

Ai GROUP SUBMISSION

Senate Education and Employment
Legislation Committee

Fair Work Amendment (Protecting
Australian Workers) Bill 2016

4 April 2016



Ai Group's position

Ai Group makes this submission to the Committee's inquiry into the *Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Bill)*.

The Bill addresses a few of the recommendations of the Productivity Commission (PC) Inquiry into the Workplace Relations Framework. However, in Ai Group's view, a balanced approach needs to be taken to the implementation of the recommendations, rather than implementing those that benefit workers without addressing those that would improve productivity and flexibility for businesses. Accordingly, we do not support the Bill, as drafted.

In January 2016, Ai Group released its response to the PC's final report. This response included the following positions on the PC recommendations of relevance to the content of the Bill:

| No. | Recommendation | Ai Group's position | Comments |
|--|--|----------------------|--|
| Chapter 18: General protections | | | |
| 18.2 | <p>The Australian Government should amend s. 341 of the FW Act and related explanatory material to more clearly define the meaning and application of workplace rights.</p> <ul style="list-style-type: none"> Modified provisions should indicate that the exercise of a workplace right in instances where a complaint or inquiry has resulted in alleged adverse action must involve instances bearing a direct and tangible relation to a person's employment. In this regard, consideration should also be given to a standard 'test' formulation, such as applies in Part 3-1 with regard to dismissals being 'harsh, unjust or unreasonable'. | Supported | <p>This recommendation has merit. The concept of a "workplace right" is not currently adequately defined which creates significant risks for employers.</p> <p>The reference to Part 3-1 in the recommendation should be to Part 3-2 (Unfair Dismissal).</p> |
| Chapter 25: Alternative forms of employment | | | |
| 25.1 | <p>The Australian Government should amend the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.</p> | Not supported | <p>Ai Group opposes the replacement of the "recklessness" test in the sham contracting laws with a "reasonableness test". The small number of sham contracting cases which have been pursued by the FWO to date highlights that the laws are not being widely breached.</p> <p>The sham contracting laws were tightened when the FW Act was implemented and a further tightening is not justified.</p> |
| Chapter 29: Migrant workers | | | |
| 29.1 | <p>The Department of Immigration and Border Protection and the FWO should improve the information available on their websites about migrant workers' workplace rights and conditions. They should also explore other ways of providing migrants with this information, ensuring that it is in easily accessible languages and formats.</p> | Supported | <p>This recommendation has merit.</p> |

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|------|--|----------------------|--|
| 29.2 | The Australian Government should give the FWO additional resources to identify, investigate, and carry out enforcement activities against employers that are underpaying workers, particularly migrant workers. | Supported | This recommendation has merit. |
| 29.3 | Penalties for breaching Reg. 3.44 of the Fair Work Regulations 2009 (Cth) by keeping false or misleading documents as required under the Regulations and the FW Act should be increased to be aligned with similar penalties under s. 234 of the Migration Act 1958 (Cth). | Not supported | The penalty proposed by the PC is not proportionate to other penalties imposed by the FW Act and Regulations. The penalties should not be increased for all employers to deal with a migration issue that affects a relatively small proportion of employers and employees. |
| 29.4 | The Australian Government should amend the FW Act to clarify that, in instances where migrants have breached the Migration Act 1958 (Cth), their employment contract is valid and the FW Act applies. | Supported | Ai Group does not oppose this recommendation. |
| 29.5 | Subject to arrangements that ensure that this is lawful, the FWO should not share any identifying information with the Department of Immigration and Border Protection about a migrant who has only breached their employment-related visa conditions. The Department of Immigration and Border Protection should share any information with the FWO about a migrant and their employer, when they suspect an employer has underpaid a migrant. | Supported | Ai Group does not oppose this recommendation. |

Concerns with particular provisions of the Bill

Ai Group has substantial concerns about the following provisions of the Bill:

Item 9 – Adverse action

It is unnecessary to include a specific provision in the *Fair Work Act 2009 (FW Act)* prohibiting adverse action being taken against a person who raises an issue or concern about whether the person, or another person, has a workplace right. This issue is already addressed through the following provisions of the FW Act:

- Paragraph 341(1)(c) which gives an employee a workplace right to make a complaint or inquiry in relation to his or her employment; and
- Sections 346 and 347 which protects union delegates who make inquiries and claims about employment matters.

Rather than implementing Item 9 in the Bill, PC Recommendation 18.2 should be implemented (see above).

Item 10 – Sham contracting

Ai Group opposes the replacement of the current recklessness test in s.357(2) of the FW Act with a reasonableness test. See the table above regarding PC Recommendation 25.1.

Item 14 – Executive officers of phoenix companies

Ai Group opposes making directors and managers of phoenix companies liable for wages owed to workers of failed companies. There are already very substantial penalties under the *Corporations Act 2001* for directors who enter into transactions with the intent to deprive workers of their entitlements upon insolvency.

Item 14 would impose a substantial barrier to entrepreneurship, investment and employment.

Item 16 – penalties

Ai Group does not support an increase in penalties for contraventions of the FW Act relating to terms and conditions of employment. Hefty penalties of up to \$54,000 per breach already apply, with unlimited damages able to be awarded in some circumstances.

Item 18 – disqualification of company directors

Ai Group does not support amendments to the FW Act to enable company directors to be disqualified from managing corporations if a director is held to have intentionally contravened provisions of the FW Act relating to terms and conditions of employment. The *Corporations Act 2001* already contains comprehensive provisions dealing with the disqualification of directors. This is not a topic that is appropriately dealt with in the FW Act.

Item 22 – Criminal penalties

Ai Group opposes the implementation of criminal penalties for serious contraventions of the FW Act. The Act already contains a regime of substantial civil penalties of up to \$54,000 per breach, with unlimited damages able to be awarded in some circumstances.

Criminal penalties are not warranted. They would impose a substantial barrier to entrepreneurship, investment and employment.