Supplementary Submission from the SDA

The SDA notes the supplementary submission made by the Department in relation to the operation of proposed Section 52AAA of Schedule 8 of the Act.

The SDA welcomes the fact that there is a clear policy intention of having proposed S.52AAA apply to Workplace Agreements that displace NAPSA's even where the Workplace Agreement excludes all protected notional award conditions.

However the interpretation suggested by the Department in relation to proposed S.52AAA is not consistent with the actual language of S.52(2) of Schedule 8.

S.52(2) of Schedule 8 provides:

"52(2). Those protected notional conditions:

(a) are taken to be included in the workplace agreement; and
(b) have effect in relation to the employment of that person; and
(c) have that effect subject to any terms of the workplace agreement that expressly exclude or modify all or part of them."

Whilst the section opens with the words that 'protected notional conditions are taken to be included in the workplace agreement' this is only a premise, which is qualified by other paragraphs of the same sub-section.
There is a real difference between "taken to be included" and "are included".
In the first a protected notional condition is "taken to be included' but it might in fact not be included.
In the second there is no doubt because if protected notional conditions "are included", then this is simply a statement of legal effect and legal fact.

As S.52(2) uses the words "taken to be included" then the protected notional conditions will only be actually included if paragraph 52(2)(c) does not apply.

A workplace agreement commences operation on lodgement and from its commencement the workplace agreement can operate to the exclusion of protected notional conditions.

If the Department suggested interpretation of S.52(2) of Schedule 8 was correct then each and every workplace agreement would commence operation with all protected notional conditions included and then after the commencement of operation of the workplace agreement the exclusion of the protected notional conditions would operate.

This is not the case!!

It is also important to note that paragraph 52(2)(b) of Schedule 8 talks about the "effect" of protected notional conditions on an employee.
It is also important to note that paragraph 52(2)(c) of Schedule 8 repeats the use of the word "effect" but then goes on to talk about the exclusion or modification of "them".
"Them" refers to the protected notional conditions.

What is allowed to be excluded from a workplace agreement are the protected notional conditions themselves rather than the effect of the protected notional conditions.
This is more than just semantics!

Where paragraph 52(2)(c) operates and a term of a workplace agreement excludes protected notional conditions then the workplace agreement never included those protected notional conditions in the first place.

The Departments contention as to the interpretation of proposed S.52AAA is wrong.

However given that the policy intention is to ensure that workplace agreements that do exclude protected notional conditions are to be subject to the fairness test then a simple amendment to proposed S.52AAA will achieve the policy objective.

Proposed S.52AAA(1)(c) should be amended to read:

> "the workplace agreement contains, *or would have contained but for the operation of paragraph 52(2)(c) of this Schedule*, protected notional conditions because of paragraph 52(2)(a) of this Schedule."

The additional words have been underlined and italicised.

The SDA urges the Senate to make the suggested amendment to ensure that the policy objective behind proposed S.52AAA is achieved.