated to continue to arbitrate the matter. This is true when there has been approximately double the number of relevant applications made each year.

[34] Where the Full Bench has observed at [39] that there are public policy considerations underlying those earlier statutes that remain relevant, it is telling that neither side of the two major political parties in Australia has, since the introduction of the *Fair Work Act 2009* decided to include such direct restrictions on Members of the Commission. In my respectful view, if Parliament had wished for such a direct restriction on Members of the Commission to be in place, to, as the Full Bench has observed, provide parties with comfort that frank and open conciliation will not affect arbitration of their matter, it would have legislated so.

[35] If opposition is made to a Member arbitrating a matter where the Member has earlier conciliated the matter, and the Member does not agree to have the matter reallocated, a recusal application is necessary. In my respectful view, that is the appropriate course of action where any party to any proceeding holds concerns that what has been said or done during conciliation may involve the Member from being able to impartially decide the matter. I respectfully disagree with the Full Bench at [47] where it was observed:

> "…once a party to a dispute objects to a member of the Commission who has been involved in conciliating that dispute from undertaking arbitration, that by itself should generally be enough to persuade the member to arrange for the matter to be reallocated to another member for arbitration."

[36] Over many decades, authorities reveal that Members have, at times, refused to recuse themselves. It is expected that some of those recusal applications will have been based on what was said or done by the Member in the course of the earlier proceedings. There is good authority that judicial and quasi-judicial officers should not readily stand down from the matter before them in the discharge of their duties unless good reason is shown.[15] Further, the test for whether recusal is appropriate is described below:[16]

> "**[15]** These principles must be carefully applied. It has been said that: "... disqualification flows from a reasonable apprehension that the judge might not decide the case impartially, rather than that he will decide the case adversely to a party": *Cabcharge* at [32]; Re JRL; *Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 352 (Mason J)."

[37] To provide an avenue to a party to proceedings to "Member shop" on the basis that they hold concerns that the Member might decide the case *adversely*, as opposed to *impartially*, would be inappropriate and an inefficient use of the jurisdiction. Further, it would be unfair to the other party.

[38] The correct course is if a party holds concerns that the Member will be unable to impartially exercise their duties on account of the Member having earlier conciliated the matter, the party is free to make application that the Member have the matter reallocated on that basis; not simply because they prefer an alternative Member, or hold concerns that the Member will find against them.

[39] In my respectful view, in the absence of statute requiring so, there is very good reason to resist requests for administrative reallocation without any sound basis that the Member cannot impartially decide the matter.

Conciliation versus conference

[40] In my experience there are occasions when a conference is convened and where no conciliation occurs. This is true where parties have a firm position, simply state their position in the forum of a conference, and make no concessions at all. It would, in my view, be inappropriate for a party to seek to have the matter reallocated on account of the convening and participation in a conference where no conciliation has taken place.

Unfair dismissal applications

[41] There are presently six Members of the Commission based in Brisbane. Metropolitan unfair dismissal matters are typically allocated on the basis of three Members being available approximately every second week to arbitrate matters earlier conciliated by staff conciliators. I am generally allocated metropolitan unfair dismissal applications across approximately 15 weeks per annum. All other applications are appropriately listed so as far as practicable not to interfere with 'arbitration week'.

[42] Metropolitan unfair dismissal matters in Brisbane typically have had directions earlier issued by the Commission's Unfair Dismissal Team (UDT). The three Brisbane Members rostered on for 'arbitration week' each fortnight will typically be allocated the matters approximately three-to-four weeks from the date of arbitration.

[43] Upon allocation to me, I determine if it is necessary or appropriate to liaise with the parties prior to the matter being arbitrated. There will be occasions where the parties are interested in further conciliation either before me, or if available, another Member in a Member Assisted Conference (MAC). It is my experience that parties typically have an expectation that the dates set by the UDT for arbitration will remain listed. It is, of course, available for a Member to move those dates, if necessary; however it is preferable not to alter them without good reason.

[44] Where is it not possible to have another Member 'MAC' a conference of the parties, I will, if appropriate, convene a telephone conference to determine if there is any appetite for resolution. The parties are always advised that if without prejudice offers are made and the matter does not resolve, I will continue to arbitrate the matter. Parties often make without prejudice offers to each other in my presence, and I may, if I consider it appropriate, spend some time in private session.

[45] In the event that a without prejudice offer is made, for example, by a respondent employer in such a telephone conference, and settlement is not reached, the parties are advised that I will not have any regard to the offer made at conference when I arbitrate the matter. It is, indeed possible, and has been the case for many matters before Members of the Commission to refrain from being influenced by the offer made and rejected. I respectfully disagree with the Full Bench at [40] that simply learning that, in this example, a respondent employer might offer say, six weeks' pay in settlement of an unfair dismissal application as opposed to arbitrating a matter over some days, might influence a Member in determination of the matter.

[46] To suggest that Members, having learned of offers in conciliation might be influenced at arbitration would lead to a conclusion that where no opposition is made to a Member both conciliating and arbitrating a matter, that Member, despite no opposition having been made, could have been influenced. It matters not whether there has been opposition to the Member arbitrating after conciliation; the Member knows of the offers made and rejected. For the Full Bench observations to have any practicality, it would be necessary for there to be a direction that on *any* occasion a Member learns of a without prejudice position of a party, the Member can no longer arbitrate the matter.

[47] In arbitrating metropolitan unfair dismissal applications in Brisbane, if it was expected that a presiding Member *should have regard to* having the application administratively reallocated once he or she learned of any offers between parties and objection was made to the Member arbitrating the matter, it is possible that other Members would have suitable dates within their diaries to accommodate re-listing of the matter within the three or so weeks (or less), but it could not, of course, be guaranteed.

[48] This practice might not only cause inconvenience to the parties, it would, in my view, potentially unduly prejudice applicants in unfair dismissal applications. Where an applicant has secured new employment, and has informed his or her employer of dates of arbitration and might perhaps be taking annual leave, or leave without pay to attend a hearing, a late relisting may affect their ability to properly present their case.

[49] In my experience, regional unfair dismissal applications are even more problematic. Regional matters include any area outside of the metropolitan area, including, for example, Townsville, Rockhampton, Cairns, and Mackay etc. Typically, no directions have been

issued from the Commission in regional matters, and upon allocation to me, it is routine to convene a telephone directions conference to understand the parties' availability and preferences for dates and location of the hearing.

[50] Quite naturally, once programming has occurred by telephone, either at the Commission's initiative, or by any of the parties requesting, settlement discussions often occur. If offers are made in the Member's presence, and if a party objected to the Member continuing to arbitrate the matter, it would, according to the Full Bench generally be appropriate for another Member to be allocated the matter. The parties' preferences for material to be filed and dates and places for hearing may not be suitable for the second Member, and it may be necessary to convene further conferences where further programming can occur. The second Member, it would appear from the Full Bench decision, would be cautious against canvassing settlement options with the parties and restrict their duties to arbitration only on account of being asked to administratively reallocate the file. If the second Member did engage in settlement discussions, it is conceivable that if the discussions did not result in settlement of the matter, a further objection could be made and the application then reallocated to a third Member.

[51] I am of the view that artificial constraint of arbitration powers is not in any party's best interests. In my experience, Members can move from arbitration to conciliation in a fluid manner during arbitration, with the parties' consent. If, during the function of arbitration there is some interest from the parties to enter into conciliation, I am troubled that the engagement of conciliation could render arbitration broken if a party then elected to oppose the Member from continuing arbitration. This is true even if, before entering conciliation from arbitration, the parties undertake not to oppose the Member continuing to arbitrate if settlement of the matter cannot be achieved.

Enterprise Agreement applications

[52] In enterprise agreement approval applications, it is my experience that Members allocated a matter will typically write to the Applicant, bargaining representatives and any other party (for example, an interested union who is not a bargaining representative, but an objector). Such correspondence typically includes concerns the Member may have as to the ability of the Commission to approve the agreement. Members might otherwise convene a conference to discuss the various issues.

[53] It is typical that a Member may express a preliminary view as to whether undertakings may overcome the concerns of the Member, or whether there are other considerations affecting the application.

[54] The act of expressing a preliminary view, or indeed progressing the application on the basis that a better-off-overall-test (BOOT) consideration has been met to the Member's preliminary satisfaction, could give rise to a party requesting the Member have the application reallocated. Such expression of a preliminary view in written correspondence is arguably no different from one expressed during an in-person conference or telephone conference. It is therefore conceivable that a party or an objector to such an application may cite the Full Bench decision as authority to persuade the Member that they ought to have the matter administratively reallocated, when the normal course of events would be to call for further material and perhaps hold a hearing on the issue. The mere preliminary view could, in my

view, be used to call for another Member to determine the issue, resulting in delays in the determination of the application, and double-handling of matters.

Any time limit on objecting?

[55] The Full Bench observations do not provide any views or opinions as to when a party's objections may be made, or when they may be limited. Should an objection be made immediately after conciliation has ceased and arbitration has been set? If arbitration is nigh, is a party prevented from objecting on the basis that it would cause prejudice to the other party if arbitration could not proceed?

[56] If an unrepresented party only became aware of a right of objection on the day of the hearing, would it be necessary for the Member to abandon the hearing for the matter to be reallocated?

[57] If a recalcitrant party wished to slow proceedings down, and strategically make a late application for the Member to have the application reallocated, what prejudice to the other party should the Member have regard to?

Obligation of Member to inform parties?

[58] Might there be an obligation on a Member who has conciliated a matter to inform parties of a right of objection to them continuing to arbitrate the matter? If the matter proceeds and is determined against a party, might it be an appeal point if the party was not suitably informed by the Member of a right to oppose the Member continuing to arbitrate?

Full Bench review of Members' decisions

[59] In the event that a Member decides against having a matter administratively reallocated on application by a party, such decision is open to appeal by a Full Bench. It is conceivable that differently constituted Full Benches may, on the facts in each matter, find that some matters should have been administratively reallocated, and others not. Without a solid base of authority of higher courts, such as the case in recusal applications, full bench reviews of single member decisions may not be consistent across the Commission.

The President's power to allocate matters

[60] Section 582 of the Act provides as follows:

> "**582 Directions by the President**
>
> (1) The President may give directions under subsection (2) as to the manner in which the FWC is to perform its functions, exercise its powers or deal with matters.
>
> (2) The President may give a direction that is of a general nature, or that relates to a particular matter, to one or more of the following persons:
>
> (a) an FWC Member;
>
> (b) a Full Bench;

(c) an Expert Panel;

(d) the General Manager.

(3) The direction must not relate to a decision by the FWC.

(4) Without limiting subsection (2), the direction may be a direction of the following kind:

(aa) a direction about the conduct of 4 yearly reviews of default fund terms of modern awards under Division 4A of Part 2-3;

(ab) a direction about the exercise of modern award powers in accordance with Division 5 of Part 2-3;

(b) a direction about the conduct of annual wage reviews;

(c) a direction that 2 or more matters be dealt with jointly by one or more single FWC Members or one or more Full Benches;

(d) a direction about the transfer between FWC Members (including a transfer between Full Benches) of one or more matters being dealt with by the FWC;

(e) a direction that a single FWC Member perform a function or exercise a power in relation to the variation of a modern award.

Persons must comply with the President's directions

(5) A person to whom a direction is given must comply with the direction.

Note: For directions to the General Manager, see section 658.

Direction is not a legislative instrument

(6) If a direction is in writing, the direction is not a legislative instrument."

[61] In my respectful view, if the Commission were to embrace such a concept as that contemplated by the Full Bench – that Members should, generally, not conciliate a matter arbitrated by them if there is objection – it should be at the direction of the President under the powers of the Act. There exists authority to do so at s.582(2). Any such direction, of a general nature, would ensure that Members act consistently and without discretion. It would be a notorious feature of the administration of the Commission and provide absolute certainty to parties and to Members.

[62] The authority currently vested in a Full Bench of the Commission is to determine if the Member below erred. A Member may err for reasons not limited to the incorrect application of the Act, denying a party procedural fairness, or refusing to recuse themselves when they should have properly done so. In my respectful view, offering observations as to when a Member *should* administratively reallocate a matter extends beyond the purview of

review of an individual statutory office holder's decision to exercise their discretion to continue to impartially determine an application.

This matter

[63] Noting that the recusal appeal was dismissed, anything that was said by me during the conference of 14 December 2018 has been well and truly ventilated. The actions taken by me to investigate the safety concerns of the respondent are well documented. There remains a contest on various grounds to the application, not limited to safety and privacy concerns. There are genuinely held concerns and they deserve to be determined, together with the jurisdictional objection.

[64] The respondent did not make any concessions in the conference held before me. There has not been a private discussion with any of the parties. No offers or counter-offers have been made other than for the applicant to consider and go about constructing a third gate. I accept the applicant's submission that the parties walked out of the conference on 14 December 2018 with the same position in which they commenced the conference.

[65] There is no basis as contemplated by the Full Bench observations, which I accept are examples and not limiting, for any party to hold concerns that I will not impartially determine the application before me.

Conclusion

[66] For the reasons above, I have decided to arbitrate the application in this matter. All of the material required for arbitration has been filed and served. A notice of listing will follow the publication of this decision.

COMMISSIONER

Appearances:

T Spence, counsel, with *M Giles*, solicitor, for Watpac Construction Pty Ltd.

L Doust, counsel, with *L Tiley*, solicitor, for the Construction, Forestry, Maritime, Mining and Energy Union.

Hearing details:

Brisbane

2019

June 13.

Final written submissions:

Written submissions of the Respondent, 13 June 2019.

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[1] *CFMMEU v Watpac Construction Pty Ltd T/A Watpac Construction* [2019] FWC 1758.

[2] *Watpac Construction Pty Ltd t/as Watpac Construction v CFMMEU; Mr Kurt Pauls* [2019] FWC 405, and a decision given in email from the Commissioner's chambers on 28 February 2019.

[3] *Construction, Forestry, Maritime, Mining and Energy Union* [2019] FWCFB 214.

[4] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

[5] [2019] FWCFB 214 [13].

[6] Ibid [17]-[18].

[7] Ibid [19].

[8] *CFMMEU v Watpac Construction Pty Ltd* [2019] FWCFB 3855, [32].

[9] Ibid, [34] – [38].

[10] *Re Dalrymple Bay Coal Terminal* [1996] AIRC 2141; *BRB Modular v AMWU* [2015] FWCFB 1440, [16].

[11] PN398 - PN401.

[12] S.626 of the *Fair Work Act 2009*.

[13] S.634 of the *Fair Work Act 2009*.

[14] Only lodged information reproduced, not finalised.

[15] *Kirby v Centro Properties Limited (No 2)* (2011) 202 FCR 439 at [8].

[16] Ibid, [15].