Senate Standing Committee on Education Employment and Workplace Relations

QUESTIONS ON NOTICE
Additional Estimates 2009-2010

Outcome 5 - Workplace Relations

DEEWR Question No.EW1056_10

Senator Cormann asked on 10/02/2010, Hansard page 143.

Question

DISTINCTION BETWEEN PROHIBITED CONTENT AND UNLAWFUL CONTENT

Senator ABETZ—Is there a legal definition (sic) between prohibited content and unlawful content, because a big song and dance is being made about the fact that prohibited content has been removed, but of course we now have unlawful content, which is a neat distinction— ..... Mr Kovacic—At the end of the day, the provisions refer to provisions that you cannot have in enterprise agreements. Senator ABETZ—Yet. All right. So what is the difference? It is basically stylistic? Ms Perdikogiannis—If, for the benefit of the committee, I could list the terms of— ..... CHAIR—You should take that on notice and provide it to the committee

Answer

The legal distinction between "unlawful content" and "prohibited content" is as follows. Under the *Workplace Relations Act 1996,* the concept of prohibited content was used to define the scope of agreement content. It did this in the negative, by setting out the matters that were not permitted to be included in agreements. As a consequence, the list of "prohibited content" in the WR Act and the *Workplace Relations Regulations 2006* was lengthy.

The *Fair Work Act 2009*(FW Act) replaced the prohibited content rule with a broad "positive" rule for the content of enterprise agreements, which is set out in subsection 172(1) of the FW Act. Section 172 states that enterprise agreements may be made about the following:

- matters pertaining to the relationship between the employer and employees to be covered by the agreement;
- matters pertaining to the relationship between the employer and union(s) to be covered by the agreement;
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and
- how the agreement will operate.

The "unlawful content" rule operates in this context to ensure that enterprise agreements do not contain certain terms that would be inconsistent with the framework of the FW Act. The meaning of unlawful terms is set out in section 194 of the FW Act.

Therefore, a term of an enterprise agreement will be an unlawful term if it:

- discriminates against an employee covered by the agreement because of or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion, national extraction or social origin
- requires or permits (or purports to require or permit): the payment of a bargaining services fee to a union; or a contravention of the general protections in Part 3-1 of the FW Act;
- provides unfair dismissal remedies to persons who have not served the applicable minimum period of employment (of 6 or 12 months);
- is inconsistent with the industrial action provisions of the FW Act (that is, it purports to authorise industrial action during the life of the agreement);
- provides an entitlement to right of entry, inconsistent with the requirements of the right of entry provisions of the FW Act;
- allows for the exercise of any State or Territory Occupational Health and Safety legislative right of entry in a manner different to the rights set out in the right of entry provisions of the FW Act.