

FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

(S.156 of the Fair Work Act)

FAMILY AND DOMESTIC VIOLENCE CLAUSE

(AM2015/1)

SUBMISSION OF THE AUSTRALIAN MEAT INDUSTRY COUNCIL

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1. As part of the 4 yearly review pursuant to s.156 of the *Fair Work Act*, a Full Bench was constituted to hear the ACTU claim AM2015/1 – the Family & Domestic Violence clause – being a claim to vary all modern awards.
2. The Full Bench fully heard the claim, adjourned proceedings and reserved its decision ¹ pending publishing. The presiding member of the properly constituted Full Bench published a decision ² but has since resigned from the Fair Work Commission February 2017 while the two other members of the Full Bench have not published their decisions at this point. The Australian Meat Industry Council (AMIC) made submissions before the Full Bench during the hearing of the matter opposing the ACTU claim.
3. At issue, therefore, is how the matter should proceed given two (2) members of the Full Bench have not, as yet, published decisions while the presiding member did issue his decision but has since resigned from FWC. In other words, whether the circumstances fit s.622 of the FW Act.
4. AMIC regrets that this situation has been reached given the resources of the parties expended during the conduct of the hearing.
5. The FWC President issued a Statement 28 April 2017 ³ that followed a short hearing 4 April 2017.
6. The President’s Statement of 28 April indicated, inter alia, that:

‘.....my provisional view is that I should seek certainty in the final disposition of matter AM2015/1 by referring questions of law to the Federal Court pursuant to s.608(1) of the FW Act.....for the opinion of the Court..’ ⁴
7. The Statement requested interested parties to, should they wish to do so, make:
 - (i) submissions concerning the President’s provisional view, and
 - (ii) any comments concerning the contents of the **Attachment** to the Statement that sets out, on a provisional basis, the statement of facts, questions of law and other materials to be provided to the Federal Court should a referral take place.

¹ PN3071 of transcript 2 December 2016

² [2017 FWCFB 1133

³ [2017] FWC 2347

⁴ [2017] FWC 2347 at [23]

The Claim in the context of the 4 yearly review

8. The 4 yearly review, conducted by FWC, comprises an Initial stage, Common issues stage and an Award stage.⁵
9. The ACTU claim concerning 'family and domestic violence' has been characterised as a 'common issue' by FWC as it is relevant to all modern awards.⁶
10. Early during the 4 year review, FWC characterised a 'common issue' claim as one that:

*'.....simply related to the process adopted for hearing and determining the claim (and) does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards..'*⁷ (our emphasis).
11. One outcome is that the ACTU claim may be rejected as not consistent with s.134 of the FW Act and that would end the matter. An example of rejection during the 4 yearly review is the Transitional/sunseting claims of the ACTU in AM2014/190.

6(i) above being the President's Provisional view

12. Whilst certainty of outcome is of primary importance, AMIC is still of the view – expressed during the 4 April hearing - that there appears to be no valid legal reason why, concerning the ACTU clam, the two (2) members of the Full Bench who have not handed down decisions cannot hand down their decision and that their decision, along with the already published decision, constitute the decision of the Full Bench for the purposes of s618 of the FW Act. The Bench was properly constituted, the claim was heard and the matter was adjourned with decision reserved. A decision of the presiding Vice President, as he then was, was published. The Vice President's decision, as he then was, cannot be disregarded under administrative law. The only remaining administrative action required is for the other Full Bench members to publish and their decision that stands alongside that of the former Vice President. What subsequent action may be required following publication is not relevant at this point.
13. In our view, the scenario in [12] above does not impact upon s. 622 of the FW Act. The then Vice President did not become unavailable 'following adjournment' and therefore could not deal with the matter. If the then Vice President was indisposed following the 'reserved decision' date that is a different scenario but not the scenario here. The then Vice President dealt with the matter to completion.

⁵ [2014] FWC 8583 at [2]

⁶ Ibid at [29]

⁷ Ibid at [15]

14. Once published, in our view, the decision of the two (2) remaining members of the Full Bench will either (a) bring the matter to conclusion or (b) require other steps which a newly constituted Bench can perform with the issuing of new directions having regard to the procedure adopted by FWC and as outlined in [10] above. This procedure has been adopted during the 4 year review when a member of FWC has resigned and a Bench re-constituted.
15. Protocol might suggest that decisions of Full Benches of FWC should be handed down contemporaneously but protocol is not the issue and is not binding.
16. In a short submissions for the 4 April hearing AiGroup, at [26 and 27] pointed to adverse consequences if a member of a Full Bench was not able to hand down a decision before an event, such as resignation, occurring. AMIC concurs with the short points made by AiGroup.

6(ii) above – the Attachment to 28 April Statement

17. If, after a consideration of any further submissions filed by 10 May next, the President is still of the view that the issue should be referred to the Federal Court as a 'special case' AMIC only has very short comments concerning the contents of the **Attachment**.
18. First, and perhaps it may not be relevant, but the STATEMENT OF FACTS seems to not make any reference to procedure as referred to in [10] above. It may be as to how FWC has dealt with the 4 year review is irrelevant for present purposes but we raise it for consideration.
19. Second, and this concerns the QUESTIONS FOR CONSIDERATION within the **Attachment**. It seems to AMIC that the issue, put simply, is whether, as a matter of law given the circumstances, that s. 622(1) and (2) apply and if so whether the President is therefore mandated to act under s.622(3) to appoint. Perhaps paragraphs 10(1) and (2) of the **Attachment** fully encapsulate the issue. We again only raise it for consideration.

Other submissions

20. Parties have made submissions concerning the situation that, if the Full Bench needs to be re-constituted what then should happen and whether the newly appointed member should publish a decision. ACCI made comments at the 4 April hearing if the Full Bench was re-constituted as to the possible action of any new member [PN224]. In filed submissions dated 4 May the MUA submits any new member should refrain from issuing a decision.

21. AMIC is comfortable with the provisional view expressed by His Honour the President at PN225 of the transcript 4 April 2017.

9 May 2017

Australian Meat Industry Council