SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Enterprise Awards

1. Will Enterprise Awards be able to continue under the legislation? Yum International expressed concern about this in South Australia. Also, will the legislation allow for new Enterprise Awards to be made along similar lines to that which Yum International operates under?

Answer

As outlined by the Deputy Prime Minister in her second reading speech to the Fair Work Bill, the Transition Bill will allow parties to modernise enterprise awards so that they can continue to operate in the new system and will treat Notional Agreements Preserving State Awards derived from state enterprise awards in the same way. Other machinery provisions on enterprise awards will be included in the Transition Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Fair Work Australia

2. Are there any specific clauses in the legislation that puts employment levels at the forefront of consideration for Fair Work Australia? Also, in relation to the issue of productivity?

Answer

The Fair Work Bill 2008 includes the following specific clauses which require Fair Work Australia to consider employment levels and productivity in undertaking its functions.

Clause 3: Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Clause 134: The modern awards objective

(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

Clause 284: The minimum wages objective

(1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:

> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth.

Clause 171: Objects of this part (Re Enterprise agreements)

The objects of this Part are:

> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits.

Clause 241: Objects of this Division (Re Low paid bargaining)

The objects of this Division are:

> (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises.

Clause 243: When FWA must make a low-paid authorisation (Re Low paid bargaining)

(3) In deciding whether or not to make the authorisation, FWA must also take into account the following:

> (a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates

Clause 262: When FWA must make a special low-paid workplace determination—general requirements

(4) FWA must be satisfied that the making of the determination will promote:

> (b) productivity and efficiency in the enterprise or enterprises concerned.

Clause 275: Factors FWA must take into account in deciding terms of a workplace determination

The factors that FWA must take into account in deciding which terms to include in a workplace determination include the following:

> (b) for a low-paid workplace determination – the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive; and
>
> (e) how productivity might be improved in the enterprise or enterprises concerned.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Low-paid Authorisation

3. The issue of low pay was discussed at length; when it is assumed that Fair Work Australia will have defined low pay?

Answer

This will be a matter for Fair Work Australia to determine in the context of specific applications that come before it under clause 243 of the Bill. Clause 243 sets out the matters that FWA must take into account in deciding whether to make a low-paid authorisation and this will require an assessment of whether the employees to be covered by the authorisation are low-paid employees.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Low-paid Authorisation

4. Is it anticipated that there will be simply one definition or category of low pay, or that low pay will be considered as a relative concept depending on what enterprise and activity is engaged in?

Answer

This will be a matter for Fair Work Australia to determine in the context of specific applications that come before it under clause 243 of the Bill. Clause 243 sets out the matters that FWA must take into account in deciding whether to make a low-paid authorisation. Among other things, this includes taking into account the current terms and conditions of the employees who will be covered by the agreement, as compared to relevant industry and community standards.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Employment Record

5. What is understood by the term 'employment record'?

Answer

The term 'employment record' is not used in the right of entry provisions of the Fair Work Bill 2008 (the Bill). The term 'employee record' is defined in clause 12 of the Bill. This clause states that 'employee record', in relation to an employee, has the meaning given by the *Privacy Act 1988*. That Act defines 'employee record' to mean a record of personal information relating to the employment of an employee, which includes information about:

- the engagement, training, disciplining or resignation of the employee;
- the termination of the employment of the employee;
- the terms and conditions of employment of the employee;
- the employee's personal and emergency contact details;
- the employee's performance or conduct;
- the employee's hours of employment;
- the employee's salary or wages;
- the employee's membership of a professional or trade association;
- the employee's trade union membership;
- the employee's recreation, long service, sick, personal, maternity, paternity or other leave;
- the employee's taxation, banking or superannuation affairs; and
- the employee's health.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Collective Bargaining scenarios

6. In relation to collective bargaining scenarios, in what circumstance could a union not be involved unless it deliberately did not want to be?

Answer

An employer will be able to enter into negotiations with their employees and make an agreement without union involvement if their employees choose not to be represented by a union in bargaining. In this circumstance, the employer would negotiate directly with its employees and if approved by a majority of employees, could have the agreement approved without any union involvements.

Employees are entitled to be represented by the union, by themselves or another representative of their choosing (such as a co-worker). Where a union or another person is involved as a bargaining representative, an employer does not need to seek that representative's approval before asking employees to approve the agreement.

A bargaining representative need not be a union. If an employee is a union member their union will automatically be taken to be their representative (cl. 176(1)(b)). The employee can, however, still choose not to be represented by their union and appoint a different representative (cl. 176(1)(c)) or represent themselves (cl. 176(4)).

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Right of Entry

7. Can right of entry be expanded through enterprise bargaining?

Answer

An agreement cannot provide for entry of a type dealt with in the Right of Entry provisions of the Fair Work Bill 2008 (the Bill). Clauses 194(f) and (g) of the Bill would make such provisions unlawful terms. FWA may not approve an enterprise agreement unless it is satisfied the agreement does not include any unlawful terms.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Redundancy

8. How will the concept of redundancy be determined under the legislation?

Answer

The National Employment Standards provide an employee with an entitlement to redundancy pay if their employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee (except where this is due to the ordinary and customary turnover of labour); or because the employer is bankrupt or insolvent.

The redundancy National Employment Standard will not apply where an employee has continuous service with an employer of less than 12 months or if the employer is a small business employer (i.e. a business employing fewer than 15 employees).

Clause 141 of the Fair Work Bill 2008 provides that a modern award may include an industry-specific redundancy scheme. The Australian Industrial Relations Commission (the Commission) is undertaking award modernisation. The Commission is determining if, according to the factors provided in the award modernisation request issued by the Minister for Employment and Workplace Relations, an industry specific redundancy scheme should be included in a modern award. If an industry specific redundancy scheme is included in a modern award or by reference in an enterprise agreement, the redundancy provisions in the National Employment Standards are excluded (subclause 123(4)).

The Bill also contains provisions setting out when a person has been unfairly dismissed, including where Fair Work Australia is satisfied that the dismissal was not a case of genuine redundancy. Clause 389 of the Bill sets out what will and will not constitute a genuine redundancy.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Existing Australian Workplace Agreements

9. Will existing AWAs be allowed to exist for longer under this regime than they would have under the existing legislation?

Answer

The Fair Work Bill 2008 has no impact on existing AWAs.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Hours of Work

10. Under the legislation, how will sectors that work more than 38 hours per week be dealt with? For example: mining, agriculture, fishing and forestry.

Answer

The National Employment Standards (NES) provide that an employer must not request or require a full-time employee to work more than 38 hours per week unless the additional hours are reasonable. An employee may refuse to work the requested additional hours if they are unreasonable.

The NES provides a non-exhaustive list of factors to be taken into account when determining the reasonableness of additional hours (subclause 62(3)). These factors include:

- the needs of the workplace/enterprise where the employee works;
- whether the employee is entitled to receive overtime or penalty rates for additional hours;
- whether the employees remuneration reflects an expectation of working additional hours;
- notice given by the employer;
- usual patterns of work in the industry/part of the industry; and
- whether the additional hours are in accordance with averaging terms in a modern award or enterprise agreement that applies to the employee.

Modern awards and enterprise agreements may provide for averaging of hours of work over a specified period (clause 63). Modern awards will be made on industry or occupation lines and are able to tailor conditions to the needs and practices in an industry.

An employer and award/agreement free employee may agree to an averaging arrangement over a specified period of not more than 26 weeks (clause 64). In both cases, average weekly hours must not exceed 38 for a full-time employee.

Modern awards may also include arrangements for when work is performed, including hours of work. Importantly, modern awards must include terms specifying the ordinary hours of work for each classification of employee covered by the award.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Non-award industries

11. How will non-award industries such as aquaculture be dealt with under the new regime?

Answer

In an award modernisation request to the Australian Industrial Relations Commission on 28 March 2008, the Hon Julia Gillard MP, made clear that award modernisation is not intended to extend award coverage to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. However, this does not preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards). The Government has asked the Australian Industrial Relations Commission to create a modern award to provide minimum entitlements for employees who are not covered by another (industry or occupation based) modern award and who are performing work of a similar nature to that which has historically been regulated by awards.

There will be a national minimum wage for employees not covered by a modern award.

The 10 National Employment Standards (NES) will apply to all employees - whether they are covered by an award or not.

Simple and flexible ‘default rules’ will apply consistently to all employees not covered by a modern award or enterprise agreement to ensure the NES are effective.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Right of Entry

12. How will ROE operate in non-award industries?

Answer

Under the Bill, right of entry is not linked to a union's coverage by an industrial instrument.

The right of entry provisions of the Fair Work Bill 2008 (the Bill) will apply to non-award industries in the same way as other industries.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Impact of legislation

13. How will the legislation impact on supported employment services? Reference is made to the Chamber of Commerce and Industry of Western Australia Submission, paragraph 23 on page 19. A suggestion was made that there be an exemption for these employers, and feedback as to that suggestion and its acceptability to the Government would be appreciated.

Answer

The Government recognises that there are particular circumstances facing employers who engage employees with disabilities in supported employment services. For example, as the submission from the Chamber of Commerce and Industry Western Australia notes, the Bill provides for a special national minimum wage to apply to employees with a disability.

The Government, however, does not support specific exemptions from the provisions of the Bill providing for low-paid authorisations to be made by Fair Work Australia. The low-paid bargaining stream is designed to extend the benefits of bargaining to employers and employees who have not been able to bargain in the past. Importantly, it will give the parties – some of whom may not have had much prior experience with bargaining –access to Fair Work Australia to facilitate the bargaining process and help them reach agreement. The intention is not to necessarily exclude any particular sectors from access to this bargaining stream.

In the event an application was made for a low-paid authorisation to cover this sector, this would be a matter for FWA to determine based on the various factors set out in clause 243. This involves weighing up whether it would be in the public interest to grant access to the low-paid bargaining stream for those employers and employees. Clause 243 is framed in such a way that FWA would take into account the particular circumstances of the sector. For example, among other things, Fair Work Australia is required to take into account the views of the employers and employees who will be covered by the agreement, and whether granting the authorisation would assist in identifying improvements to productivity and service delivery.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Individual Flexibility Arrangements

14. During the course of the hearing questions have arisen as to the robustness, if any, of checking of agreements that are to be made, especially the IFAs – and if they are not to be vetted what is the public policy reason for not vetting them?

Answer

The Fair Work Bill 2008 does not require that individual flexibility arrangements (IFAs) be lodged or vetted by Fair Work Australia in order to make it easy and efficient for employers and employees to make individual arrangements. The Bill provides other protections to ensure that employees cannot be disadvantaged by entering into an IFA.

Enterprise agreements must be approved by Fair Work Australia before they can operate and the flexibility term in each agreement will be tested by Fair Work Australia when deciding whether to approve the agreement. Where an enterprise agreement does not contain a flexibility term, the model flexibility clause that is to be prescribed by the regulations will be taken to be included as a term of the agreement. As mentioned in the explanatory memorandum to the Bill (see paragraph 864), it is intended that the model term to be prescribed in the regulations will be based upon the model flexibility term developed by the Australian Industrial Relations Commission for inclusion in modern awards.

Individual flexibility arrangements can only be made in a way that is authorised by a flexibility term in a modern award or enterprise agreement. These terms must require that an employee is better off overall under an IFA compared to the modern award or enterprise agreement. If an employer were to make an IFA with an employee that made the employee worse of than the relevant instrument this would be a breach of the enterprise agreement. The Bill provides for civil penalties for breaches of modern awards and enterprise agreements.

IFAs can also be terminated by either an employer or an employee with a maximum of 28 days written notice. This ensures that an employee can easily terminate an IFA if they have a concern that the arrangement is not making them better off than the relevant industrial instrument.

An employee can also seek assistance from the Fair Work Ombudsman if they believe that an IFA does not make them better off overall compared to their modern award or enterprise agreement. The Fair Work Ombudsman would also examine IFAs through its regular compliance audit processes.

Given these extensive protections, it was not considered desirable or necessary to require employers and employees to go through any formal lodgement or approval mechanisms in addition as this would result in delay and unnecessary red-tape.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Enterprise Agreements

15. Can Enterprise Agreements contain matters pertaining or include clauses that potentially undermine the ABCC's powers? It is assumed that the legislation must prevail, but clarification on this would be appreciated.

Answer

No, the *Building and Construction Industry Improvement Act 2005* will prevail over any term of an enterprise agreement that is inconsistent with it.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Right of Entry

16. Will right of entry be allowed even in workplaces where there are only AWAs or non-union agreements in operation?

Answer

Yes. As mentioned in the answer to question 12, a union's eligibility rules will determine whether it can enter a workplace either to hold discussions or to investigate suspected contraventions (noting the additional requirement that entry to investigate a contravention may only occur where the breach relates to or affects a member of the permit holder's union).

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Right of Entry

17. Can enterprise agreement include greater power for ROE? My reading is that they won't, but can this be clarified?

Answer

An agreement cannot provide entry of a type dealt with in the Right of Entry provisions of the Fair Work Bill 2008 (the Bill). Clauses 194(f) and (g) of the Bill would make such provisions unlawful terms. FWA may not approve an enterprise agreement unless it is satisfied the agreement does not include any unlawful terms.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Individual Flexibility Arrangements

18. It is my understanding that IFA can be unilaterally terminated by either side after 28 days notice – is this correct? If not, what is the situation?

Answer

Under clause 203(6) a flexibility term in an agreement must allow for individual flexibility arrangements (IFAs) to be terminated by either the employee or the employer giving written notice of not more than 28 days. The flexibility term must also allow the employer and employee to agree, in writing, to terminate an IFA at any time.

Clause 145(4) of the Bill and the model award flexibility clause developed by the Australian Industrial Relations Commission also provide for IFAs made under modern awards to be terminated in this way.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Conscientious Objections

19. The Religious Objection Clause in the legislation is noted. Does this differ from the existing clause or regime and if so, how?"

Answer

The intent of clause 485 of the Fair Work Bill is the same as section 762 of the *Workplace Relations Act 1996* concerning conscientious objections. Some minor changes to the language have been made for clarification.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Unfair Dismissal - Headcount

20. Was there ever any indication in Forward with Fairness that the headcount for unfair dismissal cut-offs would be by way of headcount, and not full-time equivalent?

Answer

Neither the *Forward with Fairness* nor the *Forward with Fairness: Policy Implementation Plan* documents indicated how employees would be counted for the purposes of calculating eligibility for unfair dismissal protections. The documents simply refer to employers with "fewer than 15 employees".

The headcount for the unfair dismissal provisions was subject to extensive consultation at the Small Business Working Group, the Committee on Industrial Legislation and other forums.

It was considered desirable to ensure that a small business operator would be able to ascertain with certainty at any given point in time which scheme they were within. Head count was considered the most stable measure and the easiest for the employer and employees to calculate and ascertain.

Requiring a calculation based on the number of "full time equivalent" employees would mean that from week to week, an employer could fall between the two schemes. It would be difficult to calculate and require complex and difficult to understand drafting.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

TCF Outworkers and Independent Contractors

21. How will the legislation differentiate between outworkers and genuine contractors for the TCF sector?

Answer

The term outworker is defined in Clause 12 of the Fair Work Bill to include both employee outworkers and also an individual who is not an employee outworker, subject to requirements set out in the definition. Clause 140 of the Fair Work Bill permits a modern award to include terms that specifically relate to outworkers.

The Department has had discussions on a range of issues concerning outworkers in the TCF sector with the Textile, Clothing and Footwear Union, and other stakeholders. The Department is in the process of developing draft provisions that are designed to address issues of concern raised by stakeholders. This process has not yet been finalised.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Right of Entry

22. If there is a breach of a right of entry law, how is it prosecuted and by whom?

Answer

A breach of any of the civil remedy provisions in the right of entry part of the Fair Work Bill 2008 (the Bill) will expose a permit holder and their union to civil penalties. Penalties my be sought by a person affected by the contravention or an inspector in either the Federal Court or the Federal Magistrates Court. A maximum penalty of 60 penalty units may be imposed against an individual permit holder while a maximum of 300 penalty units may be imposed against a union. These arrangements are set out in Part 4-1 of the Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Abetz asked in writing:

Question

Fair Work Australia – Australian Federal Police / State Police

23. How will the Australian Federal Police and other police officers be dealt with under Fair Work Australia? What rights do they currently have which will be removed or undermined or weakened in any way by the new proposed regime?

Answer

Currently, the Workplace Relations Act has limited operation in relation to the Australian Federal Police. Section 69B of the Australian Federal Police Act disapplies the Workplace Relations Act in relation to matters involving AFP command powers and termination of employment of AFP employees. There will be a process of consulting with the AFP about appropriate amendments to the AFP Act to preserve the current arrangements.

Police officers in other jurisdictions (except Victoria) are currently subject to state industrial law. As stated in Forward with Fairness, current arrangements for state public sector employees can continue with many of these workers regulated by state industrial relations jurisdictions.

Forward with Fairness also states that state governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees.