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Mr John Carter
Secretary
Senate Standing Committee on Education,
Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

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Dear Mr Carter

Re: Inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*

At the hearing on 28 April, Ai Group undertook to provide further information to the Senate Committee on the following three issues:

1. The SDA's proposed amendments to the enterprise award modernisation provisions of the Bill;
2. The exemption rate in the NSW Clerks award, which the Australian Industrial Relations Commission (AIRC) has incorporated within the Modern Clerical Award; and
3. Ai Group's proposal for Fair Work Australia (FWA) to be given the power to make "relief from increased costs orders".

1. Enterprise award modernisation and the SDA's proposals

At the hearing on 28 April, Ai Group expressed strong opposition to the SDA's proposed amendments to Schedule 6 – Modern Enterprise awards, of the Bill.

Senator Collins sought Ai Group's views on the specific amendments proposed by the SDA and queried whether Ai Group had studied the SDA's amendments prior to the hearing. Prior to the hearing Ai Group had studied both the SDA's submissions and its oral evidence and, accordingly, our criticisms of the SDA's proposals at the hearing were well-considered and we believe well-founded.

Ai Group has considerable involvement in the fast food industry. For example, Ai Group represented the fast food industry in the award modernisation proceedings, including representing McDonald's Australia Ltd, Hungry Jacks Pty Ltd, Yum Restaurants Australia Pty Ltd (which incorporates KFC, Pizza Hut and Taco Bell), Australian Fast Foods Pty Ltd (which includes Red Rooster and Chicken Treat), Collins Food Group (which operates KFC outlets and Sizzler Restaurants) and Eagle Boys Dial-A-Pizza Australia Pty Ltd. We presented extensive submissions and evidence on behalf of the industry during Stage 1 of modernisation.

The fast food industry employs over 250,000 people, a high proportion of which are young people who are particularly vulnerable to periods of unemployment in the current recession. A high proportion of the workers in the industry are award-dependent and therefore any increases in minimum wages and conditions would have a direct and substantial negative impact upon employers and employees in the industry.

The SDA's proposed amendments to Schedule 6 deal with the following issues:

- The removal of franchises from the definition of "enterprise award-based instrument" or, alternatively, to only permit franchisees which are bound by an existing enterprise award to be bound by a modern enterprise award;
- The inclusion of specific criteria compelling FWA to include in all modern enterprise awards terms and conditions of employment which are at least equal to those in the relevant modern industry award.

Ai Group strongly opposes the SDA's proposals. The SDA's reasoning appears to be entirely based upon inaccurate assertions about the fast food industry and the nature of awards in that industry.

Most, if not all, of the enterprise awards in the fast food industry were created by consent with the SDA and include franchisees as parties. Accordingly, it would be highly inappropriate and unworkable to exclude franchise arrangements from the definition of "enterprise award-based instrument". If the SDA wishes to argue that enterprise awards in the fast food industry should not apply to franchisees, this is an argument that the union should pursue before FWA when applications are made to modernise relevant enterprise awards.

With regard to the SDA's secondary proposal that the definition of "enterprise award-based instrument" should only include franchisees which are bound by an existing enterprise award, Ai Group regards such proposal as unfair and unworkable.

The nature of the franchising system is to create a homogenous brand with commonalities in procedures and operations from one franchisee to the next. The ability to grow a business of this type is largely through increasing the number of franchisees. This creates an obvious benefit for the franchisor but also benefits existing franchisees through marketing, shared costs and brand awareness.

Unfortunately the restrictions on award variations in the WorkChoices legislation do not allow franchises to be as homogenous as they often choose to be in respect of labour costs. This has resulted in the anomalous situation, whereby franchisees which have commenced operations prior to commencement of an enterprise award, are covered by the award, whilst those that commence operations later, either as new franchisees or through transmission, are excluded from the enterprise award. Such outcomes are being imposed by the legislation and not through the choices of the parties.

The inclusion of franchise arrangements in Schedule 6 is imperative to ensure that such anomalies are rectified and that there is a modern workplace relations framework to allow for franchise businesses to grow. Franchise structures are not only prevalent within the fast food industry but can be found in many other industries, eg. retail chains, fitness centres, cleaning services and gardening businesses, to name a few.

The inclusion of franchise arrangements in Schedule 6 is consistent with the agreement making provisions of the *Fair Work Act*, in particular the “single interest employer” stream. (See s.247(2) of the Act).

With regard to the SDA’s proposed amendments to the criteria which FWA would be required to apply in modernising awards, Ai Group opposes the proposed amendments and regards the criteria in Item 4, paragraph (5) and Item 6 of Schedule 6, as being balanced and appropriate.

A balanced approach is important because some employers strongly oppose the termination of their enterprise award, while others support termination. Some enterprise awards have conditions which are more favourable for the employer than the relevant industry award and hence provide a competitive advantage, others have conditions which are less favourable for the employer than the industry award and accordingly result in a competitive disadvantage.

To cater for the different views and circumstances, any party to an enterprise award should have the right to argue for the retention or termination of an enterprise award and to argue for the level of conditions in the award to be maintained or amended upwards or downwards during the modernisation process. The Bill provides for this.

Criteria that is weighted in favour of abolishing enterprise awards would advantage employers with generous enterprise awards who wish to abolish them but would disadvantage the employees bound by such awards. Such criteria would also disadvantage employers bound by enterprise awards that provide an important competitive advantage in terms of cost-effectiveness and/or flexibility.

The SDA’s proposed amendments to the criteria are unfair upon employers and inappropriate. The amendments would also have negative impacts upon employees through reduced employment.

Enterprise awards have passed the test of being a fair and appropriate safety net when they were made, not in comparison to some industry award, but in their own right. The modernising of enterprise awards should not be subject to a mandatory No Disadvantage Test against an industry award, as proposed by the SDA.

The criteria in Schedule 6 require FWA to weigh-up all of the different interests and issues and to make a fair decision.

In its submission, the SDA has ignored its own role in the creation and maintenance of enterprise awards in the fast food industry. The enterprise awards in this industry contain different terms, some lower and some higher, than the industry awards / NAPSAs. Over the years, in its pursuit of award coverage for the fast food industry, the SDA has not sought to develop a “level playing field” as it now proposing. The SDA has recognised that different terms and conditions were appropriate for different enterprises / brands in the fast food industry.

If the SDA has concerns about the fairness of any conditions in enterprise awards in the fast food industry then these concerns should be raised with FWA when applications are made to modernise them. Its proposed amendments to the legislation are clearly designed to pre-determine the outcome of FWA’s deliberations in the SDA’s favour.

Further, as is evident from the SDA's submissions and evidence, its focus is entirely upon the fast food industry and its proposals ignore the fact that there are a very large number of enterprise awards and enterprise NAPSAs in Australia in numerous industries.

The SDA's proposals would result in the provisions of Schedule 6 becoming unworkable for employers in the fast food industry and other industries.

Whilst strongly opposing the SDA's proposed amendments, as outlined at the Senate Committee hearing Ai Group seeks an amendments to Item 4, paragraph (3) in Schedule 6 to enable applications to be made prior to the FW (safety net provisions) commencement day in exceptional circumstances. Such circumstances would include, for example, where an enterprise instrument applies to some but not all franchisees of the same franchisor and it is more appropriate for a modern enterprise award to apply to all franchisees, rather than the relevant modern industry award. This is an important issue for the fast food industry.

2. The exemption rate in the NSW Clerks Award

At the hearing on 28 April, the Committee sought information about the exemption rate which the AIRC has inserted into the modern *Clerks – Private Sector Award 2010*.

The modern award states that, except for the provisions of the following clauses, the Award does not apply to employees employed by the week who are in receipt of a weekly wage in excess of 15% above the Level 5 wage rate in clause 16 (NB. the wage rate is not inclusive of overtime payments and/or shift allowances):

- Clause 14 – Redundancy;
- Clause 24 – Superannuation;
- Clause 29 – Annual leave;
- Clause 30 – Personal/carer's leave and compassionate leave;
- Clause 31 – Public holidays; and
- Clause 32 – Community service leave.

The above calculation currently results in an exemption rate of \$44,252 per annum.

The exemption rate in the Modern Clerical Award is in similar terms to the exemption rate in the *NSW Clerical and Administrative Employees State Award*.

Ai Group has investigated the background to the exemption rate in the NSW Clerical Award. An exemption rate has applied since the first NSW clerical award was made on 9 June 1916.

In a substantial case before the Industrial Relations Commission of NSW (IRCNSW) between 1992 and 1996, the ASU argued for the exemption rate to be removed from the Award. The Commission's decision to retain an exemption rate highlighted the history of the provision, its widespread use within industry, and the fact that the arguments about the exemption had been "well ventilated" before the Commission over recent years (Ref.: *Clerical and Administrative Employees (Classification Structure) State Award [1996] NSWIRComm 190, 25 October 1996*).

Also, under s.19 of the NSW *Industrial Relations Act 1996*, the IRCNSW is required to review all awards at least once every three years to ensure that they remain modern and up-to-date. The exemption rate has not been removed during any s.19 review.

An exemption rate like that contained within the Modern Clerical Award is not unusual in existing federal awards or modern awards. For example, the modern *Business Equipment Award 2010*:

- Exempts business equipment technicians from a substantial number of clauses (eg. hours of work, overtime, allowances, shift loadings) where a technician is paid \$46,346 or higher; and
- Exempts clerical employees in the industry from many clauses in the award if paid a salary of more than 10% above the award.

The ASU has pursued extensive arguments in the AIRC opposing the inclusion of an exemption rate in the modern *Clerks – Private Sector Award 2010*. The AIRC has rejected those arguments and supported the arguments of Ai Group in favour of the exemption.

The decision of the Commission is not surprising, the modern award is intended to be a safety net, in conjunction with the National Employment Standards. If the exemption rate had not been included in the Modern Clerical Award there would have been a major negative impact upon NSW employers.

3. Proposed “relief from increased costs orders”

As set out in Ai Group’s written submission, Ai Group opposes the provisions of the Bill which give FWA the power to issue “take home pay orders”. We regard these provisions as lopsided and unfair upon employers.

If the power is to be retained, despite our objections, Ai Group submits that provisions need to be added to the Bill enabling employers to apply for an order remedying an increase in costs. Employers in some cases are facing a huge increase in costs and/or loss of flexibility as a result of award modernisation which could have negative employment effects.

Some may argue that it would be best for employee disadvantage from award modernisation to be dealt with via “take home pay orders” and that employer cost increases are best dealt with via transitional provisions in modern awards. If this is the Government’s view then this should be expressly stated in the Award Modernisation Request.

As currently drafted, the Award Modernisation Request affords equal weight to employee disadvantage (refer to paragraph 2(c) of the Request) and cost increases for employers (refer to paragraph 2(d)) from the award modernisation process. Also, the AIRC appears to be giving equal weight to these two important issues in developing transitional arrangements. In its 19 December 2008 decision (and referred to again in its 3 April 2009 Statement), the Full Bench said:

“[106] We have received many submissions and suggestions concerning the way in which modern awards should deal with the multitude of transitional issues which may arise in the establishment of a safety net based predominantly on modern awards and the NES. Transitional provisions must

be developed, that, in a practical way, take account of the intention of the consolidated request that modern awards not disadvantage employees or increase costs for employers....”

If the FWA is to be given the power to issue “take home pay orders” it is very unfair for FWA to be deprived of the power to issue “relief from increased costs orders”.

There is a long history of the AIRC and State Industrial Commissions having the power to issue orders based upon the incapacity of an employer to pay minimum wage increases, redundancy pay etc. It is not in the public interest for FWA to be deprived of the power to consider the circumstances of an individual employer and to decide whether such employer has the capacity to provide the pay and/or conditions in the relevant modern award. The public interest lies in allowing FWA to ensure the survival of businesses and to protect employees’ jobs.

At the hearing on 28 April, Senator Collins invited Ai Group to provide more detail about how the proposed “relief from increased costs orders” would work. In summary, we would see the provisions as operating in the following manner:

- Similar to the “take home pay orders”, the proposed “relief from increased costs orders” would not impact upon any transitional arrangements that the AIRC decides to incorporate within modern awards to reduce the impact upon employers and employees.
- FWA would be required to consider the capacity of the individual employer making the application to provide the pay and conditions which are required to be provided under the relevant modern award at the time the application is determined.
- FWA would have the power to make an order varying particular modern award provisions or delaying the implementation of particular modern award provisions (as such provisions relates to the employer making the application) for any period that FWA decides is appropriate.

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

Yours sincerely



Stephen Smith
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