INQUIRY INTO THE

KEEPING JOBS FROM GOING OFFSHORE (PROTECTION OF PERSONAL INFORMATION) BILL 2009

BY THE

SENATE STANDING COMMITTEE ON ENVIRONMENT, COMMUNICATIONS AND THE ARTS

SUBMISSION BY

THE AUSTRALIAN INDUSTRY GROUP

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The Australian Industry Group (Ai Group) welcomes the opportunity to provide comments to the Senate Standing Committee on Environment, Communications and the Arts on the Keeping Jobs from Going Offshore (Protection of Personal Information) Bill 2009.

Ai Group is a leading industry association and is committed to helping Australian industry meet the challenge of change. Our focus is on building competitive industries through global integration, human capital development, productive workplace relations practices, infrastructure development and innovation.

Ai Group member businesses employ around 750,000 staff in a number of industry sectors including: manufacturing, engineering, construction, defence, health, ICT, call centres, labour hire, transport, logistics, utilities, infrastructure, publishing, environmental products and services and business services. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff across Australia and the world.

This submission considers the trade law and other implications of the *Keeping Jobs from Going Offshore (Protection of Personal Information) Bill 2009* (Bill).

i. Introduction

It is widely accepted that freedom of economic movement across borders is beneficial to domestic economies. Trade, broadly defined, benefits both parties as it allows them to divide resources between themselves. Such freedom of trade lowers costs and frees up resources for activities where each can be more profitable, permitting trading partners mutual benefit from trade of goods and services.

Since the 1970's, successive Australian governments have resisted protectionism and supported the principles of free and open trade unequivocally. In this time of global economic uncertainty, the return of protectionist trends has again become an issue. At the G20 Summit in London in April 2009, despite world leaders completely condemning any trend towards protectionism, the World Bank's report that 17 out of the G20 economies had implemented new trade-restrictive measures in the first six months of the global crisis was truly discouraging. This is not a trend Australia should follow.

If the Bill is enacted, its application may have serious unintended consequences beyond its original intent due to its broad scope. As the Bill requires Australian organisations to meet certain requirements before transferring personal information about an individual to an organisation in a foreign country, it is possible that these requirements could have broader ramifications including, but not limited to, breach of Australia's international trade commitments; hampering international security

procedures; the provisions of the Bill being applied on a reciprocal basis by Australia's trading partners, and significant additional regulatory burden on business above and beyond the protections afforded by the existing *Privacy Act 1988* and *Trade Practices Act 1974.*

If the Bill is enacted, it may place the Australian Government in contravention of its international treaty obligations. Specifically, the Bill may contravene the Australian Government's obligations under the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS). The Bill may also contravene the Government's obligations under various bilateral and plurilateral Free Trade Agreements (FTAs).

ii. Consequences of breach

A contravention of the GATS would expose Australia to the risk of any aggrieved WTO member initiating a complaint with, and seeking dispute settlement within, the WTO processes. Such dispute settlement does have the potential to give rise to diplomatic tensions and would run a risk of Australia being found to have contravened international law. As a member of the WTO, if a finding were made against Australia, the Government would be compelled to respect and fully implement any decision which could require the Bill to be repealed or face possible trade sanctions.

iii. Application of Bill

The Bill appears to be intended to address call centres and other forms of business process outsourcing (BPO). However, in fact the Bill has much greater potential application. The Bill's requirement for express and affirmative consent is not limited to the transfer of data in relation to the operation of a foreign call centre. Rather, the Bill potentially applies to any cross-border data flow.

Cross-border data flows are essential to a wide range of potential services and applications. The Bill therefore has the potential to create serious issues for a diverse range of industries that may need to convey personal data to offshore locations. The Bill has the potential to cause real harm to any industries that are heavily dependent on cross-border personal data flows, including cloud computing offerings, financial services, telecommunications services (such as Blackberries) and Internet based applications and services. By way of example, global Internet application providers with an Australian presence such as Google, Facebook, Hotmail, Gmail and YouTube, would all be subject to the Bill and could experience significant difficulties in implementing practical mechanisms for compliance.

While the analysis below is focussed on BPO, the same analysis applies to a broad range of other services. Moreover, given the severity of application of the Bill and the potential disproportionate impact on Internet application

providers, it is likely that these complaints may be made by providers in those nations that are more likely to aggressively enforce their international treaty rights, such as the United States and the European Union.

There is an additional risk beyond the enforcement of international treaty obligations, which is that the provisions of the Bill could in turn be applied to Australian organisations on a reciprocal basis by Australia's trading partners. This could disadvantage Australian consumers which would be antithetical to the intention of the Bill.

In addition, cross-border data flows are not restricted solely to commercially focussed activities. Currently there are significant amounts of cross-border data transfer by Government organisations exchanging individuals' information to assist with international security cooperation, for example advanced passenger information would likely be in breach of the provisions of this Bill. At the broadest application, this Bill could potential inhibit Australian organisations from assisting international anti-terrorism efforts.

The potential harm that could be caused by the Bill to Australian industry and Australia's international reputation should not be underestimated.

iv. The Bill may contravene the GATS

The enactment of the Bill would likely place the Australian Government in contravention of its obligations under the GATS given the discriminatory application of the Bill against foreign suppliers.

Applicable trade law

- *National treatment under the GATS*

  The requirement to ensure "national treatment" under the GATS requires the Australian Government to ensure that governmental measures do not modify the conditions of competition in favour of domestic services or services suppliers, thereby discriminating against foreign services or service suppliers. The Government is required to accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

- *The permitted exception for protection of privacy*

  Article XIV(c)(ii) of the GATS contains a specific exception to the 'national treatment' obligation where the relevant governmental measure has the purpose of protecting the privacy of individuals in relation to the processing and dissemination of personal data and the

protection of the confidentiality of individual records and accounts. However, Article XIV also specifically requires that the measure must not be applied in a manner which would constitute a disguised restriction on trade in services. The Article also requires that the measure must be applied in a manner which would not constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail.

Analysis

- The Bill impedes the ability of an Australian firm to acquire certain BPO services from offshore BPO providers. The supply of services by foreign firms to Australian domestic firms is an example of a "Mode 1" or "cross-border" form of supply that is regulated by Article 1.2(a) of the GATS, namely the supply of a service from the territory of a member State into the territory of another member State. The Bill could possibly affect the supply of services as regulated by the GATS under "Mode 2 – consumption abroad" and "Mode 3 – commercial presence".

- Under the WTO Uruguay Round, the Australian Government has made specific commitments on market access and national treatment in relation to BPO and other relevant services under its GATS Schedule of Specific Commitments (Schedule). A specific commitment in the Schedule relevantly represents an undertaking by the Australian Government to comply with the GATS for the service in question on the terms and conditions specified in the Schedule.

- Taking BPO as an example, BPO services are covered by various express categories under the Schedule, including telephone answering services; email and voicemail; online information and database retrieval; electronic data interchange; data processing services; supply services of office support personnel and mailing list compilation. Commitments under the Schedule in relation to BPO services can also be more generally inferred from commitments on the final service itself: for example, commitments on insurance services include the services of call centres that respond to customer queries about insurance policies.

- For each of the relevant categories in its Schedule for BPO, the Australian Government has not notified limitations on the application of the 'national treatment' obligation to cross-border supply of services. A similar scenario likely applies to many other services potentially caught by the Bill. Accordingly, the Australian Government is required to ensure that the 'national treatment' obligation in Article XVII of the GATS is upheld in relation to the cross-border supply of those services.

- The Bill, if enacted, would unequivocally be a 'measure affecting the supply of services'.

- The Bill would, and is clearly intended to, modify the conditions of competition in favour of domestic services in a discriminatory manner. Indeed, the Bill makes no attempt to disguise this fact and states, as one of its express objects, that it is intended to "*protect employment in Australia by reducing the outsourcing of customer service and call centre jobs overseas*".

- The Bill does not meet the requirements of the exception to the 'national treatment' obligation contained in Article XIV(c)(ii) of the GATS. As the Bill is expressly intended to reduce the outsourcing of customer service and call centre jobs overseas, it is undeniably using privacy issues as a means to implement a restriction on trade in services. The Bill therefore fails both requirements for a valid exception under Article XIV. Moreover, on a more general public benefit assessment, the level of protection afforded to domestic firms by the Bill seems disproportionate to the policy intent of protecting personal data.

v. The Bill may contravene Australia's plurilateral and bilateral free trade agreements

A similar analysis arises under the various FTAs to which Australia is a party. Of these, the Australia – United States Free Trade Agreement (AUSFTA) may well give rise to the greatest concerns for Australia. United States firms, including global US-based Internet application providers, are likely to be adversely affected by the Bill and may well complain to the United States Trade Representative (USTR). The USTR can be highly aggressive in pursuing the cause of aggrieved United States firms.

Chapter 10 of AUSFTA regulates cross-border trade in services and is very broad in scope. As with the GATS, the underlying philosophy of Chapter 10 is to provide an open and non-discriminatory environment for cross-border trade in services. As with the GATS, Chapter 10 applies national treatment obligations to governmental measures, including legislation. Chapter 10 therefore seeks to ensure a level playing field between each nation's respective service suppliers so that they can both compete on fair terms. As AUSFTA adopts the provisions of Article XIV of the GATS *mutatis mutandis*, the same analysis applies as identified in relation to the GATS above.

Beyond the existing provisions of the *Privacy Act 1988* and the *Trade Practices Act 1974*, Australia already requires certain obligations of our trading partners which complement the provisions of the *Electronic Transactions Act 1999*. These obligations are incorporated into our existing free trade agreements. Australia's FTA partners are required to ensure their domestic legal frameworks governing electronic transactions comply with the provisions of the United Nations Commission on International Trade Law - Model Law on Electronic Commerce. Further, that each Party shall:

(a) minimise the regulatory burden on electronic commerce; and

(b) ensure that regulatory frameworks support industry-led development of electronic commerce.

The intent of this Bill is contrary to express, bi-partisan, Government objectives under E-commerce provisions of existing treaties, which include *inter alia* non-discriminatory online consumer protection, and would repudiate current efforts of new treaties under negotiation, in particular the Trans-Pacific Partnership Agreement.

Further, the Bill's requirement for the Minister to determine which country can be certified as having adequate privacy protections may also breach international trade commitments if the Minister's determination contradicts "Most-Favoured-Nation" treatment under existing or future treaty obligations.

Beyond the Australia – Chile FTA, other FTA provisions that the Bill could also contravene include the Singapore – Australia FTA, Thailand – Australia FTA, and the ASEAN – Australia – New Zealand FTA, hence Australia risks antagonising many of its South-East Asian trading partners.

It is also worth noting that Australia has only recently completed a feasibility study for an Australia – India FTA. The study recommended that the Australian and Indian Governments should consider negotiating a comprehensive bilateral FTA that includes trade in services. Given the extent of BPO and call centre operations in India, the Bill would appear to pre-empt and potentially damage the prospects of the contemplated FTA negotiations.

vi. Conclusion

In summary, the Bill may place the Australian Government in contravention of the GATS, the AUSFTA and a number of other FTAs to which the Australian Government is party. The Bill may also lead to significant difficulty for the Government in its relations with various Asian trading partners.

For these reasons, it is imperative that a review of the Bill be undertaken by conducting a Regulatory Impact Statement to assess the broad diplomatic, international security, international trade commitments and legal ramifications of this Bill assessment prior to it being considered further. Accordingly such a review would require extensive consultation including with, but not limited to, the Australian Federal Police, the Australian Security Intelligence Organisation, the Department of Broadband, Communications and the Digital Economy, the International Law and Trade Branch in the Office of International Law in the Attorney-General's Department and the Trade Law Branch of the Office of Trade Negotiations in the Department of Foreign Affairs and Trade.