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To: Chambers - Ross J
Attachments: DV Statement.docx

Statement attached.

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Statement

Graeme Watson

30 March 2017

Arising from the four-yearly review of all modern awards required by s.156 of the Fair Work Act 2009 (the Act), the ACTU made a claim in 2014 to amend all modern awards by inserting a new right of employees to take domestic violence leave in addition to other existing forms of leave contained in the National Employment Standards of the Act.

A Full Bench of the Fair Work Commission comprising myself, Deputy President Gooley and Commissioner Spencer, was constituted in 2015 to hear and determine the matter. The hearings before the Full Bench concluded on 2 December 2016. The FWC timeliness benchmark for reserved decisions is to hand down 90% of all reserved decisions within 8 weeks and 100% of all reserved decisions within 12 weeks of the final hearing date in the matter. I published my decision in the matter on 27 February 2017. My resignation from the Commission took effect on 28 February 2017. I was the presiding member of the Full Bench constituted to hear and determine that application. Pursuant to s.619(2) of the Act I was responsible for managing the Full Bench in performing its functions and exercising the powers of the Fair Work Commission. At the conclusion of my decision I said:

“This matter has been before this Full Bench since November 2015. The evidence, submissions and hearings were comprehensively and completely dealt with by 2 December 2016. 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.”

As each member of a Full Bench has an individual obligation to decide the matter, and in circumstances when all members cannot issue a decision at the one point in time, I consider that the above statement to be entirely conventional, albeit uncommon because of the unusual nature of the

circumstances involved. In my experience, when a member of a Full Bench is approaching a date of resignation, every effort is made by all those involved to finalise cases before the resignation takes effect.

On 27 March 2017, the President of the Fair Work Commission, Justice Iain Ross published a statement concerning the ACTU application. The Statement indicates that a hearing will be convened before him on Tuesday 4 April 2017 to provide the parties with an opportunity to make submissions on the following questions:

- “1. Are Deputy President Gooley and Commissioner Spencer permitted to issue a decision in this matter? If so, would their decision, taken together with the decision of the Vice President, constitute the Full Bench's decision?
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?
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?”

The President's statement raises the prospect of my decision handed down on 27 February 2017 being rendered null and void. I was not contacted by the President or the members of the Bench about this matter either before or after the Statement was issued. However, on 25 February 2017, I had a discussion with Vice President Hatcher, in his capacity as Acting President at the time, about another outstanding Full Bench decision and this matter, to which I refer below.

Attached to the President's Statement was a memorandum to the President from Deputy President Gooley and Commissioner Spencer which purports to record communications between me and the other members of the Full Bench while I was a member of the Full Bench. That memorandum is misleading in a number of respects. The publication of those allegations about internal

communications, their inaccuracy and the environment at the time when normal professional courtesies were not being observed, has led me to issue this statement.

The memorandum states:

“Members of the Full Bench asked the Vice President, as the presiding member, to provide a draft of his decision but apart from providing a summary of the evidence Vice President Watson advised that he was unwilling to provide a draft.”

This is not a complete and accurate statement. After the hearings in the matter were concluded I advised the other members of the Bench that I considered that the application should be dismissed. Deputy President Gooley disagreed with my views. Commissioner Spencer said that she was undecided. I said that I would circulate a summary of the evidence and submissions that I proposed to insert into my decision and said that I would prepare my reasons with the aim of publishing our decisions around the end of January. I said that if either of the other members agreed with me on the outcome of the case they could have input into my draft and join in those reasons if they wished to do so. I said that if they were not in agreement as to the outcome, I was not prepared to provide my draft reasons in advance of them drafting their reasons. The summary of evidence and submissions was provided by me on 13 December 2016.

Upon my return from leave in late January 2017, I commenced drafting my reasons for decision. In early February 2017, I wrote to the other bench members indicating that I was close to finalising my reasons and enquired as to their progress. I indicated my desire to have the decision handed down by 10 February 2017. DP Gooley indicated that she would not be in a position to have her decision ready by then. Commissioner Spencer indicated that she was still undecided as to the outcome. I believe further communications by email occurred over subsequent weeks without any change in the position of the other members as indicated above.

I arranged to have a discussion with Commissioner Spencer about the matter on 20 February and phoned her at the time nominated by her for that purpose. As a result of that conversation I formed the view that Commissioner Spencer was confused about my views and the protocols for preparing

decisions by Full Bench members and remained undecided as to how the case should be decided.

After that telephone discussion, I sent the following email to DP Gooley and Commissioner Spencer:

“Anne/Paula,

We seem to have descended into an unedifying position over the provision of my draft to the other members of the bench.

It is appropriate that I make my position clear. In the brief discussions after the hearings were completed Anne and I expressed opposite views as to the outcome of the case. Paula said that she was unsure. I said that we should therefore prepare our respective reasons for our decisions. I suggested that Paula should collaborate with whoever she agrees with as to the outcome. To date Paula has not expressed any view as to the outcome to me.

On 13 December I provided both members a summary of the evidence, submissions and the claim that I proposed for insertion into my decision.

I do not wish to provide my reasons for saying no to the claim and have my reasons criticised in a decision deciding to grant the claim. This has happened before and I regard it as unethical. Of course we should be free to engage on the parties submissions and critique them, but a critique of another member’s reasons is in my view inappropriate. I have also made it clear that if we are agreed on the outcome then of course I have no difficulty in collaborating on the wording of the decision.

I accept that this has put Paula in a very difficult position. To resolve the impasse I attach the latest version of my draft.

I would appreciate your prompt attention to finalising your position and decision.”

Commissioner Spencer communicated to me during the week of 20 February that she was working on the decision. On 24 February she advised me that she had been advised to take a week’s sick leave effective immediately.

The memorandum from Deputy President Gooley and Commissioner Spencer further states:

“After further requests Vice President Watson provided the other members of the Full Bench with a copy of his draft of the decision on 20 February 2017 which did not include his final conclusion.”

This statement is also misleading.

The draft decision I forwarded to the other members included my conclusion that I was not satisfied that the ACTU claim is necessary to provide a fair and relevant minimum safety net of terms and conditions and that the ACTU claim should be rejected. Additional words were subsequently added to the concluding paragraph over the weekend of 25-26 February, after it became clear on the evening of 24 February, that both DP Gooley and Commissioner Spencer were not going to be able to issue their decisions prior to my resignation taking effect and after my discussion with Vice President Hatcher. Those additional words are the words extracted above about the result of the case depending on the majority view when all members of the Bench had discharged their obligation to decide the case.

My discussion with Vice President Hatcher on 25 February, and the circumstances in which it arose, are relevant and should be communicated to the parties. I was a member of another Full Bench dealing with proposed changes to the Seagoing and related awards which concluded hearings in October 2016. Further written submissions were made by the parties on a discrete aspect of that case in November and December 2016. The other members of the Bench were DP Gooley and Commissioner Cambridge. The Bench was agreed as to the outcome of that case on three of the four matters that were required to be determined. The other members disagreed with me on the fourth matter. At the conclusion of the case I indicated that I would prepare a draft decision on all matters and the other bench members could issue a separate decision indicating the matters in which they were agreed and the matters on which they disagreed. I circulated a preliminary draft in early December 2016 and a final decision in late January 2017, after returning from leave. Inquiries over subsequent weeks as to when the other members would have their decision prepared failed to elicit a clear response. On 20 February 2017, I wrote an email to the other members of the bench,

reminding them of the versions that had been provided to them and asking them to indicate when their decision would be available. I was not provided with the courtesy of a response. On Friday 24 February, I issued my decision in that matter and sent copies of my decision to the other members of the Bench. Later that night, on reviewing the list of FWC decisions handed down that day, I noticed that my decision did not appear. My associate determined that the decision had been loaded into the FWC system but had been removed at some time during 24 February. On Saturday 25 February, I made enquiries as to the reasons for this action and received a phone call from the acting President, Vice President Hatcher. He confirmed that on 24 February he had been approached by Deputy President Gooley about my decision and had issued a direction to the publications team not to publish my decision. He did not speak to me before doing so and he did not notify me of his actions after the event. In the course of our discussion, I raised the issue of the Domestic Violence Leave decision. I told him that since the other members of the Bench were not in a position to finalise their decision, and I would have no authority to hand down a decision after my resignation took effect, I saw no alternative than to hand down my decision on Monday 27 February. He was very familiar with the circumstances of the matter. He said that he probably did not have the power to prevent me from publishing my decision, but the legality of the matter was something that the parties would need to address at some point in the future. In the light of his comments I determined the decision-making process in the Domestic violence leave case referred to in the final paragraph of my decision and amended my decision accordingly before handing it down on 27 February 2017.

I do not wish to make any further comment on the appropriateness of the various actions referred to above and their legal consequences. However, given the publication of internal communications by the President and in the interests of transparency, it would be appropriate for all of my email communications to other members of the Bench in February 2017, together with attachments, be provided to the parties. As I no longer have access to those communications they will need to be provided by the FWC.