

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Family and Domestic Violence Clause
(AM2015/1)

3 April 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 - FAMILY AND DOMESTIC VIOLENCE CLAUSE

1. INTRODUCTION

1. This outline of submission responds to the Statement of President Ross issued on 27 March 2017¹ and is lodged ahead of the hearing on 4 April 2017 in order to inform the Commission of Ai Group's position.

2. In the Statement, the following questions are posed:

Question 1A: Are Deputy President Gooley and Commissioner Spencer permitted to issue a decision in this matter?

Question 1B: If so, would their decision, taken together with the decision of the Vice President, constitute the Full Bench's decision?

Question 2: Alternatively, does s.622 of the Fair Work Act require that the President appoint another Member to the Full Bench in order for the Full Bench to issue a decision?

Question 3: If the answer to question 2 is yes and if the President appoints a new Member to the Full Bench, are the parties content for the newly constituted Full Bench to proceed to determine the application after reviewing the materials filed and the transcript of the hearing, without the need for a further hearing?

3. These questions are dealt with in the sections below.

¹ ([2017] FWC 1733

2. RELEVANT PROVISIONS OF THE STATUTE

4. Before dealing with the relevant legislative provisions we acknowledge the salient general observations made by the Full Bench in the *4 Yearly Review of Modern Awards - Penalty Rates Decision*² regarding the task of statutory construction:

3.1 Statutory construction – general observations

[95] This part of our decision deals with the legislative provisions relevant to these proceedings. We begin by making some general observations about the task of statutory construction.

[96] The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy. Regard may also be had to the legislative history in order to work out what a current legislative provision was intended to achieve.

[97] Each provision of the FW Act must be read in context by reference to the language of the FW Act as a whole. The relevant legislative context may operate to limit a word or expression of wide possible connotation. The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose, as the majority observed in *Project Blue Sky*:

‘... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.’

[98] The provisions of an act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.

[99] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Alcan)* the High Court described the task of legislative interpretation in the following terms:

‘This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.’

² [2017] FWCFB 1001

5. The provisions of the *Fair Work Act 2009 (FW Act)* of relevance to the questions to be determined, need to be interpreted in accordance with relevant statutory interpretation principles.
6. Section s.616 of the FW Act specifies certain functions of the FWC that must be performed by a Full Bench. Section 616 relevantly provides:

SECTION 616 – FWC’S FUNCTIONS ETC. THAT MUST BE PERFORMED BY A FULL BENCH

616(2) A 4 yearly review of modern awards must be conducted under Division 4 of Part 2-3 by a Full Bench.

616(3) A determination that varies or revokes a modern award made in a 4 yearly review of modern awards conducted under Division 4 of Part 2-3 must be made by a Full Bench.

7. Section 618 regulates both the constitution and decision-making functions of a Full Bench:

SECTION 618 – CONSTITUTION AND DECISION-MAKING FUNCTIONS OF A FULL BENCH

Constitution of a Full Bench

618(1) A Full Bench constituted under this section consists of at least 3 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.

Making decisions

618(3) A decision of a majority of the FWC Members on the Full Bench prevails.

618(4) However, if there is no majority, the decision of the FWC Member who has seniority under section 619 prevails.

8. Section 622 deals with the reconstitution of the FWC in certain discrete circumstances:

SECTION 622 - RECONSTITUTION OF THE FWC WHEN FWC MEMBER OF A FULL BENCH OR AN EXPERT PANEL BECOMES UNAVAILABLE

622(1) This section applies if:

- (a) an FWC Member (the **unavailable member**) forms part of a Full Bench or an Expert Panel in relation to a matter; and
- (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.

622(2) The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:

- (a) for the Expert Panel--the President and at least 2 Expert Panel Members;
- (b) for a Full Bench--at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.

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.

Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see section 623).

3. QUESTION 1B – WOULD THE DECISION OF GOOLEY DP AND SPENCER C, TAKEN TOGETHER WITH THE DECISION OF WATSON VP, CONSTITUTE THE FULL BENCH’S DECISION?

9. Section 618(1) deals with the constitution of a Full Bench. It provides that a Full Bench must include at least 3 FWC Members but may include more.
10. In the current context, a Full Bench was validly constituted for the purposes of conducting a hearing in relation to the domestic and family violence leave common claim.
11. The hearing has been conducted and the Full Bench has reserved its decision. Vice President Watson, as the Presiding Member, has issued his decision and identified that the other Members will issue their respective decisions. All that is necessary to bring the matter to a conclusion is for the remaining Members to now issue their decisions.

12. There are no statutory requirements that prescriptively 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. Notwithstanding this, s.612(2) of the FW Act has relevance. This subsection provides that the most senior FWC Member on the Full Bench (in this case Watson VP) “is responsible for managing the Full Bench in performing functions and exercising powers of the FWC”. Watson VP had the discretion to decide how best to carry out this management task.
13. The memorandum issued by Deputy President Gooley and Commissioner Spencer (**the remaining Members**) does not reveal any barrier to the remaining Members finalising and publishing their respective decisions (either jointly or individually). The remaining Members do not suggest that there is any need for Watson VP to continue to deal with the matter to enable them to finalise and publish their decisions. They do not identify any function or power that Watson VP must exercise for this to occur. All that is relevantly raised is a potential concern regarding the operation of s.622.
14. Section 618(3) contemplates the possibility of a decision of the Majority of Members being issued and prevailing.
15. Section 618(4) addresses circumstances where there is not a Majority decision. In this regard, we note that given the nature of the 4 Yearly Review and the Commission’s powers, such decisions may not constitute a simple acceptance or rejection of the ACTU’s claim.
16. In the current context, it may be that the remaining Members of the Full Bench issue a Majority decision. If they do not, s.618(4) will apply.
17. The language of s.618 contemplates each Member of a Full Bench potentially issuing his or her own decision. That is, it supports the proposition that each Member of the Full Bench has the statutory power to issue his or her own decision. Relevantly, s.618(4) provides: *“However, if there is no majority, the decision of the FWC member who has seniority under section 619 prevails.”*

18. Section 618 does not impose any temporal restrictions on the issue of decisions by respective Members. It does not require that all decisions be issued simultaneously.
19. When a Dissenting Decision is handed down by one of more FWC Members, the Majority Decision and the Dissenting Decision are described as “Decisions” when they are published. For example:
 - In *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v Donau Pty Ltd* [2016] FWCFB 3075, the Majority Decision is described as: “DECISION OF SENIOR DEPUTY PRESIDENT DRAKE AND DEPUTY PRESIDENT LAWRENCE”, and the Dissenting Decision is described as: “DECISION OF COMMISSIONER CAMBRIDGE”. In his Dissenting Decision, Commissioner Cambridge stated: *“I have had the benefit of reading the Decision of Senior Deputy President Drake and Deputy President Lawrence”* (Para [22]. Emphasis added).
 - In *Uniline Australia Pty Ltd* [2016] FWCFB 4969, the Majority decision is described as: “DECISION OF DEPUTY PRESIDENT GOSTENKNIC AND COMMISSIONER RIORDAN”, and the Dissenting Decision is described as: “DECISION OF VICE PRESIDENT WATSON”.
20. In respect of Full Bench proceedings, not only does each Member have the right to hand down a separate decision, each Member has a duty to hand down a separate decision if they do not agree with the decisions of the other Members.
21. While it is customary and convenient for Members of a Full Bench to hand down their decisions at the same time (so, for example, they can be published with the same reference number), there is no statutory requirement that this occur.

22. At the conclusion of hearings on 2 December 2016, Watson VP, on behalf of the Full Bench, stated at PN3071 of the transcript: (emphasis added)

VICE PRESIDENT WATSON: Thank you, Ms Burke. We thank the parties for their submissions in this matter, we'll reserve our decision. We'll now adjourn.

23. Consistent with common judicial and tribunal practice, the Full Bench announced, at the conclusion of the last day of hearings, that they were reserving their decision in the case. At that stage, all of the evidence and the submissions, including the closing submissions, had been heard.

24. Watson VP handed down his decision on 27 February 2017, and the other two Members of the Full Bench are free to hand down their decisions on a later date. As stated by Watson VP in his decision:

[146] The other members of the Full Bench are not presently able to issue their decision. In accordance with ss.618 and 619(2) of the Act the decision of the majority of members of the Full Bench prevails. That majority position will be determined after the publication of this decision and the subsequent decisions of the other members of this Full Bench.

25. Watson VP had no option other than to hand down his decision on 27 or 28 February 2017 because:

- The hearings in the case concluded on 2 December 2016;
- Watson VP announced his retirement on 23 January 2017;
- Watson VP handed down his decision on 27 February 2017;
- Watson VP's resignation took effect on 28 February 2017.
- Gooley DP and Spencer C were not ready to hand down their decisions at the time when the resignation of Watson VP took effect.³

³ As stated in para [145] of Watson VP's Decision.

26. If FWC Members on a Full Bench were not free to hand down their decisions before the date when their resignation or retirement took effect, including in circumstances where the remaining Members were not yet in a position to hand down their respective decisions, the following adverse consequences could result:
- An FWC Member who is approaching the statutory retirement age would be unable to hand down his or her decision in any Full Bench case in which the decisions are reserved if all other Members of the Full Bench were not ready to hand down their decisions (including Full Bench cases for which the retiring Member is the Presiding Member); and
 - Any Member of a Full Bench could frustrate the decision of a Full Bench Member who is approaching the statutory retirement date, by delaying the handing down of his or her decision until after the statutory retirement date of the other Member. We assume that during the decision-making process, Members of a Full Bench would typically know the likely decisions of the other Members of the Full Bench and the impact of this on the final outcome.
27. Watson VP's decision was made within jurisdiction and must be given effect to as a decision of the Full Bench that heard the matter. In this regard, the following key aspects of the decision-making powers of FWC Members are relevant:
- a. Each individual FWC Member who forms part of a Full Bench has a statutory power to make decisions that are within their jurisdiction under the FW Act.
 - b. The President's power to give direction to FWC Members under s.582 of the FW Act do not extend to decision-making. The Act expressly states that directions by the President "must not relate to a decision by the FWC" (s.582(3)).

- c. A decision of an FWC Member can only be overturned on appeal to a Full Bench if the FWC Member has made an error.⁴
 - d. An FWC decision can only be overturned by the Federal Court or High Court in very limited circumstances, essentially in circumstances where the FWC has made a jurisdictional error.⁵
 - e. Each FWC Member has a duty to fulfil his or her functions in accordance with the FW Act and in a manner consistent with the objects of the Act. Also, each FWC Member has a duty to adhere to recognised decision-making principles such as the need to afford procedural fairness to parties, and the need to act judicially.⁶
 - f. Even though the most senior FWC Member on the Full Bench “is responsible for managing the Full Bench in performing functions and exercising powers of the FWC” (s.619(2)), such Member does not have the power to give Directions to the other Members of the Full Bench (except s.582 directions given by the President, which cannot relate to a decision).
 - g. The 4 Yearly Review of Modern Awards must be performed by a Full Bench (s.616(2)). Watson VP was exercising the jurisdiction of the FWC to review awards under s.156 of the FW Act, as one of the Members of the Full Bench that were allocated the task of reviewing whether awards should include family and domestic violence leave provisions.
28. The Full Bench was validly constituted when it heard the matter. It was validly constituted when Watson VP handed down his decision. Also, there is no temporal restriction relating to when individual Members hand down their respective decisions. Accordingly, in answer to Question 1B, we can see no reason why, once the remaining Members hand down their decision/s, that their

⁴ *Coal & Allied Operations v AIRC* (2000) 203 CLR 194 at 205.

⁵ *Craig v South Australia* (1995) 184 CLR 163 at 179.

⁶ See *Galintel Rolling Mills Pty Ltd T/A The Graham Group* [2011] FWAFB 6772 at [27].

decisions taken together with the decision of the Watson VP, would not constitute the Full Bench's decision.

29. In considering the answer to Question 1B, it is also relevant to have regard to s.624, which provides:

“A decision of the FWC is not invalid merely because it was made by a Full Bench constituted otherwise than as provided by this Division.”

30. The Explanatory Memorandum for the *Fair Work Bill 2008* provides the following explanation about s.624:

2386. Clause 624 preserves the validity of any decision, including any instrument, made by an improperly constituted Full Bench or Minimum Wage Panel. This will ensure that technical challenges to the validity of FWA instruments are avoided. The effect of s.624 is that, even if there is some deficiency in the constitution of the Full Bench at the time when its decision/s were handed down, the decision/s of the Full Bench are not invalid.

31. In conclusion, we submit that the answer to Question 1B is YES.

4. QUESTIONS 1A AND 2 – ARE DEPUTY PRESIDENT GOOLEY AND COMMISSIONER SPENCER PERMITTED TO ISSUE A DECISION IN THIS MATTER?

32. The answer to this question turns on whether s.622 prohibits Gooley DP and Spencer C from issuing their respective decisions in this matter.

33. Our primary contention is that s.622 should not be interpreted as applying in the very unusual circumstances of an FWC Member retiring after the Bench has reserved its decision in relation to a matter and that Member has issued his or her decision but the other Members are yet to publish their decisions.

34. At the outset, it must be observed that the text of s.622 does not sit comfortably with the specific factual scenario being dealt with in the context of these proceedings. That is, the language of the provision suggests it is directed at the situation where a current Member of the FWC becomes unavailable for some reason (such as illness or leave) rather than a situation where a person ceases to be a Member of the FWC.

35. In this regard we note that s.622(1) (which deals with when s.622 applies) contains numerous references to an “*FWC Member*”. The provision states: (emphasis added)

622(1) This section applies if:

- (a) an FWC Member (the **unavailable member** forms part of a Full Bench or an Expert Panel in relation to a matter; and
- (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.

36. The term “*FWC Member*” is defined in the dictionary in s.12 as follows:

“*FWC Member*” means the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.

37. Given that Watson VP is no longer “*an FWC Member*”, it can be argued that there is no FWC Member that has become unavailable and therefore s.622 does not apply. This can be contrasted with a situation where an FWC Member becomes ill and therefore is an “*unavailable member*” for the purposes of s.622.

38. Further, s.622(3) contemplates the Full Bench continuing to deal with the matter without the unavailable “*member*”. Moreover, the reference to “*another FWC Member*” in s.622(3) suggests that the provision operates on the assumption that the “*unavailable member*” is nonetheless an FWC Member and not a former Member.

39. Our submissions in this regard are reinforced by the use of the word “unavailable” in s.622(1)(b). The word “unavailable” suggests that the person would still be eligible to continue dealing with the matter were it not for them being otherwise occupied or incapacitated.

40. The wording of s.622, when viewed as whole, suggests that the purpose of the provision is to address circumstances where a person is an FWC Member and is unavailable to deal with a matter. It does not appear to be intended to apply in circumstances where a Member resigns or retires and as a consequence is no longer an FWC Member.

41. Had the Legislature intended s.622(1)(b) to apply in the context of an FWC Member's retirement it could have expressly provided for this. Such an approach was not adopted.
42. In short, our primary position is that s.622 has no application in the current context.
43. The position we here adopt would not prevent a new Full Bench being constituted for the purpose of dealing with any matter that may arise from the Decisions of Gooley DP and Spencer C.

Position in the Alternate

44. Alternatively, even if s.622 applies, we contend that s.622 does not prevent the remaining Members of the Full Bench from issuing their decisions. The terms of s.622 do not expressly prohibit such an outcome.
45. We further contend that interpreting s.622 as preventing Members of a Full Bench from issuing decisions which would otherwise enable a matter before the Full Bench to be dealt with, would not be consistent with the overarching purpose of the provision or with the specific purpose of s.622(2) or s.622(3).
46. The overarching purpose of s.622 is to enable the FWC to conclude dealing with matters that are already before the FWC in circumstances where an FWC Member becomes unavailable. The provision enables this to occur through facilitating the reconstitution of a Full Bench in one of two alternate ways in circumstances where the Full Bench as originally constituted *cannot* conclude dealing with the matter because of the unavailability of a Member of the Full Bench.
47. The purpose of s.622(2) is not to restrict the Members of a Full Bench, other than the unavailable Member, from issuing their respective decisions in circumstances where there is no other obstacle but the operation of s.622. Nor is it to invalidate the decision of an unavailable Member in circumstances where a valid decision of a Full Bench could be handed down.

48. Subsection 622(2) should also not be read in isolation of s.622(3). The purpose of s.622(2) is, in part, to simply to narrow the circumstances in which s.622(3) applies.
49. The purpose of section 622(3) is to enable a Full Bench to continue to deal with a matter before it in circumstances where the requirements of s.618(1) would not be met.
50. The inability of the FWC to deal with a matter as a Full Bench constituted in accordance with s.618, due to the unavailability of a FWC Member of the originally constituted the Full Bench, is the mischief that the provision is directed towards. This is necessary because s.618 does not deal with the reconstitution of a Full Bench.
51. It would be a perverse outcome for a provision enabling the Commission to deal with a matter, in circumstances where it might not otherwise be possible, to frustrate the resolution of a matter that could be resolved by the Full Bench as currently constituted. The memorandum of the remaining Members of the Full Bench does not identify any barrier to the issuing of their respective decisions other than the operation of s.622. We accordingly reiterate our prior submissions in relation to Question 1B, as set out above.
52. Section 622 of the Act was considered in detail by the Full Federal Court ⁷in *Financial Services Council Ltd v Industry Super Australia Pty Limited*. In this decision, Gilmour, Flick and Perram JJ decided that it was necessary to read the expression “FWC Member” in s.622(3), not in accordance with the Dictionary definition in s.12, but rather in a manner that achieves harmony with s.620(1A).
53. In this regard, the Court said: (emphasis added)

34 In those circumstances, the Court sees no reason not to give effect to its conclusion that s 622(3) must be construed conformably with the compositional requirements of s 620(1A). Whilst the applicant submitted that the two provisions were directly inconsistent and that the Court should give primacy to the latter over the former (citing *Project Blue Sky Inc v Australian*

⁷ [2014] FCAFC 92

Broadcasting Authority (1998) 194 CLR 355) the Court does not share that view. Although in practical terms the result is no different, the Court accepts the submission of the Minister that the provisions are not directly inconsistent and that what is involved is rather the process of construing them in an harmonious fashion. In this case, that requires one to read s 622(3) as not extending to empower the President to appoint a fresh member to fill a casual vacancy in a way which is inconsistent with s 620(1A). To reach this conclusion it is merely necessary to read the expression 'FWC Member' not in accordance with the dictionary definition in s 12 (i.e., all members of the Commission regardless of class) but instead only as 'eligible FWC Member'. Although s 12 is not expressed to provide that the definitions which it contains apply unless the context otherwise requires that is, in fact, how s 12 is to be read: see *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 at 621; *Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449-450 (FC); *Kelly v The Queen* (2004) 218 CLR 216 at 245 [84] and 253 [103] per McHugh J; *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40 at 62-63 [89]-[91] and most recently *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [649].

- 35 The result is that the power in s 622(3) did not extend to permit the President to appoint an ordinary member of the Commission to fill a casual vacancy in one of the three mandatory Expert Panel Member positions. In making his direction that he should fill the casual vacancy himself it is evident that the President proceeded on an erroneous - although understandable - reading of s 622(3). Consequently, he lacked the power to do so and the panel is not currently constituted as contemplated by s 620(1A).
54. Similarly, it is necessary to interpret s.622 in a manner which achieves harmony with the statutory power of an individual FWC Member to hand down his or her decision in a matter, and for that decision to be given effect to.
55. Section 622 does not operate to invalidate a decision of a Member of Full Bench who has already handed down his or her decision.
56. Accordingly, even if an additional Member is appointed pursuant to s.623, it would not invalidate the decision of Watson VP.
57. In the context of the current matter, the remaining Members should issue their decision. This would be consistent with the obligation on the FWC to:
- “..perform its functions and exercise its powers in a manner that:
- (a) Is fair and just;
 - (b) Is quick, informal and avoids unnecessary technicalities; and
 - (c) Is open and transparent

58. For the reasons outlined above, we submit that the answer to Question 1A is YES and the answer to Question 2 is NO.

5. CONCLUSION

59. In conclusion, for the reasons set out above, the answers to the three questions set out in the President's Statement of 27 March 2017 are:

Question 1A: Are Deputy President Gooley and Commissioner Spencer permitted to issue a decision in this matter?

Answer: YES

Question 1B: If so, would their decision, taken together with the decision of the Vice President, constitute the Full Bench's decision?

Answer: YES

Question 2: Alternatively, does s.622 of the Fair Work Act require that the President appoint another Member to the Full Bench in order for the Full Bench to issue a decision?

Answer: NO

Question 3: If the answer to question 2 is yes and if the President appoints a new Member to the Full Bench, are the parties content for the newly constituted Full Bench to proceed to determine the application after reviewing the materials filed and the transcript of the hearing, without the need for a further hearing?

Answer: Not applicable given the answer to Questions 1 and 2.