



STATEMENT

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Family and domestic violence clause and other matters (AM2015/1)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 20 JUNE 2017

4 yearly review of modern awards – Family and domestic violence clause – reconstitution of Full Bench.

[1] On 18 May 2017 I issued a Decision to refer questions of law to the Federal Court of Australia pursuant to s.608 of the *Fair Work Act 2009* (Cth).¹ Such a referral is to be in the form of a special case.

[2] The purpose of this Statement is to inform the parties that appeared at the hearing on 4 April 2017 and any other interested persons, that the special case has been filed in the Federal Court.

[3] The Federal Court's file number is VID618/2017 and the matter is listed for a Case Management Hearing at 10.15 am on Thursday 22 June 2017.

[4] Attached to this Statement are copies of:

- the special case as filed in the Court; and
- the notice of listing.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<Price code C, PR593927>

¹ [2017] FWC 2752

Attachments

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/06/2017 9:13:00 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Cases Stated and Questions Reserved - rule 38.02
File Number:	VID618/2017
File Title:	A REFERRAL UNDER S 608 OF THE FAIR WORK ACT BY THE PRESIDENT OF THE FAIR WORK COMMISSION
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	Please check Daily Court List for details



Dated: 9/06/2017 9:37:32 AM AEST

A handwritten signature in blue ink that reads 'Warrick Soden'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 2
Rule 2.13(3)



**Special case regarding a question of law referred by the President of
the Fair Work Commission, pursuant to s 608 of the *Fair Work Act*
2009**

No. _____ of 2017

Federal Court of Australia
District Registry: Victoria
Division: Fair Work Division

President of the Fair Work Commission

Applicant

Under s 608 of the *Fair Work Act 2009* in relation to matter AM2015/1

Statement of Facts

1. The questions for the consideration of the Court relate to proceedings of the Fair Work Commission (FWC) as part of the 4 yearly review of modern awards conducted under s.156 of the *Fair Work Act 2009* (Cth) (FW Act).
2. As part of the 4 yearly review of modern awards, in or around February 2015 the Australian Council of Trade Unions (ACTU) sought inclusion of a family and domestic violence paid leave clause in all modern awards (matter AM2015/1). Matter AM2015/1 must be heard and determined by a Full Bench of the FWC.
3. In or around October 2015 the President of the FWC constituted a Full Bench to hear and determine matter AM2015/1. The Full Bench comprised Vice President Watson, Deputy President Gooley and Commissioner Spencer.
4. At the time the Full Bench was constituted, Vice President Watson was a Deputy President of the FWC who retained the designation of Vice President by virtue of his former office as a Vice President of the Australian Industrial Relations Commission. Vice President Watson was the most senior Member of the Full Bench under s.619 of the FW Act.
5. Written submissions and other materials were filed in matter AM2015/1 between June and October 2016, evidence was heard on 14-18 November 2016 and final oral submissions were heard on 1-2 December 2016. The hearing of the matter by the Full Bench concluded on 2 December 2016 and the Full Bench reserved its decision.
6. On or around 20 January 2017, Vice President Watson wrote to the Governor-General tendering his resignation as a Member of the FWC, with effect from the close of business on 28 February 2017 (**Attachment 1**).

Filed on behalf of	_____	President of the Fair Work Commission
Prepared by	_____	Laura Groves
Law firm	_____	Australian Government Solicitor
Tel	(03) 9242 1308	Fax (03) 9242 1347
Email	_____	laura.groves@ags.gov.au
Address for service	_____	Level 34, 600 Bourke Street Melbourne VIC 3000
21930543		



7. On 27 February 2017 Vice President Watson caused his decision and reasons in matter AM2015/1 to be published and sent to the parties (**Attachment 2**). Deputy President Gooley and Commissioner Spencer were not able to issue their decision or decisions at that time and to date they have not issued their decision or decisions in the matter.
8. At close of business on 28 February 2017 Vice President Watson ceased to be a Member of the FWC.

Questions for the Consideration of the Court

9. The questions for the consideration of the Court are:
 - 1) Are Deputy President Gooley and Commissioner Spencer presently permitted by the FW Act to issue their decision or decisions in matter AM2015/1?
 - 2) If the answer to question 1 is yes: for the purposes of the FW Act will their decision or decisions, taken together with the decision of former Vice President Watson, constitute a Full Bench decision in matter AM2015/1?
 - 3) If the answer to question 1 is yes and the answer to question 2 is no: for the purposes of the FW Act will their decision or decisions without the decision of former Vice President Watson, constitute a Full Bench decision in matter AM2015/1?
 - 4) If the answer to question 1 or questions 2 and 3 is no: does the FW Act require or permit the President of the FWC to direct another FWC Member to form part of a Full Bench with Deputy President Gooley and Commissioner Spencer in order to obtain a Full Bench decision in matter AM2015/1?
 - 5) If the answer to question 4 is yes: will the FW Act require the new member of the Full Bench to issue a decision in the matter?
 - 6) If the answer to question 4 is yes: whose decisions will constitute the Full Bench decision in the matter, and, in particular, will the decision of former Vice President Watson comprise part of the decision in the matter?
 - 7) If the answer to question 1 or questions 2 and 3 is no, and the answer to question 4 is also no: does the FW Act require or permit the President of the FWC to constitute a new Full Bench in order to obtain a Full Bench decision in matter AM2015/1?

Subsequent Proceedings

10. The following paragraphs outline proceedings in Matter AM2015/1 subsequent to paragraph 8 above.
11. On 23 March 2017 Deputy President Gooley and Commissioner Spencer sent a memorandum to the President of the FWC seeking advice as to how a decision in matter AM2015/1 might now be finalised.



12. On 27 March 2017 the President of the FWC issued a Statement attaching Deputy President Gooley's and Commissioner Spencer's memorandum and notifying a hearing on 4 April 2017 in relation to issues it raises (**Attachment 3**).
13. On 3 and 4 April 2017, the ACTU, Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group) filed written submissions in response to the Statement of 27 March 2017 (**Attachments 4-6**).
14. At the hearing on 4 April 2017, the ACTU, ACCI, Ai Group, Australian Meat Industry Council (AMIC), Master Plumbers Association of NSW and the Pharmacy Guild of Australia made oral submissions (**transcript at Attachment 7**).
15. During the hearing on 4 April 2017, the President of the FWC invited the parties to file further written submissions commenting on the decision in *Morton v The Transport Appeal Board & Anor No. 1* [2007] NSWSC 1454 (**Attachment 8**).
16. At the conclusion of the hearing on 4 April 2017 the President informed the parties that he was contemplating referring to the Federal Court of Australia questions of law as to how a decision in matter AM2015/1 can now be concluded.
17. On 10, 12 and 13 April 2017, the ACTU, Ai Group and AMIC filed further written submissions (**Attachments 9-11**).
18. On 18 April 2017 the President of the FWC issued a Statement setting out the other matters that were before Full Benches in which Vice President Watson was a presiding Member and which had not been completed prior to his resignation (**Attachment 12**).
19. On 28 April 2017, the President of the FWC issued a Statement expressing a provisional view that he should refer questions of law to the Federal Court pursuant to s.608 of the FW Act and setting out on a provisional basis the statement of facts, questions of law and other material proposed to be provided to the Court for that purpose. This Statement also sought submissions on the provisional view and on the proposed statement of facts and questions of law (**Attachment 13**).
20. On 9-11 May 2017, the ACTU, Ai Group, ACCI and AMIC filed written submissions in response to the Statement of 28 April 2017 (**Attachments 14-17**).
21. On 18 May 2017, the President of the FWC issued a Decision to refer questions of law to the Federal Court pursuant to s.608 of the FW Act and attaching the statement of facts, questions of law and other material proposed to be provided to the Court for that purpose (**Attachment 18**).

Attached Documents

22. The attachments to this document are set out in the following table.

Attachment	Description
1	Letter of resignation from Vice President Watson to the Governor-General dated 20 January 2017
2	<i>4 yearly review of modern awards—Family & Domestic Violence Leave Clause</i> [2017] FWCFB 1133 (Decision of Vice President Watson in matter AM2015/1 dated 27 February 2017)



3	[2017] FWC 1733 (Statement of the President of the FWC dated 27 March 2017 attaching memorandum of Deputy President Gooley and Commissioner Spencer dated 23 March 2017)
4	Written submissions of Australian Council of Trade Unions dated 4 April 2017
5	Written submissions of Australian Chamber of Commerce and Industry dated 3 April 2017
6	Written submissions of Australian Industry Group dated 3 April 2017
7	Transcript of hearing on 4 April 2017
8	<i>Morton v The Transport Appeal Board & Anor No. 1</i> [2007] NSWSC 1454
9	Written submissions of Australian Council of Trade Unions dated 12 April 2017
10	Written submissions of Australian Industry Group dated 13 April 2017
11	Written submissions of Australian Meat Industry Council dated 10 April 2017
12	[2017] FWC 2189 (Statement of the President of the FWC dated 18 April 2017)
13	[2017] FWC 2347 (Statement of the President of the FWC dated 28 April 2017)
14	Written submissions of the Australian Council of Trade Unions dated 10 May 2017
15	Written submissions of the Australian Industry Group dated 10 May 2017
16	Written submissions of the Australian Chamber of Commerce and Industry dated 11 May 2017
17	Written submissions of the Australian Meat Industry Council dated 9 May 2017
18	<i>4 yearly review of modern awards—Family & Domestic Violence Leave Clause</i> [2017] FWC 2752 (Decision of the President of the FWC dated 18 May 2017)
19	<i>Financial Services Council Ltd v Industry Super Australia Pty Ltd and Others</i> (2014) 222 FCR 455



Date: 8 June 2017

A handwritten signature in blue ink that reads 'Craig Rawson'.

Signed by Craig Rawson
For and on behalf of the Australian
Government Solicitor
Solicitor for the Applicant



Telephone 03 8600 3333
Facsimile: 03 8600 3351
Email: vicreg@fedcourt.gov.au

**FEDERAL COURT OF AUSTRALIA
VICTORIA REGISTRY**

A.B.N. 49 110 847 399

Owen Dixon Commonwealth Law Courts Building
Level 7, 305 William Street
MELBOURNE VIC 3000

President of the Fair Work Commission
C/- Australian Government Solicitor
Attention Ms Laura Groves
Via email: laura.groves@ags.gov.au

NOTICE OF LISTING

In the matter of

**A REFERRAL UNDER S 608 OF THE FAIR WORK ACT BY THE PRESIDENT OF
THE FAIR WORK COMMISSION
COURT FILE NO. VID618/2017**

Please note that the above matter has been listed before the Court as follows:

BEFORE: Justice Kenny
LISTING: Case Management Hearing
DATE: Thursday 22 June 2017 at 10:15 AM
**PLACE: Owen Dixon Commonwealth Law Courts Building,
Level 7, 305 William Street,
MELBOURNE VIC 3000**

Please refer to the **Federal Court file number** in all correspondence to the Court regarding this matter. If you have any queries in relation to the above please direct your enquiries to the Registry on (03) 8600 3333.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'KON'.

Karen O'Neill
Senior Legal Case Manager to District Registrar Caporale

19 June 2017

Daily listing details are available on the Internet at www.fedcourt.gov.au. It is suggested you check the list displayed at the Court on the day of your listing, to confirm details of listing. Personal enquiries can be made at the Registry address shown above.