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The Honourable Bill Shorten MP
Minister for Employment and Workplace Relations
Minister for Financial Services and Superannuation
PO Box 6022
Parliament House
CANBERRA ACT 2600

Dear Minister

Re. *Fair Work Amendment (Transfer of Business) Bill 2012*

I am writing to communicate Ai Group's strong concerns about the *Fair Work Amendment (Transfer of Business) Bill 2012* which was introduced into Parliament without any consultation with industry, despite the fact that the legislative amendments will have a major impact upon many Ai Group member companies and other private sector employers.

The Government dispensed with the usual process and did not refer the Bill to the Committee on Industrial Legislation (COIL) before introducing it into Parliament. The Bill was introduced into the House of Representatives and voted upon extremely quickly which did not provide the opportunity for adequate scrutiny. This is very disappointing.

Since the introduction of the *Fair Work Act 2009* (FW Act), Ai Group has been expressing major concerns about the transfer of business laws, seeking both substantive changes and some important technical amendments. These issues are not theoretical; our Members involved in outsourcing are expressing continual, strong concerns about the impact of the transfer of business laws on their businesses.

The laws result in a lose-lose-lose scenario when operations are outsourced. Firstly, client companies lose because they often need to make employees redundant as a result of the refusal of the companies taking over the outsourced work to hire any of the client's employees because of the inappropriate industrial instruments which would be imposed upon them if they did, both for transferring employees and in many cases for their existing and future employees. Secondly, companies which take on outsourced work lose because they cannot access the valuable skills possessed by their clients' employees, because they cannot afford the risks and costs involved. Thirdly, employees lose because they lose their jobs along with their continuity of service when, if appropriate laws were in place, many would have jobs with the companies which take over the work. Company after company has advised Ai Group that these are the effects of the current laws. A number of case studies provided by Member companies are reproduced in Ai Group's February 2012 submission to the Fair Work Act Review.

Even though the FW Act gives Fair Work Australia (FWA) the power to vary transferable instruments to ensure that they operate in an appropriate way for the new employer, applications for orders are rarely made by employers because of the costs, uncertainties and risks involved.

It is very disappointing that the Government has introduced a Bill dealing with the subject matter of transfer of business but the Bill does not address any of the problems that we have been constantly highlighting to the Government. The Bill does not even incorporate the lone transfer of business amendment recommended by the Fair Work Act Review Panel. The Panel recommended that the transfer of business laws be amended to make it clear that when employees, on their own initiative, seek to transfer to a related company the laws would not apply.

The Bill would exacerbate the existing problems and result in bad laws being extended, rather than fixed.

Far from protecting the jobs of State public sector employees, the Government's proposed changes would significantly reduce their job opportunities.

Ai Group strongly opposes the Bill in its current terms. We have many member companies in industries such as information technology, health, aviation, transport and social and community services which will be adversely affected by the Bill if it is passed. Public sector terms and conditions are not appropriate for businesses in the private sector.

Ai Group urges the Government to introduce major amendments to the Bill, as set out below. Our proposed changes include both substantive matters and important technical changes.

1. Part 6-3A

Ai Group opposes the inclusion of Part 6-3A into the FW Act and proposes that the relevant provisions of the Bill be deleted.

In the event that, despite Ai Group's opposition, the Government decides to include provisions in the Bill to insert Part 6-3A into the FW Act, the following amendments are proposed:

- **Subsection 768AD(1):** Add the following paragraph and note, and renumber existing paragraph (d) as (e):

  "(d) the character of the new employer's business is the same as the character of the old employer's business;'

  Note: The issue of whether or not two businesses have the same character was considered by the High Court in PP Consultants Pty Ltd v FSU [2000] HCA 59 and by the Full Federal Court in Stellar Call Centres P/L v CPSU [2001] 103 IR 220."

  The Bill incorporates the discredited "similarity of work test" which caused so many difficulties for industry in the late 1990s, prior to the High Court and Full Federal Court decisions in *PP Consultants Pty Ltd v FSU* [2000] HCA 59, *Gribbles Radiation v HSU* [2005] HCA 9 and *Stellar Call Centres v CPSU* [2001] 103 IR 220, which resulted in settled, fair and productive law. It is imperative that the "character of the business test" as enunciated by the High Court in *PP Consultants* is re-introduced.

- **Subsection 768D(2):** Delete the words *"or has the beneficial use of"* where it appears twice and, in paragraph (d), replace the words *"transferring work"* with "*business or operation which has transferred."*

  Subsection 768D(2) should relate only to the transfer of the ownership of assets, not the use of assets. Also, the concept of *"transferring work"* is too vague. Subsection 768D(2) should not apply unless a whole business or an operation within a business transfers. The existing provision would create widespread negative consequences and risks.

- **Subsection 768D(3):** Amend as follows:

  "Old State employer outsources ~~work~~ part of its operations to new employer

  (4) There is a connection between the old State employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old State employer, has outsourced ~~the transferring work~~ part of its operations to the new employer or an associated entity of the new employer."

  The concept of outsourcing *"work"* is not defined in the Bill, and is extremely broad and uncertain. The concept of *"part of its operations"* is more certain and tangible.

- **Sections 768BG, 768BH and 768BI:** These provisions need to be deleted. It is unfair and inappropriate to give unions and former State Government employees the power to apply to FWA for an order requiring companies which take over outsourced work to apply State Government wages and conditions to their existing and future employees, as well as transferring employees.

2. Amend the Bill to incorporate the "character of the business test" in s.311(1) of the FW Act

The existing transfer of business provisions of the FW Act incorporate the discredited "similarity of work test", as explained above.

The Bill needs to include amendments to insert the following paragraph and note as s.311(1)(d) of the FW Act with existing paragraph (d) renumbered as (e)

"(d) the character of the new employer's business is the same as the character of the old employer's business;'

Note: The issue of whether or not two businesses have the same character was considered by the High Court in PP Consultants Pty Ltd v FSU [2000] HCA 59 and by the Full Federal Court in Stellar Call Centres P/L v CPSU [2001] 103 IR 220."

3. Amend the Bill to tighten the transfer of asset provisions in s.311(3) of the FW Act

The Bill needs to include amendments to ensure that s.311(3) of the FW Act relates only to the transfer of the ownership of assets, not the use of assets. The existing provision is far too broad and creates widespread negative consequences and risks.

One area of concern in this area relates to circumstances where an employee of a labour hire firm obtains permanent employment with a client company after a temporary placement with that company. Thousands of companies use labour

hire agencies for the purpose of assessing whether or not prospective employees are suitable for direct employment with their company. Moreover if a company is looking to engage more staff due to an expansion in its operations, labour hire employees are often engaged first until the company has determined its ongoing staffing needs.

The transfer of labour hire employees from agency employment to direct employment should not be caught by the transfer of business laws. Every day in hundreds of workplaces temporary employees of labour hire firms are hired by client companies.

The decision of Deputy President Sams of FWA in *Whitehaven Coal Mining Limited* [2010] FWA 1142 has caused a great deal of uncertainty and concern amongst labour hire companies and their clients. This case concerned an application to FWA by Whitehaven Coal to prevent the transfer of a collective agreement of an on-hire firm (TESA) to its client (Whitehaven Coal) when Whitehaven decided to directly employ 16 labour hire employees of TESA who had been working within its business. Whitehaven made the application due to perceived doubt about whether the circumstances would constitute a transfer of business for the purposes of s.311 of the FW Act.

In his decision, Sams DP unequivocally stated at para [12] that the arrangement constituted a "transfer of business" for the purposes of s.311:

> *"I have no doubt that the specific requirements referred to above have been satisfied. In particular, there can be no doubt that the employees' employment will be terminated by TESA; they will commence employment with the new employer, Whitehaven, within three months of their terminations; the employees will be performing the same work at the mine they have been working at as they were performing before termination; and, there remains a connection between the old and new employer by virtue of their outsourcing arrangements, which are to continue: see s 311(2) to (6)."*

Given the concerns of labour hire companies and their clients about the above decision, Ai Group wrote to the Department of Education, Employment and Workplace Relations (DEEWR) seeking its view on whether "temp to perm" scenarios were intended to be covered by the transfer of business laws. Ai Group's letter included the following typical scenario:

> *'We would appreciate your confirmation that, in the view of DEEWR, a transfer of business would not occur in the following scenario:*
>
> 1. *A labour hire company supplies a group of 10 temporary production workers to a food company;*
> 2. *During the placement, the workers are integrated into the production workforce of the food company and they use the food company's tools and equipment;*
> 3. *After 3 months the food company decides to hire the 10 workers;*
> 4. *The labour hire company is happy to accommodate the client, but consistent with the terms of the standard contract which labour hire companies ask clients to sign, the client is required to pay a recruitment fee to the labour hire company;*
> 5. *The fee is paid and the 10 workers resign from, or are terminated by, the labour hire company and employed by the food company.'*

Whilst of course stating that the factual scenario of individual cases would need to be considered, the view expressed by DEEWR on the above typical "temp to perm" scenario was that such a scenario does not fall within the transfer of business provisions of the Act. The following extract from DEEWR's reply is relevant:

> *"Section 311(3) of the Act provides that the 'asset transfer' connection will be satisfied where there is an arrangement between the old employer and the new employer (or their associated entities) that the new employer owns or has beneficial use of some or all of the tangible or intangible assets that the employer owned or had the beneficial use of and that relate to the transferring work.*
>
> *In this instance, if there is no arrangement between the labour hire company and the client company under which some assets of the labour hire company transfer to the client company, then the section will not apply. Equally, the section will not apply if there is no asset transfer or no employees transfer.*
>
> *This means that, in your example, the section would not apply if the transferring employees were only using assets of the client company; it requires the client company to own or have the beneficial use of assets which were owned or beneficially used by the labour hire company and there must be an arrangement between the two employers for that asset transfer to occur.*
>
> *In relation to whether the scenario would give rise to an outsourcing or insourcing arrangement within the meaning of ss.311(4) and (5), our view is that on the information provided to us, the requirements set out under those provisions would not be satisfied. The scenario you describe does not fall within the ordinary and accepted meaning of these words. Specific examples on how these provisions are intended to operate is provided at paragraphs 1224 and 1226 of the Explanatory Memorandum of the Act"*

Despite the views expressed by DEEWR, given Deputy President Sams' decision, the transfer of business laws should be amended to ensure that "temp to perm" scenarios are not caught by the laws, either as a result of an on-hire firm and client beneficially using the same assets (s.311(3)) or due to outsourcing (s.311(4) and (5)).

In addition to the amendments to s.311(4) and (5) set out on the next page of this correspondence, s.311(3) needs to be amended as follows:

> ***"Transfer of assets from old employer to new employer***
>
> *(3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:*
>
> *(a) the old employer or an associated entity of the old employer; and*
>
> *(b) the new employer or an associated entity of the new employer;*
>
> *the new employer, or the associated entity of the new employer, owns ~~or has the beneficial use of~~ some or all of the assets (whether tangible or intangible):*
>
> *(c) that the old employer, or the associated entity of the old employer, owned ~~or had the beneficial use of~~; and*
>
> *(d) that relate to, or are used in connection with, the ~~transferring work~~ <u>business or operation which has transferred</u>."*

4. Amend the Bill to clarify the concept of "outsourcing" in s.311(4) and (5) of the FW Act

The Bill needs to be amended to clarify the concept of "outsourcing" in s.311(4) and (5) of the FW Act. The term *"outsources work"* is not defined, and is potentially extremely broad and uncertain. The following amendments should be made:

"Old employer outsources ~~work~~ part of its operations to new employer

(4) There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced ~~the transferring work~~ part of its operations to the new employer or an associated entity of the new employer."

"New employer ceases to outsource ~~work~~ part of its operations to old employer

(5) There is a connection between the old employer and the new employer if:

(a) the transferring work had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced ~~the transferring work~~ part of its operations to the old employer or an associated entity of the old employer; and

(b) the transferring work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource ~~the work~~ part of its operations to the old employer or the associated entity of the old employer."

5. Associated entities

The Bill needs to be amended to ensure that s.311(6) of the FW Act does not operate as a major disincentive to the transfer of employees between associated entities.

Many companies are part of a broader corporate group and employees often seek redeployment to different parts of their employer's business to, for example, obtain the opportunity for a promotion or an assignment overseas, to gain skills, or to work with different technologies. Australia's workforce is increasingly mobile both locally and globally. Under the existing transfer of business provisions, employees who seek redeployment to another entity within a corporate group for the purposes of career progression or broader experience risk having the opportunity stymied because any enterprise agreement applicable to the employee's employment with the original entity would become binding upon the other entity, creating potentially widespread consequences for the business.

To address this problem, we propose the following amendment to s.311(6):

"(6) There is a connection between the old employer and the new employer if:

(a) the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer; and

(b) the employee has not, on their own initiative, sought the transfer.

The above amendment is consistent with Recommendation 38 of the Fair Work Act Review.

We urge the Government to amend the Bill in the Senate, as set out above. Our proposed amendments are practical, necessary and fair to employees and employers.

I would be happy to provide any further information that you may require.

Yours sincerely

Innes Willox
CHIEF EXECUTIVE