Submission

Submission Number: 14
Date Received: 01/2/2013

HOUSE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT INQUIRY INTO THE FAIR WORK AMENDMENT (TACKLING JOB INSECURITY) BILL 2012

1 February 2013

HOUSE STANDING COMMITTEE ON EDUCATION AND TRAINING

INQUIRY INTO THE FAIR WORK AMENDMENT (TACKLING JOB INSECURITY) BILL 2012

The Australian Industry Group (Ai Group) makes this submission to the House of Representatives Standing Committee on Education and Employment in response to its inquiry into the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012*.

Ai Group is one of the largest national industry bodies in Australia representing employers in manufacturing, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, airlines and other industries. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

The Bill proposes to amend the *Fair Work Act 2009* (FW Act) by introducing provisions giving employees and unions the right to pursue 'secure employment arrangements' and enabling the Fair Work Commission to make 'secure employment orders'. Ai Group strongly opposes the Bill and urges the Committee to recommend that the Bill not be passed.

The truth about casual and fixed-term employment

The idea of secure employment arrangements and orders is derived from a submission made by the Australian Council of Trade Unions (ACTU) to a union inquiry into insecure work last year. The unions called their inquiry the "independent inquiry into insecure work". This is a very creative title when the unions commissioned the inquiry, selected those who conducted the inquiry, and the final report was presented to the unions. The unions bombarded the inquiry with submissions and statements. Employer groups chose not to participate because the inquiry was established by the unions with the aim of imposing restrictions on employers.

The idea of secure employment arrangements and orders is premised on assertions that there is a 'casualisation' and fixed term employment problem in the Australian workforce and that employees engaged on a casual or fixed term basis lack a guaranteed safety net. In reality, there is no such problem.

Casual employees receive a casual loading (typically 25 per cent) to compensate for various entitlements of full-time and part-time employees which they do not receive such as annual leave, personal/carer's leave, etc. Many employees prefer casual employment. It is not a 'second-class' form of employment, as the unions allege.

The level of casual employment in Australia today is about the same as it was 5 years ago and 10 years ago – about 20 per cent of the workforce. In fact according to the statistics on casual employment in Australia released by the Australian Bureau of Statistics (ABS) in 2012, casual employment peaked in 2007, and there has been a steady decrease in the proportion of employees engaged on a casual basis since then:

- 2007: 21 per cent
- 2009: 20 per cent
- 2011: 19 per cent[1]

The level of fixed-term employment in Australia is about 4 per cent, 48 per cent of whom are professional employees.[2]

This data cannot be overlooked. There is no casualisation or fixed-term employment problem in Australia, which necessitates legislating for secure employment arrangements and orders.

[1] Australian Bureau of Statistics, *Catalogue 6359.0: Forms of Employment*, November 2011.
[2] Australian Bureau of Statistics, *Catalogue 6359.0: Forms of Employment*, November 2011.

The Bill is not in the interests of employers, employees or the community

The Bill, in its attempts to restrict casual and fixed term employment, not only restricts important flexibility relied on by employers to maintain productivity and competitiveness, but also restricts important flexibility enjoyed by employees to meet family responsibilities and lifestyle choices. In turn the community suffers, as the potential for economic growth, higher levels of employment, and increased workforce participation are all limited.

Australia's future success depends upon the maintenance of flexible workplaces, including maintaining employers' flexibility to engage casuals and fixed term employees. The Bill will inhibit the ability of businesses to be responsive and adaptable to market changes and in turn will create 'job insecurity' for Australian workers. The only true job security for workers comes from ensuring that businesses remain profitable and competitive. Flexibility is critical if this is to be achieved.

Casual and fixed term employment are legitimate and important features of the Australian workforce

Casual and other non-permanent forms of employment are legitimate and important. Casual and fixed term employment have long been a feature of the Australian workplace, for example at least since 1937 employers in the metal manufacturing industry have been able to engage casual employees subject to the payment of a loading.[3]

It is a feature of some industrial instruments that those casual employees who have been working for a particular employer for a set period of time have the right to request to become a permanent employee, with only reasonable refusal allowed. 'Casual conversion clauses' were inserted in many awards following the *Metal Industry Casual Employment Decision* in 2000. In this decision it was recognised that it is common for many workers to be engaged on a long-term casual basis and many employees do not wish to convert to permanent employment. In any analysis of the outcomes of this case it is necessary to consider the decision of December 2000 as well as the orders made by the Full Bench in February 2001 as a result of the decision.[4] After the initial decision was handed down, there were negotiations between Ai Group and the Australian

[3] *Metal Industry Casual Employment Decision*, Print T4991(29 December 2000), at [81].
[4] AW789529,PR901028.

Manufacturing Workers Union (AMWU) and a vigorously contested 'settlement of orders' process before the Full Bench.

The Australian Industrial Relations Commission, when making the modern awards, refrained from including 'casual conversion clauses' as a matter course for all awards but rather inserted the provision in awards where there had been a historical connection.[5] In taking this course of action, it is clear that that the Tribunal did not consider 'casual conversion clauses' appropriate for all Australian workers.

This Bill goes far beyond what is provided under 'casual conversion' clauses in modern awards. Not only would the Bill insert into the FW Act a right to 'casual conversion' for all employees (regardless whether or not a modern award covers or applies to them), it would give the Fair Work Commission the power to arbitrate:

- For a casual or fixed-term employee to become permanent;[6]
- To prohibit casual and/or fixed-term employees being employed at all by a particular employer or class of employers.

The effect of this would be extremely damaging for businesses, employees and the community. It would act as a direct disincentive to employment; it would reduce flexibility for employers and employees; and it would inhibit the engagement of specialist labour to undertake project work.

It would also close off opportunities for many people to participate in the workforce. Many employees prefer casual work because of the flexibility which it gives them and do not want a permanent job.

[5] *Award Modernisation Decision*, [2008] AIRCFB 1000
[6] See *Metal Industry Casual Employment Decision*,, Print T4991(29 December 2000), at [117], whereby the Full Bench of the Australian Industrial Relations Commission decided that an arbitrary limit on casual employees would not be appropriate.[6]

Relevantly, it is Ai Group's experience that nearly all casual employees who have been afforded the opportunity to convert to permanent employment have declined because they did not want to lose the flexibility that comes with being a casual or did not want to forgo the casual loading. This Bill undermines the needs and wishes of a very large number of employees and puts the decision on their employment in the hands of a third party.

The Bill fails to take into account that the casual loading is paid to casual employees in lieu of accumulating leave entitlements

Casual loading is the 'payment in advance' of leave and other entitlements that otherwise accrue for permanent employees to be paid out at a later date. The Bill proposes that a 'secure employment order' may provide for the 'phasing out' of the casual loading so as to avoid a sharp drop in employee remuneration.[7] Such an order would be unfair on employers and would amount to 'double dipping'.

The Bill enables unions to seek 'secure employment orders' even without a request from employees

The Bill enables unions to apply to the Fair Work Commission for 'secure employment orders' for a class of relevant persons, including a particular industry, part of an industry, kind of work, type of employment, or employer, without the relevant employees making a request for such an application.[8] In essence, the Bill enables unions to seek to impose retrograde union policy positions, opposing workplace flexibility, on employees.

The Bill would facilitate 'tyranny by the majority'

Ai Group has seen many examples of the majority of employees in a workplace and relevant unions opposing flexibility valued by a minority of employees in the workplace. In most workplaces, casuals and fixed-term employees are in the minority. The Bill would enable the majority of the employees in a workplace and their union to pursue a 'secure employment order' to prevent casuals being employed, or to force casuals to convert to

[7] Schedule 1, Item 11, s.306R(1)(c) of the Bill.
[8] Schedule 1, Item 11, s.306N(2) & (3) and s.306P(1)(b) of the Bill.

full-time employment, even though the casuals may not want, or be able to accept, a permanent job because of their family or study commitments. Unions are even given the right to pursue orders for prospective employees.[9]

The Bill would increase industrial disputation

The Bill would expand the definition of 'permitted matters' in s.172 of the FW Act, giving employees the right to take industrial action during bargaining in pursuit of enterprise agreement clauses pertaining to 'secure employment arrangements'.[10] Such arrangements are not limited to casuals and fixed term employees and could include independent contractors. Enterprise agreement clauses which prevent the engagement of contractors or which impose certain restrictions on the engagement of contractors have been found by Fair Work Australia to not be permitted matters.[11] The Bill conflicts with longstanding principles in industrial law, recognised by the High Court.[12]

Conclusion

The Bill, if passed, would have widespread negative consequences for businesses, employees and the community. The Bill not only proposes to remove important flexibility needed by employers and employees, it would operate as a barrier to employment.

We urge the Committee to recommend that Parliament reject the Bill.

[9] Schedule 1, Item 11, s.306P(2) of the Bill.
[10] Schedule 1, item 10 of the Bill.
[11] See *Australian Postal Corporation v CEPU*, [2009] FWAFB 599; *Airport Fuel Services v TWU*, [2010] FWAFB 4457; *Alcoa v AWU*, [2010] FWAFB 4889; *Construction, Forestry, Mining and Energy Union v Brookfield Multiplex Australasia Pty Ltd*, [2012] FWA 4051
[12] See *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] 221 CLR 309.