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Your Honour,

AM2016/15 – Plain Language Redrafting

This correspondence is in response to the Statement of the Full Bench [2017] FWCFB 1638 ("the Statement") and in particular the invitation therein to comment on the selection of the second tranche of modern awards for re-drafting in Plain Language.

The Statement identifies a list of 10 Modern Awards that are proposed to be included in a second tranche of awards to be re-drafted in plain language and lists the factors taken into account for the selection of those awards.

We note that the selection of some such awards has been opposed by our affiliates in joint correspondence with the AiGroup for reasons including the whether considerations deemed by the Commission to be relevant to their selection are relevant to those awards. Other submissions have also been made independently.

The matter we wish to raise relates to the threshold requirement for commencing plain language re-drafting of a particular modern award. In our view, it is arguable that one of two threshold requirements must be satisfied before issuing a determination to vary an award so as to republish it as a plain language redraft, or to vary any of its terms to reflect plain language redrafting. Neither of those two threshold requirements are directly identified in the list the considerations referred to in the Statement. Secondly, we submit that one of those threshold requirements remains accessible outside of the Four Yearly Review of modern awards. It is our position that the two alternative threshold requirements are so similar in substance that it is unnecessary to progress plain language re-drafting within the confines of the Four Yearly Review

of modern awards. If we are correct in our position, much could be saved in terms of the resource requirements on the Commission and the interested parties involved or potentially involved.

A threshold requirement arising from the *Penalty Rates*[1] decision

In the *Penalty Rates* decision, a Full Bench determined that, *in the context of a four yearly review of modern awards*, it had no basis to vary an award at all, let alone consider the relative merits of competing proposals before it to vary those awards, unless it had first reached a decision that the award as it stood did not meet the modern awards objective:

> "Contrary to the Unions' contention the Commission's task in the Review is to make a finding as to whether a particular modern award achieves the modern objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138)..."[2] (emphasis added)

In our view, this makes clear that a finding that a modern award does not achieve the modern awards objective is a mandatory precondition - a jurisdictional fact – that must be satisfied before the Commission can exercise the discretionary power under section 156 to make a determination to vary a modern award in the course of a Review.

The Full Bench elaborated on what was required in a Review to make a finding that a particular award is not achieving the modern awards objective. It decided that it was not necessary to make a specific finding as to the considerations enumerated in the modern awards objective, but rather to balance the various considerations to ensure there was a fair and relevant safety net:

> "In order for the Commission to be satisfied that a modern award is not achieving the modern awards objective, it is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations. Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives..

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[1] [2017] FWCFB 1001

[2] [2017] FWCFB 1001 at [141]

..There is a degree of tension between some of the s.134 considerations. The Commission's task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions"[3]

The subjective and discretionary nature of the inquiry required to make the requisite finding as described by the Full Bench is not incompatible with the characterisation of the finding as a jurisdictional fact. For example, in *Minister for Immigration and Citizenship v. SZMDS & Anor*[4], Gummow and Keifel observed:

"In his work Administrative Law, Professor Paul Craig describes jurisdictional facts as those relating to the existence of the power of a public body over the relevant area and continues:

> 'The statutory conditions thus laid down may be factual, legal or discretionary in nature. A classic factual precondition is that a person should be of a particular age to qualify for a benefit; a simple legal stipulation is provided by the meaning of the term employee; a discretionary precondition is where the statute provides that if a minister has reasonable grounds to believe that a person is a terrorist then he may be detained. Claims of factual error can arise in all three types of case. It might be argued that the agency simply got the applicant's age wrong because it confused the applicant with a different person. It might be claimed that the agency misapplied the legal meaning of the term employee to the facts of the applicant's case. It might be contended that the minister did not on the facts have sufficient material to sustain a reasonable ground for believing that the applicant was a terrorist.'

The criterion for attraction of the jurisdiction of the decision maker in deciding an application under the Act for a protection visa is not expressed in terms of "fact" as simply understood. Rather, as explained earlier in these reasons, the Act fixes upon a criterion of "satisfaction" as to the existence of a certain state of affairs respecting the status of the applicant.

In that regard, a statement of principle by Lord Wilberforce made in 1976, before the tectonic shifts in English public law which occurred in later decades, is of first importance. In Secretary of State for Education and Science v Tameside Metropolitan Borough Council[20], his Lordship said of a provision conditioning the power of the Secretary of State to act upon satisfaction as to a certain state of affairs:

> 'The section is framed in a 'subjective' form – if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review.

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[3] *Ibid.* at [162]-[163]

[4] [2010] HCA 16

> Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, [and] whether the judgment has not been made upon other facts which ought not to have been taken into account.'" (emphasis added)'

.....

....Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial review[45] will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view.

It was against this background that, when considering s 65 of the Act in Minister for Immigration and Multicultural and Indigenous Affairs v SGLB[46], Gummow and Hayne JJ said:

> 'The satisfaction of the Minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a ' jurisdictional fact ' or criterion upon which the exercise of that authority is conditioned[47]. The delegate was in the same position as would have been the Minister (s 496) and the Tribunal exercised all the powers and discretions conferred on the decision-maker (s 415).
>
> The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds[48]. If the decision did display these defects, it will be no answer that the determination was reached in good faith.'"[5]

Whilst the Full Bench in Penalty Rates described the process of making the requisite finding in broad terms, it has not excluded the possibility that making a finding as to particular section 134 considerations would be adequate in order to reach a view that a particular award is not meeting the modern awards objective. Indeed, it is clear that the driving force of the Plain Language Re-Drafting process to date has been linked to the requirement in the modern awards objective found at section 134(1)(g): "the need to ensure a simple, easy to understand, stable and sustainable modern award system...". So much is evident from the Commission's previous statements on the subject of plain language re-drafting, for example:

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[5] At [20]-[40]

> "Plain language drafting, supported by appropriate consultation processes, can make modern awards simpler and easier to understand, consistent with s.134(1)(g) of the *Fair Work Act 2009* (cth)"[6]

and:

> "As stated in the 20 January Decision, the aim of plain language drafting is to make awards as simple and as easy to understand as possible without unintentionally changing the legal effect of the award. Where plain language re-drafting of award terms highlights ambiguity it may be desirable that the ambiguity be resolved, even if it results in a change to the legal effect of the award"[7]

In our view, it is strongly arguable that, in the context of the Review, the requisite finding to support any ultimate determination to vary a particular award so as to introduce plain-language redrafting is a finding at some point during the proceeding that the modern award is not simple, or not easy enough to understand, and its failings in this regard are significant enough to for it to be concluded that the award does not provide a fair and relevant safety net. This is a finding that is different in nature to a finding that award would be made *more simple* or *made easier* to understand if it were re-drafted in plain language.

In our submission, the nature of the finding called for is not dissimilar to the nature of the finding required in order to enliven the power to vary award to remove an ambiguity or uncertainty, or correct an error. Whereas the essential question in the context of the Review is likely to be satisfied where it is concluded that the Award is likely to be misunderstood, the essential question in the context of an ambiguity or uncertainty is whether the relevant provision is capable of more than one meaning.

The threshold requirement to vary an award under section 160

The powers conferred by section 160 of the Fair Work Act are exercisable on application by a limited class of interested parties, however they are also exercisable on the Commission's own initiative. The capacity of the Commission to so initiate such matters is not in any way constrained by the cycle of Four Yearly Reviews, nor would it be impacted by the Bill presently before the Parliament to abolish those Reviews[8]. Where a relevant ambiguity, uncertainty or error is identified, the Commission is empowered but not required to remove it ("the FWC *may* make a determination.." ..."the FWC *may* make the determination").

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[6] [2016] FWC 2837

[7] [2017] FWCFB 1638

[8] See Schedule 1 of the Fair Work Amendment (Repeal of 4 yearly reviews and other measures) Bill 2017

Continuing the Plain Language Re-Drafting process on the basis of the Commission's "own motion" discretionary powers in section 160 would not prevent the Commission taking into account the types of factors identified in paragraph [20] of the Statement, nor would it prevent the Commission from taking into account the views of the affected parties in terms of whether it ought to proceed with the Plain Language re-drafting of particular awards. It would require the relevant parties being given an opportunity to be heard and participate. And it would require the Commission to make a positive finding either that there was an error in the award or that the relevant provisions of the award were capable of more than one meaning, at some point during the proceeding prior to a determination to vary being issued.

Our position

Threshold issues must be satisfied before a plain language re-drafting exercise is conducted on a particular modern award. A proper application of the threshold requirements that apply to enliven a discretion to vary an award under section 156 has not as yet been undertaken. Either a proper application of that threshold or the application of the threshold governing the Commission's own motion powers under section 160 would re-focus the plain language process on making corrections rather than improvements. However, the reliance on section 160 (both on the Commission's own motion and/or responsive to an application) would permit plain language drafting to proceed on a less condensed timetable and is preferred on that basis. A less condensed process could, for example, occur entirely after the Review and be responsive to the useability of the Modern Awards that have been refined through the exposure draft process undertaken in the review, rather than the Modern Awards as they are today.

Yours faithfully,

Trevor Clarke
Director – Legal & Industrial