SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE TRANSITIONAL AND CONSEQUENTIAL BILL 2009

Senator Abetz asked in hearings on 30 April 2009:

Question

ABI submission, p. 2, – re modern awards, will FWA take into account employment/inflation in decisions?

Answer

In performing its functions under the 2 yearly review of awards enabled under the Bill, Fair Work Australia must have regard to both the modern awards objective and the minimum wages objective. Both of these objectives include an express reference to employment growth and inflation.

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Senator Abetz asked in hearings on 30 April 2009:

Question

DEEWR to respond to the issue/s raised in the CCI WA Submission, pp. 8-9 regarding public holidays (6 weeks annual leave in exchange for public holidays etc).

Answer

In the example given, the public holiday entitlement in the NES would apply to the employees. This would entitle an employee to be absent on a public holiday; in such a case they would be entitled to at least their base rate of pay for the period.

It would also allow an employer to request an employee to work on a public holiday if this was reasonable having regard to a range of factors. An employee can refuse a request if the request was not reasonable, or the refusal was reasonable. The factors relevant to assessing 'reasonableness' include:

- the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
- whether the employee could reasonably expect that the employer might request work on the public holiday;
- the amount of notice in advance of the public holiday given by the employer when making the request.

In this case, the existence of an express provision in an agreement about an expectation of public holiday work (and a clear statement about benefits being provided directly in exchange for such an arrangement) would weigh in favour of employer requests being reasonable.

Item 26 of Schedule 3 of the Bill enables a person covered by a transitional instrument to apply to FWA to resolve any difficulties about the application of the rules about the interaction between transitional instruments and the National Employment Standards.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Collins asked in hearings on 30 April 2009:

Question

Please respond to Professor Stewart's supplementary submission to the Inquiry, particularly regarding FWA having to satisfy itself of the full scope of the agreement in order to discharge its statutory responsibilities?

Answer

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 provides at Clause 16 of Schedule 3 that a collective agreement-based transitional instrument can be terminated on the same basis that enterprise agreements can be terminated under Subdivision D of Division 7 of Part 2-4 of the *Fair Work Act 2009* (the Act). Section 225 of the Act provides that any of the following may apply to Fair Work Australia (FWA) for the termination of an enterprise agreement that has passed its nominal expiry date:

(a) one or more of the employers covered by the agreement;
(b) an employee covered by the agreement;
(c) an employee organisation covered by the agreement.

In deciding whether to terminate such an agreement, section 226 requires that FWA must be satisfied that it is not contrary to the public interest to terminate the agreement, and that it considers it appropriate to do so taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

In discharging its responsibilities generally, section 577 of the Act requires, among other things, that FWA perform its functions and exercise its powers in a manner that is fair and just, and open and transparent. Section 578 requires that FWA, in performing functions or exercising powers in relation to a matter, must take into account equity, good conscience and the merits of the matter.

We therefore concur with Professor Stewart that FWA will need to satisfy itself of the full scope of the agreement, since s226(b)(ii) requires FWA to take into account the views of the employees, each employer and each employee organisation covered by the agreement. We do not believe this provision will require FWA to actively seek the views of each individual employee, although presumably if each of these persons present their views to FWA then they will need to be taken into consideration by FWA in determining whether to terminate the agreement.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE TRANSITIONAL AND CONSEQUENTIAL BILL 2009

Senator Abetz asked in hearings on 30 April 2009:

Question

Look at the information provided by the ASU yesterday (the 'cameos') and respond to those.

Answer

In the limited time available, the Department has not had the opportunity to examine in detail the cameos provided by the ASU. However, information on the comparison between pay and conditions in current awards, Notional Agreement Preserving State Awards (NAPSAs) and Australian Pay and Classification Scales and those in modern awards will be useful for the Australian Industrial Relations Commission (AIRC) in determining transitional provisions in modern awards. Therefore, the Department encourages all parties, including the ASU, to submit this information to the AIRC in its upcoming proceedings regarding transitional arrangements.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE TRANSITIONAL AND CONSEQUENTIAL BILL 2009

Senator Abetz asked in hearings on 30 April 2009:

Question

The ACCI submission, p.21 para 94 makes 5 suggested amendments – please answer/respond to those in the same way as you responded to the AMMA questions.

Answer

These answers respond to ACCI's suggestions in order:

a) Enabling applications for a take home pay order to be made by, or on behalf of, classes of employees is designed to ensure efficient, fair and appropriate consideration of take home pay claims.

b) The take home pay order provisions in the Bill allow discretion on the part of Fair Work Australia when determining the application of these orders. The Department believes there may be circumstances that would provide FWA with a basis for awarding compensation in respect of past losses.

c) The Bill is clear. The situation that is able to be remedied, by payment of monetary amounts, is a reduction in take home pay. The circumstances in which such an order may be made are clearly set out in the Bill.

d) Take home pay orders absorb future increases in take home pay (see Schedule 5, paragraph 10(2)(b). The equivalent provision in relation to modern enterprise awards is Schedule 6, paragraph 13(2)(b)). The duration of an order is limited, in effect, by this fact.

e) The take home pay order will preserve the take home pay received by the employee(s) immediately prior to award modernisation. It is a transitional measure, preserving present entitlements, not a pay increase. In fact, future minimum pay increases are absorbed by the take home pay order.

The take home pay order provisions in the Bill allow for a certain level of discretion on the part of Fair Work Australia when determining whether to make a take home pay order and the nature of its terms including allowing for the staggering of any compensation payments.