



**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

*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 Bill 2008 that was tabled on 27 February 2009.

The Government 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 Rudd Labor Government took office with a commitment to taking an open, measured and consultative approach in developing its new workplace relations system. The Government approached the task of developing the new laws in a spirit of consultation and cooperation with all relevant players, including unions, States and Territories and the largest to the smallest employers across industries. The feedback from the many employer groups, unions and the states and territories who participated in these processes has been overwhelmingly positive.

This extensive consultation process has resulted in a Bill that is fair and balanced and which takes into account the legitimate needs of both employers and employees.

The Government made a commitment to the Australian people to implement all elements of its Forward with Fairness policy that were so overwhelmingly endorsed at the last election. At the same time however, the Government always maintained that it would 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.

Yours sincerely



**Julia Gillard**

**Minister for Employment and Workplace Relations**

**Fair Work Bill Inquiry: Government response****NATIONAL EMPLOYMENT STANDARDS****Recommendation 1**

- The committee majority recommends that the government gives careful consideration to any recommendations of the inquiry into better support for carers being conducted by the House Standing Committee on Family, Community, Housing and Youth on additional measures that should be taken within the workplace relations framework to assist carers.
- In particular, the government should carefully consider any recommendation that the NES be amended to extend the right to request flexible working arrangements for employees caring for a child with a disability and carers of adults in need of care.

Noted. The Government intends to carefully consider the recommendations of the inquiry into better support for carers including any recommendations regarding amendments to the NES.

- The committee majority also considers that employers and employees should be able to provide in their enterprise agreement that the agreement's dispute resolution clause can deal with disputes over the right to request flexible working arrangements.

Accepted. The Government will amend the Fair Work Bill to make it clear that that an enterprise agreement may provide for disputes about a refusal to a request for flexible working arrangement to be dealt with under the dispute settling clause under the agreement.

**Recommendation 2**

- The committee majority recommends that the Fair Work Information Statement include information on individual flexibility agreements (what they are, employee rights and where to go for independent advice), the rights to unfair dismissal claims and how employees may undertake that process. It should also be made available in community languages to assist employees from non-English speaking backgrounds.

Accepted. Workplace laws affect all Australians. It is important that employees and employers, including those from culturally and linguistically diverse backgrounds, understand their workplace rights and obligations, and know where they can seek advice and support. Fair Work Australia and the Office the Fair Work Ombudsman will operate in a seamless and integrated way to provide easy to find, accurate and practical information on the workplace relations system to both employers and employees.

The Fair Work Information Statement will include information on the National Employment Standards, modern awards, agreement making, the right to freedom of association and the role of Fair Work Australia and the Fair Work Ombudsman. In addition, information will be included on individual flexibility arrangements, employee records and privacy and termination of employment. Fair Work Australia and the Fair Work Ombudsman will provide advice on unfair dismissal. While not mandated in the Bill, the statement will be made available in community languages.

The Bill will also enable the Fair Work Ombudsman to produce guidance material for employers and employees on a range of matters, including information targeted to particular users (such as young workers or small businesses) as well as best practice guides on subject matters such as workplace privacy, flexible work practices, the use of

individual flexibility arrangements and improving workplace productivity through enterprise bargaining.

Fair Work Australia and the Office of the Fair Work Ombudsman will also provide materials in languages other than English in accordance with Government policies and practices to ensure accessibility.

## **MODERN AWARDS**

### **Recommendation 3**

- The committee majority recommends that FWA conduct regular and targeted investigations and analysis to ensure that individual flexibility arrangements are being used in accordance with the Act and are being used to provide genuine individual flexibility.

Noted. The Fair Work Ombudsman will monitor compliance, inquire into and investigate contraventions of fair work instruments, including modern awards. Inspectors will be able to exercise a range of powers to determine and enforce compliance.

The Government is considering how it may best address the Committee's specific recommendations on analysis of the usage of individual flexibility arrangements.

## **BARGAINING FRAMEWORK**

Detailed feedback in the Senate process raised concerns about the framing of some provisions of the Bill. The Government has carefully considered those suggested changes and will also move a number of amendments to ensure the bargaining system is streamlined and efficient while meeting the Government's core policy commitments.

### **Recommendation 4**

- The committee majority recommends that the period to access a proposed agreement be extended to 14 days but, where bargaining agents agree, the period be reduced to seven days.

Not accepted. The seven day period for ready access to a proposed agreement will ensure that the approval of an enterprise agreement is not unduly delayed when the parties have already agreed to the terms. The Government notes that when an employer initiates bargaining, it must give employees notice of their right to be represented by a bargaining representative and it must not ask employees to approve an agreement until at least 21 days after this notice has been given. In addition, the availability of good faith bargaining orders address some of the issues raised in the Senate Inquiry in support of a 14 day ready access period.

### **Recommendation 5**

- The committee recommends the area of confidential or commercially sensitive information as an area for future review on how good faith bargaining provisions are working.

Noted.

**FAIR TREATMENT IN THE WORKPLACE****Recommendation 6**

- The committee recommends that the bill be amended to provide for a fourteen day time limit within which time appeals against unfair dismissals must be lodged with Fair Work Australia.

Not accepted. The aim of the new seven day time period to lodge an unfair dismissal claim is to promote quick resolution of claims and increase the feasibility of reinstatement as an option.

The Government made this commitment in its *Forward with Fairness* election commitment as it strikes a balance between providing an avenue for unfair dismissal claims and certainty to business on potential claims arising from dismissal.

In exceptional circumstances FWA will have discretion to accept late applications.

**Recommendation 7**

- The committee majority recommends that the Fair Dismissal Code be amended to provide that employers be required to provide a warning in writing, taking into consideration the needs of employees from a non-English speaking background.
- Not accepted. The Small Business Fair Dismissal Code was developed and settled in 2008 in consultation with the Small Business Working Group and unions. The working group carefully considered this issue and decided not to recommend mandatory written warnings due to the red tape burden this would place on employers. The Fair Dismissal Code encourages warnings to be given in writing.

**INDUSTRIAL ACTION****Recommendation 8**

- The committee majority recommends that it would be desirable to ensure consistency of the drafting between these two provisions by providing that where industrial action threatens harm, the threat should be imminent, and the harm to the third party should be economic harm.

Noted. The Government intends to amend the Fair Work Bill to set out a clearer test in the provision that allows FWA to suspend industrial action where there is harm to a third party.

**FAIR WORK AUSTRALIA****Recommendation 9**

- The committee majority recommends that Community Legal Centres be exempt from being required to seek leave to appear before FWA.
- Not accepted. As outlined in *Forward with Fairness*, Fair Work Australia will operate in a less formal, non-legalistic way, and in most circumstances legal or other professional representation will not be necessary.

A person will be able to be represented by a lawyer or paid agent where Fair Work Australia decides that it would assist Fair Work Australia to determine the matter or it would be unfair not to allow the party to be represented. The factors that FWA must consider include the complexity of the matter and the fairness between the parties. Where FWA considers that a worker involved in proceedings is disadvantaged or vulnerable worker and that worker is being represented, especially by a lawyer who is not being paid a fee, these criteria would enable FWA to grant permission for the worker to be represented by that lawyer.

**TRANSFER OF BUSINESS****Recommendation 10**

- The committee majority recommends that a probationary period after a transfer of business should not be required to recommence and they should be treated as existing employees.

Not accepted. The Bill requires that a new employer notify transferring employees if a new minimum employment period will be required. If the employer fails to notify transferring employees in writing of the requirement to serve a new minimum employment period, previous service with the old employer will be recognised and the employees will not be required to serve a new minimum employment period for unfair dismissal purposes. The Government decided that it was important to give a new employer flexibility in this regard. To not do so could provide a disincentive to new employers offering employment to employees of the old employer. The Government also notes that the General Protections provisions provide for better protections for employees in the event that a new employer was to terminate the employment of transferred employees for the purpose of avoiding the payment of accrued entitlements, such as long service leave.

**OUTWORKERS****Recommendation 11**

- The committee majority recommends the government accepts the suggestions in this chapter regarding outworkers and implements them as amendments to ensure appropriate protections are in place that recognise the special vulnerability of these workers.

Noted. As the Government has previously foreshadowed, a series of amendments will be moved to provide for special protections to ensure a strong and effective inspection and compliance regime for vulnerable outworkers in the textile, clothing and footwear industry.

**TOWARD A NATIONAL SYSTEM AND TRANSITIONAL ISSUES****Recommendation 12**

- The committee majority recommends that the government give careful consideration to the issues raised in the submissions to the committee concerning the coasting trade and has regard to the desirability of ensuring the provision of a decent safety net of employment conditions to workers engaged in that trade.

Noted. The Government is aware of concerns raised about the provisions dealing with the extraterritorial application of the Fair Work Bill. The Fair Work Bill allows for regulations to be made by the House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government following its inquiry into Australian coastal shipping policy and regulation. In the area of shipping, the Fair Work Bill and any modifications of its coverage by the regulations will reflect the Government's response to this inquiry.

**Coalition senators' minority report**

The Government has noted the Coalition senator's minority report.

**Australian Greens minority report****Recommendation 1**

- That the Government submits the Bill to the ILO for urgent advice as to its compliance with ILO conventions.

**Recommendation 2**

- That the Bill be amended to comply with Australia's International labour obligations.

**Recommendation 3**

- That the objects of the Bill be amended so that clause 3 (a) reads "...and comply with Australia's international labour obligations."

**Recommendation 9**

- That the provisions in the Bill relating to industrial action are amended to comply with ILO obligations.

Noted. The Government is conscious of its commitments regarding international labour standards and supports the International Labour Organisation (ILO) in its objective of promoting decent work for all and raising labour and social standards.

One of the first acts of this Government was to abolish the making of new AWAs through the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 introduced on 28 March 2008. The inconsistency of AWAs with Australia's international obligations was criticised repeatedly by the ILO before this Government was elected.

Establishing transitional rules for moving to a workplace relations system underpinned by collective bargaining is one way that the Government has ensured alignment with international labour standards.

The Fair Work Bill does much more. The Government's reforms address many of the inadequacies of the previous Government's Work Choices regime and will ensure Australia's workplace relations system aligns with key ILO conventions.

In particular, the Government wishes to point to the centrality of collective agreement making in the Fair Work Bill and its emphasis on achieving a balance of employee and employer rights and obligations.

The Australian Government gave due consideration to its international obligations in developing the Fair Work Bill and is confident that the Bill gives effect to Australia's commitments under ratified ILO Conventions.

**Recommendation 4**

- That the Bill be amended to provide Fair Work Australia with the power to finally determine workplace disputes over the application of the NES, modern awards or agreements and other workplace disputes that arise outside of agreements.

Not accepted. The separation of powers doctrine means that as an administrative body, Fair Work Australia will not be able to exercise the judicial power of the Commonwealth. Judicial power involves the conclusive determination of existing legal rights (i.e., the enforcement of the law). Granting a remedy for a breach of the substantive workplace relations legislation or an instrument made under the legislation (e.g., the NES or an award) would involve the exercise of judicial power. However, in exercising dispute resolution functions under a term of an award, Fair Work Australia will be able to exercise any of its general powers. These powers will include:

- attempting to settle the dispute through mediation or conciliation;
- ordering compulsory conferences;
- making recommendations or expressing an opinion; or

- informing itself, for example, by requiring parties to provide documents or information.

The Fair Work Ombudsman will be able to take action on behalf of employees whose entitlements have been underpaid. In addition, the Fair Work Bill provides for an extended small claims mechanism which will allow employees to elect to have underpayment and other enforcement matters dealt with quickly and informally.

#### **Recommendation 5**

- That the right to request flexible working arrangements provisions are amended to reflect the UK provisions, notably to require the employer to meet with the employee to discuss the request, and to provide for independent dispute resolution of procedural rights.

Partially accepted. Refer to response to Recommendation 1 of Majority report.

#### **Recommendation 6**

- That clause 119 is amended to incorporate the AIRC Redundancy decision 2004 providing redundancy pay for employees of small businesses.

Not accepted. The current National Employment Standards provide a legislated scale of redundancy payments, replicating the 2004 Redundancy Test Case federal award scale, which will apply to employers, other than those employing fewer than 15 employees.

The Government acknowledges that small businesses with fewer than 15 employees can face particular challenges when managing employee engagement and dismissal.

The small business exemption from redundancy payments aligns with existing redundancy pay standards across the Federal, New South Wales and West Australian workplace relations systems.

The Bill allows modern awards to supplement the National Employment Standards where this is appropriate, including where there is a history of small business redundancy entitlements in an industry. However, the Government does not consider that modern awards or the National Employment Standards should provide for small business redundancy pay as a matter of course.

#### **Recommendation 7**

- That employers are required to lodge all individual flexibility agreements with Fair Work Australia with FWA is to make all IFAs freely available, without identifying the parties to the agreements.

Not accepted. Refer to the response to Majority Report Recommendations 2 & 3.

#### **Recommendation 8**

- That the Bill be amended to remove the restrictions on agreement content.

Not accepted. The Government considers that the Bill's provisions about the content of enterprise agreements are appropriate and ensure that all matters with a relevant connection to the workplace are able to be dealt with in bargaining.

#### **Recommendation 10**

- That employees have 21 days to lodge an unfair dismissal claim.

Not accepted. Refer to response to Recommendation 6 of the Majority Report.



**Recommendation 11**

- That the unfair dismissal provisions are amended to remove the discriminatory provisions relating to small business employees.

Not accepted. *Forward with Fairness* clearly stated that eligibility for unfair dismissal protections would be based on three simple factors:

- A 12 month qualifying period in businesses with less than 15 employees;
- A 6 month qualifying period in businesses with more than 15 employees;
- and
- A high income cap for award free employees.

As set out in *Forward with Fairness*, the special arrangements relating to small business are in recognition of the particular circumstances of small business and the fact that compliance costs and red tape place a heavier burden on small business than larger enterprises.