AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

(C 2006/3581 & 3631)

FURTHER SUBMISSIONS OF

THE AUSTRALIAN SERVICES UNION

Introductory

1. These submissions are made further to the ASU's initial submissions concerning variation of two common rule awards , namely, the *Clerical and Administrative Employees (Northern Territory) Award 2000* [AW 839196 CRN] and the *Social and Community Services Industry – Community Services Workers – Northern Territory Award 2002* [AW817216].

2. At a hearing before the Commission on 9 May 2007, two key issues arose. In essence, they were :

    (i) whether transitional awards apply in the Territories[1] and

    (ii) if so, whether, as a matter of discretion, they ought to be varied[2].

3. The first-mentioned issue was also raised, by implication, in emails from the Northern Territory Chamber of Commerce to the Commission on 10 January 2007. In those e-mails, the Chamber objected to the applications, on the basis that the draft orders for the two awards cited above bore :

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[1] PN 148, 152
[2] PN 150

"no relevance to the Northern Territory, as we are based on the Federal system. With the introduction of Workchoices employers are covered by Pre-reform awards only."

4. As the Chamber did not appear at the hearing of the matter on 9 May 2007, the ASU does not have the benefit of the reasoning behind its assertions. The ASU reserves its right to expand on these submissions, should the Chamber address the matter further, or should the Commission identify, as relevant to its decision, issues other than those specified above.

Transitional Awards and the Northern Territory

5. The ASU submits that the Act does not preclude the existence or application of transitional awards in a Territory. The position put by the Chamber fails to pay sufficient regard to the precise terms of the definition of "employer" in s 6 (1). That in turn, distorts the Chamber's interpretation of Schedule 6.

6. Schedule 6 of the Act applies to '*transitional employers*'[3], that is, to excluded employers who are bound by a transitional award[4]. Excluded employers, in turn, are those whom s 6(1) of the Act does not cover[5]. The starting point is therefore the definition of '*employer*' in s 6(1) of the Act and in particular, s 6(1)(f).

7. In so far as is relevant to employers, who are not bodies corporate, in a Territory, s 6 (1) provides :

> "*(1) In this Act, unless the contrary intention appears:*
>
> ***employer*** *means:*
> *…..*
>
> *(f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.*"(emphasis added)

[3] Sch 6 cl 1(1)
[4] sch 6 cl 2(1), definition of 'transitional employer'
[5] Sch 6 cl 2(1), definition of 'excluded employer'

8. The underlined words make it clear that it is only so far as the employer employs or usually employs an individual "*in connection with the activity carried on in the Territory*", that it qualifies as an 'employer', within the meaning of s 6(1)(f). In other words, this is not a blanket provision for all activities of such employers. It is not sufficient merely for an employer to carry on an activity in a Territory. If an employer carries on an activity in a Territory but employs an individual in connection with an activity which is <u>not</u> "carried on in the Territory", that employer is not caught by s 6(1)(f), in respect of that individual.

9. This highly specialised operation of s 6(1)(f) was described by a majority of the High Court, in *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia*[6], as follows:

> *"(F)or a person or entity to be an employer, two elements have to be found. First, the person or entity has to carry on an activity in a Territory. Secondly, the person or entity has to employ, or usually employ, an individual in connection with that activity."*[7]

10. The test will not always be easy to apply, but the fact that it might be difficult to assess a particular case against the test is no reason for rejecting the proposition that the legislature has envisaged that such cases will occur from time to time. In each case, it will be a question of examining the particular circumstances of the employment. As further explained by the High Court majority:

> *"It is true, as the Commonwealth accepted, that in particular cases it might be difficult to assess whether the connection between the employee's duties and the employer's activities in a Territory existed. It is also true that changes in an individual's duties might cause that individual to cease to be an employee as defined in s 5(1), and later changes may cause that individual to become one again, with consequential changes in the application of the legislation to the employer. However, if a person or entity is an "employer" because an individual is employed in connection with an activity carried on by the person or entity in a Territory, the employee is subject to the new Act in respect of all that employee's duties. "*[8]

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[6] [2006] HCA 52 (14 November 2006)

[7] at par 379

[8] *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* at par 380

11. Conversely, one must also consider the case of an employee who, though employed by an employer who carries out some activity in a Territory, is not herself or himself employed in connection with that activity. In view of the analysis above, it must follow that there will be employers in Territories who do not come within the definition of 'employer' in s 6(1). The consequence is that it cannot be presumed (as the Chamber does), that all Territory employers who were bound by a federal award, prior to the reform commencement, will always be bound by a pre-reform award after the reform commencement. Some Territory employers will, in certain cases, be bound by a transitional award and, as suggested by the High Court, this may change depending upon the employee's duties at any given time.

Transitional Awards

12. The definition of "transitional award" in cl 2 of sch 6 is "*an award as continued in force on and from the reform commencement by subclause 4(2)*[sic] *of schedule 6 of the Act"* and any variations made under the Schedule. The reference to sub-clause 4 (2) in cl 2 of sch 6 appears to be a typographical error. The correct reference should probably be to sub-clause 4 (1), which provides for an award in force before the reform commencement to continue in force on and from the reform commencement, in accordance with cl 4.

13. Sub-clause 4(2) of sch 6 provides:

> "*(2) An award that is continued in force by this clause binds the following:*
>
> *(a) all excluded employers that were bound by the award immediately before the reform commencement;*
>
> *(b) any transitional employer bound by the award under Part 6A of this Schedule (transmission of business);*
>
> *(c) all organisations that were bound by the award immediately before the reform commencement;*
>
> *(d) all employees who, immediately before the reform commencement, were members of organisations that were bound by the award;*
>
> *(e) each other entity that:*
>
> *(i) is not an employer within the meaning of subsection 6(1) or an eligible entity within the meaning of Division 7 of Part 10; and*

(ii) was bound by the award immediately before the reform commencement;

but only in relation to outworker terms."

14. Clause 2 of sch 6 defines "excluded employer" as follows:

> ***"excluded employer***" *means an employer (within the ordinary meaning of the term) so far as the definition of employer in subsection 6(1) does not cover the employer."*(emphasis added).

15. The analysis of the meaning of "employer" in relation to s 6(1)(f) set out above in this submission means that there will be cases, in a Territory, where the definition of employer in subsection 6(1) does not apply to an employer. Such an employer will by definition be an "*excluded employer*" within the meaning of cl 2 of sch 6. It also follows that such an employer may, in appropriate conditions, be caught by the categories of employer set out in cl 4(2)(a), (b) and (e) above.

16. The net effect is that:

- it cannot be presumed that all Territory employers who were bound by a federal award prior to the reform commencement will be bound by pre-reform awards ; so

- there will be cases where transitional awards may apply, in certain circumstances, to employers in a Territory.

Discretion

17. Once it is accepted that transitional awards may exist in a Territory, there are compelling reasons for ensuring that they are varied as requested.

18. The principal object of the Act refers to *"providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act"*[9]. Employees bound by transitional awards are among the classes of those whose employment is regulated by the Act and are therefore entitled to expect a sustainable

[9] s 3 (c)

safety net of minimum wages and conditions. The principal object is complemented by the objects of sch 6 which emphasise that, during the transitional period, transitional awards should not only continue in operation but should also be "*maintained*" [cl 1(2)]. The ASU submits that maintenance of transitional awards must logically include ensuring that rates of pay and similar benefits do not fall behind minimum standards.

19. Further, employees, in a Territory, who are covered by transitional awards, should not be treated less favourably than counterpart employees, in the States, in respect of whom transitional awards are varied to keep pace with minimum standards.

20. For common rule awards, where the cohort of employers is not readily identifiable in advance and the potential for unanticipated patterns of employment is therefore increased, there is even more reason to ensure protection of employees who might be employed under transitional awards.

21. While there is a "*legislative thrust to rationalise and reduce*" awards, as noted by the President in this matter[10], it is respectfully submitted that the rationalisation and review process is one which may comfortably operate parallel to the variation of transitional awards and maintenance of employees' conditions, especially given the limited life of transitional awards. It is also clear from the Explanatory Memorandum that, in providing for transitional awards, Schedule 6[11] does not create new instruments in the same terms as existing awards but provides that existing awards continue to operate and continue to bind those employers, employees and organizations that are in the transitional system. In real terms, therefore, there is no undue or additional burden placed on the total system of regulation envisaged by the Act.

Conclusion

22. For the reasons set out above, the ASU respectfully submits that the Commission should exercise its discretion in favour of varying the transitional awards as sought.

23 May 2007

[10] PN 126

[11] Formerly Sch 13