Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Fair Work Amendment (Pay Protection) Bill 2017

8 May 2017

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (**Committee**) regarding the *Fair Work Amendment (Pay Protection) Bill 2017* (**Bill**).

The Bill would amend the *Fair Work Act 2009* (**FW Act**) to:

- Require that where an enterprise agreement applies to an award-covered employee, the full rate of pay payable to the employee under the agreement must not be less than the full rate of pay payable to the employee under the relevant award. The 'full rate of pay' includes penalties, loadings, allowances and any other separately identifiable amount.

- Require that where an enterprise agreement applies to an award-free casual employee, the casual loading payable to an employer under the enterprise agreement must not be less than the casual loading payable to the employee under the national minimum wage order.

- Extend the above requirements to enterprise agreements regardless of whether they were made before, on or after the commencement of the proposed amendment.

The Bill is very problematic. Some of the difficulties that would arise from the proposed amendments are set out below.

We urge the Committee to recommend that the Bill is rejected by Parliament.

Schedule 1 to the Bill – Proposed Amendments

Items 1, 2, 3, 4, 5 and 9

These are consequential amendments to the amendment proposed at item 6. These items are also opposed by Ai Group.

Item 6

This proposed amendment is strongly opposed by Ai Group. It would have the effect of requiring that where an enterprise agreement applies to an award-covered employee, the employee's full rate of pay under the agreement must not be less than their full rate of pay under the award. The 'full rate of pay' is defined in s.18 of the FW Act as including loadings, monetary allowances, overtime, penalty rates, incentive-based payments and bonuses and any other separately identifiable amounts.

Enterprise agreements are already subject to the 'better off overall test' (**BOOT**) (s.193 of the FW Act). When an application to approve an enterprise agreement is made, the Fair Work Commission (**FWC**) carefully examines the agreement to ascertain whether it passes the BOOT. An enterprise agreement cannot be approved by the FWC if it is not satisfied that it passes the BOOT.

The BOOT creates a very significant statutory safeguard which ensures that award-covered employees and prospective award-covered employees will be better off overall under the proposed enterprise agreement than if the relevant modern award applied to them. It is an important protection that is designed to ensure that enterprise agreements do not disadvantage employees.

The BOOT gives employers and employees appropriate flexibility during enterprise bargaining. It allows them to negotiate terms and conditions that are tailored to their specific needs, so long as the employees are better off overall and are paid at least the base rate of pay under the relevant award. If s.206(1) were amended as proposed, this would drastically reduce the scope for bargaining between employers and employees because the "floor" underpinning such bargaining would be raised very substantially. This would not be beneficial for employers or employees. It would remove many opportunities for employers and employees to reach agreement on terms and conditions that are meaningfully tailored to suit the needs of the enterprise and of the employees. Many "win-win" outcomes would no longer be possible. Therefore, enterprise bargaining would be undermined.

The proposed amendments would create considerable uncertainty for employers and employees covered by enterprise agreements. This is because, whilst an enterprise agreement is in operation, an employer would be required to continuously check the relevant award for any changes to various entitlements including allowances, loadings, penalties etc. Such uncertainty regarding the entitlements due under an enterprise agreement is undesirable for employers and employees. It would create a considerable additional regulatory burden for employers.

The proposed amendments would discourage employers from engaging in collective bargaining and would undermine the enterprise bargaining system. This is contrary to and inconsistent with the objects of the FW Act (s.3(f)), the objects of Part 2-4 of the FW Act (s.171) and the overall framework of the legislation which is directed towards encouraging bargaining at the enterprise level.

Item 7

This proposed amendment is also opposed by Ai Group. It would have the effect of requiring that where an enterprise agreement applies to an award-free casual employee, the casual loading payable to an employer under the enterprise agreement must not be less than the casual loading payable to the employee under the national minimum wage order. Currently s.206(3) of the FW Act does not extend to the casual loading prescribed by a national minimum wage order. Rather, an employer is required to pay at least the national minimum wage or special national minimum wage prescribed by the order.

The amendments would likely have the impact of undermining collective bargaining in relation to award free casual employees. This is undesirable from the perspective of employers and employees.

Also, the vast majority of casual employees are covered by a modern award. There is no evidence that the change proposed in the Bill is necessary.

Item 8

This is a consequential amendment to that proposed at item 7. For the reasons set out above, it is opposed by Ai Group.

Item 10

The proposed s.30(1) of Part 6 is ill-conceived and unwarranted. The amendments would apply to all enterprise agreements, regardless of whether they were made before, on or after the commencement of the amendments.

This element of the Bill would require employers to pay higher penalty rates, loadings and allowances in addition to any more beneficial entitlements that are provided for in pre-existing enterprise agreements. This may include, for instance, markedly higher base rates of pay and more generous leave entitlements (e.g. additional annual leave, personal/carer's leave and/or other forms of leave such as 'special emergency leave', 'family and domestic violence leave, 'blood donor leave' and so on).

Many enterprise agreements also require the payment of all-encompassing 'loaded rates' which are intended to compensate employees for performing work on a range of roster patterns including work on the weekends, early in the morning or late at night. In such instances, the Bill would have potentially enormous cost implications for employers and result in a windfall gain to employees.

Conclusion

For the reasons identified above, the amendments proposed in the Bill are unnecessary and problematic.

We urge the Committee to recommend that the Bill is rejected by Parliament.