Senate Standing Committee on Education Employment and Workplace Relations

QUESTIONS ON NOTICE
Supplementary Budget Estimates 2012-2013

Outcome 4 – Workplace Relations and Economic Strategy

DEEWR Question No. EW0665_13

Senator Abetz asked on 17 October 2012, Hansard page 109

Question

Judicial interpretation of provisions in Fair Work Act

Senator ABETZ: We were told in the Australian on 2 August 2012—and the article quotes the panel—that the panel: … was disinclined to recommend legislative changes where there was a reasonable prospect that judicial interpretation of existing provisions would resolve the problem. This is an outrageous reflection on possible judicial interpretations and decisions, no doubt. Nevertheless, this was said. On what cases should we be waiting for judicial interpretations to resolve problems? Mr Kovacic: I would want to take that on notice to: (1) have a look at the article—

Answer

On 2 August 2012 *the Australian* reported on changes to the *Fair Work Act 2009* (FW Act) recommended by the FW Act Review Panel (the Panel). The article noted the Panel's comment that judicial interpretation of the FW Act's provisions is still evolving and that it was disinclined to recommend change where there was a reasonable prospect that judicial interpretation would resolve problems.

The context of this comment was the Panel's observation that one of the principles guiding its investigation was that the interpretation of industrial relations legislation is often contested. The Panel's full comment (on page 18 of its report) is as follows:

> "The FW Act itself is not yet three years old, and judicial interpretation of some of its provisions is still evolving as issues are brought before courts. The Panel was disinclined to recommend legislative changes where there was a reasonable prospect that judicial interpretation of existing provisions would resolve the problem. Amending particular provisions of the FW Act before judicial clarification of their meaning and scope runs the risk of the courts revisiting issues which have been settled, and also of opening up new issues for unnecessary curial interpretation with uncertain benefits."

The Panel identified a number of areas in which judicial or tribunal decisions could be anticipated to provide guidance on the meaning of the FW Act's provisions, including for example:

National Employment Standards (NES)

In its report the Panel considered submissions about the decision of the Full Bench of Fair Work Australia (FWA) in *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti* [2011] FWAFB 6709, which considered FW Act provisions about

- the Panel recommended that certain matters arising from the cashing out of leave under the NES and interaction of the NES with enterprise agreements(pages 100-101);

- in relation to the FW Act good faith bargaining requirements, the Panel said that as the case law continues to develop, the Panel did not recommend amendments in this area (pages 129, 130 and 138);

- the Panel noted that the capacity of the existing good faith bargaining provisions to deal with issues raised in submissions was still being tested (pages 148 and 184);

- the Panel concluded that the 'matters pertaining to the employment relationship' formulation in section 172 of the FW Act achieves a fair balance between management prerogative and employees' interests. The Panel said that any further refinements to the jurisprudence on this phrase should be left to the tribunal and the courts (page 159);

- in relation to the better off overall test (BOOT) for enterprise agreements, the Panel recommended that tribunal decisions about the BOOT be monitored to ensure the test is not being implemented too rigidly or resulting in agreements being inappropriately rejected (page 166);

- in considering the effect of the general protections on performance management, the Panel noted decisions of the Federal Magistrates Court that the general protections do not prevent employers from taking reasonable disciplinary action against employees (page 234). The Panel also noted that judicial consideration of the limits of the general protections could reduce uncertainty about these provisions (page 247);

- in relation to unfair dismissals, the Panel considered that the Small Business Fair Dismissal Code achieved a reasonable balance between employer and employee interests. The Panel noted that the FWA Full Bench decision in *Pinawin v Domingo* [2012] FWAFB 1359 provided guidance on the burden of proof under the Code in summary dismissal cases, and said it would be likely to lead to greater consistency in single member decisions. The Panel considered that the case law would need to develop before the case for legislative change in this area could be properly assessed (page 226).