FAIR WORK AMENDMENT (STATE REFERRALS AND OTHER MEASURES) BILL 2009

SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

November 2009

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Overview of Ai Group's position

1. The *Fair Work Amendment (State Referrals and Other Measures) Bill 2009* has been referred to the Senate Committee for a short inquiry. The short timeframe and the complexity of the legislation have not permitted the detailed analysis which we would have liked to have carried out.

2. That said, Ai Group welcomes the inquiry into the Bill and the opportunity to comment upon the legislation.

3. The Bill:

   - Facilitates the referral of Queensland, South Australian and Tasmanian industrial relations powers to the Commonwealth;
   - Establishes transitional arrangements for employers and employees who will move from the State systems to the national workplace relations system;
   - Varies the provisions of the *Fair Work Act* relating to the reference of Victorian IR powers to the Commonwealth to achieve uniformity with the provisions relating to other States.

4. If the Bill is passed, Part 1-3 (Application of this Act) will include the following Divisions (in addition to Divisions 1, 3 and 4):

   - Division 2A ("Application of this Act in States that refer matters before 1 July 2009") – this Division relates to the referral of IR powers by the Victorian Government;

- Division 2B ("Application of this Act in States that refer matters after 1 July 2009 but on or before 1 January 2010") - this Division relates to the referral of IR powers by the Queensland, South Australian and Tasmanian Governments.

5. Further legislation will need to be introduced into Parliament if any States decide to refer IR powers after 1 January 2010.

6. Ai Group strongly supports the referral of the State industrial relations powers to the Commonwealth.

7. A national workplace relations system, relying principally on the Corporations Power under the Australian Constitution, was implemented by the Coalition Federal Government in 2006. Having been found to be valid by the High Court, the constitutional framework for the legislation was adopted by the current Federal Government for the *Fair Work* legislation.

8. Given the implementation of the national system covering around 85% of employees, the only logical approach is for the States to refer their industrial relations powers to the Commonwealth and work within the new national framework. There is no logical reason why the same national workplace relations system should not apply to all employers and employees.

9. Australia's modern economy and the need to remain globally competitive necessitates that a national system be implemented. All Australian employees and employers in the private sector should have the same system for employee entitlements and employment obligations.

10. Ai Group would prefer a complete referral of powers. However, it is apparent that some States wish to retain their powers relating to employees in the State public sector and local government. Accordingly, Ai Group supports the more restricted scope of the Bill.

11. In support of the benefits of State referral of powers, we cite the longstanding and effective referral of IR powers by the Victorian State Government.

12. In 1996 the Victorian Government referred most of its industrial relations powers to the Commonwealth. Ai Group strongly supported the move at the time and our support has proven to be well founded. The experience in Victoria has been a very positive one for employers, employees, Governments and the community. The fact that the Victorian Government has not sought to rescind the referral over the past 13 years supports this view.

13. In summary, Ai Group's position on the Bill is:

- Strong support for the referral of State IR powers to the Commonwealth;
- Concern, if the cost of achieving a national workplace relations system for the private sector, is a cumbersome and difficult process for amending the *Fair Work Act 2009* to address any problems which may arise; and
- Concern about the proposed definition of "excluded subject matter" in Division 2A and the proposed new Division 2B of Part 1-3 of the *Fair Work Act*.

The interests of the employers and employees already in the national workplace relations system are of central importance

14. Most employers and employees are already covered by the workplace relations system. These employers and employees need workplace relations laws which:

- Are fair, flexible and productive; and
- Can be readily amended if problems arise.

15. If the cost of including non-corporate employers and their employees in the national workplace relations system is to create a workplace relations system that is more cumbersome and inflexible than currently exists, then the outcome will be a negative one for both employers and employees.

16. Ai Group is not able to accurately assess what understandings have been reached between the Federal Government and State Governments given that the final signed copy of the "Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector" has not been publicly released.

17. The Inter-Governmental Agreement is critical in order to understand the provisions of the Bill, and related understandings, concerning:

- The processes and requirements relating to amendments to the *Fair Work Act*;
- The processes and requirements relating to moves by a State to terminate its "initial reference" or "transition reference";
- The processes and requirements relating to moves by a State to terminate its "amendment reference", including any understandings reached between the Federal and State Governments relating to the processes set out in s.30L(7) and (8) of the Bill.

18. Ai Group would be very concerned if the Bill, when considered in conjunction with the Inter-Governmental Agreement, led to:

- State Governments having an effective power of veto over amendments to the *Fair Work Act*;
- State Governments being able to pressure the Commonwealth into amending the *Fair Work Act*;

- State Governments being able to pressure the Commonwealth into not proceeding with important amendments to the *Fair Work Act* to address any problems which arise over the months and years ahead;
- Delays in necessary amendments being made to the *Fair Work Act* due the processes agreed upon between the Federal and State Governments; and
- One or more State Governments terminating their amendment references, thereby creating different versions of the national workplace relations system for different groups of employers and employees.

19. The Communique which arose from the 83rd Meeting of the Workplace Relations Ministers' Council held on 25 September states that:

"At the meeting all Ministers, except the Western Australian and NSW Ministers, agreed to the content of the multi-lateral inter-governmental agreement which outlines the roles and responsibilities of participants in the national system……The Commonwealth, Victoria, South Australia, the North Territory, the ACT and Tasmania agreed to the multi-lateral intergovernmental agreement (IGA) and have signed the IGA. Queensland agreed to the text of the multi-lateral IGA and subject to resolving remaining issues would be prepared to sign the IGA. New South Wales is yet to determine whether or not it will refer its workplace relations powers, but indicated were it to do so it would not seek any amendment to the IGA. Western Australia notes the content of the IGA and the provisions that would apply in the event it elected to sign as a cooperating jurisdiction". (Emphasis added)

20. The Queensland Government has also announced its intention to sign the IGA and announced that:

"The Agreement provides that, if a Commonwealth proposal or amendment to the Fair Work Act 2009 (Cwth) is considered by one or more of the referring States or the Territories to undermine the fundamental workplace relations principles, that proposal or amendment will not proceed unless it is endorsed by a two-thirds majority of referring States, the Territories and the Commonwealth"[1]
(Emphasis added).

Schedule 1 of the Bill (Referring States)

21. The concerns expressed above, regarding the understandings reached between the Federal and State Governments, are relevant to the provisions of Schedule 1 of the Bill.

22. In addition, in the short-time that Ai Group has had to analyse the legislation, we have identified the following concerns regarding the provisions of Schedule 1:

- ***Item 15 – Section 30A (definition of "excluded subject matter" – Victoria)***

  It is important that the definition of "excluded subject matter" in the Bill aligns with the definition of "non-excluded subject matter" in s.27 of the *Fair Work Act*.

  Ai Group made strong and lengthy representations to the Government, Opposition and other parties during the development of the legislation setting out our concerns about the "non-excluded subject matters" in s.27 of the *Fair Work Act*. We were very concerned about the potential for State Governments to make laws which intrude upon federal provisions relating to such matters as

[1] Explanatory Memorandum to the *Fair Work (Commonwealth Powers) and Other Provisions Bill 2009 (Qld)*.

training arrangements, long service leave provisions, public holidays and unfair contract provisions.

The definition of "non-excluded subject matters" in s.27 of the *Fair Work Act* was the product of an extensive consultation process. The definition is explained in the Explanatory Memorandum for the *Fair Work Bill* and further dealt with in the Supplementary Explanatory Memorandum. Ai Group remains concerned about the relatively wide powers given to the States to legislate in respect of industrial relations matters, and is concerned that the State Referrals Bill proposes even wider State powers.

Item 15 should not be passed. The definition of "excluded subject matter" in Section 30A of the *Fair Work Act 2009* should not be altered.

The existing definition ensures consistency between the *"non-excluded matters"* in s.27 and the matters excluded from the reference.

The definition in the Bill gives States increased powers in respect of training arrangements, long service leave, public holidays and claims for enforcement of contracts of employment. The proposed lack of consistency between s.27 of the *Fair Work Act 2009* and Section 30A would create uncertainty and potentially an increased regulatory burden for employers.

It is not appropriate to give States increased powers in the proposed areas and, accordingly, to undermine the provisions of the *Fair Work Act*, modern awards and enterprise agreements relating to these matters.

- ***Item 39 – Section 30K (definition of "excluded subject matter" – Queensland, South Australia and Tasmania)***

  The concerns expressed above re. Item 15 apply equally to Item 39.

  Section 30K should be amended to adopt the definition of *"excluded subject matter"* from s.30A of the *Fair Work Act 2009.*

Schedule 2 of the Bill (Transitional matters relating to State referrals under Division 2B of Part 1-3 of the Fair Work Act 2009)

23. The transitional arrangements in Schedule 2 provide for:

- State awards and State agreements to be preserved as federal instruments in the same terms as the State instrument (known as Division 2B State awards and Division 2B State employment agreements).
- Division 2B State awards and State employment agreements to operate on a 'no-detriment' basis with the National Employment Standards and national minimum wage orders.
- Division 2B State awards (other than enterprise awards) to continue to apply as a federal instrument for a period of 12 months from referral commencement. After that time, the relevant modern award will cover the employees and employers.
- Division 2B State employment agreements to continue to operate as a federal instrument until terminated or replaced by a new enterprise agreement under the *Fair Work Act*.
- A model dispute resolution clause (to be prescribed in Regulations), to apply to Division 2B State awards.

- The transfer of business rules in the *Fair Work Act* to apply to transfers that occur on or after the referral commencement.

24. In the short-time that Ai Group has had to analyse the legislation, we have not identified any substantial problems with the provisions of Schedule 2.

25. It is essential that the model term about disputes, referred to in Item 7 of Schedule 2, is developed in conjunction with industry representative bodies such as Ai Group.

26. It would not be appropriate for the model term about disputes to provide compulsory arbitration powers to Fair Work Australia (FWA) or any other body. Consistent with s.739 of the *Fair Work Act*, FWA should only have the power to arbitrate if all parties agree.

Schedule 3 (Other amendments)

27. Ai Group has not identified any problems with the items in this Schedule.

28. The extension of appeal rights, to include decisions made by the General Manager of FWA under the *Fair Work (Registered Organisations) Act*, is important (Item 14). This corrects an apparent oversight in the *Fair Work Act 2009*.