CHAPTER 7

SCHEDULE 6 – AWARDS

7.1 This chapter deals with proposed amendments to provisions of the WR Act relating to awards. Awards are orders made by the Commission in settlement of industrial disputes.

Outline of proposed amendments

7.2 Schedule 6 of the Bill includes:

- amendments to regulate processes prior to the making of an award (logs of claims);
- amendments relating to the contents of awards (allowable award matters, agreement encouragement clauses and objectionable provisions);
- new provisions requiring the Commission to simplify existing awards, and requiring the Registrar to review obsolete awards;
- an amendment to limit the application of safety net wage increases made by the Commission; and
- amendments to prevent employers covered by State industrial arrangements from being 'roped in' to federal awards.

Provisions to regulate the log of claims process

7.3 The new provision proposed in item 21 of Schedule 6 prevents the Commission from finding that an industrial dispute exists for the purposes of exercising its dispute settlement functions (ie arbitrating and making a binding award), where the dispute is based on a log of claims and:

- the log of claims was not accompanied by an information sheet (proposed paragraph 101A(a));
- the dispute was notified under the Act less than 28 days after the log was served (proposed paragraph 101A(b));
- each party to the dispute was not properly notified of the time and place for proceedings at least 28 days before the proceedings (proposed paragraph 101A(c));
- the log contained demands for terms and conditions that would contravene the freedom of association provisions of the Act (proposed subparagraph 101A(d)(i));
- the log contained demands for 'objectionable provisions' to be included in an award or agreement (proposed subparagraph 101A(d)(ii)); or

- the log contains claims for terms and conditions that do not pertain to the employment relationship (proposed subparagraph 101A(d)(iii)).

Evidence

7.4 The Department submitted:

> Over the years, the practice of serving 'logs of claims' has developed in the federal industrial sphere to provide evidence of the existence of an industrial dispute. Windeyer J described this practice in *Ex parte Professional Engineers' Association*: 'The dispute here is a 'paper dispute'. To permit the creation of a malady so that a particular brand of physic may be administered must still seem to some people a strange way to cure the ills and ensure the health of the body politic. But the expansive expositions by this Court of the meaning and effect of par. (xxxv.)…have brought a great part of the Australian economy directly or indirectly within the reach of Commonwealth industrial law and of the jurisdiction of the Commonwealth industrial tribunal. The artificial creation of a dispute has become the first procedural step in invoking its award-making power.[1]

7.5 The process of 'paper' disputes developed by the courts means that the Commission can exercise its functions to prevent and settle industrial disputes without having to wait until interstate industrial action, for example a strike or a lockout, is actually occurring. However, as the Department points out, despite the integral importance of logs of claims to establishing whether the Commission can exercise its dispute settling powers, there is currently no regulation of the process of creating and serving logs of claims in the WR Act.[2]

7.6 The Department also submitted that the proposed amendments would ensure that demands included in logs of claims were matters over which the Commission could exercise jurisdiction (ie matters relating to the employment relationship)[3] and assist recipients of logs of claims (particularly small business employers) to better understand the processes and procedures of the federal award-making jurisdiction.[4]

7.7 Employer groups supported the amendments to assist employers to understand the Commission's award making jurisdiction and to allow employers more time to respond to logs of claims (ie the proposed paragraphs 101A (a), (b) and (c)). For instance, the Business Council of Australia submitted that it supported amendments to enable employees who become the subject of logs of claims to better understand the implications of the demand and to prepare for their response:

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2360-1

2 *ibid*., p. 2361

3 *ibid*., p. 2362

4 *ibid*., p. 2363

> Currently there is potential for employers (particularly small business) who are served with logs of claims (and who are not members of employer organisations) not having sufficient time to ascertain explanations of the processes of the Commission, its powers and the rights of parties served with logs.[5]

7.8 The Australian Industry Group and the Australian Chamber of Commerce and Industry supported the amendments for similar reasons:

> The creation of an industrial dispute within the meaning of the Constitution is largely a legal fiction not easily understood in the community. The proposed amendments will assist respondent parties in understanding their rights and obligations in relation to the process of creating industrial disputes and will allow adequate time to seek advice about their rights.[6]

> Employers are frequently surprised, upset and astonished about the extravagant nature of claims in logs of claims, and an information sheet will provide the employer with some guidance about the Constitutional considerations leading to logs of claims. The…Commission has itself recognised this problem, and has provided a standard information sheet which explains the issues to employers. Unfortunately this information sheet is not provided with logs of claims, instead it is served on employers with the AIRC notice of hearing. Since the notice of hearing is frequently not served on individual employers at all (because of substituted service), thousands of employers do not receive any explanation about the reasons for the extravagant claims made in the log of claims they received. This is very undesirable.[7]

7.9 The Committee also heard evidence about how small business employers react to being served with logs of claims:

> …it terrifies the pants off little people who do not know what is going on… a staggering 60 per cent of net job growth comes from small firms and microfirms…So not only is it an unpleasant process but, to the uninitiated—the new start-ups, people who are really blotting up labour—it is a major fright…[8]

7.10 Employer groups generally did not comment on the amendments in proposed paragraph 101A(d). However, many unions were opposed to paragraph (d), believing that it would lead to additional litigation. The new provisions would prevent the Commission from finding that a dispute exists where a single demand in a log of claims did not, for example, pertain to the employment relationship. Unions claimed

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5 Submission No. 375, Business Council of Australia, vol. 12, p. 2604

6 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3089

7 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3340

8 Evidence, Mr Rob Bastian, Canberra, 28 October 1999, p. 522

that the issue of which matters are considered to relate to the 'employment relationship' is a complex legal issue normally determined by the courts:[9]

> ….one invalid claim in a log of claims invalidates the whole log and the union would have to start all over again with the process. The incentives to challenge each and every claim because it would no longer be severable and it would invalidate the whole thing are very high. You can imagine the amount of litigation that would go on around each and every claim.[10]

7.11 The Shop, Distributive and Allied Employees Association submitted that if paragraph (d) were enacted the Commission would effectively be prevented from finding a dispute existed in many cases: if a log of claims had not been constructed to meet the proposed requirements, then the Commission could not find a dispute under proposed paragraph 101A(d), and if the union did 'construct' the log of claims to meet the new requirements, High Court authority would prevent the Commission from finding that a dispute existed anyway.[11]

Conclusion

7.12 A majority of the Committee supports the amendments, as they will allow parties not familiar with the federal jurisdiction time to seek independent advice and to prepare their response to the log of claims. The Committee acknowledges that this will result in some additional delay for the parties in some cases. However, it is essential to ensure that all parties can properly participate in Commission proceedings affecting them, and the Committee considers that this objective outweighs slight procedural delays.

Recommendation

7.13 That the proposed amendments to regulate logs of claims be enacted.

Allowable award matters

7.14 The Bill contains amendments to:

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9 Some examples of types of demands that do not pertain to the employment relationship were provided by the Department of Employment, Workplace Relations and Small Business (Submission No. 329, vol. 11, p. 2361 – claims for an employer to provide employees with health insurance or to pay for the schooling of employees' children) and the Shop Distributive and Allied Employees' Association (Submission No. 414, vol. 17, pp. 3741-2 – claims for pay roll deductions of union dues, right of entry of union officials, and union encouragement clauses)

10 Evidence, Ms Linda Rubinstein, Canberra, 1 October 1999, p. 27

11 In *Caledonian Colleries Ltd & Ors v. The Australasian Coal and Shale Employees' Federation* [No 2] (1930) 42 CLR 558 at pp 579-580 it was held that no real dispute existed because the log was served by the Federation merely for the purpose of attracting federal industrial jurisdiction: *Australian Labour Law Reporter*, p 3491-2, CCH Australia Ltd, 1999, quoted in Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, Attachment 8, p. 4028-9

- *remove some allowable award matters from subsection 89A(2)* (skill-based career paths, tallies and bonuses (except for outworkers), long service leave, notice of termination, and jury service);
- *clarify the scope or meaning of particular allowable award matters* (ceremonial leave, public holidays, allowances, and redundancy payments);
- *clarify that some matters are not allowable* (transfers between locations, transfers between types of employment, training or education (except for trainees and apprentices), recording hours of work, accident make-up pay, union picnic days, dispute resolution procedures where no choice as to representatives, limits on numbers/proportions of employees in particular types of employment or classifications, maximum or minimum hours of work for part time employees and tallies); and
- *clarify the types of matters that may be included in an award because they are 'incidental' to allowable award matters.*

Evidence

Skill-based career paths

7.15 The Department submitted that this amendment would have the effect of removing training and study provisions from awards, which would be matters for determination at the enterprise or work level.[12] It was not originally intended that training and study provisions would be allowable award matters, which is why they are not currently included in section 89A(2). However, most groups who commented on this proposal assumed that its purpose was to prevent the Commission from adjusting internal relativities in award pay rates.

7.16 The Australian Chamber of Commerce and Industry supported the proposed amendment, stating:

> In relation to skill based career paths, ACCI submits that the entrenched Australian practice of establishing and maintaining multiple levels of minimum wages makes us unique in the OECD…These are 'classification' levels which are supported by the term 'career paths' in s.89A(2)(a).[13]

7.17 The Australian Catholic Commission for Employment Relations did not support the proposed amendment:

> ...the removal of skill based career structure from the award has the potential to disrupt the internal relativities between the various classifications in each

12 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2345

13 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3296-7

> award. This in turn will lead to grievances about the appropriate rate of pay for work to be performed.[14]

7.18 The Committee also received union submissions which opposed the amendment mainly on the grounds that it would erode the national skills base:

> It was a complete surprise to us that the minister put forward a provision which removes skill based career paths and the essential underpinnings of training and skills development that we have all been working on over the last 10 years to get this country to a stage where it competes on the basis of skills and not on the basis of low wages.[15]

7.19 Some submissions raised particular concerns that this amendment would have a disproportionate and negative effect on women[16], workers in industries with mobile workforces[17] and low-paid workers, including outworkers.[18]

Conclusion

7.20 A majority of the Committee is of the view that training and skill development are matters best resolved at the workplace level.

Recommendation

7.21 That the amendments to remove skill-based career paths and training from the list of allowable award matters be enacted.

Tallies and bonuses

7.22 The Government has made some amendments to the Bill to ensure that bonuses for outworkers remain an allowable matter. In other cases, wage payments based on tally or bonus systems will become non-allowable in awards. However, piece rate based wage systems will remain an allowable matter.

7.23 Regarding the difference between tallies, bonuses and piece rates, the Department made the following submission:

> 'Tallies are based on inputs, in contrast to piece rate systems, which are based on outputs…Bonuses are not related to production levels in a systematic way, often being a one-off payment when a specified level of production or performance is reached. They are provided in addition to the

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14 Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 4, p. 744

15 Evidence, Mr Timothy Ferrari, Sydney, 26 October 1999, p. 358

16 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 408; Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5868; Submission No 520, New South Wales Government, vol. 26, p. 6926

17 Submission No. 177, Construction, Forestry, Mining and Energy Union, Construction & General Division, vol. 4, pp. 836-7

18 Evidence, Ms Petty Li through interpreter Ms Sally Eng, Sydney, 26 October 1999, p. 366

> minimum rates of pay, in contrast to piece rates, which are an alternative to minimum time-based pay rates of pay. Piece rate systems may also include a guaranteed minimum payment, generally close to, or slightly above the minimum time-based rate of pay in the award.'[19]

7.24 During the Committee's consideration of the Bill, the Commission handed down a decisions relating to tallies in the Federal Meat Industry (Processing) Award 1996, which provides some guidance as to the nature of tallies:[20]

> 'The simple effect of the unit tally (as specified in the (the award)) is to increase unit labour costs as output exceeds minimum and then maximum tally. However, the extent to which this feature of the tally constrains capacity utilisation and the level of output on a given shift depends also on a number of other factors, such as stock availability on the day and chiller capacity . . . Both head and unit tallies are based on inputs - such as the number of heads - rather than a measure of output, such as weight processed, yield per animal, or any other measure of quality. This has implications for the impact of the tally on incentives facing both employees and management. Unit tallies in particular are complex and prescriptive. The (award) tally provisions are over 50 pages long.'[21]

7.25 In this decision, the Commission decided to delete the tally provisions from the meat industry award, because they were not operating as minimum rates as required by the Act.[22] The Commission also commented that the tally provisions in the meat industry award had fallen into disuse because of its complexity and the conceptual difficulties involved in their application. The award provisions were seriously out of date and lacked the flexibility needed to meet the variety of work methods employed in the various plants covered by the award.[23]

7.26 Tallies and bonuses are also used to set pay rates in agricultural industries, including sheep shearing and fruit picking, and the clothing industry. The Australian Workers' Union and some of its members provided the Committee with evidence about the impact in these industries of the removal of award provisions for tallies and bonuses. However, there was some confusion as to whether the retention of 'piece rates' as an allowable award matter would allow these employees to retain their current wage rate systems.[24]

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19 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2345-6

20 Full Bench, 24 September 1999, Print F0512

21 Ibid, quoting the Productivity Commission's 1998 Report, *Work Arrangements in the Australian Meat Processing Industry*

22 *ibid.*

23 *ibid*.

24 Evidence, Mr Sam Beechey, Mrs Barabara Stephens, Melbourne, 8 October 1999, p. 149

7.27 The ACTU thought that this confusion about the difference between piece rates, tallies and bonuses would lead to lengthy proceedings before the Commission because of the problem of uncertainty, as the three terms are used interchangeably in industries such as clothing and meat.[25] However, as noted above, the Government has amended the Bill to specify that bonus payments for outworkers would remain an allowable matter.

Conclusion

7.28 A majority of the Committee believes that tally and bonus systems are more appropriately developed at workplace or enterprise level.

7.29 The Committee notes that 'piece rates' will remain an allowable award matter, and while some payment systems in the agricultural industry may currently be described as 'tally' or 'bonus' systems, they are in effect generally operating as piece rate systems and could be reformulated as such in the relevant awards. The Committee also notes that employers and employees who believe that tally or bonus systems best meet their workplace's need for flexibility and productivity are free to develop tally or bonus systems of payment through certified agreements.

Recommendation

7.30 That the amendments to remove tallies and bonuses from the list of allowable award matters be enacted.

Long service leave

7.31 The Department submitted that:

> …long service leave arrangements are already provided for in all State and Territory jurisdictions through legislation. There are some differences between long service leave provisions across the States/Territories and between the various legislative provisions and federal award provisions, with some federal award provisions more generous than the relevant State/Territory legislation and other less so…The Bill contains a two year transitional provision for the removal of long service leave provisions from awards, to enable the parties to address the issues of inconsistency between current award arrangements and entitlements that apply under State or Territory legislation.[26]

7.32 This amendment was supported by some employer groups:

> Long service leave is dealt with through State legislation…There is no need to second guess the State legislatures. Where awards deal with the same

25 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4446

26 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2346

> issues dealt with in legislation a second order of difficulty too often arises, arising from differences in the requirements in the two schemes.[27]

7.33 However, some employer groups did not support the amendment, as they did not think that removing long service leave provisions from awards would result in simplification of requirements. Instead, these employer groups thought that removing long service leave from awards would cause additional administrative burdens for employers, or result in increased long service costs.[28]

7.34 Unions opposed the amendment, particularly because it would affect employees in itinerant industries, such as construction, where employees do not work for the same employer for very long, and therefore rely on specific industry-wide long service leave schemes, enabling portability of long service leave entitlements:

> The best example of why you should not remove long service leave is the Oakdale issue. Oakdale workers were retrenched. They were owed $6.3 million. The only money they got before it was finally resolved was their long service leave entitlement, and they got that for two reasons. Firstly, there was a centralised long service leave fund available for the industry set up under Commonwealth law—and which Minister Reith is on record as wanting to abolish. Secondly, there is an award provision detailing the entitlement level, as well as other aspects of it—for example, that it is based on industry service, it is portable, et cetera.[29]

Conclusion

7.35 A majority of the Committee supports this amendment, as it will remove an additional layer of regulation in relation to long service leave. Long service leave is already regulated by federal and State legislation.

7.36 Regarding concerns that some employees and employers will be disadvantaged by moving from award regulation of long service leave to sole regulation of long service leave by legislation, the Committee majority notes that there is a two year interim period proposed before long service leave provisions would have to be removed from awards. This will give these employers and employees some time to attempt to negotiate alternative arrangements under agreements.

Recommendation

7.37 That the amendment to remove long service leave from the list of allowable award matters be enacted.

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27 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3295

28 Evidence, Mr Gregory Hatton, Victorian Automotive Chamber of Commerce, Melbourne, 7 October 1999, p. 130, Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 142

29 Evidence, Mr Tony Maher, Sydney, 22 October 1999, p. 274

Notice of termination

7.38 This amendment will remove provisions from awards that are already dealt with in legislation. The WR Act sets minimum notice requirements on termination[30]:

> Minimum required periods of notice of termination by an employer, based on age and years of employment, are provided for as a general minimum entitlement by the Workplace Relations Act. This legislated standard is identical to the award standard for required periods of notice of termination by an employer set by the *Termination, Change and Redundancy Test Case* (Print F6320).'[31]

7.39 However, some employers were opposed to the amendment, because it would also have the effect of removing award clauses requiring employees to give their employers notice on resignation. There are no equivalent legislative provisions requiring employees to give notice.[32]

7.40 Some unions also opposed this amendment as particular awards provide for longer periods of notice of termination than those minimums set out in the WR Act.[33]

Conclusion

7.41 A majority of the Committee agrees with removing duplication of provisions in awards and the WR Act. The Committee majority notes that the amendment may remove provisions from awards requiring employees to give their employers notice on resignation, but considers that affected employers could negotiate notice requirements directly with their employees, that most effectively meet the needs of their particular workplace.

Recommendation

7.42 That 'notice of termination' be removed from the list of allowable award matters.

Jury service

7.43 The Bill removes 'jury service' from the list of allowable award matters. Payments for members of the public required to serve on juries is dealt with in State legislation. For this reason, the Business Council of Australia and the Australian

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30 Section 170CM of WR Act

31 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2350

32 Evidence, Mr Gregory Hatton, Melbourne, 7 October 1999, pp. 130-1; Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

33 Submission No. 380, Construction Forestry Mining and Energy Union (Mining and Energy Divisions), vol. 13, p. 2803

Chamber of Commerce supported the amendment.[34] The Department submitted that the Government's policy position was that it was not appropriate for awards to compel employers to pay allowances for 'non-work related matters' such as jury service, and that only about one third of all federal awards currently contain provisions relating to jury service, so these provisions do not form part of the award safety net.[35]

7.44 Unions and employee groups opposed the removal of jury service from the list of allowable award matters:

> Like the removal of paid leave for blood donors…paid leave for jury service is a public interest issue which should be of concern to the whole community. The ability to draw on the greatest number and diversity of people as potential jurors is vital to the operation of our legal system.[36]

7.45 The Australian Industry Group also opposed this amendment. AIG claimed that awards currently contain obligations for employees, as well as employers, relating to jury service, which are not duplicated in State legislation.[37]

Conclusion

7.46 A majority of the Committee considers that it is inappropriate for the federal award system to require employers to make up the difference between payments for jury service by a State Government, which may be perceived by some to be inadequate, and employees' wages.

7.47 A majority of the Committee also notes that only about one third of all federal awards contain provisions relating to jury service. These provisions are therefore only currently enjoyed by selected employees, with employees covered by the remaining two thirds of awards being required to accept State payments, or to negotiate alternative arrangements in agreements.

Recommendation

7.48 That 'jury service' be removed from the list of allowable award matters.

Ceremonial leave

7.49 The Bill inserts a new allowable award matter, 'ceremonial leave for Aboriginal and Torres Strait Islander people, and other like forms of leave, to meet

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34 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3295; Submission No. 375, Business Council of Australia, vol. 12, p. 2603

35 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2350

36 Submission No 423, Australian Council of Trade Unions, vol. 19, p. 4447-8

37 Submission No. 393, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

cultural obligations'. This replaces part of the current allowable award matter in paragraph 89A(2)(g), relating to personal leave.

7.50 This amendment was generally supported by employer groups.[38] In particular, the Australian Chamber of Commerce and Industry made a fairly detailed submission about the history of this matter, and the Commission's test case decision on the scope of the existing paragraph 89A(2)(g).[39] The Committee did not receive a great deal of other evidence about this amendment.

Recommendation

7.51 That the amendments to remove 'cultural leave' from the allowable award matter relating to personal and carers' leave, and to include a new allowable award matter in the Act relating to ceremonial leave for Aboriginal and Torres Strait Islander people, be enacted.

Public holidays

7.52 The proposed amendment clarifies that the only types of provisions that can be included in awards under the allowable award matter 'public holidays' (paragraph 89A(2)(i)) are those relating to holidays declared, proclaimed or gazetted to be public holidays by State and Territory governments.

7.53 This amendment was opposed by employees who thought that the changes might result in the abolition of some public holidays contained in awards that are not generally declared by State Governments, for example, Easter Saturday,[40] and union picnic days.[41]

7.54 On the other hand, some employer groups supported the amendment on the grounds that federal award provisions should not override State responsibilities.[42]

7.55 The Australian Industry Group gave its 'conditional support' for the amendment, but thought that there may be some difficulties associated with moving from the award Test Case standard of 11 public holidays to State declared holidays, which could in fact entitle employees to additional holidays, and create different levels of entitlements in different States.[43]

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38 See Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3085; Submission No. 375, Business Council of Australia, vol. 12, p. 2603

39 Submission No. 399, p 33, ACCI

40 See, for instance, Submission No. 400, Ms Maria Cullia; Submission No. 32, Gareth Rawnsley; Submission No. 288, Peter Ibbott and Sonia Griffin

41 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4447

42 Evidence, Mr Reginald Hamilton, Canberra, 1 October 1999, pp. 37-8

43 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

Conclusion

7.56 A majority of the Committee agrees that responsibility for determining public holidays lies with State and Territory governments. It is acknowledged that this results in different standards across the various jurisdictions. This, however, has always been the case with public holidays.

Recommendation

7.57 That the proposed amendment to clarify the meaning of the allowable award matter 'public holidays' in paragraph 89A(2)(i) be enacted.

Allowances

7.58 The Bill more clearly defines what types of 'allowances' are allowable award matters under paragraph 89A(2)(j). The new provisions specify that allowances only cover monetary allowances of three main categories (reimbursement allowances, disability allowances and skill-based allowances).

7.59 The Department submitted that the amendment is necessary to address the lack of guidance provided by the wording of the current provision, noted by the Commission in a decision on the Commonwealth Bank of Australia Officers Award:

> …we do not find much assistance from the context in which the term 'allowances' appears in section 89A(2)(j). Certainly it may be accepted that an allowance within the meaning of the term used in that paragraph must be an allowance of a kind appropriately the subject of an industrial award. Essentially the elements of such an allowance…:an entitlement in the employee to a payment notionally distinct from the wage for a purpose connected with the employment relationship, and particularly to compensate for some condition of or related to the work.[44]

7.60 The Department also submitted that the proposed new paragraph 89A(2)(j) was designed to adopt the elements of the Full Bench's interpretation of paragraph 89A(2)(j) in the Award Simplification decision.[45]

7.61 Employer groups supported the amendment because it would provide certainty to the 'allowances' allowable matter.[46] Unions and employee associations were generally opposed to the amendment, providing specific examples of types of allowances that they believed could no longer be included in awards if the new provision was enacted.[47]

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44 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2349

45 Hospitality Industry Award, Full Bench, 23 December 1997, Print P 7500

46 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086; Submission No. 375, Business Council of Australia, vol. 12, p. 2603

47 See, for example, Submission No 423, ACTU, vol. 19, pp. 4445 - 4448

Conclusion

7.62 A majority of the Committee agrees that there is a need to clarify what sort of allowances are covered under the allowable award matter in paragraph 89A(2)(j), and notes in this regard that a Full Bench of the Commission has criticised the existing provision for not providing sufficient guidance as to the intention of the legislature. The Committee majority believes that the proposed provision has been drafted to encompass those payments that, according to current industrial practice and usage, are generally understood to be 'allowances'.

Recommendation

7.63 That the amendment to clarify the meaning of the allowable award matter 'allowances' be enacted.

Redundancy payments

7.64 The proposed amendment clarifies that award provisions relating to redundancy payments would only be allowable under paragraph 89A(2)(m) if the provisions relate to circumstances where an employee's employment is terminated at the initiative of the employer, and on the grounds of redundancy. The Department provided examples of where 'redundancy payments' have been interpreted as meaning something broader:

> At present, there are some awards such as the building industry awards which define redundancy as a situation where an employee ceases to be employed by an employer other than for reasons of misconduct or refusal of duty. Under these awards, employees become eligible for redundancy payment in ordinary resignation situations which are not 'genuine redundancy'.[48]

7.65 Employer groups supported the amendment because it would result in greater certainty as to the meaning of paragraph 89A(2)(m).[49] The Committee did not receive a great deal of other evidence about the proposed amendment.

7.66 However, the CFMEU did provide evidence that the amendment could affect entitlements in the mining industry:

> The coal mining industry award currently provides for payment of severance and retrenchment pay in circumstances where employees are terminated due to technological change, market forces or diminution of reserves. These

48 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2350

49 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3301. See also Submission No 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

> factors fall outside what is comprehended by the narrow definition of redundancy pay proposed by the Government.[50]

Conclusion

7.67 A majority of the Committee believes that the Bill's definition of 'redundancy pay' reflects the general community understanding of redundancy, and will provide more certainty in the interpretation of paragraph 89A(2)(m).

Recommendation

7.68 That the amendment to clarify the meaning of the allowable award matter 'redundancy pay' be enacted.

Clarification of non-allowable matters

7.69 The Bill inserts a list of matters which are not 'allowable award matters' to further clarify the operation of subsection 89A(2). These matters are set out in full in item 13 of Schedule 6 (proposed subsection 89A(3A)). Two matters attracted the most comment: accident make-up pay and transfers between locations and types of employment.

Accident make-up pay

7.70 Accident make-up pay is an additional payment required of employers to 'top up' the difference between an injured employee's normal salary and the amount of compensation they are paid under workers' compensation legislation. This is a matter already dealt with by State, Territory and Federal workers' compensation legislation.[51]

7.71 This amendment was generally supported by employers, with unions and employee associations opposed the amendment, submitting that the proposed changes would result in a loss of entitlements for employees, with workers in the construction industry being identified as most likely to be affected.[52]

Conclusion

7.72 A majority of the Committee agrees that employees' compensation for work-related injuries and illnesses is a matter most appropriately dealt with by State and Territory legislation (and federal legislation with regard to federal employees).

7.73 The various workers' compensation and occupational health and safety schemes established by State and Territory governments reflect a determination of what proportion of the costs of a workplace accident should be borne by employers,

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50 Submission No. 380, Construction, Forestry, Mining and Energy Union (Mining and Energy Division), vol. 13, p. 2803

51 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2349

52 Evidence, John Sutton, Sydney, 22 October 1999, p. 272

employees and the government. As has been indicated in some major industry reports, the costs of workplace injuries should be shared between these three groups. Workers' compensation schemes establish levels of benefits for injured employees based on this policy decision.

7.74 Governments set levels of benefits in line with an assessment of how workers' compensation payments interact with other scheme objectives, for example, encouraging early return to work and effective rehabilitation. Award provisions to 'top up' workers' compensation benefits may have the effect of negating these return to work and rehabilitation objectives.

Recommendation

7.75 That the proposed amendment to specify that 'accident make-up pay' is not an allowable award matter be enacted.

Transfers between locations and types of employment

7.76 The Department submitted that these amendments, to remove award provisions dealing with matters relating to transfers between locations and types of employment (eg casual, part time, full time) were appropriate, as these are matters best dealt with by agreement at the workplace.[53]

7.77 Some witnesses were concerned about the effect that this exclusion might have on award provisions designed to protect pregnant workers and new parents.[54]

Conclusion

7.78 A majority of the Committee is not convinced that these concerns have any foundation and agrees that these matters should be dealt with at the workplace level.

Recommendation

7.79 That the proposed amendments to specify that transfers between locations and types of employment are not allowable award matters be enacted.

Safety net increases linked to award simplification

7.80 The Bill proposes an amendment to the Act to prevent variations to awards to adjust wages to incorporate safety net increases, unless the award has been simplified under the new award simplification provisions. The Department submitted that this amendment 'is aimed at accelerating the award simplification processes'.[55]

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53 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2351, 2353

54 Evidence, Ms Grace Grace, Brisbane, 27 October 1999, p. 443

55 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2356

7.81 The amendment was strongly supported by the Australian Chamber of Commerce and Industry, which submitted that unions had frequently tried to delay the award simplification process because they opposed it:

> …the rationale…is…that restructuring of awards is a difficult process, that it is difficult to persuade unions in particular to cooperate with that process of reform, and that both a 'carrot' and 'stick' were necessary, the carrot being the safety net adjustment for the unions, and the stick being that this would not be available unless there was measurable progress or outcomes of restructuring.[56]

7.82 The Business Council of Australia supported the proposed amendment on the grounds that it would increase the pace of award simplification, but thought that the Commission should take 'a more directive role in the process to bring the process to resolution. This will assist the parties by enabling them to not become too distracted from their paramount priority of implementing enhanced workplace arrangements.'[57]

7.83 The Committee received evidence indicating other witnesses (some employer groups, unions, employees, community groups, lawyers, academics, State Governments) were opposed to the amendment:[58]

> Award simplification is a lengthy process; it is unjust to impose this requirement on the an employee who cannot speed the award simplification process along…Employees should not be penalised by not receiving pay rises to which they are entitled, especially when the AIRC may not have fully reviewed or even started to review their award because of resource or staffing issues within that organisation.[59]

Conclusion

7.84 A majority of the Committee notes that the rationale for the amendment is to encourage unions to expedite the process of award simplification. The Committee has received evidence that the pace of award simplification has been quite slow, and needs to be accelerated.

7.85 A majority of the Committee notes that the Government has passed an amendment to the Bill to stop this provision coming into operation until six months after commencement of the Bill – this means that safety net increases probably wouldn't be affected until April 2001. This gives the Commission and the Government some additional time to ensure that award-reliant employees are not disadvantaged by the slow pace of award simplification to date.

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56 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3308

57 Submission No. 375, Business Council of Australia, vol. 12, p. 2604

58 See, for instance, Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4451-2; Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5867; Submission No. 398, Jobwatch Inc., vol. 14, p. 3255-6

59 Submission No. 398, Jobwatch Inc., vol. 14, p. 3255-6

Recommendation

7.86 That the proposed provision be enacted.