

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Family and Domestic
Violence Clause
(AM2015/1)

Family Friendly Work
Arrangements Clause
(AM2015/2)

13 April 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 – FAMILY AND DOMESTIC VIOLENCE CLAUSE

AM2015/2 – FAMILY FRIENDLY WORK ARRANGEMENTS CLAUSE

1. INTRODUCTION

1. This submission responds to the President's invitation to address what course of action should be taken regarding the constitution of a Full Bench for the purposes of dealing with the ACTU's family friendly work arrangements claim (AM2015/2). It also raises issues that are of potential relevance to the President's consideration as to what course of action should be adopted in AM2015/1.
2. In short, Ai Group contends that the President has the power pursuant to s.618(2) of the *Fair Work Act 2009* (**FW Act**) to appoint an additional Member to join Gooley DP and Spencer C on a Full Bench to deal with AM2015/2. Alternatively, it would be open to the President to appoint a new Full Bench, comprised of different Members, to deal with AM2015/2 and to transfer the matter to that Full Bench. Ai Group contends that either course of action would be appropriate.

2. APPLICATION OF SECTION 618

3. Section 618 contains the following provisions:

618(1) A Full Bench constituted under this section consists of at least 2 FWC Members, including at least one FWC Member who is the President, A Vice President or a Deputy President.

Note: An Expert Panel Member might form part of a Full Bench.

618(2) The President may determine which FWC Members form part of a Full Bench.

4. Section 618 establishes the President's power to determine which FWC Members form part of a Full Bench. There does not appears to be any temporal restriction on the exercise of the President's power under s.618. The section

does not appear to limit the President's power to determine which FWC Members form part of a Full Bench to the circumstances when the Full Bench is first formed. Consequently, the President is empowered to change the Members that constitute the Full Bench after it has initially been constituted. In advancing this submission we do not contend that it would commonly be appropriate for the President to change the Members appointed to a Full Bench. It is, however, appropriate in the current unusual circumstances relating to the ACTU's family friendly work arrangements claim (AM2015/2).

5. Former Vice President Watson is no longer an FWC Member, for the purposes of s.618 and for the Act more broadly. For clarity, we note that s.629 deals with the period of appointment of FWC members:

629(2) The President, a Vice President, a Deputy President or a Commissioner holds office until the earliest of the following:

- (a) he or she attains the age of 65 years;
- (b) he or she resigns or the appointment is terminated under this Part.

6. In this context, it is entirely appropriate for the President to determine that a new FWC Member will join the other two Members to form a Full Bench for the purpose of dealing with AM2015/2. Given the resignation of former Vice President Watson there is not a valid Full Bench in place for the purposes of dealing with AM2015/2.
7. Alternatively, the President may appoint a new Full Bench to deal with the matter. A direction may then be issued pursuant to s.582 transferring the matter to that Full Bench.
8. Section 582 establishes a mechanism through which the President may implement his or her power under s.618. The provision states:

582 The President may give directions

- (1) The President may give directions under subsection (2) as to the manner in which the FWC is to perform its functions, exercise its powers or deal with matters.
- (2) The President may give a direction that is of a general nature, or that relates to a particular matter, to one or more of the following persons:

- (a) an FWC Member;
 - (b) a Full Bench;
 - (c) an Expert Panel;
 - (d) the General Manager.
- (3) The direction must not relate to a decision by the FWC.
- (4) Without limiting subsection (2), the direction may be a direction of the following kind:
- (a) a direction about the conduct of 4 yearly reviews of modern awards under Division 4 of Part 2-3;
 - (aa) a direction about the conduct of 4 yearly reviews of default fund terms of modern awards under Division 4A of Part 2-3;
 - (b) a direction about the conduct of annual wage reviews;
 - (c) a direction that 2 or more matters be dealt with jointly by one or more single FWC Members or one or more Full Benches;
 - (d) a direction about the transfer between FWC Members (including a transfer between Full Benches) of one or more matters being dealt with by the FWC.

Persons must comply with the President's directions

- (5) A person to whom a direction is given must comply with the direction.

9. Given that AM2015/2 is still in its infancy, there would be no prejudice to any party should the President adopt either course of action identified in paragraphs 6 and 7 of these submissions. The ACTU have not yet filed any material in support of their claims.

3. APPLICATION OF S.622 IN THE CONTEXT OF AM2015/2

10. Section 622 does not apply in the context of AM2015/2 for the same reasons as we identified in our submissions concerning AM2015/1.
11. The current context is not one in which an FWC Member has become unavailable due to illness or being pre-occupied with some other matter. Rather, it is a situation where, pursuant to s.629, a person has ceased to hold office as a FWC Member.

12. We also note that s.622(3) does not, in and of itself, afford the President a power to reconstitute a Full Bench. It instead compels the President to issue a direction in the prescribed circumstances:
- 622(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.
13. The direction referred to in s.622(3) is a direction as contemplated in s.582. It is s.618 that establishes the President's power to determine which Members form part of a Full Bench for the purposes of the Act and it is s.582 that establishes the President's power to issue the relevant direction. Subsection 622(3) merely has the effect of compelling the exercise of such power in circumstances where an FWC Member becomes unavailable.
14. The second sentence of s.622(3) enables the Full Bench to perform its functions related to a matter without the unavailable Member who would otherwise form part of the Full Bench as formed at the determination of the President pursuant to s.618 and, who would otherwise be required to participate in the performance of the functions of the Full Bench. This is necessary in circumstances where an "unavailable member" is still a Member of the FWC. When viewed in this light, we contend that there is no inconsistency between s.618 and s.622. Section 618 is a general power governing the constitution of a Full Bench and s.622(3) mandates the exercise of that power by the President in a certain manner in specific circumstances.
15. The inclusion of the second sentence in s.622(3), and the reference within it to an "unavailable member", reinforces our contention that s.622 appears to be intended to address circumstances where a current Member becomes unavailable rather than circumstances where a Member ceases to be a Member and is therefore ineligible to form part of a Full Bench. The reference to "another member" in the first sentence of s.622(3) provides further textual support for our position.

16. What falls from our analysis of the legislation is that in circumstances where a Member of the Full Bench resigns from their position as an FWC Member, the President would have the power to either change the constitution of the Full Bench to effectively replace the relevant Member or would have the power to transfer the conduct of the proceedings to another Full Bench. The President must determine whether to exercise such power, and the manner in which it is exercised, having regard to relevant statutory provisions, including s.581 and s.577.
17. The course of action that should be to be taken in such circumstances will depend upon the specific factual circumstances associated with the matter that the Full Bench was dealing with at the time that the relevant Member resigns. This would include, for example, the extent to which the Full Bench has already proceeded to deal with it in a substantive manner, the nature of the proceedings, and the views of any parties to such proceedings.
18. In the context of AM2015/2 it would be appropriate for the President to issue a direction for a new FWC Member to join Gooley DP and Spencer C to form a Full Bench to continue dealing with the matter. Section 622 has no application. The former Vice President, pursuant to s.629, no longer holds office as an FWC Member and as such is ineligible to form part of the relevant Full Bench as contemplated by s.618.

4. DISTINCTION BETWEEN THE APPROACH THAT SHOULD BE ADOPTED IN AM2015/1 AND AM2015/2

19. The situation in AM2015/2 is different to that which arises in relation to the proceedings concerning AM2015/1. In AM2015/1, it is possible that there may be no further action that is required to be performed by Members of the Full Bench beyond Gooley DP and Spencer C issuing their respective decisions. Whether any other further action is required is a factual proposition that is dependent upon the nature of the decisions of such Members. Moreover, in AM2015/1, the parties have already advanced detailed written and oral

submissions comprehensively addressing the contested issues, and a significant volume of evidence has been received by the Commission.

20. If the President appoints an additional member to the Full Bench in AM2015/1 prior to Spencer C and Gooley DP issuing their decisions, the newly appointed member may be required to issue a decision in relation to the subject matter of the proceedings. Such an outcome is undesirable given that the Member was not present during the conduct of the December hearing. Also, the involvement of the additional Member at this late stage may significantly delay the resolution of the proceedings. It is not a course of action that should be adopted unless it is necessary pursuant to s.622, which we submit it is not.
21. We here acknowledge that ACCI has previously submitted, in effect, that if s.622 applies in the current circumstances the President is required to direct another Member to form part of the Full Bench before Gooley DP and Spencer C hand down their decisions, but that the newly appointed Member of the Full Bench has a discretion to not hand down a decision in relation to the subject matter of the December hearing. However, it does not seem clear that the newly appointed Member would have the discretion to not issue a decision, as submitted by ACCI. The scheme of the FW Act does not appear to contemplate individual Members simply not issuing decisions in relation to matters that are before the Full Bench to which they are appointed.
22. During the course of the hearing on 4 April 2016 the President appeared to indicate that he perceived that Gooley DP and Spencer C would refrain from handing down their respective decisions in AM2015/1 for the time being. At PN156, the transcript states:

“**Justice Ross:** I don’t think they will be launching off until I have made a decision about what I do under 622, if that is your apprehension. They have raised the issue with me and...”
23. We note and concur with the President’s subsequent observation that, in effect, the timing of when Gooley DP and Spencer C issue their respective decisions is essentially a matter for them.¹ Nonetheless, given the circumstances it is

¹ PN158 and PN175

appropriate that the President issue a statement indicating that he does not propose to direct any other Member to form part of the Full Bench dealing with AM2015/1 at this time.

24. This course of action may facilitate the efficient resolution of the current matter. Under s.581 the President is responsible for ensuring the FWC performs its functions and exercises its powers in a manner that is efficient. This approach would also potentially promote the resolution of the matter in a manner that is consistent with s.577, which speaks to the need for the FWC to exercise its powers and perform its functions in a manner that is:
 - (a) is fair and just; and
 - (b) is quick, informal and avoids unnecessary technicalities; and
 - (c) is open and transparent; ...”
25. The question of whether, in the context of AM2015/1, the constitution of the Full Bench should be changed or whether a new Full Bench should be constituted for the purposes of further dealing with any outstanding matters should be determined after Gooley DP and Spencer C have handed down their respective decisions.

5. RELEVANCE OF THE *MORTON* DECISION OF THE SUPREME COURT OF NEW SOUTH WALES

26. At the hearing on 4 April 2017, President Ross invited the parties to make further submissions on the relevance (if any) of the decision of the Supreme Court of New South Wales in *Morton v The Transport Appeal Board & Anor No 1* [2007] NSWSC 1454; in particular paragraphs [41] – [48].
27. The decision is not relevant to the issues in contention in the current proceedings because the decision concerned a different tribunal operating under a very different statutory scheme. Significantly, at the relevant time, the *Transport Appeal Boards Act 1980* (NSW) did not provide for different Members of the Transport Appeals Board to hand down different decisions. The only

“decision” that was recognised under the Act was the decision of the majority of Members of the Board.

28. In contrast, s.618 of the FW Act expressly contemplates each Member of a Fair Work Commission Full Bench potentially issuing his or her own decision, and having the power to do so. Relevantly, s.618(4) provides: *“However, if there is no majority, the decision of the FWC member who has seniority under section 619 prevails.”*
29. Further, there are no provisions in the FW Act that dictate the process that Members of a Full Bench are to adhere to in formulating their decisions, or the degree to which the Members are to interact with each other in this process.