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Mr Laurie Glanfield
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Dear Mr Glanfield

Re: Report on Jury Selection

I refer to the letter dated 23 January 2008 sent to Ai Group inviting written submissions in relation to *Report 117: Jury Service* released by the New South Wales Law Reform Commission in September 2007.

In submitting Ai Group's comments to the Review, it is not our intention to comment on every aspect of the review but rather to outline Ai Group's position on issues relating primarily to the operation of the Act in workplaces and its impact on employers.

Ai Group

Ai Group is one of the largest national industry bodies in Australia, representing employers in the manufacturing, construction, food, automotive, transport, information technology, telecommunications, labour hire and related service industries.

Importance of a balanced approach

Ai Group recognises the important role played by jurors in the justice system and that those summoned for jury service and/or who serve as jurors should have appropriate support and protection. Although it is inevitable that some inconvenience will be occasioned to businesses, there is a need to avoid imposing unnecessary additional costs and inhibiting business efficiency. The perception of jurors and the important role that the jury system plays in the justice

system could be undermined if an unnecessary burden is placed upon employers.

Recommendations on the process for summoning jurors

The Report makes the following recommendations relevant to the process of summoning jurors:

- Jurors should be summoned directly from electoral rolls, removing the need for supplementary jury rolls;
- The notice period between the date of a summons and the date upon which a person is to attend for jury service should be increased from a minimum of 7 days to a minimum of 4 weeks unless a judge of the court orders otherwise.

Ai Group supports increasing the minimum notice period between the date of a summons and the date of attendance. This should not impose any difficulty on the Sheriff in the majority of cases, given, as the report notes, common practice is for 4-6 weeks notice to be given. Increasing the minimum notice period would also facilitate a requirement for an employee who has been summoned to provide adequate notice to his or her employer, as discussed below under “Notice to employers”.

Ai Group has reservations about the recommendation to remove the intermediate step associated with the compiling of a supplementary jury roll. The process allows for a culling phase to occur before persons are added to the jury list, from which persons are ordinarily summoned to appear. It therefore allows for claims of exclusion or exemption to be dealt with in a more timely manner and prior to the scheduled attendance date. This enables a greater number of persons to have successful claims dealt with prior to being summoned and without the need to attend in response to a summons.

Although removing this stage may appear to streamline the process, in practice, it would result in a greater number of people having to attend court to have their claims dealt with. The Sheriff’s Office would have as little as 7 days (or the proposed 4 weeks) to deal with all claims made in response to the summons. There having been no prior culling stage, the number of claims being made in response to summonses would be greatly increased. Unless far greater resources were devoted to the task, it appears highly unlikely that as many claims could be determined by the Sheriff’s Office prior to the schedule date of attendance. As a result, far more people with legitimate claims would be required to attend court than would otherwise be the case, resulting in greater inconvenience to both employers and employees. In addition, more court time may be taken up dealing with such claims, as the Sheriff’s Office may not be able to deal with the greater number of claims on the day, before court commences. Alternatively, the commencement of the trial would have to be delayed while the Sheriff took the time to deal with all the claims being made on the day. Either eventuality represents an inefficient and unnecessary use of court resources.

Disqualification, ineligibility and exemption as of right

Currently, the Act contains a somewhat complex framework for eligibility and liability to serve as a juror. The general principle is that all people on the electoral role are eligible and liable to serve. However, the Act establishes a number of categories of exceptions or exemptions. These relate to:

- Persons who are automatically exempt from serving as jurors (namely, those who are “disqualified” or “ineligible”, according to the criteria in Schedules 1 and 2, respectively); or
- Persons who may exercise a right to be excused (“exemption as of right”), in accordance with the criteria in Schedule 3;
- Persons who can show “good cause” to be excused from jury service.

This last category is dealt with separately below.

Schedules 1-3 of the Act set out, exhaustively, the categories of disqualification, ineligibility and who can claim exemption as of right.

The report recommends:

- The heading of “exclusion from jury service” be adopted in preference to the separate headings of ineligibility and disqualification for those who may not undertake jury service;
- The categories of persons who are presently “ineligible” be reduced;
- The categories of persons who may be exempt as of right be reduced. The only existing category which would be retained relates to the right of certain people who have previously performed jury duty;
- A new category of exemption as of right be created, to apply to anyone employed by a small business (fewer than 25 employees) which has had another employee serve as a juror in NSW within the preceding 12 months.

The report generally favours a number of existing categories of “ineligibility” and “exemption as of right” being dealt on a case-by-case basis as application for excusal for good cause, rather than automatic exclusions. This would effectively broaden the scope of the Sheriff’s discretion and heightens the need for clear guidance on what constitutes good cause. The issues concerning excusal for good cause are discussed below.

Bearing in mind the issues which arise in that context, Ai Group supports reviewing the categories of automatic exclusion and exemption as of right to ensure they remain appropriate. Any such categories should only be retained where there is sound reason for their inclusion which reflects prevailing community attitudes and other practical realities. In principle, the jury pool should be as large as possible and should not be unduly confined, to ensure both that the burden of jury service is shared in an equitable manner between individuals (as well as businesses) and that juries reflect the diversity of the community. Ai

Group agrees that many of the categories for ineligibility and exemption as of right would be better dealt with by way of application for excusal for good cause, provided that the decision-making in this area is subject to greater guidance than is currently the case.

The proposal to combine the categories of disqualification and ineligibility under the heading “exclusion from jury service” would to remove an unnecessary complication in the language of the Act and seems a worthwhile amendment.

Ai Group supports the inclusion of the proposed new category of exemption as of right, recognising the particular burden faced by small businesses in having to replace employee who is absent on jury service as well as potentially maintain that employee’s wages. However, some further amendments would be necessary to ensure the amendment achieved its purpose. At a minimum, the exemption would require employees to notify their employer of the summons, in order for the employer to inform the employee that the relevant criteria exist. It may also be appropriate to enable an employer to reasonably require an employee to request an exemption where the circumstances exist, as it is difficult to see how the purpose of the exemption could be achieved if left to the employee’s discretion rather than the employer’s.

Excusal for good cause

Currently, the circumstances in which a person can make out “good cause” to be excused are generally left at large by the Act. There is some qualification on the meaning of good cause where an application is made to the Sheriff prior to a person being summoned, which is that a person can show any matter of “special importance” or “special urgency” (s 18A of the Act).

Ai Group supports the Act being amended to contain a general definition of “good cause”, which would shape the guidelines as well as the approach taken by the court. With regard to the proposed terms of the definition, Ai Group submits that it would be reasonable and appropriate to include reference to the effects on third parties such as employers. For example, clause (a) of the suggested definition on p 131 of the report could be amended to encompass “undue hardship or serious inconvenience to an individual, to his or her family, to his or her employer or any other third party, or the public”. The requirement for “undue hardship” or “serious inconvenience” would ensure that some unusual level of harm or disruption to an employer would need to be shown in order to amount to good cause for excusal.

Ai Group strongly supports the introduction of clear and comprehensive guidance for the Sheriff’s exercise of discretion in excusing people for good cause, whenever the power is exercised. Such guidance would promote a more transparent and consistent approach to decision making by the Sheriff. Although it is difficult to determine the extent of inconsistency, it is of concern that the making of such a significant decision takes place behind closed doors without any meaningful criteria to guide the decision-making process being made publicly available. This is compounded by the lack of a right of appeal, other than the right to seek excusal for good cause on the day of the trial, before the trial judge.

The report notes various positions taken in submissions regarding the form which such guidance should take. The report favours the publication of guidelines which are not part of the Act, worded so that they “do not harden into de facto entitlements to exemption”. In Ai Group’s view, either approach would be an improvement on the current position. Non-legislative guidelines would probably be preferable by allowing for greater flexibility. If this approach is adopted, it would be appropriate to monitor progress to see whether formal guidelines are warranted.

The terms of the guidelines proposed in the report appear appropriate and reasonable. In particular, guideline (c) would encompass the undue inconvenience to a business or professional practice resulting from a person’s attendance for jury service. The report also sets out some further guidelines in relation to (c). Ai Group supports the inclusion of these additional criteria in the guidelines. Claims invoking such considerations would appear to be common, and specific guidelines on these issues would be worthwhile to promote consistency. The further guidance recognises some important, practical issues in the workplace such as supervision of apprentices, persons undertaking a special project who cannot be replaced and new starters, which are worthy of specific recognition as relevant factors for the exercise of the discretion.

Ai Group recommends that an additional issue be included in the additional guidance for guideline (c) to address the situation where a person with a very senior position and high level of responsibility for the management of a business is summoned. In many cases, such a person would be extremely difficult to replace and the nature of their position is such that their absence from the business other than for a short period would be highly detrimental. Persons in such positions may also have commitments to travel regularly, including overseas, which is incompatible with jury service. It is appropriate and reasonable for guidance to be developed which recognises that the absence of such persons may cause “undue hardship” or “serious inconvenience” to a business.

Guideline (g), which concerns the situation where two or more partners in the same business partnership or two or more employees in the same business establishment (being one with fewer than 25 staff members) have been summoned to attend in the same period, also appears reasonable and appropriate. There is an issue however that by defining a number of staff that a pseudo right will be established to the exclusion of businesses with 25 or more staff. It may be more appropriate for a number not to be included and the issue to be approached based on all the circumstances, including the size and nature of the business as well as the role and responsibilities of the two or more employees who have been summoned.

It must also be emphasised again that the aims of the guidelines in ensuring that businesses are not unduly burdened by an employee’s jury service can only be met if an employee is required to notify an employer in a timely way of having to attend for jury service. An employer should be able to either seek an exemption

of its own volition or to reasonably require an employee to seek an exemption in appropriate circumstances.

As the report notes, there is no right of review of the Sheriff's decision not to grant an excusal for good cause. Ai Group agrees that it would be appropriate and worthwhile for the Act to incorporate a process of review which could be exercised before the day of the trial.

The report notes the different wording of the Act regarding the Sheriff's power to excuse for good cause, depending on whether the application is made before or after a person is summoned. It notes that if the supplementary jury roll process was removed, so too would the process for excusing jurors before being summoned. As indicated above, Ai Group is not convinced that the supplementary jury roll process should be abolished. Accordingly, there is a need to address the different wording in the Act in s 18A and s 38 of the Act. It would appear appropriate for the same approach to be taken whenever the power is exercised.

Deferral or allocation to a short trial

The report recommends that before excusing a juror who is otherwise eligible to be excused, the Sheriff or court should be able to consider allowing a deferral or allocation for a short trial. Such persons would be able to defer and to nominate dates within the coming 12 months when they will be available. The proposed guidelines would also apply in deferring the time at which those who seek to be excused might still be required to serve. The report also recommends that the Sheriff (with a right of appeal to the District Court) should have the power to excuse jurors who can demonstrate ongoing cause to be excused permanently or for a limited period as appropriate.

The combination of these measures would appear to introduce unnecessary complexity into the system of jury selection. Further detail on how the deferral and allocation scheme would operate would be necessary in order to properly assess this. The proposals would also introduce an additional layer of discretion in the Sheriff's decision-making and would require more detailed guidance than contained in the draft guidelines.

It may be more appropriate and workable to simply enable the Sheriff and the court to excuse a person for a specified period as appropriate to the details of the person's claim for excusal. For example, a person who seeks to be excused for good cause because he or she is a new starter may show good cause to be excused for a period of a few months, after which time he or she would be liable to serve as a juror if summoned, unless some other ground to be excused could be made out.

Remuneration of jurors

Ai Group supports both the need to review the level of the jury attendance fee and the decision not to recommend a uniform requirement for employers to pay

“make up pay” to employees undertaking jury service. The recommendation that jurors be entitled to an additional capped amount upon evidence of actual loss of earnings or income also has merit.

The report acknowledges that the level of jury attendance fee does not reflect average weekly earnings. In fact, in most cases, the attendance fee is significantly less than the standard federal minimum wage, which is currently \$522.12. A daily allowance commensurate with the federal minimum wage would be around \$104 (ie \$522.12 divided by 5). Only the maximum daily attendance fee (\$116.80) which applies for the 11th and subsequent days of jury service, is above this amount.

From an employer perspective, the issue becomes significant because, as the report notes, many employers are required under industrial instruments to pay “make up” pay to employees who attend for jury service. The obligation to pay make up pay, combined with the need to replace an employee, poses particular difficulties for small business, especially where an employee is absent for a long trial.

There is some indication that in practice, many employers pay their employees their full wage whilst serving as a juror, even where the employer is only obliged to pay “make up” pay or even where the employer is not obliged to pay the employee at all. It is likely that at least in some cases, this is because employers are not aware of their obligations while in others, it may simply be a matter of choice and goodwill. Ai Group considers that any obligation of an employer to pay “make up pay” is properly dealt with in industrial instruments and contracts of employment, rather than legislation.

The Federal Government’s National Employment Standards

An important recent development has increased the importance of the level of the jury attendance fee. On 14 February 2008, the Federal Government released its exposure draft of its proposed legislative minimum employment conditions known as “National Employment Standards”. The proposed Standards include an entitlement for all employees except casuals to paid jury service leave in the form of make up pay. If the Standards become law in their present form, this would result in a considerable burden for employers on top of their existing obligations and underscores the need for a more realistic level of attendance fee to be set.

In addition, it may be appropriate, in light of the proposed national standard for paid jury service, for States and Territories to hold discussions with a view to harmonising the levels of jury attendance fees. Generally, it would appear appropriate for the payment to be at a level at least comparable with the federal minimum wage.

Jury service and employment protection

Section 69 of the Act prohibits an employer from dismissing, injuring a person in his or her employment or prejudicially altering the position of an employee by

reason of the fact that the person is summoned as a juror. Threats of any such action are also prohibited.

The report recommends the following amendments:

- Clarifying whether the protection applies to casuals (on which the Commission's position is not stated);
- Increasing the maximum penalty from 20 penalty units (\$2200) to 50 penalty units (\$5,500) and/or 12 months imprisonment or 200 penalty units (\$22,000) for corporations;
- Extending a similar protection to independent contractors who provide services on a continuing basis equivalent to employment;
- Amending the Act to clarify that requiring an employee to use annual leave or other leave entitlements while serving as a juror amounts to prejudicial alteration of his or her position;
- Amending the Act to specifically prohibit employers from requiring employees to work on days on which they actually attend for jury service and from requiring jurors to work outside sitting times in order to make up for time lost while serving as jurors.

The report does not recommend additional protections for conduct such as hindering or harassing a person for a prohibited reason, on the basis that such conduct is the subject of specific and adequate provision in the *Crimes Act 1900*.

As the report notes at page 14, a number of the problems cited by employees may be due in part to ignorance on the part of employers about their obligations rather than deliberate flouting of the law. The report suggests that a handbook could be provided to jurors with the jury summons accompanied by a document addressed to the employer setting out in plain English the relevant prohibitions and penalties and dealing with matters such as make up pay. Ai Group supports the use of education and awareness tools over the use of legislative amendment, as being more likely to achieve the desired outcomes. In particular, it would be desirable for such initiatives to be undertaken on an ongoing basis, so that an employer is aware of the relevant obligations prior to an employee being summoned for jury service.

In relation to the particular recommendations, there is no reason that the protection in s 69 of the Act would not apply to casual employees, given that the prohibition applies to "an employer" in relation to a person's "employment". Ai Group does not consider it necessary to amend the Act to clarify the application of the provision to casual employees. The report notes that some practical difficulties appear to arise in relation to the application of the provision to casuals, with regards to the concept of termination. In this context it may be noted that unlawful termination provisions under the *Workplace Relations Act 1996* (Cth) apply to casuals without any such difficulties. It is simply a question of fact in all the circumstances whether a person employed on a casual basis was no longer provided with work for a prohibited reason. In this regard, the employee's patterns of work and length of service, as well as other factors, may be relevant.

Ai Group does not oppose the Act being amended to:

- Clarify that requiring an employee to use leave entitlements whilst on jury service is a form of prejudicial alteration of an employee's position;
- Provide that a juror must not be required to work outside sitting times to make up lost time.

However, Ai Group does oppose the recommendation to extend the protection to independent contractors who work on a basis equivalent to employment, for two practical reasons. If the aim is to ensure that all persons who have the characteristics of being an employee have the benefit of the protection the provision is unnecessary. A person is either an employee or a contractor, and the courts have developed a set of criteria for distinguishing between the two. Where a person is described or treated in some ways as a contractor is not determinative and numerous factors are taken into account. In addition, specific legislative provisions exist to address sham contract arrangements: see Pt 22 of the *Workplace Relations Act 1996*. These provisions apply to conduct including misrepresentations that a particular contract is a contract for services when it is in reality a contract of employment and expose persons contravening the provisions to penalties of \$6600 for individuals and \$33,000 for bodies corporate. Other orders including reinstatement are also available.

Ai Group is not convinced that amendments to the Act are necessary to expressly provide that an employee cannot be required to work on a day on which the person attends for jury service. It may be noted that the issue is not dealt with in the jury legislation of any Australian jurisdiction. What appears important is that the person is allowed sufficient rest time between attending for jury service and being required to work. In Ai Group's view, the issue is better dealt with in industrial instruments or by individual employers and employees as the issue arises.

The report notes that the *Defence Services (Protection) Act 2001* (Cth) which provides protection from discrimination for defence service personnel in relation to contracts for service with third parties. Under that Act, many disputes are dealt with and resolved by way of mediation, without the need to resort to criminal prosecution (see *Defence Reserve Service (Protection) Regulations 2001*). The mediation service is operated by the Office of Reserve Service Protection and a mediation conference is conducted as a structured process in which the mediator assists the parties to a dispute by encouraging and facilitating discussion between the parties so that they can communicate effectively with each other about the dispute and devise strategies for resolving the dispute. Ai Group supports a similar approach being taken under the Jury Act, with the creation of a mediation service by the NSW Attorney-General's Department or the Sheriff's Office.

Notice to employers

The Act currently places no obligation on an employee to notify his or her employer of having been summoned for jury service.

To balance the obligations of employers under the Act, Ai Group considers that it would be appropriate and reasonable for the Act to require an employee to be required to give at least 3 weeks notice to his or her employer (other than where such notice is not reasonably practicable) in advance of the date upon which the person is summoned to attend for jury service. Increasing the minimum period of notice to 4 weeks would facilitate this requirement. A person who is summoned for jury service should be advised in the information accompanying the summons of the requirement to advise his or her employer of having been summoned to attend, the date on which attendance is required and, where such information is contained in the summons, the estimated period of the trial.

Should you require any further information, please contact Samantha Edwards on (02) 9466 5421.

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Smith". The signature is fluid and cursive, with a large initial "S" and a trailing flourish.

Stephen Smith
Director – National Workplace Relations