THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Mr Jeff Lawrence
Secretary
Australian Council of Trade Unions
Level 6, 365 Queen Street
MELBOURNE VIC 3000

30 APR 2010

JC CC

Dear Mr Lawrence

During our recent meeting in Sydney we discussed the Government's legal advice concerning the compulsory arbitration of disputes about the National Employment Standards (NES), modern awards and enterprise agreements under the *Fair Work Act 2009* (FW Act). You will recall that the Australian Council of Trade Unions (ACTU) was given access to this advice during the drafting of the FW Act.

Attached to this letter is a detailed summary of the advice provided to the Government about these matters during the development of the Fair Work Bill. The essence of this advice is that Fair Work Australia (FWA) could only have a role in determining disputes that is constitutionally sound by way of:

- compulsory, binding dispute resolution which involved capacity to create new legal rights having regard to considerations of industrial fairness;
- private arbitration (i.e. by consent of the parties); and
- non-binding dispute resolution.

In relation to disputes concerning the safety net, the Government's view is that FWA should not be empowered to settle disputes about the NES or modern awards by creating new rights. The NES apply universally to the employment of all employees in the national system and cannot be varied other than by the Parliament. Modern awards are not made in settlement of disputes but apply to all employees and employers in relevant industries or occupations and provide a safety net of terms and conditions that can be varied in limited circumstances. This stable safety net is intended to underpin the negotiation of additional entitlements at the enterprise level.

In relation to disputes concerning enterprise agreements, the summary points to significant risks associated with the ACTU's preferred approach of providing for the compulsory arbitration of disputes. Such an approach would be likely to be challenged as offending Chapter III of the Constitution on the basis that it would compel consent to arbitration (that is, consent would not be freely given if it is a condition of entry into an enterprise agreement). I

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appreciate that there are arguments to the contrary. Indeed, in *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWAFB 1464, counsel acknowledged (in accordance with Commonwealth constitutional policy requirements) the broadest interpretation of Commonwealth powers in this area. However, irrespective of the ultimate outcome, such a challenge would take time to be resolved and this in itself would create significant and undesirable uncertainty around the validity of agreements, the bargaining framework and the FW Act as a whole.

The Government accepts the need for a fast, effective enforcement process and the FW Act provides for this in a way that remedies the worst features of the previous system. For example, the FW Act requires enterprise agreements to provide for the settlement of disputes by FWA or another person who is independent of the parties, and to enable an employee to be represented in the dispute settlement process. The new small claims procedure in the federal Magistrates' Court and local courts provides a significantly simpler and cheaper way for unions to assist their members to enforce entitlements under the FW Act, modern awards and enterprise agreements, as well as common law entitlements.

You would appreciate that this material is highly sensitive. Accordingly, as discussed with my office, I provide the attached summary of legal advice on the basis of your agreement to the following conditions:

- this letter and the attached summary is held securely and is not copied or distributed in any manner;
- access to this letter and the attached summary is limited to members of the ACTU Executive and to the ACTU's relevant senior industrial and legal staff;
- information about this letter and the attached summary is not conveyed beyond the people described above; and
- that you seek the same commitments from any person having access to this letter and the attached summary in accordance with the above conditions.

I trust that providing this information will assist the ACTU to better understand the information and advice that informed the policy choices made in developing the Fair Work Act.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

Separation of judicial power

1. The Commonwealth Constitution requires a separation of the judicial power of the Commonwealth from the executive and legislative power of the Commonwealth. Section 71 (in Chapter III) of the Constitution confers the judicial power of the Commonwealth on the High Court, other federal courts and other courts invested by the Parliament with federal jurisdiction. Only the courts stipulated in s 71 of the Constitution can exercise the judicial power of the Commonwealth (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254).

2. An administrative tribunal or other administrative decision-maker (such as FWA) cannot exercise the judicial power of the Commonwealth, and a court cannot exercise non-judicial power.

3. The classic statement of what constitutes judicial power is that of Griffith CJ in *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357, where his Honour said:

> I am of the opinion that the words "judicial power" as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

4. Mason, Murphy, Brennan and Deane JJ said in *Fencott v Muller* (1983) 152 CLR 570 (referring to *Huddart Parker*):

> The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.

5. However, there is no clear dividing line between powers that are exclusively 'judicial', and so can only be conferred on a Ch III court, and those that are 'non-judicial'. The High Court has repeatedly acknowledged that it is practically impossible to give an exhaustive definition of judicial power (for example, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; *Brandy v HREOC* (1995) 183 CLR 245 at 257; *Pasini v United Mexican States* (2002) 209 CLR 246 at [51]).

6. In cases on the borderline of judicial and non-judicial power, courts have regard to a range of factors to assist in characterising a power as judicial or non-judicial. The following are some indications that a body is exercising judicial power:

   - the body determines existing rights and liabilities rather than creating new rights and liabilities. One of the factors seen to indicate the creation of new rights is the conferral of a wide discretion, especially a discretion involving public interest considerations;

   - the determination is binding, authoritative and immediately enforceable (i.e., it is not subject to an independent exercise of judicial power: see *Brandy v HREOC* (1995) 183 CLR 245);

- the determination is conclusive (e.g., it cannot be the subject of collateral attack: see *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [46]);
- the power is conferred on a court (*Pasini v United Mexican States* at [52]);
- the power has traditionally been exercised by a court (see *R v Davison* ((1954) 90 CLR 353 at 375, 381, 382; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627; *White v Director of Military Prosecutions* (2007) 235 ALR 455 at [45]-[51]).

7. An administrative decision-maker can form opinions on questions of legal entitlement in performing the decision-maker's administrative functions. For example, an industrial tribunal might need to form an opinion as to the award rights of the parties to an industrial dispute in order to arbitrate the dispute. However, it is clear that the administrative decision-maker cannot conclusively determine that a legal entitlement exists. (See *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 148-149.)

Judicial power in industrial context

8. Determining that past conduct is unlawful and granting remedies consequent on the unlawful conduct involves the exercise of judicial power. Imposing a penalty for breach of the FW Act or an instrument made under that Act (including the National Employment Standards (NES), a modern award or an enterprise agreement) would involve the exercise of judicial power. Ordering payment of compensation for the breach of the law or an instrument would also involve the exercise of judicial power.

Non-judicial power in industrial context

Private arbitration

9. Binding dispute resolution (such as arbitration) does not involve the exercise of judicial power if the parties agree to participate in that process (private arbitration). Determining disputes under a dispute resolution clause in a statutory employment agreement about matters arising under the agreement would not involve the exercise of judicial power, providing that the clause authorised binding dispute resolution.

Binding dispute resolution not determining existing legal rights

10. Binding dispute resolution (such as arbitration) does not involve the exercise of judicial power if it does not involve determination of existing legal rights.

11. Determining that legal rights should be created by making or varying an award on the basis of industrial policy and fairness does not involve determination of existing legal rights even where it involves rights in respect of past conduct or transactions. The determination involves creating, not enforcing, legal rights. (See *Re Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15; *Re Cram*.) Accordingly the AIRC and its predecessors have been able to determine, for instance, that an award should be varied to require payment of entitlements for past periods.

12. The outcome of the dispute resolution is 'binding' in the sense that it must ultimately be enforced in a court if a party to the dispute fails to comply. The outcome is therefore not immediately 'binding' in the same way as a determination made in the exercise of judicial power.

Non-binding dispute resolution

13. Non-binding dispute resolution (such as conciliation or mediation, including making non-binding recommendations) does not involve the binding determination of any existing legal rights and does not involve the exercise of judicial power (even if the parties are compelled to participate).

National Employment Standards and Modern Awards

14. The NES is a set of legislated minimum employment standards that cannot be varied other than by the Parliament. Modern awards establish minimum employment conditions in particular industries and occupations. The NES and modern awards are not made in settlement of disputes under the conciliation and arbitration power (Constitution, s 51(xxxv)) but are supported principally by the corporations power (Constitution, s 51(xx)) and State referrals of power (for the purpose of s 51(xxxvii) of the Constitution). Modern awards can be varied 4-yearly but there is otherwise only limited capacity for variation (e.g. to remove ambiguity, or where necessary to achieve the modern awards objective).

15. FWA is not in a position to settle disputes about the NES or a modern award by creating new rights. As the NES and modern awards are intended to provide minimum standards as a safety net for all employees, there would be policy difficulties associated with empowering FWA to decide (for example) that an employer need not pay annual leave or notice in lieu, or that additional hours are reasonable when they are not, simply because it would be fair between the parties.

16. Settling a dispute about the application of the NES or a modern award would involve determining existing rights and the exercise of judicial power. There would be no relevant difference between a determination directly enforcing an entitlement under the NES or a modern award and a determination as to an aspect of that entitlement, including an aspect involving a matter of judgment.

17. A statutory entitlement (such as entitlement under the NES or modern award) will be dependent on satisfaction of a range of criteria. For instance, a person's present entitlement under the annual leave NES will depend on determination of the following questions of law and fact:

- whether the employee is a national system employee;
- whether the employee is a casual or a shift worker;
- what period of service the employee has with the employer; or
- whether the employee has taken any annual leave.

18. Sometimes the criteria include matters involving a degree of judgment, such as reasonableness. For instance, a person's entitlement under the NES to be absent and to be paid on public holiday would depend on questions such as:

- whether the employee is a national system employee;
- whether the day was a public holiday within the meaning of the FW Act;

- whether the employer requested that the employee work; and
- whether the employer's request was unreasonable or the employee's refusal to work was reasonable.

19. A court could enforce these entitlements (e.g. impose a penalty for failure to make available a present entitlement to annual leave or to be absent and paid on a particular public holiday). In doing so, a court would determine the criteria in dispute between the parties for the purpose of the ultimate determination of the existing legal rights of the parties as to the entitlement.

20. In making these determinations, a court would exercise judicial power, whether or not this involved determination of a criterion such as reasonableness. In the same circumstances, a non-judicial decision-maker (like FWA) would also exercise judicial power.

Private arbitration of matters arising under NES and awards

21. It would be possible to give FWA jurisdiction to make binding determinations in settlement of disputes arising under the NES or a modern award where the parties agreed to this, either before or after the dispute arose.

Enterprise agreements

22. In *CFMEU v AIRC* (2001) 203 CLR 645 (the *Private Arbitration Case*), the High Court held that the *Industrial Relations Act 1988* had validly conferred on the AIRC the power to settle disputes about matters arising under certified agreements made under that Act. The parties were required to include a dispute settlement clause in the agreement. The Act did not require that arbitral powers be conferred on any person or body. The Act allowed the AIRC to approve a clause conferring powers on the AIRC. In the course of its judgment, the High Court said (at 658) that:

> Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.

23. The legislation considered in the *Private Arbitration Case* allowed the parties to agree to any form of dispute resolution clause (although the AIRC could determine only disputes over the application of the agreement).

24. FWA could be given jurisdiction to settle disputes about matters arising under an agreement where the parties choose to nominate FWA to resolve the dispute. To constitute private arbitration, FWA could only have the powers the parties chose to give it. The decision of the High Court in the *Private Arbitration Case* supports the view that, whether or not FWA's role involved the determination of existing legal rights, this would not involve the exercise of judicial power because the parties would

have agreed to submit their dispute to arbitration and to accept as binding the arbitrator's decision.

25. There is a further question about whether there is 'agreement' to an arbitral clause where the legislation gives the parties no choice – except as to whether to enter an enterprise agreement in the federal workplace relations system at all.

26. The High Court would probably not find that this involved 'agreement' to arbitration such as to allow the arbitrator to make a binding determination of the existing rights of the parties without exercising judicial power. There is an argument that the arbitrator's powers would be a matter of agreement because the parties would retain the option to make or not make a collective agreement at all. However, against this it would be argued that consent to arbitration would not be freely given if it is a condition of entry into an enterprise agreement. The difficulties attached to making collective agreements enforceable at common law mean that national system parties would, in practice, be compelled to enter agreements under the Act and would have no practical choice as to whether to accept binding arbitration. The Commonwealth could not be confident that the alternative view would prevail.

Attachment A

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