IN THE FAIR WORK COMMISSION

AM2014/196
AM2014/197

4 yearly review of modern awards
Casual employment and part-time employment

JOINT SUBMISSIONS OF THE ASU AND ACTU

1. These submissions are made in response to the proposed casual conversion clause provided by the Local Government and Shires Association ("the Association") on 5 February 2018 (hereafter, "the Association clause"). It is understood that Association seek the insertion of their proposed clause in the *Local Government Industry Award*.

2. The Association clause replicates the model term proposed by the Full Bench in its decision [2017] FWCFB 3541 of 5 July 2017 (hereafter, "proposed model term"), save that it adds a new item in the non-exhaustive list of "reasonable grounds of refusal", which regulates the right of an employer to refuse a casual employee's request for conversion. For the reasons which follow, we submit that the Association clause should not be accepted. We remain of the view that the modifications to the proposed model term suggested by the ACTU in its submissions of 2 August 2017 are generally appropriate. Nothing that has been advanced by the Association persuades us that the industry and employers regulated by the *Local Government Industry Award* are in a special category.

3. Having read the submissions filed in support of the Association's position and the Transcript of the associated hearing in the Commission on 2 February 2018, we understand that the need for the Association clause is put on two alternative bases.

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Firstly, it is said that the proposed model term in its current form is beyond the power of the Commission to insert. Secondly, and in the alternative, some inconsistency is said to arise with State law and we take the submission to be that such inconsistency is not warranted on the merits.

Beyond power?

4. The primary basis upon which the proposed model term is opposed by the Association is that it would "offend the limitation imposed by the principle in *Melbourne Corporation*".[1] We take the objection to be that the power of the Commission to vary awards in the course of this Review does not extend to varying the *Local Government Industry Award* so as to insert terms that violate that "principle" (which we take to be a reference to the body of law expressed in *Melbourne v. Commonwealth*[2] and relevant decisions since). It is said that the effect of the proposed model term "is critical to the agent of the State (a council) capacity of the council right to determine the number and identity of the persons whom it wishes to employ and this an impairment of a State's rights in these respects constitutes an infringement of the implied limitation"[3][sic]. The Association's objection should not be upheld.

5. In *Melbourne Corporation*, the High Court was faced with a law which the Chief Justice described as follows:

> "It has the effect of submitting their [*the States'*] banking operations to the control of the Commonwealth Bank, which is in turn subject to the control of the Commonwealth Treasurer…
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> If s.48 is valid, a State and a State authority can, in the absence of any available State bank, be compelled to do all its banking business with the Commonwealth Bank. This is stated by the Treasurer to be the object (as it is plainly the consequence) of the notification proposed to be made under s.48. As the Commonwealth Bank is under no legal obligation to accept the business of any State – either upon any particular terms or at all – the result is that the operations of a State in paying money into a bank, drawing out money, and in obtaining advances from a bank, will be subject to Commonwealth control...Thus the Commonwealth Bank, acting under direction of the Commonwealth Treasurer, could, so far as legal obligation goes, decline to accept moneys or to allow cheques to be drawn for particular purposes or at all, and could refuse to make

1 Association submissions at [14]
2 [1947] HCA 1
3 Association submissions at [21].

advances for particular purposes – even though the Parliament of the State had appropriated moneys for those purposes.”

6. The High Court ruled, by majority, that the law was not valid. Whilst the definitive *ratio* in *Melbourne Corporation* might be criticised as somewhat elusive, the common thread among the majority reasons was to denounce substantial interference by Commonwealth law on the essential governmental functions of the States as inconsistent with the character of federalism embodied in the Constitution. Relevantly,:

> “..federal legislation which, though referring to a subject of federal power, is really legislation about what is clearly a State governmental function, may be said to "interfere unduly" with that function and therefore to be invalid. "Undue" interference is a rather vague conception, and an attempt to apply it as a standard for determining the validity of legislation would invite and would certainly produce differences of opinion which would often be due to other than objective considerations. In my opinion the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws. Though there will sometimes be difficulties in applying such a criterion, this is a more satisfactory ground of decision than an opinion that a particular federal "interference" with a State function reaches a degree which is "undue."
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> The application of these principles in the present case brings about the conclusion that s. 48 of the Banking Act is invalid. The section requires the consent of the Treasurer to the conduct of banking business by a bank only in the case of States and State authorities, including local governing authorities.” (per Latham CJ)
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> “... power in a State and in its essential agencies to carry on the business of banking cannot be impaired, the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the efficient working of the business of government, and that power also cannot be impaired. Accordingly, whatever meaning may be given to "State banking," s. 48 must be considered as wholly invalid.” (per Rich J)
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> “It is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other, depending upon the character and operation of the legislation and executive action thereunder. …...in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other.” (per Starke J)
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> “Accordingly the considerations upon which the States' title to protection from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions. But, to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the Constitution.” (per Dixon J)
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> “The receipt, custody and payment of the public moneys of a State is an essential governmental function of that State.

…

> "It [section 48 of the Banking Act] is plainly in pith a substance legislation aimed at giving directions to the States as to the manner in which they will exercise part of what the Privy Council has called...their sovereign powers" (per Williams J).
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> (emphasis is added in the extracts above)

7. In the present case, the Commission is not faced with a provision that is any way comparable to the provision considered in *Melbourne Corporation.* Rather, it is faced with an award provision that would give an existing employee of a local government, a local government instrumentality or labour hire company that supplied labour to the local government industry (being the employers covered by the Award[4]), the right to request a change in the conditions of their employment - subject to a right of refusal by their employer. Notably, the pattern of hours worked by the employee over 12 months forms a precondition for the employee's right to make that request. Needless to say, those patterns of hours cannot be worked over the 12 month period without the concurrence of the employer.

Consideration of the principle in Melbourne Corporation

8. The principle in *Melbourne Corporation* has been applied and refined in subsequent cases (emphasis is added in the extracts below).

9. In 1995 in *Re Australian Education Union[5],* the High Court made the following relevant statements:

> "The prosecutor submitted that the statements in the Tasmanian Dam Case, when they refer to impairment of a State's capacity "to function as a government", extend to any impairment of capacity to exercise government functions...In our view, the prosecutor's submission on this point is against the weight of modern authority and draws a distinction which is unsatisfactory. To say that the limitation protects the existence of the States and their capacity to function as a government is to give effect more accurately to the constitutional foundation for the implied limitation identified by Dixon J in the passages earlier quoted from Australian Railways Union, including s.106 of the Constitution. To press the limitation as far as the prosecutor seeks to take it would travel beyond the language of s.106 and would confer protection on the exercise of powers by the States to an extent which is inconsistent with the subordination of those powers to the powers of the Commonwealth through the operation of s.109 of the Constitution. And the argument, if successful, would protect a substantial part of a

4 See *Local Government Industry Award* at cl 4
5 [1995] HCA 71

State's workforce from the impact of federal awards, notwithstanding that the operation of those awards in relation to school teachers, health workers and other categories of employees would not destroy or curtail the existence of the State or its capacity to function as a government."[6]

"Our rejection of the particular submissions made by the prosecutor and supporting interveners other than that advanced by South Australia as to the scope and content of the implied limitation leads us, subject to consideration of one gloss put forward by the prosecutor, to express the scope and content of the limitation in this way. The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ("the limitation against discrimination") and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.

…

At this point it is convenient to consider South Australia's argument based on impairment of a State's "integrity" or "autonomy". Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government. It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question. There may be a question, in some areas of employment, whether an award regulating promotion and transfer would amount to an infringement. That is a question which need not be considered. As with other provisions in a comprehensive award, the answer would turn on matters of degree, including the character and responsibilities of the employee.

In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, Ministers and judges are not employees of a State."[7]

10. In 1996 in *Victoria v. the Commonwealth*, the joint reasons of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said:

"There are three matters to be noted with respect to the second element of the prohibition identified in Re Australian Education Union. First, it precludes the "exercise of Commonwealth legislative or executive powers 'to control the States'" for that would constitute "an exercise of power inconsistent with the continued existence of the States as independent entities and their capacity to function as such" . The second matter is that, as was held in that case, it precludes laws which prevent a State from exercising its "right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the

6 at [46]-[49]
7 at [54]-[58]

persons whom it wishes to dismiss ... on redundancy grounds". Finally, in the case of those employed at the higher levels of government, it precludes laws which prevent the State from determining "the terms and conditions on which those persons shall be engaged"[8] .

11. And further:

> "If s 6 is read down as indicated, the operation of the substantive provisions of the Act is correspondingly limited but their operation is otherwise unaffected. Thus, if any provision of the Act would otherwise operate to prevent the States from determining for themselves any of those matters which were held in Re Australian Education Union to be beyond the legislative power of the Commonwealth, the reading down of s 6 precludes invalidity for infringing the limitation on Commonwealth legislative power. That being so, it is unnecessary to consider the effect of s 7A of the Act."[9]

12. n 2003 in *Austin v. The Commonwealth*[10], Gaudron, Gummow and Hayne JJ referred to the "doctrine in *Melbourne Corporation* and observed:

> "The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments". These criteria are to be applied by consideration not only of the form but also "the substance and actual operation" of the federal law"[11]

13. In 2009, in *Clarke v. Commissioner for Taxation*[12], Gleeson CJ said:

> "In my opinion, the application of the implied limitation requires a multifactorial assessment. Factors relevant to its application include:
> 1. Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.
> 2. Whether the operation of a law of general application imposes a particular burden or disability on the States.
> 3. The effect of the law upon the capacity of the States to exercise their constitutional powers.
> 4. The effect of the law upon the exercise of their functions by the States.
> 5. The nature of the capacity or functions affected.
> 6. The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.
>
> None of these factors, considered separately, will necessarily be determinative of the application of the limitation. The decisions of this Court indicate that the fact that a law singles out the States or a State will be of considerable significance, to be weighed together with the effects of such a law on their capacities and functions. The fact that a law is of general application may make it more difficult to demonstrate, absent operational discrimination in its impact upon the States, that it transgresses the limitation."[13]

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8 at [69]
9 at [85]
10 [2003] HCA 3
11 at [124]
12 [2009] FCA 33
13 at [34]

14. Gummow added:

> "Too intense a concern with identification of discrimination as a necessity to attract the Melbourne Corporation doctrine involves the search for the appropriate comparator, which can be a difficult inquiry and is apt to confuse, rather than to focus upon the answering of the essential question of interference with or impairment of State functions. It also may be that the references to discrimination by Dixon J in Melbourne Corporation use the term in the somewhat different sense of a law which is "aimed at" or places a "special burden" on the States."

This leads to the final point, which indicates the nature of the inquiry for the present appeal. It was made as follows in the joint reasons in Austin:"[14] (His Honour then cited the passage extracted at paragraph 12 above)

15. In 2015 in *UFU v. CFA*[15], a unanimous Full Court of the Federal Court of the Federal Court said:

> "We accept that UFU's submission that, while there are some difficulties in articulating and precisely identifying the limitation imposed by the Melbourne Corporation principle, that principle applies where the the curtailment or interference with the exercise of State's constitutional power is significant, which is to be judged qualitatively and, in general, by reference, among other things, to its practical effects"[16]

16. And further:

> "The CFA cited the decision of the Full Bench of the Fair Work Commission in Parks *Victoria v Australian Workers' Union* 2013] FWCFB 950; (2013) 234 IR 242 [at [366] in support of its contention that *AEU* should be regarded as establishing a specific "sub-rule" to the Melbourne Corporation principle, such that certain features of State governments (including the capacity to determine the number and identity of public sector employees) must be kept free of Commonwealth regulation, without requiring a State to demonstrate that the regulation of those matters would in fact undermine the capacity of the State to govern. We reject that submission. We do not consider that *AEU* should be viewed as establishing any such sub-rule. Rather, *AEU* is to be understood as applying the Melbourne Corporation principle in a particular statutory context which, on its facts, involved a significant impairment to the State's capacity to function as a government in the relevant sense. Generally, however, for the implied limitation to apply it will be necessary to demonstrate the existence of such an impairment, consistently with subsequent authorities such as Austin, Clarke, the Work Choices Case and Fortescue"[17]

14 at [65]-[66]
15 [2015] FCAFC 1
16 at [179]
17 at [190]

Application to the present matter

17. Firstly, it is apparent that proposed model clause causes no interference in the capacity of the Council or State to function or to determine the number and identity of persons it wishes to employ, as alleged by the Associations.

18. The principal complaint by the Associations is that Local Governments in Western Australia and Victoria are legislatively bound to make employment decisions on merit - they seek to argue that the conversion of casual employment to part time employment under the proposed model term prevents a council from complying with that obligation.

19. As is borne out by the transcript[18] and the extracts from the West Australian and Victorian Legislation at paragraphs [8]-[10] of the Association's submission, the obligation, such as it exists, to make make employment decisions on merit makes no distinction between casual employees and permanent employees. Accordingly, casual employees should be appointed by the relevant Councils on merit today. The Association's submission that the merit process that applies might be somewhat different if a permanent rather than a casual role was considered at the outset is devoid of any real content in the witness material, which does not rise above the level of mere assertion.

20. Further, it is important to appreciate that the proposed model clause only applies to persons who have already been employed. Contrary to the Association's premise, an employing Council is not being deprived of an opportunity to appoint a person on merit nor is it capacity to appoint persons to permanent positions being curtailed. It retains its capacity recruit permanent staff of its choosing to replace casual employees should it choose to do so (subject to the usual termination of employment prohibitions, general protections and the unfair dismissal regime), given that the right to request conversion by the incumbent casual employee is conditioned upon the working patterns allocated to the casual employee by the Council over a 12 month period. The practical effect of the proposed model term,

18 at PN578-582

to put it bluntly, is to make the safety net more relevant by changing the entitlements that are associated with employment while making little (if any) change to the actual hours worked by the employee and the duties performed by that employee. We submit that an employer's conduct in choosing to retain a casual employee for 12 months or more and provide them on an ongoing basis with a pattern of hours throughout that is capable (or nearly capable) of being accommodated as permanent work under the award is *prima facie* entirely inconsistent with an assertion that the employee lacks the merit to continue to perform the very work they have been performing at the employer's request for a year or more. Rather, it is likely that such a casual employee after that length of time in those circumstances would have good grounds under the existing law to bring an unfair dismissal application if the sole reason for the dismissal was the the employer decided to go to market to see if they could find a "more meritorious" candidate.

21. Secondly, even if it could be said in principle that the proposed model clause is capable of interfering with the capacity of the Council to determine the number and identity of persons it wishes to employ, that is an insufficient basis upon which for its objection to succeed. It has been clear since *Austin* and *UFU* that in order for the Council to succeed in its objection, it needs to bring forward a body of material that demonstrates the substance and operation and actual effect, including the practical effect, of the proposed laws. Without such a body of material, it is impossible for the impact and extent of the proposed clause to be assessed as to whether or not there really is a significant effect on the capacity to function. There is no such body of material here. Importantly, a mere (and in our view, erroneous) characterisation of the subject matter dealt with in the proposed model clause as restricting the capacity of the Council to determine with the number and identity of persons the Council wishes to employ is insufficient, as it does not actually address the core issue of limiting the capacity to function. In circumstances where there is clear law that a requirement to re-employ (reinstate) an employee involves no impairment on the capacity of local government to function[19], it is difficult to imagine the Association mounting a case that an obligation to convert a casual employee in the

19 *Greater Dandenong City Council v. Australian Municipal, Clerical and Services Union* [2001] FCA 349.

form conditioned by the proposed model clause does involve a significant such impairment.

22. Thirdly, the Association clause clearly goes well beyond addressing the issue the Association has identified. Most notably, the Association clause does not confine its operation to local government or even local government entities. Any impact on the labour hire companies covered by the award is entirely outside of the *Melbourne Corporation* principle. In addition, corporations “controlled” by local government “entities” are covered by the Award. Requisite control in this sense is described at clause 4.2 of the award as “the capacity to determine the outcome of decisions about the corporations financial and operating policies”, which is clearly a more high level oversight than the granular decision making as to who is employed in roles offered as casual positions. In such circumstances, the *Melbourne Corporation* principle would likewise not apply. In addition, the Association clause purports to save *all* State or Territory legislation that “regulates the employment of employees by the employer”. This goes well beyond the area of concern identified by the Association.

Case on the merits

23. The case on the merits does no more than assert that there are some provisions of State and Territory legislation that might require different practices than those permitted by the proposed model clause. This is entirely unexceptional, and is the intended impact of Modern Awards[20].

24. Further, it is difficult to ensure a “fair and relevant safety net” as required by section 134 of the *Fair Work Act* if public sector entities are permitted to voluntarily depart from safety standards by State legislative action.

25. Finally, and in any event, none of the “statutory measures” references at paragraph 24 of of the Association’s submission interact with the proposed model clause as it

20 *Fair Work Act 2009*, s. 29, *Commonwealth of Australia Constitution Act 1901*, s. 109

applies only to existing employees and says nothing about the capacity to increase or reduce its workforce, either permanent or casual.

ASU
ACTU

9 March 2018