



## STATEMENT

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

### **4 yearly review of modern awards—Family & Domestic Violence Leave Clause** (AM2015/1)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 27 MARCH 2017

*4 yearly review of modern awards – Family & Domestic Violence Leave Clause – reconstitution of Full Bench*

[1] Hearings in relation to this matter were held before a Full Bench comprising Vice President Watson, Deputy President Gooley and Commissioner Spencer, concluding on 2 December 2016. Vice President Watson published his decision in the matter on 27 February 2017 and his resignation from the Commission took effect on 28 February 2017.

[2] In the circumstances, Deputy President Gooley and Commissioner Spencer have sought my advice as to whether they may proceed to finalise and publish a decision in the matter, in particular having regard to s.622 of the *Fair Work Act 2009* (Fair Work Act), which provides:

#### **Reconstitution of the FWC when FWC Member of a Full Bench or an Expert Panel becomes unavailable**

- (1) This section applies if:
  - (a) an FWC Member (the *unavailable member* ) forms part of a Full Bench or an Expert Panel in relation to a matter; and
  - (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
- (2) The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:
  - (a) for the Expert Panel—the President and at least 2 Expert Panel Members;
  - (b) for a Full Bench—at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.

- (3) Otherwise, the President must direct another FWC Member to form part of the Full Bench or the Expert Panel. After the President does so, the Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member.

Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see [section 623](#)).

[3] The memorandum provided to me by Deputy President Gooley and Commissioner Spencer in relation to this issue is attached.

[4] A hearing in relation to this issue will be listed for **1:00 pm on Tuesday, 4 April 2017**. The parties will have an opportunity to make submissions at this hearing and, in particular, are asked 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?

[5] I will consider the submissions received at the hearing on Tuesday, 4 April 2017 and then issue a statement setting out how I intend to proceed.



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## Memo

<b>To:</b> President Ross	<b>Date:</b> 23 March 2017
<b>From:</b> Deputy President Anne Gooley and Commissioner Paula Spencer	
<b>Email:</b>	<b>Phone No:</b>
<b>Subject:</b> Family and Domestic Violence Leave and Family Friendly Work Arrangements	

Dear President Ross

As you are aware Vice President Watson was the presiding member of the Award Modernisation Full Bench which was hearing, as part of the 4 year review, an application to vary all modern awards to insert an entitlement to family and domestic violence leave and to provide an entitlement to family friendly work arrangements for employees during pregnancy and upon return to work.

### **The Family and Domestic Violence Leave Application.**

Hearings in relation to this claim concluded on 2 December 2016. Members of the Full Bench asked the Vice President, as the presiding member, to provide a draft of his decision but apart from providing a summary of the evidence Vice President Watson advised that he was unwilling to provide a draft. After further requests Vice President Watson provided the other members of the Full Bench with a copy of his draft of the decision on 20 February 2017 which did not include his final conclusion. There was insufficient time between that date and the date of his resignation for the other members of the Bench to consider his draft and finalise their decision. On 27 February 2017 he published his decision. On 28 February 2017 his resignation took effect.

We seek your advice on the following:

1. Is s.622 an impediment to us finalising and publishing our decision? If it is not, is the decision of the Vice President and our decision (whether given separately or jointly), taken together, the Full Bench decision?
2. If s.622 is such an impediment and you direct another member to form part of the Full Bench, should the presiding member seek the advice of the parties to assess their views as to whether they are content for the new member of the Bench, along with the

other members of the Bench, to determine the application having reviewed the material that has been filed and the transcript without the need for a further hearing.

### **The Family Friendly Work Arrangements Application**

Vice President Watson after conferring with the parties issued directions on 22 December 2016 which in summary set the following timetable:

1. Material in support of the ACTU's claim is to be filed by 24 April 2017.
2. Material in opposition is to be filed by 25 August 2017
3. Reply material is to be filed by 15 September 2017
4. Matter will be listed for the week of 25 September to schedule evidence.
5. The matter will be listed for the weeks of 10 and 17 October 2017 for evidence and cross examination.

No evidence has been heard in relation to this matter.

Can you advise when an additional member is appointed to this bench?