THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Senator Gavin Marshall
Chair
Senate Education, Employment and Workplace Relations Committee
Parliament House
Canberra ACT 2600

25 MAY 2009

Gavin

Dear Senator Marshall

I am writing to provide you with the Government's response to the Committee's inquiry into the provisions of the Fair Work (Transitional Provisions and Consequential Arrangements) Bill 2009 that was tabled on 19 March 2009.

As with the *Fair Work Act 2009*, the Government once again welcomes and acknowledges the constructive and cooperative spirit in which stakeholders took part in the inquiry process either through making a submission or giving evidence before the committee.

The Government is delivering a new fair and balanced workplace relations system in a sensible and measured way to provide certainty. The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (this Bill) is the first of two Bills which make transitional and consequential provisions in relation to the new federal workplace relations system set out in the Fair Work Act.

The Government has in developing this Bill continued the spirit of consultation and cooperation with all relevant stakeholders. The feedback from the many groups who participated in these processes has once again been overwhelmingly positive.

The Government continues to welcome any suggestions or technical amendments that would improve the Bill and give proper consideration to the recommendations of the Senate Committee. The Government has now carefully considered the Senate Committee's report as well as each of the detailed submissions to the Committee's inquiry and provides the attached response.

A second Bill, the Fair Work (State Referrals of Power and Consequential Amendments to Other Legislation) Bill, will deal with the consequential amendments to all other Commonwealth legislation, which involves amendments to over 70 Commonwealth Acts.

The Government intends to introduce the Fair Work (State Referrals of Power and Consequential Amendments to Other Legislation) Bill into the Parliament in the week commencing 25 May 2009.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

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Fair Work (Transitional Provisions and Consequential Amendments) Bill: Government Response to Majority Report

MAJORITY REPORT

Recommendation	Response
Recommendation 1 The committee majority recommends that where a transitional agreement significantly disadvantages an employee compared to the award that would otherwise apply to their employment, Fair Work Australia should have the power to: (a) terminate the agreement (whether before or after its nominal expiry date); or (b) vary the agreement to re-make it in the form of a workplace agreement that meets the requirements of the Fair Work Act.	**Not agreed** The transitional provisions provide a fair, sensible and measured transition to the new workplace relations system. It is not possible to get rid of all the effects of Work Choices overnight. The Bill aims to give certainty to all parties by providing that agreements continue to apply until they reach their nominal expiry date, at which time all the options of the new system, including good faith bargaining, become available. Employees who are on sub-standard AWAs will however have the full benefits of the National Employment Standards (NES) from 1 January 2010, as well as an entitlement to the relevant award minimum wage for the employee's classification. This will go a significant way to mitigating the effects of those agreements. As soon as an AWA or ITEA has passed its nominal expiry date, an employee is entitled to unilaterally terminate the agreement by giving 90 days notice. The employee would then become entitled to an award or any collective agreement that would otherwise apply to him or her. An AWA or ITEA can be terminated at anytime before the nominal expiry date of the agreement where both the employer and employee agree, with the same effect. Parties can terminate a collective agreement as if it were an enterprise agreement under the Fair Work Act, that is by agreement of the parties and approval by FWA. Parties can agree to make an enterprise agreement under the Fair Work Act at any time, irrespective of the nominal expiry date of any existing collective agreement, and the effect of doing so is that the 'old' collective agreement ceases to cover the parties. In addition, conditional termination of AWAs and ITEAs will be available. This will allow employees whose AWAs and ITEAs have not passed their nominal expiry date to participate in collective bargaining in their workplaces. Information will be available to employee and employers on these arrangements for a fair and orderly transition to the new system.
Recommendation 2 The committee majority recommends that the content and interaction rules for each of the transitional instruments preserved by the bill be made available by FWA in a readily accessible form.	**Agreed** Provision of advice regarding the content and interaction rules for transitional instruments will be available from the Fair Work Ombudsman (which has as one of its functions the provision of education, assistance and advice to employees, employers and organisations – see paragraph 682(a) of the FW Act). The EM also notes that this educative role may include the provision of general information, including fact sheets and guides.

Recommendation 3 The committee majority recommends, where a new enterprise agreement is put in place, that it replaces any AWAs or ITEAs unless the agreement provides otherwise.	**Not agreed** The provisions for the termination of AWAs and ITEAs outlined in response to recommendation 1 provide a fair, certain and orderly transition to the new system. It is important to emphasise that as soon as an AWA or ITEA reaches its nominal expiry date, either party may terminate the agreement unilaterally, simply by giving 90 days notice. If this occurs, or if the parties agree to terminate the AWA or ITEA at any time, any enterprise agreement that covers the employee would then apply.
Recommendation 4 The committee majority recommends that, as part of the Fair Work Education and Information program, information should be provided to employees to advise them of their rights and obligations under the relevant termination provisions and facilitate further opportunities for collective bargaining.	**Agreed** The Fair Work Ombudsman has responsibility for the provision of education, assistance and advice to employees, employers and organisations – see paragraph 682(a) of the FW Act and further legislation would not be necessary.
Recommendation 5 The committee majority recommends that the government clarify the interaction of transitional instruments with state and territory laws.	**Agreed** The Government will move amendments to the T&C Bill which would preserve the interaction of state/territory laws with transitional instruments.
Recommendation 6 The committee majority recommends that Clause 28 of Schedule 3 be amended to ensure that all outworker terms of the modern TCF Award apply to all workplace agreements.	**Agreed** The Government will amend the Bill to ensure that the pre-reform protection of outworker terms is maintained.
Recommendation 7 The committee majority recommends the following inclusion as an amendment to section 12 of the FW Act: 'Designated outworker term' of a modern award, enterprise agreement, workplace determination or other instrument, means any of the following terms, so far as the term relates to outworkers in the textile, clothing or footwear industry: (a) a term that deals with the registration of an employer or outworker entity; (b) a term that deals with the making and retaining of, or access to, or filing of, records about work to which outworker terms of a modern award apply; (c) a term imposing conditions under which an arrangement may be entered into by an employer or an outworker entity for the performance of work, where the work is of a kind that is often performed by outworkers; (d) a term relating to the liability of an employer	**Agreed in part** The Government agrees that the proposed change to paragraph (b) (to add a reference to filing records) and new paragraphs (f) and (l) are not covered by the existing provision. The Government also considers it desirable to clarify that a term that deals with provision of materials (paragraph (i)) is within the scope of 'designated outworker term'. These provisions will be added to the definition of 'designated outworker terms' through a regulation (as provided for in the definition). The remaining proposals are covered by paragraph (e) of the existing definition insofar as the terms relate to non-employee outworkers. The employment terms of employee outworkers are protected by section 200 of the Bill, which ensures that agreement terms cannot be detrimental in any respect when compared to outworker terms in a modern award.

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or outworker entity for work undertaken by an outworker under such an arrangement, including a term which provides for the outworker to make a claim against an employer or outworker entity;
(e) a term that requires minimum pay or other conditions, including the National Employment Standards, to be applied to an outworker who is not an employee;
(f) a term that deals with observance of terms of an award;
(g) a term that deals with time standards;
(h) a term that deals with payment of wages;
(i) a term that deals with provision of materials;
(j) a term that deals with stand down of outworkers;
(k) a term that deals with the application of further award terms;
(l) terms that are incidental to any of the above terms; and
(m) any other terms prescribed by the regulations.
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Recommendation 8
The committee majority recommends the following inclusion as an amendment to section 539 of the FW Act:
Standing, jurisdiction and maximum penalties
<table>
<tr><th>Item</th><th>Column 1
Civil remedy provision</th><th>Column 2
Persons</th></tr>
<tr><td>4</td><td>50 (other than in relation to a contravention of an outworker term in an enterprise agreement)</td><td></td></tr>
<tr><td>5</td><td>50 (in relation to a contravention of an
outworker term in an enterprise agreement)</td><td>(a) an employee;
(b) an employer;
(c) an employee organisation which is entitled to represent the industrial instruments of the outworker to which the enterprise agreement concerned applies;
(d) an inspector</td></tr>
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Agreed
The Government will move amendments the Bill to ensure that all agreements covering outworkers can be enforced by the relevant organisation.
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Recommendation 9 The committee majority recommends the following amendment to section 60 of the FW Act: In this part, 'employee' means: (a) a national system employee, (b) an outworker and 'employer' means a national system employer.	**Not agreed** The Fair Work Act regulates employers and employees. It also extends special protections to non-employee outworkers in a number of ways, including preserving protections in state laws and providing for protections in modern awards. The draft Textile Clothing and Footwear and Associated Industries Modern Award extends the entitlements National Employment Standards to non-employee outworkers.
Recommendation 10 The committee majority recommends that in section 12 of the FW Act the term 'outworker entity' be replaced by 'TCF entity'.	**Not agreed** The definition of outworker is not limited to the TCF industry, and it would be misleading to label entities in this way.
Recommendation 11 The committee majority recommends the following inclusion as an amendment to section 483A of the FW Act: (1) A permit holder may enter premises and exercise a right under section 483B or 483C for the purpose of investigating a suspected contravention of this Act, a term of the Textile, Clothing Footwear and Associated Industries Award 2010, or a term of an enterprise agreement, workplace determination or FWA order (where the Textile, Clothing Footwear and Associated Industries Award 2010 covers the employee or outworker), that relates to, or affects, an employee or outworker: (a) whose industrial instruments the organisation is entitled to represent; and (b) who performs work on the premises.	**Not agreed** The Government committed to establishing a special right of entry scheme in the Fair Work Act for TCF outworkers in acknowledgment of the highly vulnerable nature of outwork. The amendment proposed by the Committee would extend the application of these special provisions to all employees in the TCF industry. The Government's view is that the general right of entry scheme is appropriate for the general TCF industry.
Recommendation 12 The committee majority recommends the following inclusion as an amendment to section 483B of the FW Act: Meaning of 'affected person' (1) A person is an affected person, in relation to entry onto premises under this Subdivision, if: (a) the person employs or engages a TCF employee or a TCF outworker whose industrial interests the permit holder's organisation is entitled to represent; and (b) the TCF employee or TCF outworker performs work on the premises; and (c) the suspected contravention relates to, or affects, the TCF employee or TCF outworker. (N.B. This will require amendment of other references of 'affected employer' to 'affected person' throughout the division]	**Not agreed** The Government committed to establishing a special right of entry scheme in the Fair Work Act for TCF outworkers. The amendment proposed by the Committee would extend the application of these special provisions to all employees in the TCF industry. The Government's view is that the general right of entry scheme is appropriate for the general TCF industry.

Recommendation	Response
Recommendation 13 The committee majority recommends that FWA be given the discretion to grant or refuse a low-paid workplace determination after considering all the circumstances in which they were made.	**Agreed in part** The Government believes it is appropriate that FWA can only make a low-paid determination where: • a workplace has never had a collective agreement; or • a workplace previously had a collective agreement in operation, and FWA is satisfied in all the circumstances, having regard to the objects set out in section 241 of the FW Act, that it is appropriate to make a determination.
Recommendation 14 The committee majority recommends that the Minister amend the award modernisation request to ensure that the AIRC refrains from depriving employees of modern award protections where their salary is under the $100,000 threshold in line with government policy.	**Agreed** The Deputy Prime Minister has varied her award modernisation request to make clear the Government's policy position. The Minister's letter of 7 May 2009 to the AIRC that accompanied the varied request stated: *I note the Commission's comments in the 3 April 2009 decision about award exemption clauses. The request now reflects more clearly the Government's intention that the creation of modern awards should not exempt, or have the effect of exempting from the safety net provided by modern awards, employees other than those expressly listed in the request. Employees who are not high income employees should be protected by a complete and comprehensive modern award safety net of basic entitlements unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation. For example, the Clerks – Private Sector Award 2010 exempts employees employed by the week from certain provisions of the modern award (for example, over time pay, shift and other allowances). The Government considers that this award should not seek to exclude basic award conditions for employees who should be protected by a complete and comprehensive safety net, through both modern awards and the National Employment Standards (NES), given that there is not a history of exemption from these provisions in a wide range of awards and NAPSAs.*
Recommendation 15 The committee majority recommends that FWA should be able, in appropriate cases, to make orders remedying significant non-financial disadvantage.	**Not agreed** The Government considers that award specific transitional arrangements should be developed by the Australian Industrial Relations Commission (AIRC), after consideration of submissions by interested parties. The AIRC could, for example, introduce provisions concerning changes to existing hours of work to provide how existing employee arrangements are dealt with in the move to the new award. The proposed amendment could undermine and complicate this transitional process.

Recommendation 16	Not agreed
The committee majority recommends that the government ensure employers/franchises have no power under the bill to extend the reach of substandard enterprise awards to those not covered under the existing enterprise award, and that the government consider strengthening the criteria under Schedule 6 to ensure that enterprise awards not fall below the total value of the safety net package of the relevant modern award for the industry.	The Government considers that the Bill provides appropriately balanced criteria that will allow the individual circumstances that lead to the enterprise/franchise instrument to be accommodated, as well as ensuring modern enterprise awards provide a fair and relevant safety net. In deciding whether or not to make a modern enterprise award, and in determining the content of that award, FWA must take into account the modern awards objective (s134 of the Fair Work Act 2009). The modern awards objective lists all of the general factors that FWA applies when making modern awards that apply to the industry as a whole, and includes, among other factors, a requirement for FWA to take into account: • Relative living standards and the needs of the low paid; • The need to encourage collective bargaining; and • The need to promote flexible modern work practices and the efficient and productive performance of work. In addition, when dealing with an enterprise instrument, FWA must consider the following matters: • the circumstances that led to the making of the enterprise instrument; • whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument; • the content of that modern award; • the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument; • the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment; • the likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award that would otherwise apply, of a decision to make, or not make, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons; • the views of the persons covered by the enterprise instrument; • any other matter prescribed by the regulations.
Recommendation 17 The committee majority considers that the proposed new representation orders are unnecessary because the FW(RO) Act will allow FWA to make a representation	**Not agreed** These orders are intended to address any potential demarcation disputes that may arise as a result of the removal of the requirement that a union be bound to an

order to deal with an imminent dispute that threatens to harm an employer's business (see Schedule 1 Clause 134 of the WR Act). Instead, the criteria in clause 135 should be expanded to include the factors listed in clause 137B of the transitional bill, to ensure that any representation order reflects the industrial relations arrangements in force at the workplace.	award or agreement in order to be entitled to exercise a right of entry or changes to the bargaining framework under the Fair Work Act. These orders will be available where there is a dispute about whether an organisation should be entitled to represent the industrial interests of a workplace group. The Government considers these new orders strike an appropriate balance between limiting the possibility of demarcation disputes and the right of employees to be represented by the union of their choice.
Recommendation 18 The committee majority recommends that the government ensure registered organisations have the right to appear in the Federal Court and the Federal Magistrates Court.	**Agreed** The Government agrees that registered organisations should be able to represent their members in industrial matters. This includes industrial matters before the Fair Work Divisions of the Federal Court and Federal Magistrates Court. The Government will move amendments to this effect.
Recommendation 19 The committee majority recommends that the government consider this issue, noting particularly the example provided by the Australian Nursing Federation in the committee majority's report on the Fair Work Bill, and develop a mechanism to ensure employers are not able to evade their responsibility to pay accrued entitlements.	**Noted** The potential for abuse of the transfer of business arrangements needs to be carefully balanced against the desirability of ensuring that employers purchasing a business are encouraged to take on the existing employees of the business. The Government considers that there is an effective mechanism under the FW Act to address this scenario. It would be possible under the FW Act to make a claim under the general protections provisions. Under these provisions, it is unlawful for an employer to take adverse action (including dismissal) against an employee to prevent them from taking advantage of a workplace right (which includes a benefit under a workplace law or workplace instrument, such as accrued entitlements, including long service leave). No qualifying period has to be met in order to make such a claim for remedy under the general protections provisions. Accordingly, the Department's previous response to this issue still stands.