



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT GOSTENCNIK**

**C2023/1713 C2023/1715**

**s.604 - Appeal of decisions**

**Appeal by TasTAFE  
(C2023/1713 & C2023/1715)**

**Melbourne**

**EXTRACT OF TRANSCRIPT OF PROCEEDINGS**

**3.40 PM, THURSDAY, 30 MARCH 2023**

PN1

THE DEPUTY PRESIDENT: TasTAFE is a body corporate continuing to exist as such by reason of section 4(2) of the TasTAFE (Skills and Training Business) Act 2021. It has particular functions which are set out in section 5 of that Act, including the provision of vocational education and training to a high standard directed to the needs of employers, students and the community.

PN2

On 24 March 2023, Lee C issued a decision determining two applications for consolidated orders under section 768BG of the Fair Work Act 2009 to be made to the effect that copied state instruments for transferring employees are or will be also copied state instruments for certain non-transferring employees. The two applications were made respectively by the AEU - Australian Education Union - and the United Workers Union.

PN3

The Commissioner acceded to the applications and he made two consolidated orders, each of which is to take effect tomorrow, 31 March 2023. TasTAFE has, by notices of appeal each lodged on 29 April 2023, applied for permission to appeal the decision and the orders and, if granted, will appeal. In the notices of appeal TasTAFE also applies for a stay of the consolidated orders that were made.

PN4

An appeal against a decision is not one of right, but to be made only when permission is granted. Permission is subject to the public interest test. That is, the Commission must grant permission if it is in the public interest to do so. The Commission may also, on discretionary grounds, grant permission to appeal if the principles applicable for the Commission to order a stay are not in dispute. Briefly, it will usually be necessary for the applicant for an order for a stay to make out an arguable case with some reasonable prospect of success, both as to the question of permission to appeal and the merits of the appeal, and the balance of convenience must usually favour the grant of a stay order.

PN5

The appeal notices are in substantially the same form. The appeal notice related to the UWU matter, which is C2023/1713, sets out nine grounds of appeal, whilst the appeal in C2023/1715 sets out eight. Each of the first eight grounds of each notice of appeal are, in substance, the same and without traversing all of the appeal grounds, it is sufficient for me to make the following observations. At least two of the appeal grounds – appeal grounds 1 and 5 – raise issues of the proper construction and application of particular provisions in section 768BG(4). Firstly, in relation to the meaning of the phrase –

PN6

*the employees who would be affected by the order –*

PN7

in paragraph 4(a)(i). Secondly, in connection with the meaning and application of the requirement that the Commission take into account –

PN8

*the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer –*

PN9

as set out in paragraph 4(f). TasTAFE contends that the Commissioner's construction and approach to both those provisions was erroneous. As to the first of the matters, the Commissioner concluded that the expression 'the employees who would be affected by the order' encompassed a consideration of both the views of the transferring and the non-transferring employees as both would or would likely be affected by the order.

PN10

It seems to me it is at least arguable that the contrary construction, a more confined construction, is available similarly having regard to Mr O'Farrell's earlier submission, which I will not repeat. I consider that it is at least arguable that the Commissioner's approach or construction of paragraph 4(f) was erroneous. Both those matters raise constructional issues which are both arguable and, therefore, are likely to at least engage the public interest in the granting of an appeal. If not, would likely give rise to the Commission exercising its discretion to allow permission to appeal.

PN11

As I have already indicated, both contentions are arguable, although it cannot be said that the appeal proper has no prospects of success; it has some prospects of success. Mr O'Farrell described them as very good or high prospects of success. I do not need to go that far and I would simply observe that those issues are arguable. That being the case, both matters tend to weigh in favour of the grant of a stay.

PN12

As to the balance of convenience, the appellant relies on a statutory declaration from Mr Timothy Witt, which I have marked as exhibit 1 in these proceedings. Mr Witt is the industrial relations manager employed by the appellant. He sets out some legal consequences that might arise in the event that the consolidation orders are not stayed and TasTAFE is subsequently successful in its appeal.

PN13

Whilst I do not accept every proposition that Mr Witt sets out in his statutory declaration, it is self-evidently the case that if the respondent is required to implement a set of terms and conditions for a group of employees and later the legal obligation to do so is set aside, that that will create some difficulty in unwinding the position. I also accept Mr O'Farrell's contention that the fact that the respondents in each appeal – that is the Australian Education Union and the UWU – do not oppose the grant of a stay are also matters that weigh in favour of a finding that the balance of convenience favours the grant of a stay.

PN14

Taking those two matters into account, I am satisfied that the balance of convenience in this case favours the grant of a stay and given my earlier conclusion in respect of the prospects on appeal and the prospects of obtaining permission to appeal, I consider that a stay order in each case should be made. There are no issues of a discretionary kind which might cause me not to issue such an order and I propose to do so.

PN15

In C2023/1715, I order that pending the hearing and determination of the appeal or further order, that the order made by Lee C, dated 24 March 2023, in PR760520 be stayed. In C2023/1713, I order that pending the hearing and determination of this appeal or further order, that the order made by Lee C, dated 24 March 2023, in PR750522 be stayed. I will have issued to the parties written orders later this afternoon. Otherwise, unless there is anything else, directions will be made in due course for the processing of the appeals.

PN16

I can indicate to the parties that the appeals will be dealt with in the Commission's May roster and so it is likely that the hearing of the appeal will occur during the week commencing Monday, 22 May 2023. It will be sometime in that week. I cannot give you a date now.

**END OF EXTRACT**

**[3.55 PM]**