



22 May 2009

The Hon Julia Gillard MP
Deputy Prime Minister
Parliament House
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Dear Deputy Prime Minister

Re. *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*

We are writing to communicate our views about the recommendations of the Committee Majority arising from the inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, and to express our strong opposition to several recommendations.

This correspondence does not deal with all of Committee Majority's recommendations but rather the ones that are particularly important.

We have not dealt with all of the amendments to the Bill proposed by Ai Group as these are set out in:

- Ai Group's April 2009 submission to the Senate Committee;
- Ai Group's Supplementary Submission to the Senate Committee, dated 4 May 2009.

Recommendations of the Committee Majority

- ***Recommendation 1 – Termination of transitional instruments before or after their nominal expiry date***

Ai Group opposes this recommendation. If adopted, the Government would breach a very clear and important undertaking given to Australian industry by the Labor Party prior to the last Federal Election.

- ***Recommendation 3 – New enterprise agreements to override AWAs and ITEAs unless the enterprise agreement provides otherwise***

Ai Group opposes this Recommendation. Again, to amend the legislation to have enterprise agreements override AWAs and ITEAs would breach a pre-election commitment. It is essential that AWAs and ITEAs remain in force until their nominal expiry date, and remain in force after the nominal expiry date unless a party wishes to terminate the agreement. To allow individual transitional instruments to be overridden by enterprise agreements would amount to a

repudiation of legally-binding contracts and would create a huge commercial mess for business. Also, it would allow a majority of employees to impose workplace agreement terms on an individual employee who is happy with his or her own individual, legally-binding workplace agreement.

Ai Group opposes the conditional termination provisions of the Bill. The Committee Majority's proposal is even more unacceptable.

- ***Recommendation 5 – Clarification of the interaction of transitional instruments with state and territory laws***

Ai Group supports this recommendation.

It is extremely important that federal awards and agreements which currently override State and Territory laws (eg. long service leave laws), continue to do so when they become transitional instruments. Any other approach would not be workable and would be unfair on employers and employees.

Transitional instruments which override State and Territory long service leave laws need to do so for the entire time that the instrument remains in force, including after 1 January 2010 when the NES comes into operation. There is considerable confusion amongst industrial relations practitioners about the status of long service leave provisions in transitional instruments, given the provisions of the *Fair Work Act* and *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

It is unclear to Ai Group whether the term "instrument" in Item 5 of Schedule 3 of the Bill would encompass State and Territory laws.

- ***Recommendation 9 – NES entitlements to apply to outworkers***

It would not be appropriate or practical for NES entitlements to automatically apply to non-employee outworkers. The Committee Majority's rationale for this recommendation is that some outworkers are allegedly employed under sham contracting arrangements. The *Fair Work Act* contains hefty penalties and other provisions to deal with sham contracting arrangements. Also, if an arrangement is a sham and a worker is an employee not a contractor, then the NES entitlements will apply to the worker.

The *Fair Work Act* contains an extremely comprehensive set of protections for outworkers. Many additional protections were included just before the legislation was passed by Parliament. Now, the Committee Majority has recommended numerous further protections. The TCF industry has been hit hard by the current economic environment. The Government needs to be mindful that imposing unreasonable restrictions upon TCF industry employers will have negative employment effects.

- ***Recommendations 10, 11 and 12 – Extension of union entry and inspection provisions for outworkers to all “TCF entities”***

Ai Group opposes this recommendation. Ai Group has hundreds of member companies in the TCF industry and we strongly oppose the extension of the special protections afforded to outworkers under the *Fair Work Act* being extended to workers in the TCF industry generally. The recommended approach would give the TCFUA much wider entry and inspection rights than other unions for both outworkers and employees generally. This is not appropriate.

- ***Recommendation 13 – Giving FWA the power to grant a low-paid workplace determination even if the employer has been covered by a collective agreement-based transitional instrument or collective enterprise agreement***

Ai Group opposes this recommendation. Item 22 in Schedule 7 of the Bill is very important. If s.263(3) in the *Fair Work Act* did not include transitional instruments every employer of low-paid employees would be exposed to the making of a determination, even if it had maintained a collective agreement for many years.

- ***Recommendation 14 – Amending the award modernisation request to ensure that employees under \$100,000 are not deprived of modern award protections***

The Committee’s recommendation appears to misinterpret the policy which the Government has announced. As Ai Group understands it, the Government’s policy is not for all employees paid less than \$100,000 to be covered by a modern award but rather those employees who are not high-income employees **and** not in a class of employees who have “traditionally been award free” (Ref. Clause 2(a) of the Request).

Ai Group is concerned about the amendments made to the award modernisation request on 2 May 2009 for the following reasons:

- Ai Group was not consulted about the proposed amendments despite the fact that we have a major interest in many awards which have exemption rates and have taken the leading role in representing employers in the proceedings relating to the Modern Clerical Award;
- Paragraph 2(f) in the award modernisation request could be read as negating the operation of 2(a) of the request, and requiring that all employees who are not high-income employees and who are not specifically exempted from relevant awards / NAPSAs are covered under a modern award. During the award modernisation proceedings, Ai Group has argued vigorously, and so far successfully, for certain award-free types of work to remain so (eg. web designers, web developers).

This issue will be extremely important when the modern award referred to in clause 4A of the request is developed during Stage 4 of the modernisation process.

- ***Recommendation 15 – Giving FWA the power to make orders remedying significant non-financial disadvantage from award modernisation***

Ai Group opposes this Recommendation. We regard the “Avoiding Reductions in Take Home Pay” provisions of the Bill as lopsided and unfair upon employers. The provisions would most likely be used by unions to facilitate a recruitment drive in industries where award modernisation has resulted in a perceived reduction in wages or conditions.

Ai Group’s concerns about the provisions are reduced to some extent by the provisions in the Bill which:

- Clarify that the reduction in take home pay needs to relate to the same pattern of work;
- Clarify that an order would not have application to any employee who does not actually suffer a reduction in take home pay (eg. an employee employed after the relevant modern award came into effect); and
- Ensure that an order will eventually no longer have effect once the employee’s wages have increased to cover the shortfall in take home pay.

It would be very inappropriate to give FWA the power to make orders relating to non-financial disadvantage. The accessibility of such orders would invite a raft of claims from employees and unions.

Recommendation 16 – Enterprise award modernisation

Ai Group opposes this recommendation. The reasons for our opposition are set out in detail in separate correspondence relating to the fast food industry.

Recommendation 17 – Abolition of the new Representation Orders

Ai Group opposes this recommendation. The *Fair Work Act* massively expands union entry rights for the purposes of holding discussions with employees. The Representation Order provisions of the Bill give employers some (albeit small) level of protection.

Recommendation 18 – Rights of registered organisations to appear in the Federal Court and Federal Magistrates Court

Ai Group supports this recommendation.

Ai Group is very concerned that Division 3, Part 20, ss.854 and 855 of the *Workplace Relations Act* have not been replicated in the *Fair Work Act* and the unions share our concerns.

The right of registered organisations to represent themselves and their members in relevant Courts dates back to 1904 and it is extremely important that this right is preserved. Prior to the WorkChoices amendments, the relevant sections of the *Workplace Relations Act* were ss.469 and 470. These provisions became ss.854 and 855 under the WorkChoices legislation.

Under the current provisions, registered organisations can represent themselves and their members before the Federal Court and Federal Magistrates Court in all proceedings under the *Workplace Relations Act*, the *Building and Construction Industry Improvement Act* and the Registered Organisations Schedule, except appeals and prosecutions, and only with leave in matters dealing with the interpretation of awards and agreements and questions of law.

The only relevant provisions in the *Fair Work Act* appears to be s.548 (8) and (9) which give a registered organisation a very limited right to appear in small claims matters under the Act.

Ai Group submits that ss.854 and 855 of the *Workplace Relations Act* should have been included in the *Fair Work Act* but given that they have been omitted we seek that these provisions be inserted into Schedule 22 and included as provisions in the *Fair Work (Registered Organisations) Act*.

Section 856 of the *Workplace Relations Act*, which relates to intervention rights of the Minister, was apparently similarly omitted from the *Fair Work Act* but such rights will be reinstated through Item 50 of Schedule 22 of the Bill. It is important that a similar approach be taken with the omissions relating to ss.854 and 855 of the *Workplace Relations Act* and that appropriate provisions be included in Schedule 22.

Recommendation 19 – Transfer of business

Ai Group does not believe that the transfer of business provisions need to be amended to address accrued entitlements, as suggested by the Committee Majority. However, amendments are needed to address the issues set out in Ai Group's April 2009 submission to the Senate Committee. There is a major concern amongst employers (particularly those in the labour hire industry and industries based around outsourcing including ICT and contract call centres) that the transfer of business provisions of the legislation are unworkable. A simple way of alleviating some of the concerns would be to insert appropriate definitions in the Bill for key terms such as "outsource" and "arrangement".

We would be happy to provide any further information which you may require.

Yours sincerely



Heather Ridout
CHIEF EXECUTIVE