Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 – Supplementary Submission

Who is covered by the fairness test?

Employees covered by a NAPSA

In his evidence, Mr De Bruyn of the Shop Distributive and Allied Employees' Association suggested that employees covered by NAPSAs are not entitled to the fairness test if an agreement excludes all protected award conditions. A similar statement is included in the Association's submission (at pages 16 and 17).

The Association has misinterpreted the relevant provision (proposed new clause 52AAA of Schedule 8; to be inserted by Item 42 of Schedule 1 to the Bill).

Clause 52AAA of the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (the Bill) applies to an employer and an employee if the:

- parties were bound by a notional agreement preserving State awards (NAPSA) immediately before the workplace agreement was lodged; and

- workplace agreement is taken to include protected notional conditions because of paragraph 52(2)(a) of Schedule 8.

However, the Association has misread clause 52AAA as referring to paragraph 52(2)(c), not paragraph 52(2)(a).

- Under paragraph 52(2)(a), a workplace agreement is taken to include any protected notional conditions that are terms of a NAPSA in force immediately before the workplace agreement was lodged.

- Under paragraph 52(2)(c) the protected notional conditions may be expressly excluded or modified by the agreement.

This means that where an employer and employee are bound by a NAPSA immediately before lodgement and that NAPSA contains protected notional conditions, they will be within the scope of section 52AAA (because the workplace agreement would, by force of paragraph 52(2)(a)) be taken to include the protected notional conditions). This is the case regardless of whether the workplace agreement purports to exclude or modify the conditions because of paragraph 52(2)(c).

"usually covered by an award"

The Bill provides that an award may be designated where the work of the employee is not regulated by a federal award, but work of that type in the relevant industry usually is.

The intention of these provisions is that, where appropriate, an agreement will be assessed for fairness against the protected award conditions in a federal award. This

provision is designed to ensure that 'traditionally' award covered areas are subject to the fairness test.

A number of submissions have suggested that the intention may not be given effect to because in some industries a large number of employees are not subject to federal awards, but have historically been subject to State award coverage: eg, retail.

The Government has indicated that an amendment will be moved in the Senate to ensure that the policy intent is properly reflected in the Bill.

Agreement making in the context of transmission of business

Mr De Bruyn referred to a case where employees were asked to enter in to AWAs after a transmission of business as a condition of continued engagement.

From the information provided at the hearing, the Department's view is that the conduct described is likely to constitute duress, contrary to subsection 400(5) of the Act. Courts have found duress to have occurred in circumstances where existing employees would be in a less favourable position than they are currently in by refusing to accept an AWA, and had some legitimate expectation that they should not be placed in that position. Transferring employees can be regarded as being in a similar position to existing employees. The Federal Court has found that, in the context of a transmission of business, a requirement to make an AWA may amount to duress: *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 579.

Items 13 and 14 of Schedule 1 to the Bill propose amendments to section 400 to put beyond doubt that the prohibition on applying duress to an employer or employee in connection with an AWA applies to the engagement of employees as part of a transmission of business.