SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

2003-2004 SUPPLEMENTARY BUDGET ESTIMATES HEARING 6 NOVEMBER 2003

OFFICE OF THE EMPLOYMENT ADVOCATE

QUESTIONS ON NOTICE

Question Number: W146-04

Question

Senator Collins asked at *Hansard* page 20:

Could the OEA please provide copies of detailed decisions of referred cases for the period that the Commission has been receiving referrals?

Answer:

Copies of the OEA summaries of cases maintained by the OEA where the Australian Industrial Relations Commission (AIRC) has provided written reasons upon referral to it by the OEA of AWAs are set out below.

AWA – No Disadvantage Test

Australian Workplace Agreements [PR922331] (10 September 2002)

The Employment Advocate referred this matter to the Australian Industrial Relations Commission pursuant to s 170VPB(3) of the *Workplace Relations Act 1996* (Cth) being unsure that an AWA passed the no disadvantage test. Duncan SDP held that a deficiency of $2.29 in hourly rates for casuals with a probationary period entirely at the discretion of the employer was not offset by discretionary bonus payments and use of company cars to travel between jobs, particularly when the lack of travelling allowances, minimum daily engagement and meal breaks were also taken into account. He considered that only an undertaking to meet the award base rate by increasing the hourly figure would allow the AWAs to pass the no disadvantage test. The employer refused or failed to give any undertaking.

The employer argued that approval would not be contrary to the public interest because the comparable award was directed at commercial rather than domestic cleaning services, and therefore the heavy equipment and special skills required for commercial cleaning did not apply. Further the employer offered workers compensation and superannuation, (not industry standards) and claimed to be providing a safer more equitable working environment.

SDP Duncan rejected these arguments holding that they provided no warrant 'in the public interest' for reducing the award safety net, based on the employer's particular circumstances. He considered that approval for the reasons advanced would 'invite a

general movement to reduce the existing safety net' rather than a particular circumstance or set of circumstances justifying that step for one enterprise. He was particularly reluctant to approve AWAs in this case where the failure to pass the NDT was 'fairly great'.

Australian Workplace Agreements [PR904659] (25 May 2001)

Following referral by the Employment Advocate, the AIRC approved an AWA under the Act's public interest test.

The EA presented evidence to the Commission that the agreement provided pay $7,000 lower than the relevant award. It provided an annual aggregate wage of $27,000. The worker was required to work 12 hour shifts on any day of the week (compared to the 8-hour shifts Monday to Friday under the award) and the aggregate wage included work on weekends and public holidays.

The employer also provided free accommodation, power, phone and local calls. Deputy President Duncan accepted the free accommodation was a benefit to be considered in assessing the deal against the relevant award, despite the employee declining to use the accommodation. Rejecting the employer monetary valuation of the AWA benefits of free accommodation, power and telephone facilities, DP Duncan found that the AWA failed the no disadvantage test.

Public interest test

In considering whether it was appropriate to approve the individual contract under the s170VPG(4) public interest test, DP Duncan said there was no short term crisis to overcome (the statute provides an example of a short-term business crisis as a reason for passing an AWA in the public interest), and referred to earlier AWA rulings that the statutory example didn't limit the circumstances in which the Commission could pass an AWA in the public interest.

DP Duncan said the case before him was similar to earlier case where other employees at the workplace had been employed under AWAs in similar terms. While he would have normally attached some significance to the wishes of an employee who opposed the approval of their AWA (the employee no longer works for the employer and made unfair dismissal application), in this case the employee had worked under the AWA before making a "late" objection and the employer "was entitled to proceed as he did". That entitlement and the employer's acting with the knowledge that similar AWAs had been approved by the Employment Advocate, "tips the balance" in favour of approval under s170VPG(4), he said.

However, the term would be restricted to the term of the employer's current tender, he said. He required the employer to give an undertaking to terminate the AWA at the end of the tender or the nominal expiry date of the AWA, whichever came first.

Australian Workplace Agreements [Print S8540](26 July 2000)

In another decision on AWAs referred by the Employment Advocate, SDP Harrison has indicated that a number of AWAs will be approved. The AWAs all related to the security industry and were for new employees. SDP Harrison had commented that

she had previously refused approval for a number of certified agreements in the same industry applying the same no disadvantage test. 'Mr T' appeared as bargaining agent for the employer in this matter and argued that approval should be granted as approval was 'not contrary to the public interest' because of the flexibility obtained and because previous AWAs had been approved by the Employment Advocate which had led the employer to arrange its business as if similar agreements would be approved in the future. SDP Harrison noted that again penalty rates under the AWAs were either nonexistent or small. She also noted that Mr T argued these employment arrangements could only proceed under a contract with another security firm if AWAs were secured to allow legal operations on a basis different from that covered by the applicable state award. Further it was stressed that the nominal expiry date of the AWAs was 30 June 2001.

SDP Harrison held that the AWAs did not pass the no disadvantage test. A significant number of employees would receive less under the AWA than under the state award and most of their hours would be worked during the night, on weekends or on public holidays. However because of the business arrangements made by the employer after obtaining initial approval from the Employment Advocate, SDP Harrison was prepared to find that approval was "not contrary to the public interest" provided that the employer agreed to enter agreements with its employees to terminate the AWAs on 30 June 2001. That is, SDP Harrison was not content merely with having a nominal expiry date but wished to ensure that in fact the AWAs did not continue to operate after that date. The matter was adjourned pending advice from Mr T about the completion of the written agreements.

Australian Workplace Agreements [Print S5352](28 April 2000)

In another AWA related matter, DP Duncan has refused to approve AWAs which were referred by this office under s170VPB(3). There has been a focus on the finding of the DP that staff discounts were not relevant to the no disadvantage test. However, the employer seems to have blundered in several respects and focused on claiming that this office had misapplied the no disadvantage test and not correctly calculated the benefits. DP Duncan began by rejecting the relevance of an argument that similar agreements had been approved. He considered this could not be relevant when the Commission was considering whether it was satisfied that an AWA passed the no disadvantage test. Its relevance could only arise when the Commission was considering whether to apply the "not contrary to the public interest" requirement of s170VPG(4). The DP discounted an argument that employees on ordinary day hours were ahead of the award rate, since the rosters produced indicated that it was rare for employees to work ordinary day hours. DP Duncan was also unimpressed by arguments that the gross value (as opposed to the net after tax value) of a benefit should be taken into account for the NDT.

In this context he did reject staff discounts as relevant to the NDT since they were both optional and required an advance outlay by the employee to secure any advantage. DP Duncan compared the situation to a company store which required employees to expend their wages before anything could be obtained. Removing the employer's calculated figure of $76 per month for staff discounts left a substantial disadvantage for four of the classifications wot which AWAs applied. While it was arguable that the two highest classifications would only marginally fail the no

disadvantage test, none of the employees whose AWAs had been referred were in these classifications.

DP Duncan then considered 'not contrary to public interest' test but found no circumstances supporting the application of that test. There were neither the short-term financial considerations nor the significant community benefits that had been obvious in Atlas and Ramsey's for example. The employer's only real argument was that he was 'adding to employment' by offering these AWAs – an argument which was not regarded as particularly significant in isolation. Finally DP Duncan concluded that where an AWA failed to pass the no disadvantage test there was clearly contrary to the public interest and factors were required to outweigh that detriment. Merely relying upon proper explanation by the employer and the fact that employees were not objecting did not suffice, although DP Duncan indicated that he would re-consider any AWAs relating to the highest grades of employees (which might only marginally fail).

Australian Workplace Agreements [Print S9090] (11 August 2000)

SDP Harrison has approved another 35 security industry AWAs in a follow-up decision to that reported recently. On this occasion, Mr J, a principal of the business appeared and explained that his company had taken over another security company's business which had gone into receivership. The AWAs were based upon a template prepared by this office.

SDP Harrison repeated her concerns about the unfairness of a number of aspects of the AWAs when compared to the South Australian Security Officers Awards. While junior positions had higher pay rates under AWAs, senior positions dropped below award rates, there were no minimum breaks between shifts and call out rates were lower under AWAs. While it was possible for an employee to work a roster which would result in payment above the award, in a significant number of cases that would not occur, particularly when hours were mainly worked at night and on weekends.

In considering the public interest SDP Harrison again noted that the majority of employees of the business were already engaged on AWAs in terms which had been approved by the Employment Advocate and that a new business had been obtained by the employer acting on the expectation that similar AWAs would also be approved. However in view of the effect of the AWAs SDP Harrison again indicated that she would not allow them to operate beyond 30 June 2001, rather than the three year period stated. She therefore invited the employer and employees to make termination agreements with the effective date 30 June 2001 and indicated that once that was done she would approve each AWA as not contrary to the public interest.

Australian Workplace Agreements [Print R9659] (1 October 1999)

DP Duncan delivered his third written decision on an AWA referral from this office under s170VPB(3). In his decision dated 1 October, the DP noted that the three AWAs had been referred to him but that one had been withdrawn. The Employment Advocate had expressed concerns in the remaining two cases that the annual rate in the AWAs was insufficient to compensate for the removal of penalty rates and overtime. An annual review of salary for one AWA (subsequent to the Employment

Advocate's referral) had overcome the monetary difference with the result that the new salary met the No Disadvantage Test and the AWA was approved. However, the remaining AWA was not subject to a salary review nor any undertakings.

The company simply asserted that compensation for lost overtime could be met by time off in lieu and that this would meet the NDT. However, DP Duncan rejected this proposition as time off was not taken regularly and he was not prepared to elevate a *possible* entitlement to offset a clear award entitlement. In declining to approve the AWA, DP Duncan noted that there were no short-term financial circumstances argued by the employer in this case nor any significant community benefits. The employer merely argued that, as the AWA was an internal document which had been introduced for other employees, an 'inappropriate' designated award should not be used to override the AWA. Since the AWA failed the NDT and there was nothing further to balance that the DP considered he could not approve the AWA.