

Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Supplementary Submission by Professor Andrew Stewart
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This supplementary submission addresses two issues on which I undertook to provide advice to the Committee, in response to questions raised at the hearing.

Terminating an Expired Agreement

I understand an issue has been raised with the Committee about a practical difficulty for a group of employees in seeking to terminate an expired collective agreement, where those employees are unable to ascertain exactly who else might be covered by the agreement.

Clause 16 in Schedule 3 of the TPCA Bill provides that a collective agreement-based transitional instrument may be terminated after its expiry date on the same basis as an expired enterprise agreement under the *Fair Work Act 2009* (FW Act).

Having now checked the relevant provisions in the FW Act, I can confirm that a single employee is able to apply to Fair Work Australia (FWA) to have an expired agreement terminated (s 225(b)). If the agreement is terminated, that will be the case for *all* employees covered by the agreement. But FWA must not make such a decision without considering the views of, and any impact on, all affected parties (s 226(b)).

On the face of it, therefore, the fact that one or more employees might not know who else is covered by an agreement would not prevent them from applying to have it terminated after its expiry date. It would obviously be up to FWA in that situation to satisfy itself of the full scope of the agreement, in order to discharge its statutory responsibilities.

Correcting Oversights in Modern Awards

I was asked to consider whether there is scope under the legislation as it stands to ask FWA to address a clear oversight in, or unintended consequence of, the award modernisation process: for example, the omission of a particular classification, or the failure to set a pay rate for a classification.

Having now reviewed the FW Act, I believe there is indeed scope to deal with such issues. Section 160 allows FWA to vary a modern award, not just to resolve any ambiguity or uncertainty, but to 'correct an error'. In addition, s 157(1) confers a general power to vary modern awards, wherever that variation is 'necessary to achieve the modern awards objective' set out in s 134.

Between them, these provisions seem to me to provide FWA with sufficient power to rectify any major errors or omissions in modern awards that have not been picked up by the Australian Industrial Relations Commission.