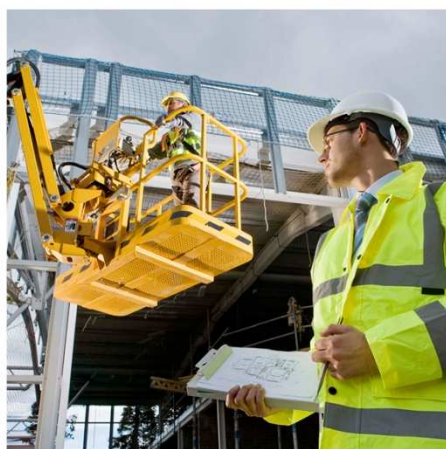


Removing the Barriers to Productivity and Flexibility

FEBRUARY 2012

SUBMISSION TO THE FAIR WORK ACT REVIEW



FAIR WORK ACT REVIEW

SUBMISSION OF THE AUSTRALIAN INDUSTRY GROUP

February 2012

FOREWORD

The Australian Industry Group (Ai Group) welcomes the Australian Government's decision to review the *Fair Work Act 2009* (FW Act) and the appointment of the Review Panel.

In this submission we argue that the Act should be changed to ensure it is providing the productivity gains that the Government foreshadowed when it was introduced. A closer alignment between the Act and the need for flexibility and productivity is required if Australia is to manage the considerable challenges it faces and if it is to take full advantage of the considerable opportunities that lie ahead.

The Australian economy is experiencing, and is set to continue to experience, major structural pressures that are giving rise to significant transformations both in individual businesses and across broad industries. In a relatively short space of time Australia has become a high cost economy compared to our major trading partners and international competitors due to the cumulative impacts of the high dollar, rises in input costs – particularly of energy, and a growing disparity in relative unit labour costs.

In the present circumstances the challenges these pressures present are particularly acute for non-mining trade exposed industries such as manufacturing, education and tourism as well as the growing range of service industries that are becoming increasingly trade-exposed. These industries are very large employers.

Adapting to these pressures and surviving and thriving in the face of these transformations requires Australia to reverse the fall in productivity that has occurred since the late 1990s and to secure ongoing improvements in productivity. Conversely, failing to reverse the slump in our productivity will leave us poorly equipped to cope with the substantial challenges we face and will leave Australia less well off and more vulnerable.

Gains in productivity require, among other things, flexible and effective workplace relations. However, on the basis of the real experiences of our Member companies in trying to implement and work within the Act, we present in this submission a body of evidence that shows that, in recent years, workplace flexibility has diminished and industrial disputation has increased markedly.

We are not asserting that workplace relations is the only contributor to productivity and competitiveness, but it is a major driver in its own right and is integral to successful adoption of other drivers of productivity. Workplace relations is a vital part of the economic and regulatory framework.

Some parts of the Act are working effectively but many are not. There is much common ground between the major industry groups on key problem areas and a shared view that the FW Act is hampering productivity growth, workplace flexibility and competitiveness.

Moreover, the *Fair Work* bargaining laws are less flexible and unions have much more power in the bargaining process than the laws implemented in 1993/94 when enterprise bargaining was first introduced into the federal workplace relations legislation. For example, nowadays unions can bargain and take industrial action over a much wider set of claims and agreement scope is no longer simply a matter to be bargained over; the scope for bargaining can now be imposed by Fair Work Australia (FWA). This is very inappropriate when Australian companies have never faced such fierce competition and cost pressures.

Since the FW Act was implemented, the Act has been thoroughly tested. Ai Group has done a great deal of the heavy lifting. In addition to representing our Member companies in a very large number of cases before individual FWA Members, Ai Group has pursued or intervened in 16 appeals¹ against FWA bargaining decisions dealing with critical principles under the Act. Individual Ai Group members have pursued a number of other appeals. The evidence is in; the FW Act has been found wanting in a number of important respects.

Ai Group argued when the FW Act was introduced that it would increase union power. This has occurred and, as Ai Group warned may happen, there has also been a discernible negative change in union culture and behaviour.

When the FW Act came into operation, union power was increased in over 100 areas. Such powers need to be wound back given the increased militancy of unions and the numerous instances where unions have used provisions of the Act to block or disturb lawful and fair workplace arrangements which were supported by the employer and the majority of its employees.

In this submission, Ai Group proposes a series of changes to the FW Act which would remove barriers to productivity growth and workplace flexibility, whilst at the same time preserving fairness for employers and employees. Key proposals include:

1. The 'permitted matters' for enterprise agreements need to be defined in accordance with the High Court's decision in the *Electrolux*² case, and agreements must not be able to include any other terms. Along with this, the 'unlawful terms' need to be more tightly defined and the list needs to be expanded to include terms which impose restrictions on outsourcing, contractors or on-hire arrangements.
2. A voluntary bargaining system, as was in operation for 15 years between 1993/94 and 2009 needs to be reintroduced. In such a system, majority support determinations, bargaining orders and scope orders are not necessary.

¹ These include cases involved Woolworths, Dunlop Foams, TriMas, Airport Fuel Services, McDonalds, Power Projects International, Armacell, Direct Paper Supplies, Downer EDI, Philmac, JJ Richards, the Graham Group, ADJ Contracting (FWA Full Bench appeal against SDP Acton's decision), Moyle Bendale Timbers, Thiess (in this matter Ai Group sought to intervene and filed comprehensive submissions but was ultimately refused intervention after arguments at the hearing) and ADJ Contracting (Full Federal Court appeal against FWA Full Bench decision).

² *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40.

3. If the Act is to continue to require that an employer bargain where the majority of employees want an enterprise agreement, the provisions relating to majority support determinations need to be amended to address some key problems which are occurring. Secret ballots should be required to determine majority support, both employer and employee bargaining representatives should be permitted to apply for a determination, and employers should be permitted to re-test the support of the employees for a collective agreement after protracted bargaining.
4. To improve certainty, consistency and the ability of employers to manage their businesses, section 255 should be expanded to include other key areas which cannot be the subject of an FWA bargaining order.
5. Scope orders should be abolished. The scope of an enterprise agreement is a matter to be bargained over, not a matter to be imposed on the bargaining parties.
6. The term '*genuinely trying to reach an agreement*' in subsection 413(3), which operates as a pre-condition to the taking of protected industrial action, should be defined to ensure that industrial action is a last resort.
7. A union should only be covered by an enterprise agreement if the agreement, as voted upon and approved by the majority of employees, specifies that the union is covered by the agreement.
8. Enterprise agreements between an employer and an individual employee should be allowed. The FW Act stretches the term 'enterprise agreement' to include agreements which potentially cover a large number of different enterprises, so the use of the term to cover an agreement between one employer and one employee at a single enterprise is not counterintuitive.
9. Unions currently have too much power to refuse to enter into a greenfields agreement for a new project unless all their demands are met. To address the power imbalance, greenfields agreements should be allowed between an employer and any union eligible to represent any employees on the project. Employer greenfields agreements should also be reintroduced.
10. The framework for the making of Individual Flexibility Arrangements (IFAs) under enterprise agreements and modern awards should be set out in the Act so that individual employees have access to flexible work arrangements that suit their needs, by agreement with their employer.
11. Given the Federal, State and Territory Governments' lack of progress over the past two years in agreeing upon a national long service leave standard, the Panel should recommend the implementation of an appropriate national standard. That standard should be the federal award standard of 13 weeks' leave after 15 years of service with pro rata leave available after 10 years. The national standard must override State and Territory long service leave laws. Also, enterprise agreements need to be able to override State and Territory laws.

12. Some important changes need to be made to the annual leave and personal / carer's leave provisions of the National Employment Standards to address problems which have been arising and to enable employers to more effectively deal with absenteeism.
13. The list of matters which are prohibited in awards should be expanded to reduce the risk of unproductive outcomes arising from the 4 yearly reviews. Over time the focus needs to be on reducing the level of regulation not adding to it.
14. The transfer of business laws are unworkable. They are impeding productivity, competitiveness and the restructuring of Australian businesses. They are also reducing employment and promotion opportunities for Australian workers. A series of important amendments must be made including restoring the High Court's 'character of the business test'.
15. The General Protections in the Act are poorly drafted and are operating extremely unfairly for employers. These laws need to be substantially revamped to address a raft of problems and to restore balance.

We are mindful that the Panel will receive submissions calling for more restrictions upon employers, wider arbitration powers for FWA and more union powers. Ai Group is very concerned that such calls could gain support and, indeed, in recent times the Government has introduced a number of workplace relations Bills into Parliament which, in further detracting from workplace flexibility and adding to the regulatory burden, would worsen rather than improve Australia's workplace relations arrangements.³ The experiences of many European nations which have implemented overly restrictive and unaffordable employment conditions highlight the hazards involved in these steps and in taking further steps down this path. It is vital that these claims are rejected by the Panel.

Ai Group is a leading national industry body representing employers in the manufacturing, construction, transport, automotive, food, information technology, telecommunications, labour hire, defence, mining equipment, aviation and other industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia and directly manages a number of those organisations. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

We were comprehensively involved in the development of the FW Act through our participation in the Government's Business Advisory Group, the National Workplace Relations Consultative Council and the Committee on Industrial Legislation (COIL)

³ These include: (1) the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* which would abolish the Australian Building and Construction Commissioner and reduce penalties for unlawful industrial action; (2) the *Road Safety Remuneration Bill 2011* which would establish a new Tribunal with sweeping new powers to set remuneration for employee drivers and contract drivers; and (3) the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* which would expand the rights of unions and workers in the TCF industry including union rights of entry.

and through our separate, extensive representational efforts. During the Government's consultation process, employers had little to gain and much to lose and Ai Group worked extremely hard to achieve a workable outcome for employers. Several parts of the legislation which we argued would be very problematic have proved to be so.

We have a long history of playing a constructive role in the development of fair and productive workplace relations laws in Australia.

Ai Group is well placed to provide input to the Review Panel in its important deliberations.



Heather Ridout
CHIEF EXECUTIVE

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EXECUTIVE SUMMARY

In this submission, Ai Group proposes a series of changes to the FW Act aimed at achieving a more productive, flexible and fair workplace relations system; one that is aligned with the economic challenges which Australia faces at this time, and one which will enable us to take full advantage of the opportunities which lie ahead.

1. Definitions

Amendments are needed to some key definitions in the FW Act given problems which have occurred since the Act was introduced:

- The definition of ‘objectionable term’ needs to be tightened because it has been interpreted by a Full Bench of FWA as not covering a clause in an enterprise agreement which required an employer to promote union membership amongst its employees.⁴
- The definition of ‘industrial action’ needs to be amended to reinstate the former reverse onus of proof for action taken based on a reasonable concern of the employees about an imminent risk to their health and safety. The former provision in the *Workplace Relations Act 1996* was aimed at stamping out bogus safety disputes which are still a problem in the construction industry.
- The definition of ‘service’ needs to be amended to address some problems which have arisen regarding the term ‘unpaid leave’.

2. Application of the Act and interaction with State laws

Some significant problems have arisen regarding the interaction of the FW Act with State and Territory laws. In some areas the Australian Government conceded too much power to State and Territory Governments during the development process for the FW Act, and these concessions have had a significant negative impact on those employers who have long been covered by the national workplace relations system and are now forced to comply with a complex web of overlapping and inconsistent federal, State and Territory laws.

One important area is long service leave. It is essential that employers be able to enter into enterprise agreements which override State and Territory long service leave laws. This flexibility has been available since enterprise bargaining was introduced in Australia in the early 1990s, and it should not have been substantially removed in the FW Act.

⁴ *The Australian Industry Group v ADJ Contracting Pty Ltd*, [2011] FWA 6684.

Forcing an employer to comply with a raft of inconsistent State and Territory long service leave laws, when the employer and its employees want to agree upon a single set of long service leave provisions via an enterprise agreement (or want to continue to apply the provisions that have been in place within their enterprise for many years) is costly and disruptive and makes no sense for employers or employees.

3. Requests for flexible working arrangements

Ai Group strongly supports the educative and facilitative nature of the right to request provisions in Part 2-2, Division 4 of the FW Act. An important feature of these provisions is that they encourages dialogue between employees and their employers about achieving meaningful flexibility in the workplace that works on both a personal level for the employee and an operational level for the employer.

This issue of whether compulsory arbitration should be available in respect of the right to request flexible working arrangements was heavily contested between employer groups and unions during the development of the FW Act. During the development of the NES, the Government announced that FWA would not be empowered to impose requested working arrangements on an employer.

4. Annual leave

The calculation of annual leave payments on termination under s 90(2) has been the subject of much debate and there are conflicting views between Ai Group, the Fair Work Ombudsman (FWO) and other stakeholders as to the subsection's correct interpretation. In Ai Group's view, it is logical to interpret s 90(2) as requiring payment at the base rate of pay for the period of the accrued leave. 'Base rate of pay' is defined in s 16 of the Act as excluding loadings. The Act should be amended to reflect this interpretation.

The mandatory content provisions for modern awards should be amended to require that annual leave cashing out provisions are mandatory content for all modern awards, subject to the safeguards in s 93. This would ensure that there are strong protections for employees whilst at the same time providing a legitimate mechanism for cashing-out should an employer and employee agree. Alternatively, ss 93 and/or 94 should be amended to enable award covered employees to cash out a portion of their annual leave by agreement in writing.

5. Personal/carer's leave

The following changes should be made to better enable employers to address absenteeism problems:

- Notice should be required to be given before the commencement of the work day wherever practicable, and if not then as soon as possible after;

- The requirement to provide ‘evidence that would satisfy a reasonable person’ should be replaced with a requirement to provide a certificate from a medical practitioner.

Some important changes also need to be made to the General Protections.

6. Long service leave

Given the Federal, State and Territory Governments’ lack of progress over the past two years in agreeing upon a national long service leave standard, the Panel should recommend the implementation of an appropriate national standard, based on the federal award standard of 13 weeks after 15 years of service with pro rata leave after 10 years.

It is essential that employers be able to enter into enterprise agreements which override State and Territory long service leave laws.

7. Public holidays

The Federal, State and Territory Governments should agree on consistent public holidays and then these should be reflected in the NES.

8. Notice of termination

The requirement under the NES to terminate employees in writing in all circumstances should be removed from the Act.

Provisions should be included in the NES requiring employees to give notice to their employer.

9. Modern awards

Most modern awards are operating effectively although there is still much work to be done in completely modernising these industrial instruments. We note that the terms of reference for the FW Act Review do not extend to the legislative provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which govern the 2 year review of modern awards which is underway.

The following important changes need to be made to the FW Act:

- Section 156 should be amended to ensure that any variation to modern awards as part of a 4 yearly review must be *necessary* to achieve the modern awards objective.

- Paragraph 165(2)(a) should be amended to enable variations made to modern awards under s 157 of the FW Act to have a retrospective operative date in exceptional circumstances.
- To prevent awards expanding over time and dealing with matters that should not be included in awards, the existing list of terms which must not be included in awards should be expanded.
- Annual leave cashing out provisions should be mandatory content for all modern awards, subject to the safeguards in s 93.

10. Flexibility terms in modern awards

While the intention of flexibility terms in modern awards was to offer employers and employees a workable alternative to Australian Workplace Agreements, Ai Group's experience is that relatively few employers have entered into Individual Flexibility Arrangements (IFAs) under award flexibility clauses. To implement a more workable framework for IFAs, s 144 of the FW Act should be amended to set out the framework for IFAs in the Act rather than this being a matter to be dealt with in an award clause:

- This framework should allow for IFAs to operate for defined nominal terms with a maximum term of four years. There should be no ability, unless agreed within the IFA, for unilateral termination prior to the expiry of the nominal term.
- The parties should have the ability to include a provision in the IFA which removes the right to take protected industrial action prior to the nominal expiry date.
- Section 144 should expressly provide that an IFA under a modern award can be offered as a condition of employment.
- As set out the section of this submission dealing with Part 3.1 – General Protections, a new s 341(6) needs to be inserted stating that a prospective employer does not contravene s 341(3) if an employer makes an offer of employment conditional on entering into an IFA with a prospective employee. The Note in s 341(3) also needs to be deleted.

11. Enterprise agreements

Enterprise agreement making is a central aspect of Australia's workplace relations system. A flexible, productive and fair agreement making system is a powerful and positive force for increased productivity, reduced disputation and positive relations between workers and employers. Unfortunately, there are several aspects of the *Fair Work* bargaining laws which are not operating effectively, particularly for employers and the Australian economy. These aspects need to be addressed without delay.

Arguments that employers are failing to take advantage of the bargaining provisions of the FW Act to increase productivity largely miss the point. Yes, there are occasions when employers and employees will want to negotiate specific provisions aimed at improving productivity but, more often, what leading employers want is legislation and industrial instruments which allow them to focus on productivity improvement every day. They want legislation and industrial instruments which do not impose barriers to productivity improvement such as clauses which impede outsourcing, or restrict the use of contractors, or prevent IFAs being negotiated with employees, and so on.

There is now overwhelming evidence that the *Fair Work* bargaining laws need some major amendments. Key changes which need to be made to the Act are:

- Only ‘permitted matters’ should be able to be included in an enterprise agreement and be the subject of protected industrial action.
- Permitted matters, should be defined as matters pertaining to the employment relationship consistent with the High Court’s *Electrolux* decision;
- ‘Unlawful terms’ should be defined to include:
 - A term which is not a ‘permitted matter’;
 - Clauses which impose restrictions on outsourcing, or the engagement of, or conditions for, independent contractors or on-hire workers;
 - A discriminatory term;
 - An objectionable term;
 - A term which requires or authorizes an official of a union to enter the premises of the employer covered by the agreement;
 - A term which requires the provision of information to a union about employees covered by the agreement, contractors or on-hire providers;
 - A term about unfair dismissal;
 - A term about industrial action.
- Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project;
- Employer greenfields agreements should be reintroduced.
- Statutory individual agreements should be reintroduced and become another type of ‘enterprise agreement’.
- The Act should be varied with the effect that a union is only entitled to be covered by an enterprise agreement if the agreement, as voted upon and approved by the majority of employees, specifies that the union is covered by the agreement.

- Where an FWA Member wishes to propose an undertaking, the Member should be required to make a finding that the agreement would not pass the better off overall test unless the undertaking is given and provide written details of the finding to the parties before an enterprise agreement is rejected. Such finding should be subject to appeal.
- Sections 202 and 203 of the FW Act should be amended to create a more effective framework for IFAs. Flexibility terms which detract from that framework need to be outlawed. The framework should:
 - Enable IFAs to be offered as a condition of employment to employees who will be covered by the enterprise agreement;
 - Not permit an IFA to be unilaterally terminated by one of the parties before the nominal expiry date of the enterprise agreement, unless the employer and the employee agree to include a provision in the agreement that permits unilateral termination;
 - Include the areas where agreement can be reached to vary the effect of the enterprise agreement in relation to the employee and the employer.
- The Model Term for Dealing with Disputes for Enterprise Agreements in Regulation 2.08 and Schedule 6.1 of the FW Regulations should be amended to remove the compulsory arbitration requirement.
- A voluntary bargaining system, as was in operation for 15 years between 1993/94 and 2009, needs to be introduced. In such a system, majority support determinations, bargaining orders and scope orders are not necessary. If the Panel does not support Ai Group's primary position that a voluntary bargaining system should be reintroduced, and is of the view that a compulsory bargaining system should be maintained, the following sections are relevant.
- Subsection 237(3) should be amended to require that a secret ballot be conducted by the Australian Electoral Commission to ascertain majority support if the employer is not prepared to accept the union's evidence in proceedings for a majority support determination.
- Section 236 should be amended to enable employee bargaining representatives and employer bargaining representatives to apply for a majority support determination. At present, only employee bargaining representatives can apply.
- A union should not be permitted to obtain a protected action ballot order without first obtaining a majority support determination, in circumstances where an employer has not agreed to bargain.
- Scope orders should be abolished. The scope of an agreement is a matter to be bargained over, not a matter to be imposed on the bargaining parties.
- In addition to the existing prohibitions, bargaining orders should not be able to:

- o require that an enterprise agreement with a particular scope be negotiated;
 - o prevent or delay the approval of a proposed agreement by the employees covered by the Agreement;
 - o require an employer to provide paid meetings or paid leave to employees involved in bargaining;
 - o prevent employers communicating with their employees about bargaining;
 - o prevent or delay the payment of a wage increase by an employer during bargaining;
 - o prevent employers introducing workplace changes during bargaining;
 - o require an employer to table a proposed enterprise agreement during bargaining.
- Serious Breach Declarations (ss 234 and 235) should be abolished.
 - Multi-employer enterprise agreements should be abolished. If such agreements are to be retained it is vital that the existing prohibitions on protected action continue.
 - Protected industrial action should not be permitted in the single interest bargaining stream. Protected action should only be available for the negotiation of an agreement for a single enterprise.
 - Compulsory arbitration should be removed from the low-paid bargaining stream.

A frequent complaint voiced by employers to Ai Group is the lack of consistency amongst FWA Members in the manner in which they deal with applications for the approval of agreements and other matters relating to the bargaining process. The amendments which Ai Group has proposed for the bargaining and agreement making laws would increase consistency and certainty.

12. Workplace determinations

Ai Group supports the availability of industrial action related workplace determinations under the FW Act where industrial action has been suspended or terminated under Part 3-3 of the Act. The requirements under s 275 that FWA must take into account 'the public interest' and 'how productivity might be improved in the enterprise or enterprises concerned' are very important.

Ai Group opposes low-paid workplace determinations. There is a legitimate role for FWA in assisting employers and employees in industries where workers are typically low-paid to negotiate enterprise agreements, but an outcome should not be arbitrated if agreement is not reached. Ai Group opposes bargaining related

workplace determinations which are available where a serious breach declaration has been made.

13. Minimum wages

There is a timing problem which needs to be addressed in Part 2-6 of the FW Act. Annual Wage Review decisions currently operate from 1 July each year but a more workable operative date would be 1 September. Under the current arrangements most employers who are required to pay the Annual Wage Review increase are forced to backpay their employees because there is insufficient time for them to be advised of the new wage rates and allowances in modern awards before 1 July.

If Ai Group's proposal is adopted, it would result in a one-off gap of 14 months between the operative dates of the two relevant Annual Wage Review decisions. No doubt the Minimum Wage Panel would take this into account in determining the level of wage increase in the year of implementation (ideally 2013).

14. Equal remuneration

Some important changes need to be made to the equal remuneration provisions of the Act given the looseness of the provisions, including:

- A requirement that FWA be satisfied that any unequal remuneration is as a result of gender based discrimination;
- Removal of the phrase '*comparable value*' throughout Part 2-7.
- Inclusion of a provision which identifies that the terms of an equal remuneration order cannot be made to operate beyond a single employer.
- Inclusion of a provision which requires FWA, prior to making any equal remuneration order, to consider whether enterprise bargaining is a more appropriate mechanism to resolve any wage inequality.

15. Transfer of business

a. When does a 'transfer of business' occur?

The transfer of business laws are imposing excessive and unworkable restrictions on employers. The laws have reinstated the concepts which caused so many difficulties for industry in the late 1990s, prior to a number of High Court and Full Federal Court decisions which resulted in settled, fair and productive laws. In fact the laws appear to be expressly designed to extinguish the principles embedded in the Courts' decisions and to impose the ill-conceived 'similarity of work' approach which was rejected by the Courts. Consistent with the High Court's decision in *PP Consultants*,⁵ the 'character of the business test' should be reinstated through amendments to s 311(1)

⁵ *PP Consultants Pty Ltd v FSU* [2000] HCA 59.

b. Transfer of assets

Subsection 311(3) should relate only to the transfer of the ownership of assets, not the use of assets. The existing provision is far too broad and creates widespread negative consequences and risks.

c. Outsourcing

In ss 311(4) and (5), the concept of 'outsource' needs to be clarified to avoid unintended consequences. Rather than 'outsourcing' relating to 'work', it should relate to a 'part of a business' which is much more tangible and certain concept.

d. Associated entities

Australia's workforce is increasingly mobile, both locally and globally. Under the transfer of business laws, an enterprise agreement applicable to the employee's employment with the first business would become binding upon the second business creating potentially widespread consequences for the company. For this reason, many employees are currently missing out on promotion and employment opportunities because the laws operate as a major disincentive to transfer employees between associated entities. Section 311(6) should be deleted from the Act.

e. FWA orders relating to transferable instruments

Applications for FWA orders are not being widely utilised to address transfer of business problems because of the costs and risks involved. While employers need to retain the ability to apply for FWA orders, such orders will be unnecessary in most circumstances if the laws are amended as Ai Group has proposed.

f. Non-transferring employees of the new employer

Section 314 is unfair upon the new employer and needs to be deleted. It is not appropriate for transferable instruments to cover employees who are not transferring employees.

16. Payment of wages

There is a significant drafting problem in Part 2-9 of the FW Act which is causing difficulties and risk for a large number of employers. Section 324 needs to be amended to permit any reasonable deductions to be made from an employee's pay.

17. General Protections

The General Protections are becoming an ever increasing burden on employers. The extremely wide scope and uncertain nature of the provisions has created substantial risks for employers and a major barrier to effectively managing their businesses. It is vital that changes are made to implement a more balanced regime which protects employees, employers and other persons from unlawful conduct.

a. Adverse action and workplace rights

With regard to ss 340, 360 and 361 of the FW Act, fairness to employers and workability needs to be restored through the following changes:

- In s 340, the term ‘*because*’ needs to be clarified to ensure that a person is only found to have taken adverse action against another person if the action is done consciously and with the intent of adversely treating that person because of a workplace right.
- Section 360 of the FW Act should be replaced with a provision reflecting a ‘sole and dominant reason’ test.
- Section 361 should be deleted, to restore an important principle of justice that a party making a claim bears the onus of proof.

b. Employer rights under the General Protections

The decision of a Full Bench of FWA in *Australian Industry Group v ADJ Contracting*⁶ has raised doubt about whether employers are entitled to the benefit of an industrial instrument, or simply just have obligations under such an instrument. The definition of ‘workplace right’ in s 341 of the FW Act should be clarified to ensure that it includes the rights, benefits and entitlements of employers under industrial instruments, workplace laws, etc.

c. Discretionary benefits and reasonable responses to industrial action

The nature of a discretionary benefit is that it is granted only at the discretion of the employer and is not an automatic entitlement. Section 341 of the Act should be amended to clarify that a discretionary benefit is not a ‘workplace right’. An employer should not be found to be engaging in adverse action if it exercises its discretion to grant or not grant a discretionary benefit.

d. Right to make a complaint or inquiry in relation to employment

The phrase ‘*in relation to his or her employment*’ in s 341(1)(c)(ii) is vague and uncertain. A broad interpretation of this phrase could allow a person to make a complaint about any matter with the most tenuous link to his or her

⁶ [2011] FWAFB 6684.

employment. An employee should not be protected from legitimate disciplinary action because the employee has made a complaint about the matter.

e. Reasonable employer responses to industrial action

Standing down an employee engaged in protected industrial action is appropriately excluded from the definition of adverse action. However, other reasonable employer conduct in response to protected industrial action is not excluded and thereby potentially captured by the General Protections. Subsection 342(4) should be expanded to include all lawful employer responses to protected industrial action.

f. Unlawful activities and the General Protections

In its current form, the definition of ‘engages in industrial activity’ in s 347 expressly includes certain types of unlawful industrial activity. Union delegates, union members and other persons should not be protected from disciplinary action if they encourage or engage in unlawful activity.

g. Discrimination

The anti-discrimination provisions should be removed from the FW Act, other than those provisions that have been in Federal workplace relations legislation for many years (e.g. the requirement that employees not be terminated for a discriminatory reason). Currently the area of anti-discrimination is overregulated by a complex web of overlapping and inconsistent Federal, State and Territory anti-discrimination and industrial laws.

h. Union nominated labour

Section 355 of the FW Act prohibits a person from coercing another to employ, engage, designate or allocate duties to a third person. This is an extremely important provision. In the construction industry it was common for employers to be forced by unions to employ highly militant individuals as full-time union delegates or OHS officers before the union would sign a project agreement for a new construction project. This type of behaviour is creeping back into the industry and s 355 is becoming increasingly important.

i. Sham contracting

The sham contracting laws are appropriate and effective, and should be retained in their existing form.

j. Exemptions from the General Protections

The *Workplace Relations Act 1996* and previously the *Industrial Relations Act 1988* excluded certain types of employees from pursuing an unlawful termination claim. It is not logical or fair that these same exemptions do not apply to General Protections applications relating to termination of employment. The absence of these exemptions encourages General Protections claims from employees who do not have access to unfair dismissal laws.

k. Time limits for lodging General Protections applications

Section 366 of the FW Act allows a claimant to make a General Protections application in relation to termination of employment within 60 days of the dismissal taking effect. The unfair dismissal provisions allow only 14 days to make a claim. There is no logical reason for this discrepancy between time limits. There was an almost 60 per cent increase in the number of General Protections applications involving dismissal between 2009–10 and 2010–11 which shows that the unfair dismissal laws are being undermined. The time limit in s 366 should be 14 days.

There is no limit on the time for making a General Protections application not involving dismissal. This leaves the door open for a person to make a claim in relation to alleged adverse action occurring years earlier. This is extremely unfair to employers. Similar to the proposed time limit for claims involving termination of employment, a time limit of 14 days should apply, calculated from the time the adverse action is alleged to have occurred.

l. General Protections proceedings

General Protections applications should be required to be lodged in the Federal Court or Federal Magistrates Court, rather than in FWA. This would limit the number of General Protections claims made that are without merit and are motivated only by a monetary settlement. The Court, with the support of the parties, would be able to order mediation before proceeding to a full hearing. By agreement with all of the parties, conciliation in FWA should also be able to be ordered by the Court.

It appears that some lawyers and paid agents are not discouraging claimants from pursuing speculative and spurious claims, and in fact are deriving significant income from such claims. The FW Act should include a civil penalty for lawyers or paid agents who are found to be in breach of s 376, similar to the former provision in the *Workplace Relations Act 1996*.

m. Remedies

The FW Act should be amended so that the remedies available to employees for a General Protections claim are the same as the remedies available under the unfair dismissal regime; that is, a cap on compensation of 26 week's pay.

18. Unfair dismissal

To improve the operation of the unfair dismissal laws the following changes should be made:

- The requirement to redeploy where reasonable in all the circumstances should be limited to redeployment only within the employer's enterprise.
- Small businesses, satisfying the definition under section 21 of the Act, should be exempt from the requirements of Part 3-2.
- The application fee for unfair dismissal applications is currently \$62.40. This fee is very low and should be increased to, say, \$150 to discourage speculative claims.
- Sections 401 and 402 of the Act should be tightened. This can be done by including a civil penalty for lawyers or paid agents who are found to be in breach of these sections. The former *Workplace Relations Act 1996* at s 680 included a similar provision in relation to unlawful termination claims.
- Lawyers and paid agents should be required to disclose any contingency fee arrangements they may have with the employee. This requirement was in the *Workplace Relations Act 1996* between 2001 and 2009 and should have been included in the FW Act.

19. Industrial action**a. Employee claim action**

Over the past year there has been a huge increase in the level of industrial action. A significant proportion of the industrial action relates to union claims which would have been prohibited under the *Workplace Relations Act 1996*. Paragraph 409(1)(a) is a critical provision which requires that for industrial action to be protected, it must be taken 'for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters'.

b. Pattern bargaining

The pattern bargaining laws are working effectively with one important exception which needs to be addressed. In *John Holland v AMWU*⁷, a Full Bench concluded that there is no requirement on a union which applies for a protected action ballot order to satisfy FWA that it is not pattern bargaining, as was a requirement under the *Workplace Relations Act 1996*. The decision means that, rather than pursuing arguments about pattern bargaining when a protected action ballot is applied for, employers need to pursue arguments about pattern bargaining at a later stage. Given that industrial action in pursuit of pattern bargaining is unlawful, employers should be able to pursue arguments about this at the ballot order stage. The sensible approach in the *Workplace Relations Act 1996* needs to be reinstated.

c. Employer response action / lock-outs

Employers' rights to take industrial action were substantially reduced under the FW Act. Employers are now only entitled to lock-out in response to employee / union industrial action. The unions and the Greens have announced their intention to pursue amendments to the FW Act to require that employers give three working days' notice of a lock-out. Ai Group strongly opposes such amendments. Lock-outs are not common but it is important that employers retain their right to lock-out without notice, in response to union industrial action.

d. Common requirements for industrial action to be protected

Subsection 413(3) has been problematic since the FW Act was implemented and two very important amendments need to be made.

Firstly, the term '*genuinely trying to reach an agreement*' in s 413(3) should be defined to ensure that industrial action is a last resort, by adding the following new paragraph:

- '(3A) *For the purposes of determining whether a person referred to in s 413(3) is genuinely trying to reach an agreement, the following factors are relevant:*
 - (a) *Whether the person has discussed with the other bargaining representatives, all of the terms which each of bargaining representative proposes for the agreement;*
 - (b) *Whether the person has provided information to the other bargaining representatives in support of each term which the person proposes for the agreement ;*

⁷ [2010] FWAFB 526.

- (c) *Whether the person has met on a sufficient number of occasions with other bargaining representatives to endeavour to reach agreement;*
- (d) *Whether the person has met, and is meeting, the good faith bargaining requirements;*
- (e) *Whether the person is pattern bargaining.'*

Secondly, in the *JJ Richards* case⁸ a Full Bench of FWA held that a party can be 'genuinely trying to reach an agreement' and hence can take protected industrial action even though bargaining has not commenced in one of the ways identified in s 173 of the FW Act. This problem should be addressed by amending s 413 to require that industrial action is not taken before the notification time in s 173.

e. Notice requirements for employee claim action

Under the FW Act a number of employers have been subjected to industrial action without any realistic ability to take defensive action to protect their business. Section 414(6) should be amended to require greater specificity regarding the nature and timing of industrial action.

f. Stop orders

The provisions relating to stop orders are extremely important to protect employers against unlawful industrial action. These provisions are generally working effectively.

g. Suspension or termination of protected industrial action

We strongly oppose any changes to s 424 which would reduce access to an order to suspend or terminate industrial action. This is a vital provision which is designed to protect the community from damaging industrial action. In circumstances where s 424 applies, the interests of the community outweigh the interests of bargaining parties. For this reason, it is not appropriate for FWA to be required to consider the motives or actions of bargaining parties in taking protected industrial action, as some parties have proposed. If the economy or the life, health, safety or welfare of the population is threatened by industrial action, the community needs to be protected regardless of the motives or actions of the bargaining parties.

Section 425 has been very important on occasions and it needs to be retained. One problem which has been identified is that an order suspending industrial action to allow for cooling off is only available for industrial action that 'is being engaged in'. Orders should be available where industrial action is 'being engaged in, threatened, impending or probable'. Similarly, s 426 is a very important

⁸ *JJ Richards v TWU* [2011] FWA 3377.

provision and orders suspending industrial action which is threatening to cause significant harm to a third party should be available where industrial action is 'being engaged in, threatened, impending or probable'.

It is important that the Minister retains the right under s 431 to terminate industrial action which is threatening to harm the Australian economy or the life, health, safety or welfare of the population. Even though the provision has never been used it may be needed in the future. If the need arises the Minister will need to act quickly. The President of the United States of America has a similar power.

h. Protected action ballots

An employer's right to be heard in proceedings relating to protected action ballots, should be confirmed in the Act.

Where an employer decides to appeal against a ballot order, justice dictates that FWA should be able to issue a stay order where it regards this as appropriate, applying the usual principles for the granting of such orders.

Consistent with the *Workplace Relations Act 1996*, applications for a protected action ballot order should not be permitted prior to the nominal expiry date of an enterprise agreement.

With regard to the cost of ballots, under the *Workplace Relations Act 1996* applicants for a protected action ballot order were required to pay 20 per cent of the cost. This had the positive effect of reducing the incidence of unwarranted industrial action. Given the significant increase in industrial action under the FW Act, the Act should be amended to require that all ballots be conducted by the Australian Electoral Commission and that applicants for protected action ballot orders be required to pay 20 per cent of the cost.

When a ballot is conducted and industrial action is approved by the employees, the Australian Electoral Commission or other ballot agent should be required to advise the employer of the names of the employees who are able to take protected action, to enable the employer to identify any employees who take unlawful industrial action.

i. Payments relating to periods of industrial action

Division 9 of Part 3-3 outlaws strike pay, implements a minimum period for pay deductions where unlawful industrial action is taken on a day, recognizes the 'No Work, No Pay' Principle, and deals with payments to employees during periods when bans are imposed. Ai Group supports all of these provisions.

20. Right of entry

Unions have an important representational role to play and balanced right of entry laws are appropriate. The right of entry provisions were expanded significantly under the *FW Act* and some problems have arisen.

Firstly, it is important that the existing ‘unlawful term’ dealing with right of entry is tightened up in the Act.

Secondly, entry rights were expanded markedly under the *FW Act* and the Government introduced a system of representational orders to address demarcation problems which arose. These orders have not proved to be very useful in practice. To reduce the risk of demarcation disputes, a union should only have the right to enter a workplace where an enterprise agreement applies, to have discussions with employees, if the union is covered by the agreement. This was the situation which applied under the *Workplace Relations Act 1996*.

21. Stand down

Given the essential nature of stand-down provisions, it is not appropriate that employers be subject to industrial claims to limit their stand-down rights. For this reason, s 524(2) should be amended to prevent enterprise agreements and contracts of employment removing an employer’s right to stand down in the circumstances specified in s 524(1).

22. Compliance and enforcement

A number of appeals against FWA decisions have been determined by the Federal Court of Australia. A number of others are before the Court including an Ai Group appeal against the decision of a Full Bench of FWA in *The Australian Industry Group v ADJ Contracting Pty Ltd*⁹ which will be heard by the Full Federal Court in May. It is critical that s 570, which prevents costs being awarded against a party unless the party instituted the proceedings vexatiously or without reasonable cause etc, is retained. It is also critical to maintain the existing practice of Judges and Federal Magistrates not being permanently appointed to the Fair Work Division of the Federal Court or Federal Magistrates Court.

23. Appointment of FWA Members

FWA’s reputation will suffer unless the Government adopts a more balanced approach to appointing Members of FWA. The following approach is proposed:

- In addition to the existing practice of placing advertisements in newspapers, the Government should approach candidates with the right experience and qualities and canvass their interest in being appointed as a Member of FWA.

⁹ [2011] FWAFB 6684.

- Together with the existing practice of consulting State Governments and the Shadow Workplace Relations Minister, the Government should confidentially consult Ai Group, ACCI and the ACTU on proposed appointments.
- The Government should ensure that over time a roughly equal number of FWA Members with an employer and union background are appointed.

24. Fair Work Ombudsman

The Office of the Fair Work Ombudsman (FWO) carries out its functions in an effective and consultative manner.

The system of enforceable undertakings is a very worthwhile option. These undertakings are often fairer, less costly and more effective in securing compliance than prosecution, particularly where a party has not deliberately broken the law.

In addition to its role in ensuring compliance with awards and agreements, Ai Group supports the FWO's role in investigating and prosecuting those who take unlawful industrial action. It is in the interests of the whole community that industrial action laws are adhered to. The FWO's role in this area continues to be an important influence in reducing the incidence of unlawful conduct.

25. FWA powers when dealing with disputes

The provisions within Part 6-2 of the FW Act are extremely important and must not be changed to increase FWA's arbitration powers. These provisions clarify that FWA does not have the power to arbitrate under a dispute settling term in a modern award, enterprise agreement or contract of employment without the agreement of the parties, nor have the power to deal with disputes about whether an employer had 'reasonable business grounds' under ss 65(5) and 76(4). Granting FWA compulsory arbitration powers would impede workplace flexibility and the rights of employers to manage their businesses in an efficient manner. The Panel needs to reject the calls from unions and an array of special interest groups to increase FWA's arbitration powers.

26. Compliance with ILO Conventions

The Australian Government has provided a number of detailed reports to the International Labour Office (ILO) setting out the reasons why the FW Act complies with relevant ILO conventions, including the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (Convention 87) and the *Right to Organise and Collective Bargaining Convention, 1949* (Convention 98), *Equal Remuneration Convention, 1951* (Convention 100), *Discrimination (Employment and Occupation) Convention, 1958* (Convention 111), *Employment Policy Convention, 1964* (Convention 122), and *Tripartite Consultation (International Labour Standards) Convention, 1976* (Convention 144).

The social partners (Ai Group, ACCI and the ACTU) have been consulted in the preparation of these detailed reports.

Ai Group agrees with the Australian Government's view that the FW Act complies with Australia's international labour obligations.

Ai Group assumes that the Government has made its relevant reports to the ILO available to the Panel. If not, Ai Group would be pleased to provide further information to the Panel about these issues.

27. Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

It would appear that the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (FW TPCA Act) does not fall within the terms of reference for the Review. The definition of 'Fair Work legislation' in the terms of reference does not include this Act. There are some extremely important provisions in the FW TPCA Act relating to transitional instruments, interaction rules, modern industry awards, modern enterprise awards and other matters. In the event that the Panel decides to Review the FW TPCA Act, Ai Group requests an opportunity to express its views on key provisions.

28. Fair Work (Registered Organisations) Act 2009

Ai Group is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (FW RO Act). It appears that the FW RO Act does not fall within the terms of reference for the Review. In the event that the Panel decides to Review the FW RO Act, Ai Group requests an opportunity to express its views on the legislation.

29. The building and construction industry

Ai Group and the Australian Constructors Association (ACA) have made a separate submission relating to the operation of the FW Act in the building and construction industry. A copy of the Ai Group / ACA joint submission is included towards the end of this submission. It addresses a number of particularly important issues relating to the impact of the FW Act on the construction industry.

A PRODUCTIVE AND COMPETITIVE FUTURE

Introduction

The purpose of this section is to provide Ai Group's view of the economic context in which the FW Act is operating and in which it is set to operate over the next decade or so.

The current economic environment and the medium-term outlook are characterised by unusual uncertainty and upheaval.

Australia has undoubted strengths that proved to be of considerable importance during the Global Financial Crisis (GFC) and in many respects place us in an advantaged position to capitalise on the considerable opportunities that lie ahead.

Nevertheless, and in large part because of these strengths and advantages, we also face some very serious challenges over coming years. These challenges call for us to adapt to our relatively rapid emergence as a high-cost country and to manage a process of deep industrial restructuring without sacrificing the capabilities that are necessary for longer-term economic diversity and resilience.

To paraphrase Paul Krugman,¹⁰ our ability to meet Australia's challenges and take full advantage of emerging opportunities will depend not totally, but almost totally on our ability to increase our productivity. Yet Australia's recent productivity experience has been dismal.

We now require a national focus on lifting productivity, not only to make up for what has been called 'the lost decade' during which productivity growth has been next to negligible, but also to lay the foundations for ongoing productivity improvement in the years ahead.

Flexible and effective workplace relations that are simple to administer have a central role to play in lifting productivity growth in Australia and as such the FW Act is a critical part of the regulatory environment facing Australian employers and employees.

Of course productivity is multifaceted and its drivers also include investment, developing and adopting new technologies, building innovative cultures, improving and developing new goods and services, reconfiguring supply chains, reorganising business structures and building and acquiring new capabilities. These diverse drivers are not independent of workplace relations. In all cases realising the full potential of these other drivers depends on flexible and effective workplace relations.

¹⁰ Krugman, Paul (1992), *The Age of Diminished Expectations: US Economic Policy in the 1980s*.

The Global Economy

The global economy is facing unusual uncertainty and profound upheavals.

In recent months the uncertainty surrounding the road to recovery from the GFC has hung like the sword of Damocles over, not just the North Atlantic but the entire global economy. The United States is grinding out a very tentative recovery and the Euro area remains under the cloud of debilitating levels of public debt particularly in, though not limited to, Greece, Italy, Spain, Ireland and Portugal.

To some extent the post-GFC trauma is diverting attention from even more fundamental upheavals. Seismic shifts are underway as the established centres of global economic activity are being displaced by the emergence of new economic powers fueled by processes of industrialisation and urbanisation particularly in Asia. This fundamental transformation has been accelerated by the post-GFC malaise in the US and Western Europe.

Over recent years, the strength of the industrialisation and urbanisation process in China and other emerging economies has seen a phenomenal surge in demand for a range of mineral commodities. This is seeing unprecedented levels of investment in lifting existing capacity and developing new sources of supply. At present, however, the growth in demand continues to outpace rising supply and global prices remain very high.

The same processes are creating a rising wave of wealth and are rapidly swelling the ranks of the global middle class. The global economy is on the crest of an explosion in consumer demand for a wide range of goods and services.

The Australian Economy

These forces, particularly the rapid economic development of populous Asian countries, dominate the present and the prospects of the Australian economy.

In recent years, having dodged the worst of the GFC, the Australian economy has failed to secure the strong rebound that was expected at the time of the 2009-10 Budget. Even though the investment and income surge associated with the China-driven mining boom has returned with gusto, the domestic economy has been constrained by the combination of a number of factors.

- Ongoing reaction to the GFC including the caution and new parsimony of the household sector; the dampening impacts of the withdrawal of fiscal stimulus; a relatively swift rebound in interest rates; an increased risk aversion particularly in the finance sector; and renewed uncertainties stemming from the European sovereign debt crisis.
- Severe and disruptive weather and flooding.

- A substantial challenge to the competitiveness of large sections of the domestic economy as Australia has become a comparatively high-cost economy on the back of the strong dollar; higher input costs – including for energy; comparatively high interest rates; and a pattern of real wage increases not supported by productivity gains.

These factors have given rise to the ‘multi-speed economy’ in which, alongside the mining and mining-related engineering construction sectors for which growth is particularly strong on the back of very high prices, rapidly growing volumes and a massive pipeline of investment in additional capacity, much of the rest of the economy is either barely growing or not growing at all.

In the most recent Mid-Year Economic and Financial Outlook (MYEFO), the dimensions of the multispeed economy were outlined in the following terms:¹¹

‘Growth in the resources and resources-related parts of the economy — about 15 per cent of total GDP — is expected to exceed 10 per cent in both 2011-12 and 2012-13. In contrast, average growth in the remainder of the economy (outside of agriculture) is expected to remain very modest, with significant divergences in growth rates across sectors.’

The MYEFO also observed that:¹²

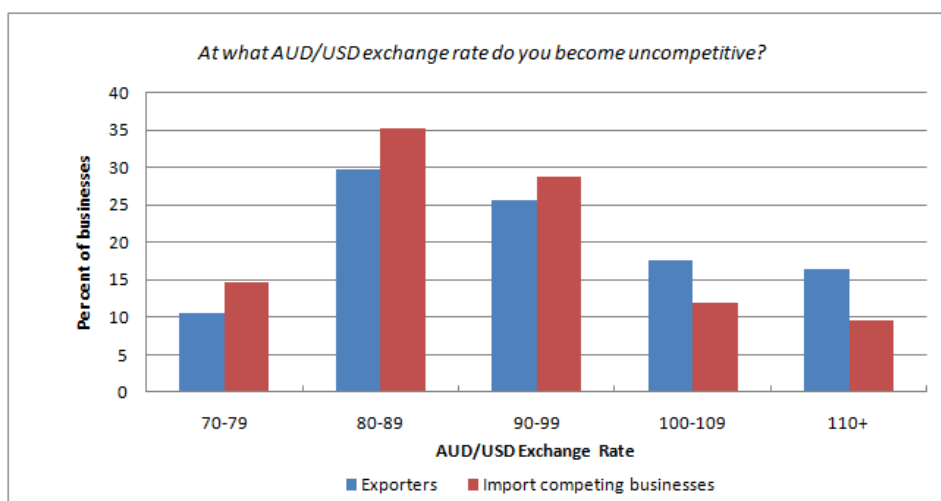
‘These divergent trends are set to continue through at least the next two years and probably longer.’

Particular vulnerabilities are evident in non-mining trade-exposed industries affected by the high dollar such as manufacturing, tourism, education services and a growing range of service industries where new levels of trade exposure are being felt.

In a recent survey of businesses in the manufacturing, services and construction sectors, Ai Group asked exporting and import competing businesses at what level of the dollar they became uncompetitive. The results are summarised in Chart 1.

¹¹ Australian Government, *Mid-year Economic and Fiscal Outlook 2011-12*, 29 November 2011.

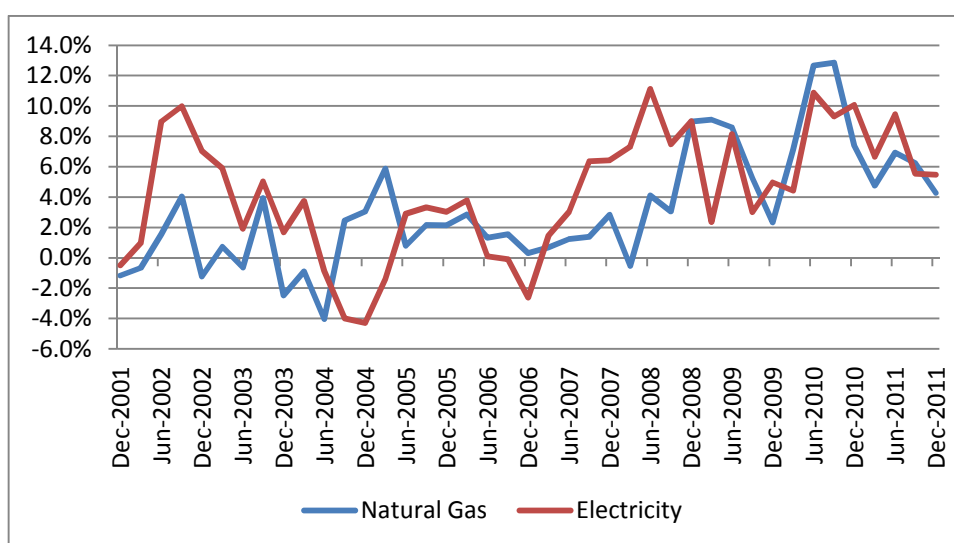
¹² Australian Government, *Mid-year Economic and Fiscal Outlook 2011-12*, 29 November 2011.

Chart 1: Impact of the Exchange Rate on Competitiveness

Source: Ai Group.

On average, exporting businesses reported that their products become uncompetitive at an AUD/USD exchange rate of 91 cents, while import competing businesses reported that their products become uncompetitive at an exchange rate of 87 cents.

While the strength of the domestic currency is a major factor, its impacts on trade exposed businesses are being exacerbated by high input costs particularly of raw materials. Rising energy costs are being felt across a wide range of industries with increases felt particularly keenly by trade-exposed industries both because of the extent of other pressures and because their ability to pass on additional costs is severely constrained by international competition. The extent of increases in electricity and natural prices paid by business in recent years is indicated in Chart 2.

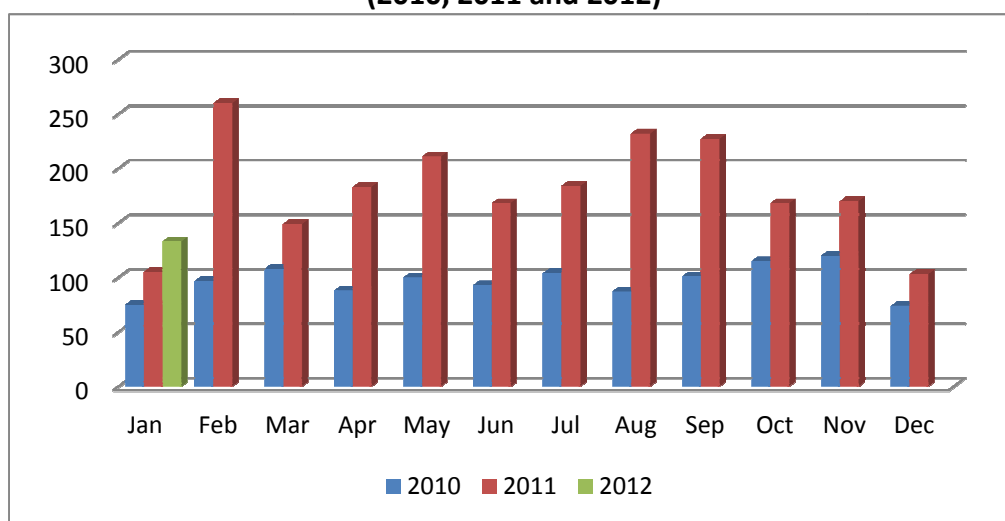
**Chart 2: Changes in Electricity and Natural Gas Prices Paid by Businesses
(Percentage change over previous year)**

Source: ABS, 6427.0 Producer Price Indexes December 2011.

As a result of the cumulative pressures on trade-exposed non-mining industries we are seeing a heightened pace of re-examination of business models, widespread restructuring and reorganisation and job losses.

A large proportion of Ai Group's membership is in trade-exposed sectors such as manufacturing. Among the services we provide is a telephone information service called BIZassistInfoline through which we provide members with on-the-spot advice. We record the subject matter of calls. As an indication of the competitive pressures faced by businesses, calls to BIZassistInfoline about redundancies escalated over the course of 2011 and indications are of a continuation of this escalation into 2012. The broad trends are set out in Chart 3.

Chart 3: Calls about Redundancies to Ai Group's BIZassistInfoline (2010, 2011 and 2012)



Source: Ai Group.

The pattern of calls on redundancies accords with ABS labour force data which shows that manufacturing sector employment fell by almost 75,000 between August 2009 and November 2011 representing a reduction of 7.3 per cent. The pace of job losses has tended to accelerate and in the year to the end of November 2011, the manufacturing workforce fell by 44,000 or by 4.4 per cent.¹³

Productivity

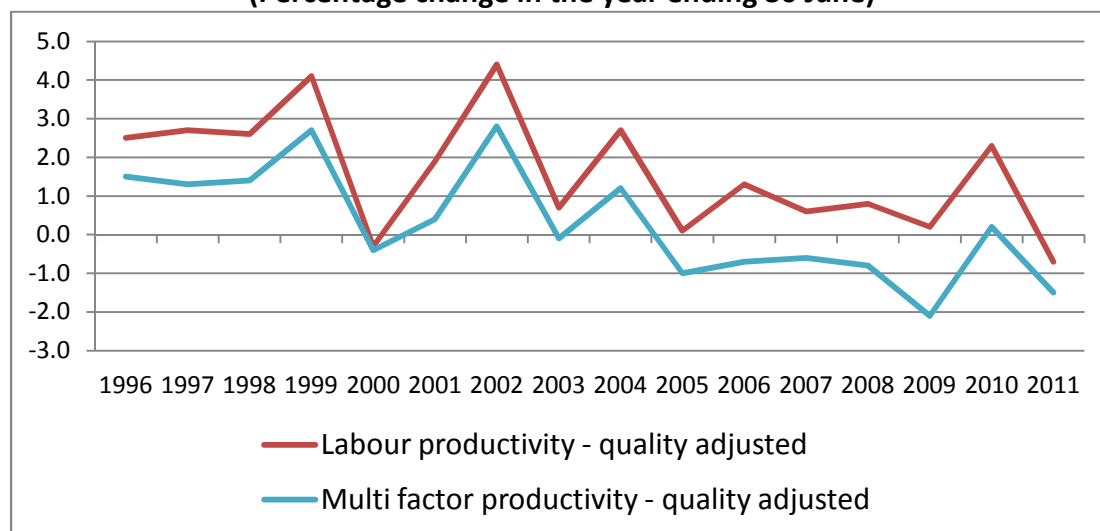
Improved productivity could have helped ameliorate the extraordinary array of forces challenging the competitiveness of large sections of the Australian economy. However, the opposite has occurred and the intensification of competitive pressures has been exacerbated by the very poor productivity performance across the economy over the past decade.

¹³ ABS, (6291.0.55.001), Labour Force, Detailed Quarterly, 15 December 2011.

The Chairman of the Productivity Commission has spoken of ‘the marked productivity slump’ in Australia so far this century.¹⁴ There is a considerable body of support for this view.

- In its most recent Annual Report¹⁵, the Productivity Commission noted that annual average multifactor productivity growth in the market sector over the most recent productivity cycle (2003-04 to 2007-08) was -0.3 per cent per year. While warning that annual figures not averaged over a productivity cycle can be misleading, it also noted that market sector productivity growth in 2008-09 was recorded at -2.4% and in 2009-10 +0.4%.
- In his work on the fall in Australia’s productivity, Saul Eslake has looked in particular at the suggestion that the deterioration in productivity has been concentrated in the mining and utilities sectors. He counters this view with sectoral analysis and concludes that ‘the slow-down in Australian productivity growth has been broadly-based rather than being largely the result of peculiar outcomes in a handful of industries.’¹⁶
- In a 2008 report¹⁷ based on research undertaken by Dr Barry Hughes, Ai Group pointed to the waning of productivity across most sectors since the late 1990s.
- The most recent ABS data illustrates the extent of the slowdown in market sector productivity growth.

**Chart 4: Annual Productivity Growth in the Market Sector
(Percentage change in the year ending 30 June)**



Source: ABS, 5204.0, Australian System of National Accounts.

¹⁴ Gary Banks, *Industry Assistance in a Patchwork Economy*, November 2011.

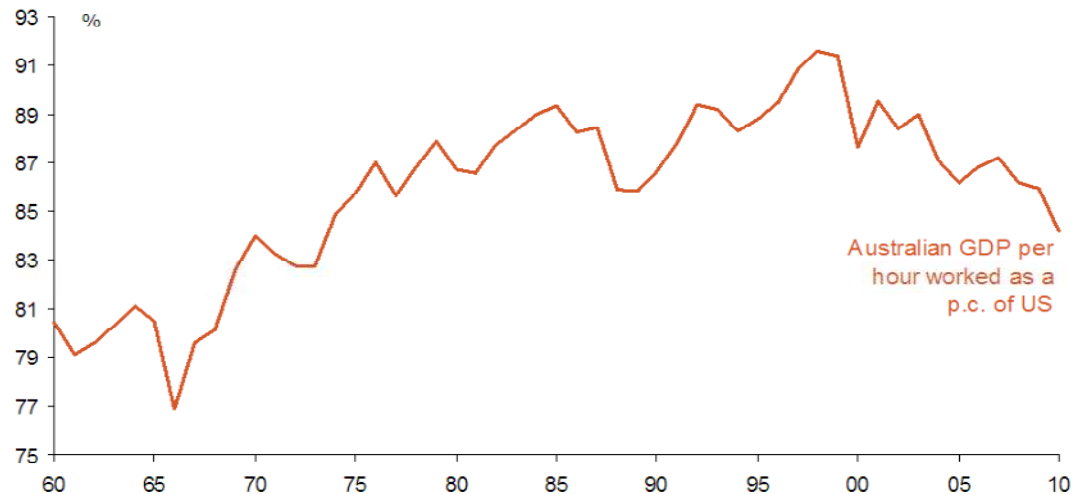
¹⁵ Productivity Commission, *Annual Report 2010-11*.

¹⁶ Saul Eslake, *Productivity*, RBA Conference, August 2011.

¹⁷ Ai Group, 2008, *How Fast Can Australia Grow? III*.

The fall in domestic productivity has eroded Australia's international competitiveness. This is evident in Chart 5 which compares real GDP per hour worked in Australia and the United States. It shows a marked erosion of competitive position in the first decade of the 21st century. This erosion has reversed the distinct catch-up in relative productivity evident from the 1960s to the late 1990s. The reversal over the past decade has taken Australia's relative productivity performance back to where it was in the mid-1970s.

Chart 5: Australian and United States Labour Productivity 1960 – 2010
(Australian GDP per hour worked as a percentage of US GDP per hour worked)



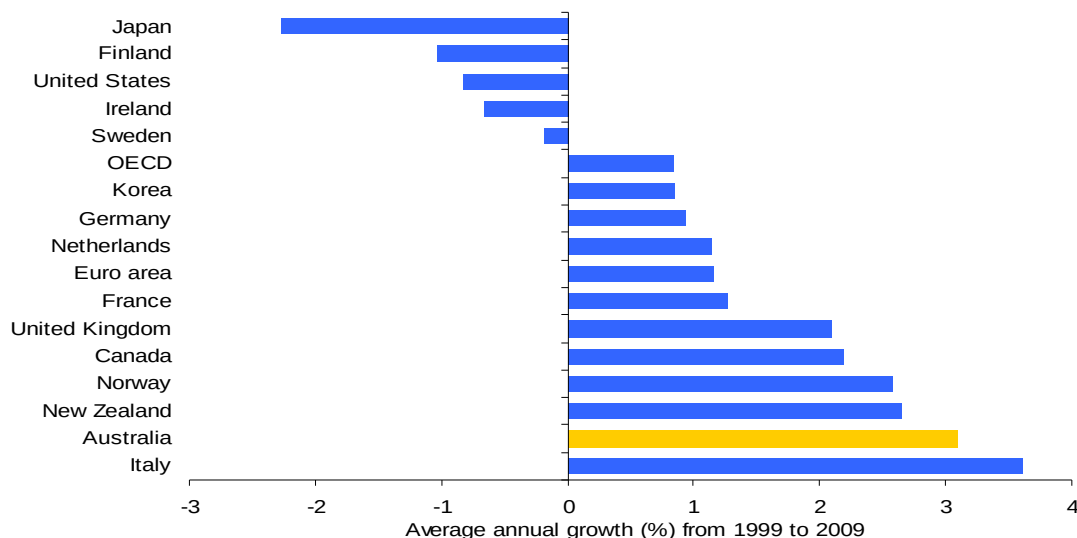
Note: Labour productivity here is real GDP (in 2010 US dollars) per hour worked.

Source: The Conference Board (2011).

Source: From Saul Eslake, *Productivity*, RBA Conference, August 2011

The slump in Australia's relative productivity performance and our competitiveness extends well beyond an Australia-US comparison and is apparent across a very wide range of countries. Chart 6 looks at changes in unit labour costs (a measure that incorporates productivity growth and changes in real wages) in a cross-section of OECD countries. It shows Australia's cost competitiveness falling substantially as a result of our relatively high pace of growth in unit labour costs

**Chart 6: Change in Manufacturing Unit Labour Costs in OECD Countries
1990-2009**



Source: US Bureau of Labor Statistics, 2010.

The relative cost competitiveness challenge and the importance of improving productivity is a very real issue for Australian industry. The Managing Director of an Ai Group member company recently reported that his organisation's plants in Asia make exactly the same products as the Australian plant, and make them to the same standards using workers with similar education and skills. The workers in Australia are paid up to 6-8 times what the Asian workers are paid, and the only way that the Australian plant is going to be able to close the gap is through higher levels of productivity and flexibility.

An important means of assisting companies to close the cost gap and to achieve higher productivity is to ensure that legislative provisions which promote productivity-destroying workplace practices are redressed.

Any country which freezes its workplace relations system in time and decides that no further improvements are desirable or necessary, will subject its citizens to low levels of productivity growth, reduced employment, reduced competitiveness, and harsh effects from globalisation.

It is vital that a productive, flexible and fair workplace relations system is maintained in Australia. No country can afford to persist with productivity-inhibiting features of its workplace relations system; least of all a country like Australia with such an open economy, relatively high wage costs and a high dollar.

A flexible and productive workplace relations system benefits employees, employers and the whole community. Australian employers need to remain lean, responsive and flexible if they are to remain competitive. Employees need flexibility to enable them to meet family responsibilities and lifestyle choices. The community needs flexible workplaces to achieve higher participation levels to cope with our ageing population.

The impact of the FW Act on productivity and flexibility – the views of employers

In August 2011 Ai Group conducted a comprehensive survey of our members to obtain their views on the FW Act. The survey results are set out in the attached report (*Annexure*).

The survey provides a good insight into the views and experiences of employers – large and small.

Firstly, about 80% of employer respondents said they were very concerned or somewhat concerned about the wage expectations of their employees over the next 12 months.¹⁸

Secondly, their views on productivity and flexibility were insightful.

Of those employer respondents who had experienced an increase in productivity since the FW Act came into operation, almost none attributed it to the FW Act.¹⁹ In contrast, of the employers who had experienced reduced productivity, nearly two thirds said that the FW Act was an important factor.²⁰ Similarly, of those employers whose workforce had become less flexible, over 80% said that the FW Act was an important factor in the loss of flexibility.²¹

The survey respondents were asked if they had made an enterprise agreement under the FW Act. Of those which had, 43 per cent reported that the agreement contained new restrictions.²²

It appears that the larger the company, the greater the barriers to productivity and flexibility imposed by the FW Act. 74% of large employers (500 or more employees) reported that the *Fair Work* bargaining laws had made it more difficult to negotiate flexibility or productivity improvements.

¹⁸ Survey report, Question 13.

¹⁹ Survey report, Question 24(b).

²⁰ Survey report, Question 24(c).

²¹ Survey report, Question 23(c).

²² Survey report, Question 9(b)(i).

These results point to two things. Firstly, in itself the FW Act has not delivered increased productivity or flexibility to Australian employers. Secondly, the Act has introduced barriers to productivity growth and labour flexibility which need to be addressed.

The FW Act has some positive aspects but there are some major problems which need to be addressed.

FW ACT CHAPTER 1 - INTRODUCTION

Chapter 1 deals with the Object of the Act, definitions and the application of the Act.

PART 1-1 – INTRODUCTION

For the reasons set out later in this submission, the Act needs to enable enterprise agreements to be reached between an employer and an individual employee.

Ai Group's survey on the Impact of the FW Act (***Annexure***) demonstrates that most employers want the FW Act changed to enable employers and individual employees to enter into a statutory agreement. Overall, 69 per cent of employers supported this flexibility being available.²³ The views were even stronger among large employers. Over 80 per cent of employers with more than 500 employees want the Act to be amended to permit some form of statutory individual agreement to be reached.

Accordingly, s 3(c) in the Object of the Act needs to be deleted.

Changes which need to be made:

- | |
|--|
| <ul style="list-style-type: none">• Delete s 3(c) of the FW Act. |
|--|

PART 1-2 – DEFINITIONS

Definition of 'objectionable term'

The definition of 'objectionable term' in s 12 of the Act is very important because an objectionable term is an 'unlawful term' for the purposes of s 194. A problem has arisen as a result of the change in the definition from the *Workplace Relations Act 1996* to the FW Act.

²³ Survey Report, Question 12.

The *Workplace Relations Act 1996* included the following definition of “Objectionable Provision” within Division 10 – Objectionable Provisions of Part 16 (sections 810 to 812):

- “(a) *a provision that requires or permits any conduct that would contravene this Part, or that would contravene this Part if Division 2 were disregarded;*
- (b) *a provision that directly or indirectly requires a person:*
 - (i) *to encourage another person to become, or remain, a member of an industrial association; or*
 - (ii) *to discourage another person from becoming, or remaining, a member of an industrial association;*
- (c) *a provision that indicates support for persons being members of an industrial association;*
- (d) *a provision that indicates opposition to persons being members of an industrial association;*
- (e) *a provision that requires or permits payment of a bargaining services fee to an industrial association.”*

(Underlined wording is not included in the FW Act)

As has occurred throughout many parts of the FW Act, previous legislative provisions have been streamlined without an apparent intention to change the meaning. Ai Group was of the understanding that this is what was intended with the definition of ‘objectionable term’. The Explanatory Memorandum for the *Fair Work Bill* states that:

“Clause 356 – Objectionable terms

1445. Clause 356 provides that a term of a workplace instrument, or an agreement or arrangement (whether written or unwritten), has no effect to the extent that it is an objectionable term. It is intended to broadly cover subsection 811(2) of the WR Act. Objectionable term is defined in clause 12 to mean one that requires or permits (or has the effect of requiring or permitting):

- *a contravention of the provisions of the Part; or*
- *the payment of a bargaining services fee.*

(Emphasis added)

Ai Group opposed the approval of the first enterprise agreement lodged for approval with FWA in accordance with a pattern agreement for the Victorian electrical contracting industry reached between the Communications, Electrical and Plumbing Union (CEPU) and the National Electrical and Communications Association (NECA). One of the clauses which Ai Group challenged stated that:

‘Union membership shall be promoted by the Employer to all prospective and current Employees’.

The clause would have clearly been an ‘objectionable provision’ under the *Workplace Relations Act 1996* and Ai Group argued in FWA that the clause was an ‘objectionable term’ under the FW Act. Ai Group’s argument was rejected by Senior Deputy President Acton ([2010] FWA 2380) and Her Honour’s decision was upheld on appeal (*The Australian Industry Group v ADJ Contracting Pty Ltd*, [2011] FWA 6684). An Ai Group appeal against the Full Bench’s decision will be heard by the Full Federal Court in May.

Clauses like the one in the CEPU / NECA pattern deal conflict with principles of freedom of association and need to be stamped out. Employees should not be subjected to their employer’s promotion of union membership to them. They should have a free choice. A legal requirement upon an employer, through the terms of an enterprise agreement, to encourage its employees to join a union cannot be aligned with encouragement in social contexts. Undoubtedly, many employees would feel pressure to join a union if their employer promoted union membership to them, particularly given their employer’s role in hiring, firing, promoting, rewarding, etc.

Definition of ‘workplace determination’

For the reasons explained in the section of this submission dealing with Part 2-5 – Workplace Determinations, low-paid workplace determinations and bargaining related workplace determinations should be abolished, and deleted from the definition of ‘workplace determination’.

Definition of ‘industrial action’

Under the *Workplace Relations Act 1996* (s 420) where employees sought to rely upon the exclusion from the definition of ‘industrial action’ for action taken based on a reasonable concern of the employees about an imminent risk to their health and safety, the onus of proof was on the employees.

Bogus safety disputes remain a problem in the construction industry (see the joint Ai Group and Australian Constructors Association submission, which appears later in this submission). The former reverse onus of proof needs to be reinstated.

Definitions of ‘service’ and ‘continuous service’

Section 22 of the Act is extremely important because it operates to determine when annual leave and personal/carer’s leave accrue. In Ai Group’s experience, employers and employees find the section difficult to interpret in some circumstances.

The term ‘unpaid leave’ for the purposes of s 22(b) needs to be clarified to avoid risk and uncertainty for employers in the following circumstances:

- where an employee is on unpaid parental leave under the NES, but the employee receives payments under the Government's PPL scheme;

(Note: the Government's PPL toolkit clarifies that annual leave and personal / carer's leave do not accrue on a period of Government funded paid parental leave)²⁴

- where an employee is on unpaid parental leave under the NES but receives payments from an employer under an employer paid parental leave scheme or an enterprise agreement;

(Note: the NES is a minimum standard and an employer is entitled to implement more generous entitlements. The fact that an employer chooses to do so by implementing a paid parental leave policy or by including paid parental leave terms in an enterprise agreement, should not automatically alter the leave accrual arrangements under the NES. The issue of whether or not annual leave and personal / carer's leave accrues when an employee receives payments under a company paid parental leave policy or enterprise agreement is typically set out in the policy or enterprise agreement).

- where an employee is absent from work but is being paid by an income protection insurance provider, the Transport Accident Commission or some other third party.

(Note: as held by Commissioner Roe in *Webster v Toni and Guy* [2010] FWA 4540, a payment from a third party does not result in 'unpaid leave' becoming paid leave for the purposes of s 22 of the FW Act. Despite this decision, some uncertainty remains).

Changes which need to be made:

- Define 'objectionable term,' in s 12 in the same terms as the definition of 'objectionable provision' in s 810 of the *Workplace Relations Act 1996*.
- Delete the references to low-paid workplace determinations and bargaining related workplace determinations from the definition of 'workplace determination' in s 12.
- In the definition of 'industrial action' in s 19, reinstate the former reverse onus of proof for action taken based on a reasonable concern of the employees about an imminent risk to their health and safety.
- Include a definition of 'unpaid leave' in The Dictionary in s 12 clarifying that 'unpaid leave' for the purposes of s 22 includes parental leave (regardless of whether the employee receives payments under the Government's PPL scheme or an employer scheme) and leave which is not paid by the employer regardless of whether the employee receives payments from another party.

²⁴ [http://www.centrelink.gov.au/internet/internet.nsf/filestores/fpr081_1107/\\$file/fpr081_1107en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/fpr081_1107/$file/fpr081_1107en.pdf) (see p.12)

PART 1-3 – APPLICATION OF THIS ACT

Some significant problems have arisen regarding the interaction of the FW Act with State and Territory laws.

In respect of general long service leave laws, portable long service leave laws and child labour laws the Australian Government conceded too much power to State and Territory Governments during the development process for the FW Act, and these concessions have had a significant negative impact on those employers who have long been covered by the national workplace relations system and are now forced to comply with a complex web of overlapping and inconsistent federal, State and Territory laws. These issues are discussed below.

State and Territory long service leave laws

It is essential that employers be able to enter into enterprise agreements which override State and Territory long service leave laws. This flexibility has been available since enterprise bargaining was introduced in Australia in the early 1990s, and it should not have been substantially removed in the FW Act. Forcing an employer to comply with a raft of inconsistent State and Territory long service leave laws, when the employer and its employees want to agree upon a single set of long service leave provisions via an enterprise agreement (or want to continue to apply the provisions that have been in place within their enterprise for many years) makes no sense for employers or employees. It is costly and disruptive.

It is common for enterprise agreements under the FW Act to contain long service leave provisions, because such provisions have usually been rolled-over from earlier agreements. However, the extent to which such provisions operate when they are inconsistent with State and Territory long service leave laws and where there are no ‘applicable award-derived long service leave terms’ or ‘applicable agreement-derived long service leave terms’ is subject to legal doubt and conflicting opinions.

The FW Act includes a mechanism under s 113 for a party to apply for an order that there are ‘applicable agreement-derived long service leave terms’ where:

- a workplace / enterprise agreement which was in operation on 31 December 2009 included long service leave terms which applied in more than one State or Territory; and
- the scheme was no less beneficial to the employees than the State and Territory laws which would otherwise apply.

To the best of Ai Group's knowledge, no employer has applied for or obtained such an order. Employers and their employees see no sense in being involved in potentially complex and expensive FWA proceedings in pursuit of an order when they simply want their agreement approved. A large number of employers have continued to include long service leave provisions in their FW Act enterprise agreements despite the fact that such provisions are inconsistent with State laws.

Originally Ai Group was of the view that long service leave provisions in an enterprise agreement could not override State and Territory long service leave laws where there were no 'applicable award-derived long service leave terms' or 'applicable agreement-derived long service leave laws'. This is the position that was adopted by a Full Bench of FWA in *Armacell*²⁵ in line with Ai Group's submissions in that case. It is also consistent with an earlier decision of Vice President Lawler (which was upheld on appeal) concerning the approval of the *University of New South Wales (Professional Staff) Enterprise Agreement 2010*.²⁶

However, upon closer analysis this interpretation may not be correct, at least in respect of long service leave laws like those in New South Wales and Victoria which are not incorporated within a general State industrial law.

This issue is canvassed in the following analysis of the interaction between the FW Act, the *Long Service Leave Act 1992* (Vic) (VIC LSL Act) and the *Construction Industry Long Service Leave Act 1997* (Vic) (VIC CILSL Act):

- Section 26 of the FW Act does not operate to exclude State long service leave laws, except where the long service leave provisions are incorporated within a 'general State industrial law' such as the *Industrial Relations Act 1999* (QLD). Accordingly, s 26 does not exclude the VIC LSL Act or the VIC CILSL Act.
- Section 27 is intended to 'save' certain laws which would otherwise be excluded by s 26. Section 27(1) states that 'Section 26 does not apply to a law of a State or Territory so far as...the law deals with any non-excluded matters'. Section 27(2)(g) includes as a non-excluded matter 'long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave'. Accordingly, s 27(2)(g) has no effect in respect of the VIC LSL Act and the VIC CILSL Act because these laws are not excluded under s 26, and s 27 only deals with laws which are a subset of those covered by s 26.
- If ss 26 and 27 do not apply to the VIC LSL Act and the VIC CILSL Act for the reasons outlined above then s 29 applies to such laws.
- Also, given that the VIC CILSL Act is not a law about long service leave (as determined by the High Court in the *Jemena* case²⁷), s 29 applies to this law.

²⁵ *Armacell Australia Pty Ltd and others* [2010] FWA 9985.

²⁶ [2010] FWAA 9588 and [2011] FWA 5163.

²⁷ *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33.

- Section 29(1) is similar to the provision in the *Workplace Relations Act 1996* which allowed enterprise agreements to override State laws.²⁸ Section 29(1) is subject to s 29(2). Section 29(2) states that an enterprise agreement applies subject to any State law *‘so far as it is covered by paragraph 27(1)(b), (c) or (d)’*. Section 27(1)(c) deals with the ‘non-excluded matters’ but, as already identified above, the ‘non-excluded matter’ in section 27(2)(g) can have no effect in respect of long service leave laws which are not covered by s 26. Further, the VIC CILSL Act is not a law about long service leave (as held by the High Court in the *Jemena* case) and therefore s 27(2)(g) has no relevance to this law and s 29 applies.
- Under s 55 of the FW Act, a provision in an enterprise agreement must not exclude the NES. The NES long service leave provisions only apply to ‘applicable award derived long service leave’ and ‘applicable agreement derived long service leave terms’. Accordingly, s 55 is not relevant where there are no ‘applicable award derived long service leave’ or ‘applicable agreement derived long service leave terms’ as would generally be the case for employers covered by the VIC LSL Act and the VIC CILSL Act
- Accordingly, it appears that s 29(1) applies to employers covered by the VIC LSL Act and the VIC CILSL Act and it is open to the employer to include a provision in an enterprise agreement which excludes these Acts without applying for an order for ‘applicable agreement derived long service leave terms’.

If the above analysis is correct, enterprise agreements are able to override State long service leave laws which are not included within a general State industrial law (e.g. the NSW long service leave laws and the VIC LSL Act). Enterprise agreements are also able to override laws which Courts have determined are not ‘laws about long service leave’ such as the VIC CILSL Act. However, enterprise agreements are not able to override State long service leave laws which are included within a general State industrial law (e.g. the QLD long service leave laws). Such an outcome is not logical. Why should employers in New South Wales and Victoria have access to sensible long service leave arrangements but not employers in Queensland?

Regardless of what the correct interpretation is of the existing provisions, the following changes are needed:

- The FW Act should be amended to implement a national long service leave standard (discussed later in the section of this submission dealing with Part 2-2 – The National Employment Standards);
- The national long service leave standard should oust the operation of State and Territory long service leave laws for employees covered by the FW Act;

²⁸ Section 17.

- The national long service leave standard should not contain a general exclusion for employers and employees covered by State and Territory portable long service leave schemes for the construction industry. The coverage of some of these schemes is extremely vague and problematic (e.g. the VIC CILSL) and the coverage typically creeps wider over time.
- The national long service leave standard should oust the operation of portable long service leave laws and schemes for employees other than those engaged in the ‘construction industry’ as defined in a legitimate manner, such as those employees covered by the *Building and Construction Industry On-site Award 2010*, as at 1 January 2010.
- Sections 26, 27 and 29 of the FW Act should be amended to allow enterprise agreements to override:
 - State and Territory general long service leave laws; and
 - State and Territory portable long service leave laws regardless of whether those laws are ‘laws about long service leave’ (refer to the High Court’s *Jemena*²⁹ decision).
- Until the national long service leave standard is implemented, amend s 193 of the Act to include relevant State and Territory long service leave laws as a consideration for the purposes of the better off overall test.

Child employment

Section 27(2)(e) of the FW Act preserves State and Territory laws dealing with ‘child labour’. In 2006, in a political response to the federal workplace relations legislative changes that year, some State Governments implemented laws requiring employers to provide conditions of employment to workers under the age of 18 which were at least equal to the conditions in the comparable state award and state legislation.³⁰ These laws remain in place and often conflict with the provisions in modern awards for juniors and apprentices. To address this problem, the FW Act needs to be amended to narrow the scope of the exclusion in s 27(2)(e). The exclusion should not apply to terms and conditions in the NES or a modern award.

Changes which need to be made:

- The FW Act should be amended to implement a national long service leave standard (discussed later in the section of this submission dealing with Part 2-2 – The National Employment Standards);
- The national long service leave standard should oust the operation of State and Territory long service leave laws for employees covered by the FW Act;

²⁹ *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33.

³⁰ Part 2A of the *Child Employment Act 2006* (QLD) and Part 2 of the *Industrial Relations (Child Employment) Act 2006* (NSW).

- The national long service leave standard should not contain a general exclusion for employers and employees covered by State and Territory portable long service leave schemes for the construction industry. The coverage of some of these schemes is extremely vague and problematic (e.g. the VIC CILSL) and the coverage typically creeps wider over time.
- The national long service leave standard should oust the operation of portable long service leave laws and schemes for employees other than those engaged in the ‘construction industry’ as defined in a legitimate manner, such as those employees covered by the *Building and Construction Industry On-site Award 2010*, as at 1 January 2010.
- Sections 26, 27 and 29 of the FW Act should be amended to allow enterprise agreements to override:
 - o State and Territory general long service leave laws; and
 - o State and Territory portable long service leave laws regardless of whether those laws are ‘laws about long service leave’ (refer to the High Court’s *Jemena*³¹ decision).
- Until the national long service leave standard is implemented, s 193 of the FW Act should be amended to include relevant State and Territory long service leave laws as a consideration for the purposes of the better off overall test.
- Replace s 27(2)(e) with the following wording:

‘(e) *child labour, except in relation to terms and conditions of employment to the extent that those terms and conditions are provided for by the National Employment Standards or may be included in a modern award.*’

FW ACT CHAPTER 2 – TERMS AND CONDITIONS OF EMPLOYMENT

PART 2-1 – CORE PROVISIONS FOR THIS CHAPTER

Part 2-1 sets out various core provisions for Chapter 2 including the interaction rules relating to the NES, modern awards and enterprise agreements. Ai Group has not identified any problems with this Part.

³¹ *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33.

PART 2-2 – THE NATIONAL EMPLOYMENT STANDARDS

Division 3 – Maximum weekly hours

We have not identified any problems with Part 2-2, division 3 of the FW Act.

Division 4 – Requests for flexible working arrangements

Ai Group strongly supports the educative and facilitative nature of the right to request provisions in Part 2-2, Division 4 of the FW Act. An important feature of these provisions is that they encourages dialogue between employees and their employers about achieving meaningful flexibility in the workplace that works on both a personal level for the employee and an operational level for the employer.

This issue of whether compulsory arbitration should be available in respect of a right to request flexible working arrangements was heavily contested between employer groups and unions during the development of the FW Act. During the development of the NES, the Government announced that FWA would not be empowered to impose requested working arrangements on an employer. For example, the following question and answer has been extracted from the Government's NES Discussion Paper (p.12):

'Can Fair Work Australia impose a flexible working arrangement on an employer?

*No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer."*³²

In Ai Group's submission in response to the NES Discussion Paper, we said:

"Ai Group supports the approach set out on page 12 of the NES discussion paper, whereby:

- The provisions of Division 3 of the NES are intended to encourage discussion between employers and employees;*
- Fair Work Australia would not have the power to impose any requested work arrangements upon employers.*

Such an approach is educative and is more likely to achieve positive outcomes than a heavy-handed prescriptive approach."

³² Department of Education, Employment and Workplace Relations, 'Discussion Paper - National Employment Standards Exposure Draft', 2008, http://www.workplace.gov.au/NR/rdonlyres/42FEBED0-4F5D-49C2-8826-39FA72C48BAF/0/NES_DiscussionPaperNESExposureDraft_Finalforweb_2_.pdf

During the Senate Committee inquiry into the *Fair Work Bill 2008*, Ai Group submitted:

‘Ai Group strongly supports s.44(2) which implements the Government’s public commitment to not expose employers to orders where they refuse a request for flexible work arrangements on reasonable business grounds.’

With regard to s 66 (State and Territory laws that are not excluded), the NES provides a comprehensive safety net of terms and conditions applying to all national system employees. Section 66 should be deleted.

Division 5 – Parental leave and related entitlements

As detailed in the section of this submission dealing with Part 1.2 – Definitions, there is some uncertainty regarding the definition of ‘unpaid leave’ in s 22 as it relates to periods of parental leave in some circumstances.

Division 6 – Annual leave

Payment of annual leave loading on termination

Section 90 of the FW Act specifies how annual leave is paid to an employee during a period of annual leave (s 90(1)) and on termination (s 90(2)).

The calculation of an annual leave payment on termination under s 90(2) has been the subject of much debate and there are conflicting views between Ai Group, the Fair Work Ombudsman (FWO) and other stakeholders as to the subsection’s correct interpretation.

In Ai Group’s view, s 90(2) needs to be read in conjunction with s 90(1). Subsection 90(1) specifies that when an employee ‘takes a period of paid annual leave’, the employee is entitled to be paid at the ‘base rate of pay’ for the employee’s ordinary hours of work. Section 90(2) refers to a ‘period of untaken paid annual leave’, and requires that the employee be paid the ‘amount that would have been payable to the employee had the employee taken that period of leave’. In our view, it is logical to interpret s 90(2) as requiring payment at the base rate of pay for the period of the accrued leave. ‘Base rate of pay’ is defined in s 16 of the Act as excluding loadings.

Modern awards and enterprise agreements are able to substitute and supplement the NES and thereby are free to specify that loadings are payable or not payable on accrued leave upon termination of employment. Where a modern award or enterprise agreement does not specify that a loading is payable on accrued leave on termination then, in our view, leaving loading is not payable.

The FWO has adopted a different view to the effect that s 90(2) requires that accrued annual leave payable on termination is calculated so as to include loadings. It expressly specifies on its website that the payment of annual leave loading on termination cannot be excluded by any term in a modern award, agreement or other instrument that may provide for a lesser benefit because it is a term of the NES.³³ This is particularly troublesome for employers whose employees are covered by a modern award or enterprise agreement that excludes the payment of annual leave loading on termination.

We disagree with the FWO's interpretation. To interpret s 90(2) in this way would conflict with the award modernisation decisions of FWA whereby clauses were inserted into a substantial number of awards stating that leave loading is not payable on termination of employment. Section 55(4) of the FW Act and the Award Modernisation Request required that the Tribunal not include a provision in a modern award unless satisfied that the provision was not detrimental to the employees covered by the award, when compared to the NES. It would set a dangerous precedent if s 90(2) was interpreted in way which causes a decision of a Full Bench of the Tribunal to have no effect because the Tribunal exceeded its jurisdiction.

Accordingly, it is imperative that s 90 of the FW Act is clarified to reflect the logical and true intent of the clause.

Subsection 90(2) of the FW Act should be amended as follows:

'If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee at the employee's base rate of pay for the period of the untaken paid annual leave ~~the amount that would have been payable to the employee had the employee taken that period of leave.~~

Sections 92, 93 and 94 – Cashing out of annual leave

The NES allows employees to cash out annual leave accrued beyond 4 weeks if that employee is covered by a modern award or enterprise agreement permitting the cashing out of annual leave (s 93) or by agreement with the employer if the employee is an award/agreement free employee (s 94).

Despite s 93, no modern awards contain terms permitting the cashing out of annual leave beyond 4 weeks. This means that award covered employees, by the failure of modern awards to include terms consistent with s 93 of the Act, are denied the right to enjoy this benefit.

³³ See <http://www.fairwork.gov.au/termination/final-pay/pages/default.aspx>

This issue is very important to many employers and employees. Many employers have expressed concern about the inability for them to lawfully cash out an employee's annual leave when requested by the employee. Cashing out of annual leave should not be excluded if both parties agree to arrangement.

Views expressed in writing by an Ai Group Member company:

'Provisions of the Fair Work Act disadvantage our employees. Specifically in reducing the opportunity to cash out long service leave and making it harder to cash out annual leave.'

The freedom to cash out accrued annual leave is an important employee benefit, intended to provide flexibility to employees.

The mandatory content provisions of Subdivision C of Division 3 of this Part should be amended to require that annual leave cashing out provisions are mandatory content for all modern awards, subject to the safeguards in s 93. This would ensure that there are strong protections for employees whilst at the same time providing a legitimate mechanism for cashing-out should an employer and employee agree. Alternatively, ss 93 and/or 94 should be amended to enable award covered employees to cash out a portion of their annual leave by agreement in writing.

Division 7 – Personal/carer's leave and compassionate leave

Section 107 – Notice and evidence requirements

An employee that has provided notice to his or her employer of the taking of any personal/carer's leave (paid or unpaid) or any compassionate leave, must give the employer, if the employer so requires, evidence that would satisfy a reasonable person that the leave is or was taken for a permissible purpose.³⁴

It has been the experience of some of Ai Group's members that absenteeism has increased since the commencement of the FW Act and it has been more difficult to discipline employees for failing to provide reasonable evidence to justify the taking of personal/carer's leave because of the General Protections in Part 3-1 of the Act. Tightening up the notice and evidence requirements would assist employers deal with absenteeism problems in their workplace. The following changes should be made:

- Notice should be required to be given before the commencement of the work day wherever practicable, and if not then as soon as possible after;
- The requirement to provide 'evidence that would satisfy a reasonable person' should be replaced with a requirement to provide a certificate from a medical practitioner.

³⁴ Section 107 of the *Fair Work Act*; also see section 97 in respect of paid personal/carer's leave, subsection 103(1) in respect of unpaid carer's leave, and subsection 105(1) in respect of compassionate leave.

Division 8 – Community service leave

We have not identified any problems with Part 2-2, division 8 of the FW Act.

Division 9 – Long service leave

A national long service leave standard

Given the Federal, State and Territory Governments' lack of progress over the past two years in agreeing upon a national long service leave standard, the Panel should recommend the implementation of an appropriate national standard.

A national long service leave was a feature of the Labor's *Forward with Fairness Policy* in 2007:

"10. Long Service Leave

As part of its commitment to national industrial relations laws, Labor will work with the States to develop nationally consistent long service leave entitlements. In the transitional period, Labor's guaranteed entitlement to long service leave will reflect the long service leave arrangements currently contained in State laws or federal awards and federal agreements. Under Labor, long service leave entitlements accrued under these arrangements will be protected in the transition to nationally consistent long service leave entitlements so Australian employees are not disadvantaged."

Unfortunately, this did not translate into the FW Act and we now have a far more complex and inflexible set of arrangements for long service leave than has ever existed. The Discussion Paper to the NES Exposure Draft foreshadowed the Government's objective to engage in discussion with the States and Territories to develop a national long service leave standard.³⁵ This was in 2008. It is clear that discussion on this issue is moving very slowly as the Workplace Relations Ministers Council only announced its commitment to develop a national standard in August 2011.³⁶

It is imperative that an appropriate national long service leave standard is developed and implemented without any further delay. It is our view that the standard should reflect the conditions and entitlements of the standard federal long service leave provision, being 13 weeks long service entitlement after 15 years of service (pro-rata after 10 years). It is appropriate that this standard is adopted as it was used to

³⁵ NES Exposure Draft Discussion Paper, para 233.

³⁶ WRMC Communiqué 85, 10 August 2011, <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/10Aug2011.pdf>

determine the national redundancy pay standard in the 2004 *Redundancy Case*,³⁷ which is now largely reflected in the NES redundancy pay entitlement.³⁸ Features of a national long service leave standard should include the ability to cash out long service leave by agreement in writing between the employer and an individual employee, and the ability to take long service leave in any number of periods which are agreed.

Only service in Australia should be counted for the purpose of the national standard. It is important that this is specified given Australia's increasingly mobile workforce.

Also, in the section of this submission dealing with Part 1.3 of the FW Act, we explained that it is essential that employers be able to enter into enterprise agreements which override State and Territory long service leave laws.

Division 10 – Public holidays

The public holiday arrangements in Australia are extremely unsatisfactory for employers with a great deal of inconsistency between States and Territories. The NES does not address this problem but rather leaves States and Territory Government's free to decide what original days, additional days, substitute days will be declared, and on what dates.

The Federal, State and Territory Governments should agree on consistent public holidays and then these should be reflected in the NES.

Division 11 – Termination and redundancy

Subsection 117(1) requires that an '*employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination*'.

This provision is causing some problems in practice. It was not a requirement of the *Workplace Relations Act 1996* and it has increased red tape for employers and exposed them to risks when defending unfair dismissal claims. The requirement should be removed from the Act.

Also, provisions should be included in the NES requiring employees to give notice of termination to their employer.

³⁷ See the *Redundancy Case*, Decision PR032004, Giudice J, Ross VP, Smith C and Deegan C, 26 March 2004 and *Redundancy Case Supplementary*, Decision PR062004, Giudice J, Ross VP, Smith C and Deegan C, 8 June 2004.

³⁸ See Part 2-2, Division 11, Subdivision B of the FW Act.

Changes which need to be made:

- Amend s 90(2) in the following manner:

“If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee at the employee’s base rate of pay for the period of the untaken paid annual leave ~~the amount that would have been payable to the employee had the employee taken that period of leave.~~”
- The evidence and notice requirements for personal / carer’s leave should be tightened to assist employers to deal with absenteeism problems.
- Given the Federal, State and Territory Governments’ lack of progress over the past two years in agreeing upon a national long service leave standard, the Panel should recommend the implementation of an appropriate national standard, based on the federal award standard of 13 weeks after 15 years of service with pro rata leave after 10 years.
- It is essential that employers be able to enter into enterprise agreements which override State and Territory long service leave laws.
- The Federal, State and Territory Governments should agree on consistent public holidays and then these should be reflected in the NES.
- The requirement to terminate employees in writing in all circumstances should be removed from the Act.
- Provisions should be included in the NES requiring employees to give notice of termination to their employer.

PART 2-3 – MODERN AWARDS

Ai Group devoted massive resources to the process of award modernisation conducted by the Australian Industrial Relations Commission (AIRC). This process resulted in the creation of 122 modern awards which commenced operation on 1 January 2010.

Most modern awards are operating effectively although there is still much work to be done in completely modernising these industrial instruments. Also, some employers have been subjected to very substantial increases in labour costs. For example:

- Employers in the glass industry have been subjected to an afternoon shift penalty which increased from 15 per cent to 50 per cent and many other cost increases and inflexibilities; and

- Employers in the fast food industry in some States have had to pay much higher penalty rates on weekends.

These cost increases are being phased-in through the transitional provisions but are still causing great difficulties for employers in the industries affected given the magnitude of the increases. In the case of the glass industry, the result has been the importation of more overseas glass and the winding back of local production and employment at some of the businesses.

We note that the terms of reference for the FW Act Review do not extend to the legislative provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which govern the 2 year review of modern awards which is underway. Ai Group intends to make a series of applications to FWA to vary awards, as part of the award review.

It is important that modern awards provide a stable, fair and consistent safety net of conditions for employers and employees. Section 157, which generally only allows for a variation to a modern award where such variation *'is necessary to achieve the modern awards objective'*, must be retained to ensure this certainty. Equally, the modern awards objective in s 134 is critical and must be retained.

In this regard Ai Group has identified an important and perhaps unintended omission within the provisions relating to the performance of FWA's functions as part of the 4 yearly reviews of modern awards. Subsection 134(2) requires that the Tribunal perform all of its functions under Part 2-3 in accordance with the modern awards objective, which would include the 4 yearly reviews. However, the FW Act contains no reference to the requirement that a variation made during a 4 yearly review can only occur if it is necessary to achieve the modern awards objective.

Given the tight and sensible constraints placed on variations to modern awards in all other circumstances, it would be incongruous if during the 4 yearly reviews variations which were not necessary could be made. Section 156 of the FW Act should be amended to ensure that any variation to modern awards as part of a 4 yearly review must be necessary to achieve the modern awards objective.

Retrospective variations in exceptional circumstances

Section 165 expresses the date when any determination varying a modern award can come into operation. Retrospective variation is only available where the determination is made under s 160 (which deals with variations to remove an ambiguity or uncertainty, or to correct an error).

The ability for FWA to make a determination which is retrospective in operation should be broadened to include applications under s 157. The restriction within section 165(2)(b) that a retrospective variation can only be ordered by FWA if *'FWA is satisfied that there are exceptional circumstances that justify specifying an earlier day'* is sufficient protection to ensure that such provisions will not be abused or

unduly disrupt the safety net. If circumstances exist that are exceptional and justify a retrospective variation to a modern award, it is important that FWA is not precluded from making such a determination merely because the basis of the application is not the correction of an error, or to remove ambiguity or uncertainty.

Terms of modern awards

Subsection 136(1) states that modern awards may only contain terms that are permitted or required by various sections of the FW Act. Subdivision D of Division 3 of Part 2-3 of the Act specifies various terms which must not be included in awards including objectionable terms (s 150), terms about payments and deductions for the benefit of employers (s 151), terms about right of entry (s 152), terms that are discriminatory (s 153), terms that contain State-based differences (s 154) and terms dealing with long service leave (s 155). This list should be expanded to include:

- Terms which impose restrictions or limitations on outsourcing, or the engagement of independent contractors or on-hire workers;³⁹
- Terms which require the provision of information to unions about the employees covered by the award, or about contractors or on-hire providers;
- Terms which include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;⁴⁰
- Terms which restrict or hinder the efficient performance of work;⁴¹
- Terms which have the effect of restricting or hindering productivity, having regard to fairness for employees;⁴²
- Conversion from casual employment to another type of employment;⁴³
- The number or proportion of employees that an employer may employ in a particular type of employment;⁴⁴
- Prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;⁴⁵
- Maximum or minimum hours of work for part-time employees;⁴⁶
- Stand-down provisions.⁴⁷

³⁹ A largely similar provision was included in s 515(1)(g) and (h) of the *Workplace Relations Act 1996*.

⁴⁰ This is based on s 143(1B) of the *Workplace Relations Act 1996* (as it existed up to 27 March 2006).

⁴¹ This is based on s 143(1B) of the *Workplace Relations Act 1996* (as it existed up to 27 March 2006).

⁴² This is based on s 143(1B) of the *Workplace Relations Act 1996* (as it existed up to 27 March 2006).

⁴³ An identical provision was included in s 515(1)(b) of the *Workplace Relations Act 1996*.

⁴⁴ An identical provision was included in s 515(1)(c) of the *Workplace Relations Act 1996*.

⁴⁵ An identical provision was included in s 515(1)(d) of the *Workplace Relations Act 1996*.

⁴⁶ An identical provision was included in s 515(1)(e) of the *Workplace Relations Act 1996*.

⁴⁷ During the award modernisation process the AIRC decided that stand-down provisions would not be included in modern awards. See [2008] AIRCFB at para [33].

Despite the substantial progress made during the award modernisation process, awards are still very detailed and complex. Over time the focus needs to be on reducing the level of regulation not adding to it. The addition of the above requirements will assist this process and reduce the risk of unproductive outcomes from the 4 yearly reviews.

Flexibility terms

In performing its award modernisation functions the AIRC was required to include in all modern awards a flexibility term. At the time when the provisions of the model award flexibility term were being considered by the AIRC the legislative regime in which modern awards would operate had not been released. This circumstance caused the AIRC in its decision⁴⁸ on the terms of the model flexibility term to state:

'[192] The model clause will not commence to operate before 1 January 2010. It is not possible to be certain about the award and legislative environment in which the clause will operate. While it is anticipated that the award modernisation process will have been completed, the content and scope of the awards is yet to be decided. In addition the details of the workplace relations system which will be operating at that time are also uncertain. While the Government has given indications of its policy on many matters the legislative process has barely begun. For a number of reasons, it is obviously desirable that there be a review of the operation of the model flexibility clause after it has been operating for a reasonable period. This review would provide an opportunity to assess whether the clause has achieved its purpose of providing flexibility to meet the genuine individual needs of employers and employees. An important related issue for consideration would be whether the provision has provided sufficient protection from disadvantage for employees. The experience of employers, employees and unions would be extremely helpful in such a review as would the views of the authority responsible for ensuring the observance of modern awards.'

When the legislative provisions relating to modern award flexibility terms were developed, the provisions essentially reproduced the approach determined by the AIRC. This approach included a requirement that an individual flexibility arrangement (IFA) could only apply to those terms which are specified in the flexibility term of the modern award (s 144(4)(a)) and that the IFA could be terminated unilaterally by the giving of 28 days' notice (s 145(4)(a)).

While the intention of these flexibility arrangements was to offer a meaningful alternative to Australian Workplace Agreements, Ai Group's experience is that they have seldom been used. Their failure arises primarily due to the unilateral termination provisions which are a feature of the Tribunal's model flexibility clause and which are replicated in s 145(4)(a) of the FW Act. Such provisions provide no

⁴⁸ [2008] AIRCFB 550.

certainty for employers or employees and as a result typically neither party is prepared to enter into such an unstable arrangement.

Section 144 of the FW Act should be amended to set out the framework for IFAs in the Act rather than this being a matter to be dealt with in an award clause. This framework should allow for IFAs to operate for defined nominal terms with a maximum term of four years. There should be no ability, unless agreed within the IFA, for unilateral termination prior to the expiry of the nominal term.

Also, the parties should have the ability to include a provision in the IFA which removes the right of the employee to take protected industrial action prior to the nominal expiry date and removes the right of the employer to take protected industrial action against the employee prior to the nominal expiry date.

Furthermore, the inability for IFAs to be offered as a condition of employment has prevented many employers from structuring their business with the flexibilities that these arrangements were intended to enable. Flexibility in relation to the operation of award provisions as a condition of employment is not an unusual concept. Indeed many modern awards contain facilitative provisions which allow deviation from specified award provisions by either individual or majority agreement. These provisions can be offered as a condition of employment upon engagement. It is unproductive and overly restrictive for IFAs to not be able to be used in similar circumstances.

Section 144 should be amended to expressly provide that an IFA under a modern award can be offered as a condition of employment. Consistent with this proposal and as set out the section of this submission dealing with Part 3.1 – General Protections, a new s 341(6) needs to be inserted stating that a prospective employer does not contravene s 341(3) if an employer makes an offer of employment conditional on entering into an IFA with a prospective employee. The Note in section 341(3) also needs to be deleted.

Cashing out of annual leave

The ability for award covered employees to cash out a portion of their accrued annual leave entitlements by individual agreement has been identified by a significant number of Ai Group members as a problem. Although s 93 of the FW Act specifically contemplates an ability for modern awards to contain cashing out provisions subject to a range of mandatory safeguards, the AIRC, when it made the modern awards, declined to include any mechanism for such cashing out.

This is an important issue for employers as often employees approach them seeking an opportunity to cash out a portion of their annual leave. Under the current modern award system, employers are unable to agree to any request in the absence of creating an enterprise agreement which includes a cashing out provision. Employers who do not have an enterprise agreement in most cases do not want one and, in Ai Group's experience, they are very unlikely to change their view based upon

the wishes of a few employees who wish to cash out a portion of their annual leave. An IFA cannot currently be used for this purpose due to the absence of a modern award term which provides for cashing out.

The mandatory content provisions of Subdivision C of Division 3 of this Part should be amended to require that annual leave cashing out provisions are mandatory content for all modern awards, subject to the safeguards in s 93. This would ensure that there are strong protections for employees whilst at the same time providing a legitimate mechanism for cashing-out should an employer and employee agree. Alternatively, ss 93 and/or 94 should be amended to enable award covered employees to cash out a portion of their annual leave by agreement in writing.

Changes which need to be made:

- Section 156(2) should be amended to insert reference to the modern awards objective and a requirement that any variation to modern awards which occurs as part of the four yearly review should only occur if the variation is necessary to achieve the modern awards objective.
- Section 165(2)(a) should be expanded to include determinations made under s 157 of the FW Act.
- Subdivision D of Division 3 of Part 2-3 of the Act specifies various terms which must not be included in awards. This list should be expanded to include:
 - Terms which impose restrictions or limitations on outsourcing, or the engagement of independent contractors or on-hire workers;
 - Terms which require the provision of information to unions about the employees covered by the award, contractors or on-hire providers;
 - Terms which include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;
 - Terms which restrict or hinder the efficient performance of work;
 - Terms which have the effect of restricting or hindering productivity, having regard to fairness for employees;
 - Conversion from casual employment to another type of employment;
 - The number or proportion of employees that an employer may employ in a particular type of employment;
 - Prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;
 - Maximum or minimum hours of work for part-time employees;
 - Stand-down provisions.
- To implement a more workable framework for IFAs:

- Section 144 of the FW Act should be amended to set out the framework for IFAs in the Act rather than this being a matter to be dealt with in an award clause.
- This framework should allow for IFAs to operate for defined nominal terms with a maximum term of four years. There should be no ability, unless agreed within the IFA, for unilateral termination prior to the expiry of the nominal term.
- The parties should have the ability to include a provision in the IFA which removes the right of the employee to take protected industrial action prior to the nominal expiry date and removes the right of the employer to take protected industrial action against the employee prior to the nominal expiry date.
- Section 144 should expressly provide that an IFA under a modern award can be offered as a condition of employment.
- As set out the section of this submission dealing with Part 3.1 – General Protections, a new s 341(6) needs to be inserted stating that a prospective employer does not contravene s 341(3) if an employer makes an offer of employment conditional on entering into an IFA with a prospective employee. The Note in s 341(3) also needs to be deleted.
- The mandatory content provisions of Subdivision C of Division 3 of this Part should be amended to require that annual leave cashing out provisions are mandatory content for all modern awards, subject to the safeguards in s 93. Alternatively, ss 93 and/or 94 should be amended to enable award covered employees to cash out a portion of their annual leave by agreement in writing.

PART 2-4 – ENTERPRISE AGREEMENTS

Enterprise agreement making is a central aspect of Australia's workplace relations system.

A flexible, productive and fair agreement making system is a powerful and positive force for increased productivity, reduced disputation and positive relations between workers and employers. Unfortunately, there are several aspects of the *Fair Work* bargaining laws which are not operating effectively, particularly for employers and the Australian economy. These aspects need to be addressed without delay.

Of those respondents to Ai Group's survey (*Annexure*) who had made an enterprise agreement under the FW Act, 43 per cent reported that the agreement contained new restrictions.⁴⁹ It appears that the larger the company, the greater the barriers to productivity and flexibility imposed by the FW Act. 74% of large employers (500 or more employees) reported that the *Fair Work* bargaining laws had made it more difficult to negotiate flexibility or productivity improvements.

Arguments that employers are failing to take advantage of the bargaining provisions of the FW Act to increase productivity largely miss the point. Yes, there are occasions when employers and employees will want to negotiate specific provisions aimed at improving productivity but, more often, what leading employers want is legislation and industrial instruments which allow them to focus on productivity improvement every day. They want legislation and industrial instruments which do not impose barriers to productivity improvement such as clauses which impede outsourcing, or restrict the use of contractors, or prevent IFAs being negotiated with employees, and so on.

There is now overwhelming evidence that the *Fair Work* bargaining laws need some major amendments, as explained below

Content of enterprise agreements

Perhaps the most important change that needs to be made to the agreement making laws is to implement tighter and more appropriate definitions for 'permitted matters' (s 186) and 'unlawful terms' (s 194) and to tighten the relationship between these two concepts. The evidence in support of this change is in the newspapers every few days. Nearly all the high profile bargaining disputes since the FW Act was implemented have not revolved around wage outcomes, but around attempts by unions to impose restrictions on:

- Outsourcing;
- The use of contractors;
- The use of on-hire employees;
- The introduction of workplace changes without the agreement of unions; and
- Other restrictions on the ability of employers to manage their businesses flexibly and productively

Employers have strongly resisted these union claims. In the current fiercely competitive environment, company cannot afford to give up flexibility.

⁴⁹ Survey report, Question 9(b)(i).

The ‘permitted matters’ for enterprise agreements need to be defined in accordance with the High Court’s *Electrolux*⁵⁰ decision, that is, matters pertaining to the employment relationship between the employer and the employees to be covered by the enterprise agreement. This was the principle which applied between 1994 and 2009 (although there were some conflicting Court and Tribunal decisions leading up to the High Court’s decision in 2004). The experience over the past few years has demonstrated that moving away from the *Electrolux* principle was a damaging step.

It is essential that enterprise agreements not contain any terms that are not permitted matters. Under the FW Act, FWA must approve an agreement if the approval requirements set out in ss 186, 187 and other relevant sections are met. Unfortunately, it is not an approval requirement that an enterprise agreement only contain ‘permitted matters’ but it should be. Currently, agreements can deal with matters which are not permitted matters, so long as those matters are not unlawful terms. There are two particularly negative effects of this approach:

- Firstly, this approach leads to a great deal of uncertainty about the rights of employers and unions when industrial action is taken and/or the parties cannot agree on the content of the agreement; and
- Secondly, when the unions have a great deal of bargaining power (e.g. when a construction company needs to sign a greenfields agreement before work commences on a project, in order to manage risk) the unions are able to pressure the employer into agreeing to highly restrictive and costly clauses, the content of which would, in many cases, not be permitted matters.

The ‘unlawful terms’ in s 194 have a vital role to play. The existing terms need to be more tightly defined and some additional terms added. An ‘unlawful term’ should include:

- **A term which is not ‘permitted matter’;**

There is much similarity between this proposal and the prohibited content item in the former *Workplace Relations Regulation 8.7*.

- **A term which imposes restrictions on outsourcing, or the engagement of, or conditions for, independent contractors or on-hire workers;**

‘Independent contractor’ is defined in the FW Act to include individuals and contracting firms, as was the case under the *Workplace Relations Act 1996*. There is much similarity between this proposal and the prohibited content item in the former *Workplace Relations Regulation 8.5(1)(h) and (g)*.

- **A discriminatory term;**

This is an existing unlawful term (s 194(a)).

⁵⁰ *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40. Electrolux is a member of Ai Group and we funded the employer’s costs in this case given the importance of the case for all employers.

- **An objectionable term;**

This is an existing unlawful term (s 194(a)) but, as argued in the section of this submission dealing with Part 1-2 of the Act, this term needs to be defined in the same way as the former definition of ‘objectionable provision’ in the *Workplace Relations Act 1996*.

- **A term which requires or authorises an official of a union to enter the premises of the employer covered by the agreement;**

The existing unlawful term dealing with right of entry has been highly problematic and a central issue in at least three FWA appeals:

- In *Australian Industry Group v Dunlop Foams* [2010] FWA FB 4337, a Full Bench overturned a decision of Ryan C and decided that a right of entry clause which would have allowed unions to circumvent the right of entry provisions of the Act, was an unlawful term.
- In *CFMEU v Moyle Bendale Timber Pty Ltd* [2011] FWA FB 6761, a Full Bench overturned an earlier decision of O’Callaghan SDP to decide that the right of entry clause in the enterprise agreement was not unlawful.
- In *ADJ Contracting Pty Ltd Enterprise Agreement*, [2011] FWA FB 6684, a Full Bench comprising of Harrison SDP and Row C (majority) and Richards SDP (dissenting) held that a dispute resolution clause providing union officials with a right of entry onto the worksite (with exception to the last paragraph in the clause) was not an unlawful term.

- **A term which requires the provision of information to unions about employees covered by the agreement, contractors or on-hire providers;**

There is much similarity between this proposal and the prohibited content item in the former *Workplace Relations Regulation 8.5(1)(k)*.

- **A term that is inconsistent with a provision of Part 3-2 (which deals with unfair dismissal).**

This is a tighter form of wording than the current provision.

- **A term that is inconsistent with Part 3-3 (which deals with industrial action) action.**

This is an existing unlawful term (s 194(e)).

Greenfields agreements

The provisions of the FW Act relating to greenfields agreements are not working effectively given the power imbalance which often exists between employers (who in many cases need to reach an agreement before work starts on a project in order to manage industrial risk) and relevant unions. The problems are explained in the joint

Ai Group / ACA submission which is included towards the end of this submission, and it is proposed that the following provisions be reintroduced, as were formerly in place under the *Workplace Relations Act 1996*:

- Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project;
- Employer greenfields agreements should be reintroduced. (NB. Employer greenfields agreements in the construction industry typically included generous terms and conditions, consistent with those paid on other projects of the relevant type. The availability of these agreements was important in influencing unions to adopt a reasonable approach in greenfields agreement negotiations).

Statutory individual agreements

Ai Group's survey on the Impact of the FW Act (***Annexure***) demonstrates that most employers want the FW Act changed to enable an employer and an individual employee to enter into a statutory individual agreement. Overall, 69 per cent of employers supported this flexibility being available.⁵¹ The views were even stronger among large employers. Over 80 per cent of employers with more than 500 employees want the Act to be amended to permit some form of statutory individual agreement to be reached.

Statutory individual agreements (entitled Australian Workplace Agreements (AWAs) in the past) were introduced into the *Workplace Relations Act* in 1996. They operated without a great deal of controversy for 10 years before they became associated with the former Government's Work Choices legislation which initially did not include a 'no disadvantage test' for such agreements.

Statutory individual agreements offer flexibility for employers and employees and should be introduced into the FW Act, as part of a more flexible agreement making system.

If statutory individual agreements and collective enterprise agreements are both required to comply with the NES and pass the better off overall test, there can be no valid suggestion that these agreements are unfair.

Statutory individual agreements would offer more protection to employees than common law contracts. They would be vetted by an independent body, required to meet specified approval requirements, including a better off overall test, and they would be easily enforced by the FWO.

⁵¹ Survey Report, Question 12.

In the *Fair Work* system, it is proposed that statutory individual agreements simply become just another type of ‘enterprise agreement’. The FW Act stretches the term ‘enterprise agreement’ to include agreements which potentially cover a large number of different enterprises, so the use of the term to cover an agreement between one employer and one employee at a single enterprise is not counterintuitive.

Enterprise agreements which cover unions

Under the FW Act, unions have far too much power to interfere with lawful agreements which are supported between an employer and the majority of its employees. Two case studies are set out below.

Case study:

Ai Group Member company the Graham Group reached an agreement with the employees in its Galintel Rolling Mill operation and 100 per cent of the employees voted to approve the agreement in a secret ballot. The AMWU vigorously opposed the agreement in proceedings before FWA over several months:

- On 8 July 2011 the employees voted to approve the agreement and it was lodged with FWA on 12 July;
- On 15 July, after a hearing at which the AMWU opposed the agreement, Ryan C rejected the agreement because the employer had included a tear-off slip at the bottom of the notice of representation rights for the employees to use should they wish to appoint a bargaining representative;
- After rejecting the agreement, Ryan C issued a bargaining order relating to four companies in the group, including Galintel Rolling Mills;
- Ai Group represented the Graham Group in a successful appeal against the refusal of Ryan C to approve the agreement. The decision was handed down in late October [2011] FWAFB 6772;
- After the decision of Ryan C was overturned, the agreement was referred to Justice Boulton for approval. Again the AMWU vigorously opposed the approval of the agreement;
- Eventually on 20 December 2011, the agreement was approved by Justice Boulton [2011] FWAA 9028.

Case study:

Ai Group member Philmac reached agreement with the employee bargaining representatives of its workforce in December 2010. The majority of the employees approved the agreement in a ballot in January. United Voice, the AMWU and the CEPU opposed the agreement in proceedings before O’Callaghan SDP:

- On 16 March, O’Callaghan SDP rejected the agreement on the basis of a finding that the company had not met the good faith bargaining requirements;
- Ai Group represented Philmac in a successful appeal against O’Callaghan SDP’s decision [2011] FWAFB 2668;
- The agreement was eventually approved in mid-2011.

Prior to the FW Act, employers had the option of entering into an Employee Collective Agreement without a union being covered. Under the FW Act, even if a union has only one member in the workplace it is entitled to be covered by the enterprise agreement unless that member appoints another person as a bargaining representative. This is not appropriate.

The Act should be varied with the effect that a union is only entitled to be covered by an enterprise agreement if the agreement, as voted upon and approved by the majority of employees, specifies that the union is covered by the agreement. This approach lets the majority of employees decide whether they want a union covered by their agreement.

Undertakings

Some employers who have negotiated enterprise agreements containing generous over-award wages and conditions have been effectively required by particular FWA Members to make substantial changes to their agreements, through the giving of undertakings during the approval process.

On 1 June 2010, Ai Group wrote to the President of FWA, Justice Giudice, requesting that His Honour issue a procedural rule under s 609 to ensure greater consistency amongst FWA Members in the way that undertakings were recorded in bargaining decisions. Justice Giudice wrote back to Ai Group on 7 June 2010 stating:

‘It is not my practice to make procedural rules requiring members to include particular matters in their decisions or to express their decisions in a particular way. Indeed whether the President has the power to do so may be open to doubt: see s.582(3).’

It is important that the actions of FWA Members in assessing enterprise agreements for approval are open to public scrutiny and are subject to appeal processes.

Where an FWA Member wishes to propose an undertaking, the Member should be required to make a finding that the agreement would not pass the better off overall test unless the undertaking is given and provide written details of the finding to the parties before an enterprise agreement is rejected. Such finding should be subject to appeal.

Individual Flexibility Arrangements

IFAs promised so much but in reality they have not proved to be a meaningful replacement for the flexibility provided by AWAs.

At the present time, unions are routinely refusing to sign enterprise agreements unless the flexibility term which enables IFAs blocks any meaningful flexibility. To address this problem, ss 202 and 203 of the FW Act should be amended to create a more effective framework for IFAs. Flexibility terms which detract from that framework need to be outlawed. The framework should:

- Enable IFAs to be offered as a condition of employment to employees who will be covered by the enterprise agreement;
- Not permit an IFA to be unilaterally terminated by one of the parties before the nominal expiry date of the enterprise agreement, unless the employer and the employee agree to include a provision in the agreement that permits unilateral termination;
- Include the areas where agreement can be reached to vary the effect of the enterprise agreement in relation to the employee and the employer, as follows:
 - o Arrangements about when work is performed; (currently included in the Model Flexibility Term in Regulation 2.08)
 - o Overtime rates; (included in Regulation 2.08)
 - o Penalty rates; (included in Regulation 2.08)
 - o Allowances; (included in Regulation 2.08)
 - o Leave loading; (included in Regulation 2.08)
 - o Arrangements for the taking of leave; (new item)
 - o Cashing out of annual leave subject to the conditions in s 93 of the FW Act. (new item)

Dispute settling terms

For the reasons set out in the section of this submission dealing with Part 6-2 of the FW Act, the Model Term for Dealing with Disputes for Enterprise Agreements in Regulation 2.08 and Schedule 6.1 of the FW Regulations should be amended to remove the compulsory arbitration requirement.

What type of bargaining system should we have?

Between 1993/1994 and 2009 Australia had a voluntary bargaining system. The introduction of compulsory bargaining was a retrograde step and Australia's interests are best served by reinstating a voluntary system.

The reasons why a voluntary bargaining system is appropriate and a compulsory bargaining system is not were examined in detail in the 1994 *Asahi Case*⁵², by a five Member Full Bench (O'Connor P, Ross VP, McIntyre VP, McBean SDP and McDonald C). The decision is as compelling today as it was in 1994.

The Tribunal expressed the view that 'compulsion' and 'bargaining' are incompatible. The Full Bench said *'an agreement cannot be reached with a person who does not want to agree and negotiations for an agreement cannot take place with a person who does not want to negotiate'*. Bargaining is conceptually a voluntary thing.

The Tribunal found that there is nothing unfair in having a voluntary bargaining system, as was in operation at the time. A right to strike exists to allow employees who want a collective agreement to apply lawful pressure in pursuit of an agreement. Also, a safety net of minimum conditions exists for those not covered by an agreement.

Employees should have the right to seek an enterprise agreement, including taking protected action as a last resort, but employers should not be compelled to bargain collectively.

With a voluntary bargaining system, majority support determinations, bargaining orders and scope orders are not necessary.

If the Panel does not support Ai Group's primary position that a voluntary bargaining system should be reintroduced, and is of the view that a compulsory bargaining system should be maintained, the following sections are relevant.

Majority support determinations

Under the FW Act, when considering an application for a majority support determination, FWA can satisfy itself that the majority of the relevant group of employees support the negotiation of a collective agreement 'using any method FWA considers appropriate' (s 237(3)). Consistent problems have been arising regarding these provisions.

Typically a union will ask the employees to sign a petition or cards expressing their support for the negotiation of a collective agreement. The union will then apply to FWA for a majority support determination but often the employer will not be shown

⁵² Print L9800.

a copy of the petition or cards. Therefore, the employer does not have the opportunity to identify irregularities in the employees' signatures or other aspects of the documentation or process used by the union. This is unfair, given that imposing an obligation upon an employer to bargain for an enterprise agreement when the employer does not want to bargain collectively is a serious step. Bargaining collectively can be time-consuming, risky, costly and disruptive, particularly when an employer has not previously had an enterprise agreement and a union is involved.

The case study below shows the potential for employers to be disadvantaged if the FWA Member simply relies on the information provided by unions.

Case study – Ai Group Member BlueScope Steel Lysaght, Gillman, South Australia:

In August 2011, the Australian Workers Union (AWU) applied for a majority support determination (B2011/229) against BlueScope Lysaght at its Gillman site in South Australia.

BlueScope has in place a single common law agreement covering the 48 maintenance and production employees on site. All 48 employees signed the agreement in November 2010. It is current until expiry in November 2014. The AWU were seeking bargaining orders from FWA to commence bargaining for an enterprise agreement to cover the workforce. The application was based on a petition signed by approximately 30 of its 48 employees.

From the outset, BlueScope challenged the methodology of the AWU's petition. Employees had signed the AWU's petition because they had been told that the current agreement wasn't registered, that it wasn't legally enforceable and that by signing the petition they were in effect asking BlueScope to simply register their current agreement.

BlueScope presented a second petition signed by the majority of the workforce stating they were satisfied with the current agreement and that they didn't want to pursue an alternative enterprise agreement to cover the workforce. In addition, employees independently presented to FWA a third petition essentially reinforcing their satisfaction with the current agreement.

BlueScope also presented to FWA, a sworn affidavit by an employee whose signature appeared on the AWU petition but who never actually signed the document. This development was never comprehensively addressed by the tribunal in its written decision on the matter.

SDP O'Callaghan determined that an independent vote needed to be conducted to determine the actual wishes of employees. The AEC ran the vote in which only two employees voted in favour of bargaining for an agreement. With such a decisive vote FWA dismissed the AWU's application.

The application was heard before SDP O'Callaghan over three separate occasions in Adelaide; both parties made written submissions and filed various affidavits. From the time employees originally signed the AWU petition to dismissal of the application by FWA the matter took three and a half months to resolve.

Fairness dictated that s 237(3) be amended to require that a secret ballot be conducted by the Australian Electoral Commission to ascertain majority support if the employer is not prepared to accept the union's evidence in proceedings for a majority support determination.

Fairness also dictates that s 236 be amended to enable employee bargaining representatives and employer bargaining representatives to apply for a majority support determination. At present, only employee bargaining representatives can apply. Also, employers should be permitted to re-test the support of the employees for a collective agreement after protracted bargaining.

Further, as discussed below in the section of this submission dealing with Part 3-3, a union should not be permitted to obtain a protected action ballot order without first obtaining a majority support determination, in circumstances where an employer has not agreed to bargain. As set out in that section, an amendment is needed to s 413 of the Act to overcome the FWA Full Bench decision in *JJ Richards v TWU* [2011] FWA 3377.

Scope orders

Scope orders should be abolished. The scope of an agreement is a matter to be bargained over, not a matter to be imposed on the bargaining parties.

On occasions, unions have applied for scope orders to require an employer to negotiate an agreement covering all employees, including middle management and senior management: See *Metropolitan Fire and Emergency Services Board v United Firefighters Union of Australia* [2010] FWA 3009. Ai Group intervened in these proceedings and made detailed submissions.

Unions have also sought scope orders requiring a company to negotiate a single agreement covering all sites across Australia when the company wanted to negotiate a separate agreement in each State or on each worksite: See the decision of Acton SDP in *Wattyl Australia v LHMU* [2010] FWA 2587 where FWA issued a scope order for a national agreement as sought by the LHMU.

The parties at the enterprise should be free to decide what scope they want for their agreement. If they have different positions on the issue then consistent with the laws that operated between 1993/94 and 2009, this is a matter to be bargained over. The employees have the right to take protected industrial action in pursuit of the scope that they are seeking for the agreement. It is not appropriate for FWA to have the power to impose a scope for bargaining.

The good faith bargaining requirements

Section 228(2) and s 255 are critical provisions which specify that:

- A bargaining representative is not required to make concessions during bargaining (s 228(2));
- A bargaining order cannot require a bargaining representative to reach agreement on the terms to be included in the agreement (s 228(2));
- FWA cannot make an order requiring particular content to be included or not included in an enterprise agreement (s 255(1)(a));
- FWA cannot order an employer to request that the employees vote to approve an enterprise agreement (s 255(1)(b)); and
- FWA cannot order an employee to approve or not approve an enterprise agreement (s 255(1)(c)).

In the consultations during the development of the FW Act, Ai Group fought very hard to achieve the above provisions and we very strongly oppose any change to the provisions which interfered with an employer's right to not enter into an agreement which it does not support.

Ai Group submits that the list of limitations on FWA's powers in s 255 should be expanded as follows. Some cases which have dealt with similar issues are identified:

"This part does not empower FWA to make an order that:

- (a) Requires or has the effect of requiring particular content to be included or not included in a proposed enterprise agreement; or***
- (b) Requires or has the effect of requiring an employer to request under subsection 181(1) that employees approve a proposed agreement; or***
- (c) Requires or has the effect of requiring an employee to approve, or not approve, a proposed enterprise agreement; or***
- (d) Prevents or delays the approval of a proposed agreement by the employees covered by the Agreement; or***

In *CFMEU v Tahmoor Coal*, [2010] FWA 351, a Full Bench upheld a decision of Roberts C to reject a union application for a bargaining order which would have prevented the company proceeding with a ballot to approve a proposed agreement. The Full Bench said: *'Although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the good faith bargaining requirements, it will not always be*

so. There is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot.....we are satisfied that in arranging to put its proposed agreement to the employees in a ballot, Tahmoor was not acting capriciously or unfairly in the circumstances prevailing at the time.'

In NUW v CHEP, [2009] FWA 202, Watson VP said 'Whether a particular order is contrary to s.255 depends on the nature of the order, and the effect of the order in the circumstances of the case....An order that delays a vote, provided it be only for a short time and does not in substance deny employees the opportunity to vote for an agreement, is not precluded by s.255....In a given case the facts will need to be considered to determine whether intervention of this nature by deferring a vote has the effect precluded by s.255'.

(e) Requires that an enterprise agreement with a particular scope be negotiated; or

Scope is a matter for bargaining; it should not be imposed upon the bargaining parties.

(f) Requires an employer to provide paid meetings or paid leave to employees involved in bargaining; or

In LHMU v Foster's, [2009] FWA 750, Kaufman SDP rejected an LHMU application for a bargaining order which would have required the company to allow further paid mass meetings of employees. The company had already allowed three paid mass meetings that year. In rejecting the union's application, SDP Kaufman said 'In refusing to allow meetings that had as one of their purposes consideration of authorizing the potential taking of industrial action against it, Fosters cannot be criticised.'

(g) Prevents employers communicating with their employees about bargaining; or

In LHMU v Mingara Recreation Club, [2009] FWA 1442, Watson VP dismissed an application by the union for an order requiring the employer to invite the union to any meeting held to discuss the enterprise agreement negotiations with employees. The Vice President said: 'In my view, communicating with staff is good management practice. If such communications are not accompanied by a refusal to meet and communicate with a bargaining representative, then in my view there is no breach of the good faith bargaining requirements of the Act.'

In *CFMEU v Tahmoor Coal*, [2010] FWA 351, a Full Bench upheld a decision of Roberts C to reject a union application for a bargaining order which would have prevented the company communicating with its employees about bargaining matters. The Full Bench concluded that *‘in the circumstances of this case holding the employee meetings and sending material to the employees’ homes was not capricious or unfair conduct that undermined freedom of association or collective bargaining.*

(h) Prevent or delays the payment of a wage increase by an employer during bargaining; or

In *FSU v Commonwealth Bank of Australia* [2010] FWA 2690, Smith C found that the employer had not met the good faith bargaining requirements by failing to disclose to the union that it had awarded a unilateral pay increase to its employees while at the same time refusing to put a pay offer on the table in negotiations with the union. However, the Commissioner only decided to intervene in a limited way and issued an order that *‘CBA advise the employees’ bargaining representatives within 24 hours of any decision which changes its position of not considering increasing wages to employees.’*

(i) Prevents employers introducing workplace changes during bargaining; or

In *LHMU v Coca-Cola Amatil*, [2009] FWA 153, the union sought a bargaining order preventing the company from implementing a restructuring proposal until the conclusion of the enterprise agreement negotiations. O’Callaghan SDP refused to grant the order and held that the company’s actions and consultation process complied with the relevant award and the Act and did not breach the good faith bargaining requirements.

(j) Requires an employer to table a proposed enterprise agreement during bargaining.

Employers should not be required to table their own proposed enterprise agreement during bargaining. They should have the option of responding to the agreement proposed by the union / employees.

Other proposed changes

In addition to the amendments set out in the sections above Ai Group proposed the following changes to the Act:

- Serious Breach Declarations (ss 234 and 235) should be abolished. None of these declarations have been issued. The provisions are not necessary or desirable.
- Multi-employer enterprise agreements should be abolished. This form of agreement is not necessary or desirable. If such agreements are to be retained it is vital that the existing prohibitions on protected action continue.
- Protected industrial action should not be permitted in the single interest bargaining stream. Protected action should only be available for the negotiation of an agreement for a single enterprise.
- Compulsory arbitration should be removed from the low-paid bargaining stream. There is a legitimate role for FWA in assisting employers and employees in industries where workers are typically low-paid, to negotiate enterprise agreements, but:
 - an outcome should not be arbitrated if agreement is not reached (In such circumstances low paid employees have the benefit of a comprehensive safety net of minimum conditions in the NES and modern awards); and
 - the focus of the low-paid bargaining stream should be on the negotiation of genuine enterprise agreements, not multi-enterprise agreements.

Inconsistency in FWA bargaining and enterprise agreement decisions

A frequent complaint voiced by employers to Ai Group is the lack of consistency amongst FWA Members in the manner in which applications for the approval of agreements and other matters relating to the bargaining process are dealt with. The formal decisions which are made are only part of the story.

The process which applies once an agreement is lodged for approval by an employer, the undertakings the employer is required to give, the time taken for a decision to be made, and decision made should not depend on which FWA Member is allocated the file, as too often occurs at present.

The appeal process provides one avenue to achieve greater consistency but it is not fair or productive for parties to have to frequently appeal bargaining decisions of FWA. Ai Group has pursued appeals or intervened in appeals against 16 bargaining decisions of FWA dealing with critical principles under the Act, with much success, but these cases have consumed significant resources of Ai Group and the individual companies involved.

The following table shows the appeals which have been determined against bargaining and enterprise agreement decisions of FWA Members for the period between 1 July 2009 and 17 February 2012 and the outcome of each appeal:

<i>FWA Member</i>	<i>Appeals against the decisions re. bargaining and enterprise agreement (as at 17/02/12)</i>	<i>Appeal upheld and decision quashed by the Full Bench</i>	<i>Appeal dismissed by the Full Bench</i>
Justice GM Giudice AO (M)	0		
Vice President MJ Lawler (M)	3	1	2
Vice President GR Watson (S)	2		2
Justice AJ Boulton AO, Senior Deputy President (S)	1		1
Senior Deputy President IR Watson (M)	3	1	2
Senior Deputy President AM Harrison (S)	2		2
Senior Deputy President JM Acton (M)	1		1
Senior Deputy President LEC Drake (S)	2	2	
Senior Deputy President MG O'Callaghan (A)	5	3	2
Senior Deputy President L Kaufman (M)	0		
Senior Deputy President JM Hamberger (S)	1	1	
Senior Deputy President PJ Richards (B)	11 (NB one matter involved 4 appeals and another matter involved 2 appeals)	1	10
Deputy President RS Hamilton (M)	0		
Deputy President BP McCarthy (P)	3	1	2
Deputy President PJ Sams AM (S)	2	1	1
Commissioner GR Smith AM (M)	2	2	
Commissioner JCW Lewin (M)	2		1
Commissioner GJ Harrison (S)	3		3
Commissioner MAG Gay (M)	0		
Commissioner WD Blair (M)	8	4	4
Commissioner AL Cribb (M)	0		
Commissioner HM Cargill (S)	0		
Commissioner B Deegan (C)	0		
Commissioner FJ Raffaelli (S)	2	2	
Commissioner PJ Spencer (B)	1		1

Commissioner MG Roberts (S)	2		2
Commissioner BD Williams (P)	5	2	3
Commissioner DS McKenna (S)	3	2	1
Commissioner IW Cambridge (S)	0		
Commissioner IC Asbury (B)	0		
Commissioner DJ Cloghan (P)	3	1	2
Commissioner A Gooley (M)	2		2
Commissioner JF Ryan (M)	9	9	
Commissioner PJ Hampton (A)	2	1	1
Commissioner J Roe (M)	3	2	1
Commissioner MP Bissett (M)	1	1	
Commissioner CF Simpson (B)	0		
Commissioner T Lee (M)	0		
Commissioner S Booth (B)	1	1	
Commissioner S Jones (M)	0		
Deputy President KM Bartel (A)	2		2
Deputy President RW Harrison (N)	1	1	

While the appeal process is an important means of achieving greater consistency amongst the decisions of FWA Members, the changes which Ai Group has proposed to the Act also greatly assist in achieving more consistency.

The key changes which need to be made to the Act are:

- Only 'permitted matters' should be able to be included in an enterprise agreement and be the subject of protected industrial action.
- Permitted matters, should be defined as matters pertaining to the employment relationship consistent with the High Court's *Electrolux* decision;
- 'Unlawful terms' should be defined to include:
 - A term which is not a 'permitted matter';
 - Clauses which impose restrictions on outsourcing, or the engagement of, or conditions for, independent contractors or on-hire workers;
 - A discriminatory term;
 - An objectionable term;
 - A term which requires or authorizes an official of a union to enter the premises of the employer covered by the agreement;
 - A term which requires the provision of information to a union about employees covered by the agreement, contractors or on-hire providers;
 - A term about unfair dismissal;

- A term about industrial action.
- Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project;
- Employer greenfields agreements should be reintroduced.
- Statutory individual agreements should be reintroduced and become another type of 'enterprise agreement'.
- The Act should be varied with the effect that a union is only entitled to be covered by an enterprise agreement if the agreement, as voted upon and approved by the majority of employees, specifies that the union is covered by the agreement.
- Where an FWA Member wishes to propose an undertaking, the Member should be required to make a finding that the agreement would not pass the better off overall test unless the undertaking is given and provide written details of the finding to the parties before an enterprise agreement is rejected. Such finding should be subject to appeal.
- Sections 202 and 203 of the FW Act should be amended to create a more effective framework for IFAs. Flexibility terms which detract from that framework need to be outlawed. The framework should:
 - Enable IFAs to be offered as a condition of employment to employees who will be covered by the enterprise agreement;
 - Not permit an IFA to be unilaterally terminated by one of the parties before the nominal expiry date of the enterprise agreement, unless the employer and the employee agree to include a provision in the agreement that permits unilateral termination;
 - Include the areas where agreement can be reached to vary the effect of the enterprise agreement in relation to the employee and the employer.
- The Model Term for Dealing with Disputes for Enterprise Agreements in Regulation 2.08 and Schedule 6.1 of the FW Regulations should be amended to remove the compulsory arbitration requirement.
- A voluntary bargaining system, as was in operation for 15 years between 1993/94 and 2009, needs to be introduced. In such a system, majority support determinations, bargaining orders and scope orders are not necessary. If the Panel does not support Ai Group's primary position that a voluntary bargaining system should be reintroduced, and is of the view that a compulsory bargaining system should be maintained, the following sections are relevant.
- Subsection 237(3) should be amended to require that a secret ballot be conducted by the Australian Electoral Commission to ascertain majority support if the employer is not prepared to accept the union's evidence in proceedings for a majority support determination.

- Section 236 should be amended to enable employee bargaining representatives and employer bargaining representatives to apply for a majority support determination. At present, only employee bargaining representatives can apply.
- A union should not be permitted to obtain a protected action ballot order without first obtaining a majority support determination, in circumstances where an employer has not agreed to bargain.
- Scope orders should be abolished. The scope of an agreement is a matter to be bargained over, not a matter to be imposed on the bargaining parties.
- In addition to the existing prohibitions, bargaining orders should not be able to:
 - require that an enterprise agreement with a particular scope be negotiated;
 - prevent or delay the approval of a proposed agreement by the employees covered by the Agreement;
 - require an employer to provide paid meetings or paid leave to employees involved in bargaining;
 - prevent employers communicating with their employees about bargaining;
 - prevent or delay the payment of a wage increase by an employer during bargaining;
 - prevent employers introducing workplace changes during bargaining;
 - require an employer to table a proposed enterprise agreement during bargaining.
- Serious Breach Declarations (ss 234 and 235) should be abolished.
- Multi-employer enterprise agreements should be abolished. If such agreements are to be retained it is vital that the existing prohibitions on protected action continue.
- Protected industrial action should not be permitted in the single interest bargaining stream. Protected action should only be available for the negotiation of an agreement for a single enterprise.
- Compulsory arbitration should be removed from the low-paid bargaining stream.

PART 2-5 – WORKPLACE DETERMINATIONS

Industrial action related workplace determinations

Sections 423, 424 and 431, which permit industrial action to be suspended or terminated are discussed in the section of this submission dealing with Part 3-3 – Industrial Action.

Where industrial action is terminated under one of these sections, the provisions of Division 3 (Industrial action related workplace determinations), Division 5 (Core terms, mandatory terms and agreed terms of workplace determination etc), Division 6 (Operation, coverage and interaction etc of workplace determinations) and Division 7 (Other matters) of Part 2-5 apply. Appropriately, these provisions:

- Implement a 21 day post-industrial action negotiating period;
- Only permit the 21 day period to be extended if all parties agree;
- Require that the determination specify a nominal expiry date of up to 4 years;
- Prevent terms being included which are not permitted matters;
- Prevent unlawful terms being included;
- Require that the terms pass the better off overall test;
- Require that a flexibility term be included;
- Require that any agreed terms be included.

The requirements under s 275 that FWA must take into account ‘the public interest’ and ‘how productivity might be improved in the enterprise or enterprises concerned’ are very important.

Low-paid workplace determinations

Ai Group opposes low-paid workplace determinations, for the reasons set out in the section of this submission dealing with Division 9 (Low-paid bargaining) of Part 2-4 – Enterprise Agreements. There is a legitimate role for FWA in assisting employers and employees in industries where workers are typically low-paid, to negotiate enterprise agreements, but:

- an outcome should not be arbitrated if agreement is not reached (In such circumstances low paid employees have the benefit of a comprehensive safety net of minimum conditions in the NES and modern awards); and
- the focus of the low-paid bargaining stream should be on the negotiation of genuine enterprise agreements, not multi-enterprise agreements.

Bargaining related workplace determinations

Ai Group opposes bargaining related workplace determinations which are available where a serious breach declaration has been made under s 235 of the Act. None of these declarations or determinations have yet been made. The provisions are not necessary or desirable and should be deleted from the Act.

Changes which need to be made:

- Delete Division 2 (Low-paid workplace determinations) of Part 2-5;
- Delete Division 4 (Bargaining related workplace determinations) of Part 2-5.

PART 2-6 – MINIMUM WAGES

There is a timing problem which needs to be addressed in Part 2-6 of the FW Act.

Sections 286 and 287 generally require that Annual Wage Review decisions operate from 1 July each year. The Explanatory Memorandum for the FW Bill states that:

‘This timing is designed to ensure certainty and predictability for employers and employees’.

Certainty and predictability can still be achieved with a more workable operative date; one which does not impose unreasonable demands on FWA in deliberating over and writing its decision, and one which allows sufficient time for employers to be advised of, and to implement, the decision.

In 2010, 2011 and 2012, the program for the Annual Wage Review has involved:

- Initial submissions in March;
- Supplementary submissions after the Budget in May;
- Hearings (5-6 days) before the Minimum Wage Panel in late-May;
- Decision handed down in early June;
- FWA circulating draft orders for each modern award in June, setting out draft wage rates and allowances, and inviting parties to identify any errors (NB. awards typically have numerous allowances and special wage rates which need to be calculated);
- Draft orders settled in late June;
- Decision operative from 1 July.

It would be much better for the whole community if the FW Act was amended so that the decision was operative from 1 September each year. This would allow adequate time for:

- Initial submissions to be lodged (March);
- Post-Budget submissions to be made (late-May);
- Hearings to be conducted following the Budget (early June);
- The Panel to deliberate over the issues (June);
- The Panel's decision to be written (June / early July);
- The decision to be handed down (early July);
- FWA to publish draft orders for each modern award setting out draft wage rates and allowances, and inviting parties to identify any errors (mid-July);
- Draft orders to be settled (late-July);
- Employers to be notified by their industry organisation of the wage rates and allowances payable in each modern award (late July / early August);
- Employers to make the necessary adjustments in their payroll system and pass on the increase to their employees (late August);
- Employees to receive the wage increase (1 September).

Under the current arrangements most employers who are required to pay the Annual Wage Review increase are forced to backpay their employees because there is insufficient time for them to be advised of and to implement the Annual Wage Review decision before 1 July.

Backpaying employees is a costly and disruptive process for employers. Backpaying would be unnecessary if the FW Act enabled a workable timeframe for the conduct of Annual Wage Reviews.

If Ai Group's proposal is adopted, it would result in a one-off gap of 14 months between the operative dates of the two relevant Annual Wage Review decisions. No doubt the Minimum Wage Panel would take this into account in determining the level of wage increase in the year of implementation (ideally 2013).

Changes which need to be made:
• In ss 286(1), 287(1), 287(4), 287(5) and 292, delete '1 July' and replace with '1 September'.

PART 2-7 – EQUAL REMUNERATION

Ai Group supports the concept of equal remuneration and gender equality. Part 2-7 of the FW Act however must be amended as the current provisions are far too loose including allowing for orders to be issued without a comparison between the wages of men and women. The key amendments to Part 2-7 need to ensure that equal remuneration orders cannot be used:

- Where gender based discrimination has not be proven;
- Where work is not of equal value;
- As a substitution for meaningful enterprise bargaining including use of the low paid bargaining stream; and
- Beyond an individual workplace.

Ai Group submits that the problems associated with the current Part 2-7 of the FW Act are obvious when one considers FWA's decisions in the *Equal Remuneration Case* including [2011] FWA FB 2700 (the May 2011 Decision) and [2012] FWA FB 1000 (the February 2012 Decision) which saw consideration of the equal remuneration provisions of Part 2-7 for the first time.

Reintroduction of discrimination as a threshold issue

Equal remuneration orders should only be available where it is proven that there is unequal remuneration and this inequity is due to reasons of gender. Prior to the introduction of the FW Act, there was a long line of arbitral precedent on the criteria required to ground an application which it was alleged that there was not "*equal remuneration for work of equal value*". The central principles were that the applicant was required to:

"....establish that for the employees which it seeks to have covered by the orders:

- (a) there is not equal remuneration for work of equal value;*
- (b) the rates of remuneration for these employees have not been established without discrimination based on sex;*
- (c) the orders proposed will ensure that for the employees covered by the orders, there will be equal remuneration for work of equal value."*⁵³

⁵³ AFMEPKIU and David Syme (Print R5199, 26 May 1999); at [28.]

The Explanatory Memorandum for the *Fair Work Bill 2008* has made it clear that discrimination is no longer a jurisdictional pre-requisite for an equal remuneration order⁵⁴. This lowering of the threshold is problematic as the reasons why in a particular workplace or industry the employees receive the remuneration that they do is complex and multifaceted. This was acknowledged by the Full Bench in the *Equal Remuneration Case* May 2011 Decision:

‘Differences in rates of remuneration between any one enterprise and another are to be expected. Indeed there are significant differences within the SACS industry itself. The reasons for differences between enterprises will be many and varied and are the result of the peculiar circumstances of each enterprise. In the public sector they may include considerations of relativities within the public sector, issues of restructuring and productivity, attraction and retention issues, cost of living factors, industrial negotiations, bargaining, informal dispute settlements, arbitrations, historical fixations for paid rates awards and the general disposition of various governments. It goes almost without saying that it is also difficult to identify the quid pro quo for a particular wage rate in a particular agreement.’⁵⁵

The removal of discrimination as a threshold requirement to the making of any order creates risk that these other ‘*reasons for differences*’ could be mischaracterised or misconceived as gender-based differences and thereby motivate the making of an order. Indeed, it is highly arguable that such a result occurred in the *Equal Remuneration Case* as although the Full Bench did not support either of the methodologies advanced by the applicants to justify the percentages increases proposed⁵⁶ it nevertheless awarded those percentages as the remedy thereby concluding that those amounts reflected the quantum of gender-based undervaluation. The dissenting judgment of Vice President Watson in the February 2012 Decision expresses this concern:

‘There is an additional fundamental flaw in the applicants’ case. The claim in this matter can only succeed to the extent that it is demonstrated that differences in pay are because of gender or to address gender-based undervaluation. In the first submissions made by the applicants since the May 2011 decision, it was asserted that the extent of undervaluation attributed to gender is the difference between what is paid to SACS industry employees under transitional arrangements and the remuneration paid to state and local government employees who perform similar work. This approach was widely criticised by most parties including the Commonwealth as inconsistent with the Act. For example, the Commonwealth contended that an equal remuneration order can only address differences in remuneration that are gender based and the critical issue is the isolation of the gender-based component of the wage gap.’

⁵⁴ Explanatory Memorandum; at [1192].

⁵⁵ [2011] FWAFB 2700; at [277]

⁵⁶ [2012] FWAFB 1000; at [62]

In subsequent submissions two techniques contained in the Joint Submission were relied on in an effort to demonstrate the extent of gender-based undervaluation in the SACS industry. The majority decision highlights the difficulties with both of these approaches. There is no reason in logic why the extent of gender-based undervaluation corresponds to the proportion of caring work undertaken by some employees in the classifications in the modern award. Further, the analysis of direct and indirect caring work relied on in the Joint Submission is highly questionable for reasons explained by employer groups in their submissions. The additional comparison of private and public sector wage rates is simply a comparison of those rates. It does not establish the extent of gender-based undervaluation.⁵⁷

To ensure that equal remuneration orders are only available and their terms will only extend to the quantum of any gender based undervaluation, the requirement that discrimination be proven as a jurisdictional pre-requisite to the making of any equal remuneration order should be reintroduced into the FW Act.

Removal of ‘comparable value’

Given the power of equal remuneration orders to override both modern awards and enterprise agreements it is important that the circumstances in which they operate are limited to those circumstances where unequal remuneration for reasons of gender have been established. The inclusion of the concept of “comparable value” within the equal remuneration provisions is unhelpful and imprecise. The Explanatory Memorandum to the FW Act explains the inclusion of this concept on the basis that “This allows comparisons to be carried out between different but comparable work for the purposes of this Part.” We submit that such a concept is not required to allow a comparison of different work and the relative remuneration paid. Indeed the *Work Value Principles* which operated under the AIRC and which were central to the operation of the equal remuneration provisions prior to the FW Act required:

“6. WORK VALUE CHANGES

- (a) *Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification. In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant*

⁵⁷ [2012] FWAFB 1000; at [103]-[104].

internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.⁵⁸

Removal of “comparable value” will create greater rigour in any application for equal remuneration orders and ensure that they are only granted where a detailed and comprehensive assessment of the work of the applicant group and the comparator group has been undertaken and found to be equal in value. This is a necessary requirement to ensure that equal remuneration orders are used appropriately.

Application should only be available at the single employer level

It is not appropriate that equal remuneration orders can be made to apply across an entire sector or industry. The modern awards objective specifically identifies the principle of equal remuneration⁵⁹ as a requirement which FWA must consider in respect of all modern awards. Any application for an equal remuneration order which applies to an entire sector or industry covered by a modern award must therefore be asserting that the modern award is not achieving this objective. If that is the case, the appropriate mechanism to address this issue is through variation to the modern award not through the making of an equal remuneration order. This will also ensure that equal remuneration orders cannot be used as a replacement safety net in a sector or industry and thereby erode or remove the requirement for modern awards to provide a “fair and relevant minimum safety net of terms and conditions.”⁶⁰

The reintroduction of discrimination as a threshold issue and the removal of the notion of “comparable value” will provide more rigour to the equal remuneration provisions of the FW Act. This will make it more difficult for an equal remuneration case pursued at an industry or sector level to be successful. Nevertheless, the FW Act should be amended to make clear that an equal remuneration order is not capable of extending beyond a single employer.

Equal remuneration orders should not be used as a substitute for enterprise bargaining

The FW Act provides for a system of enterprise bargaining. Additionally there are more detailed provisions for low paid bargaining which can be accessed at the multi-employer level. It is not appropriate for equal remuneration orders to be used as a substitute for enterprise bargaining or an absence of enterprise bargaining to be used as a basis for asserting gender based discrimination unless compelling evidence

⁵⁸ *Safety Net Review Decision 2005 PR002005*

⁵⁹ Section 134(1)(e) of the FW Act.

⁶⁰ Section 134(1) of the FW Act.

is advanced. In the *Equal Remuneration Case* it was argued that the historical lack of enterprise bargaining in the sector was as a result of the sector being primarily female. The Full Bench in its May 2011 Decision rejected this proposition:

‘In our view the manner in which the applicants seek to apply the indicia approach has a number of limitations. Many if not most of the indicia may in themselves be gender neutral. While the indicia may be indicative of gender-based undervaluation of work in some circumstances, they may also be observed in workplaces, sectors or industries which are mainly male or in which neither gender predominates. Many workers employed by a small employer are not union members and have low bargaining power. This may be so whether the workforce is predominantly female, predominantly male or neither. The applicants’ approach may therefore tend to conceal some of the real causes of undervaluation by imputing a gender bias where none exists.’⁶¹

Given the Full Bench’ conclusion that there is nothing *prima facie* that reveals enterprise bargaining is preferential based upon gender and given the importance of enterprise bargaining within the *Fair Work* system, prior to making any equal remuneration order it should be necessary for FWA to consider whether bargaining, either through the low paid bargaining stream or otherwise, is a better means of resolving any inequity in remuneration.

Changes which need to be made:

- Amendments to s 302(5) to include an additional paragraph (a) which requires FWA to be satisfied that any unequal remuneration is as a result of gender based discrimination as follows:

“(a) In order to be satisfied that there is not equal remuneration for work of equal value, FWA must be satisfied that the rates of remuneration under consideration have been set on a discriminatory basis.”
- Removal of the phrase ‘*comparable value*’ throughout Part 2-7.
- Inclusion of a provision which identifies that the terms of an equal remuneration order cannot be made to operate beyond a single employer.
- Inclusion of a provision which requires FWA, prior to making any equal remuneration order, to consider whether enterprise bargaining is a more appropriate mechanism to resolve any wage inequality.

⁶¹ [2011] FWA FB 2700; at [248].

PART 2-8 – TRANSFER OF BUSINESS

The transfer of business provisions in the FW Act are imposing excessive and unworkable restrictions on employers. Many employers are commercially hamstrung about how future business should be designed, tendered for and implemented as a result of laws which deem prevalent commercial functions of businesses as a ‘transfer of business’ under the FW Act.

The current transfer of business laws are:

- Impeding the restructuring of Australian businesses and hence impeding productivity and competitiveness;
- Increasing redundancies and removing employment opportunities for many Australian workers;
- Discouraging organisations which win outsourcing contracts from employing any of their clients’ workers and, hence, many of these workers are made redundant by the client;
- Constraining opportunities for companies in the business of outsourcing (e.g. ICT companies);
- Deterring companies that wish to outsource functions from doing so and consequently opportunities for productivity improvement are lost ;
- Driving work and jobs offshore;
- Restricting employee career progression and redeployment opportunities within corporate groups;
- Imposing multiple and inconsistent employment conditions on employers resulting in higher costs, more red tape and reduced productivity, efficiency and staff morale;
- Imposing unworkable obligations on employers in excess of what is reasonable to protect employees’ interests.

These problems have arisen due to the design of the transfer of business laws, including basing such laws on the concept of ‘work performed’ rather than the ‘character of the businesses’ of the old and new employers.

The transfer of business laws in the FW Act have reinstated the concepts which caused so many difficulties for industry in the late 1990s, prior to the following High Court and Full Federal Court decisions which resulted in settled, fair and productive laws:

- In *PP Consultants Pty Ltd v FSU* [2000] HCA 59 the High Court devised a ‘character of the business test’ to determine whether a transmission of business had occurred. The High Court said that it was necessary to

characterise the business (or relevant part of the business) of the outgoing employer, and to then identify the character of the business as carried on by the new employer. Only if the two are the same was there a transmission of business.

- In *Stellar Call Centres v CPSU* [2001] 103 IR 220, the Full Federal Court had to decide whether a group of call centres which were outsourced by Telstra were subject to Telstra's certified agreements by virtue of there being a transmission of business. The Court found that Telstra's business and Stellar's business were not of the same character and hence the certified agreements did not transmit.
- The High Court's decision in *Gribbles Radiation v HSU* [2005] HCA 9 established some further principles which applied when a business was transmitted, including the requirement that tangible assets or intangible assets (e.g. goodwill) needed to transfer from the old employer to the new employer for the transmission of business provisions to apply.

The transfer of business provisions in the FW Act are undoubtedly designed to extinguish the previous settled, fair and productive law, and impose the ill-conceived 'similarity of work' approach which was rejected by the High Court and Full Federal Court.

The FW Act gives no weight to whether a business which takes over outsourced work has the same character as the one which outsourced the work. The loss of the 'character of the business' test has resulted in the imposition of unworkable, impracticable and unfair arrangements on both employers and employees.

As currently enacted, the transfer of business laws are operating against the interests of both employers and employees. The laws result in a lose-lose-lose scenario where operations are outsourced. Client companies lose because they need to make employees redundant when outsourcing occurs. Companies who take on outsourced work lose because they cannot access the valuable skills possessed by their clients' employees. Employees lose because their jobs disappear along with their continuity of service for long service leave and other entitlements.

In outsourcing arrangements, the transfer of skilled employees who have knowledge of client systems and infrastructure is often strongly supported by both clients and service providers to facilitate a successful delivery of the outsourced services. Indeed many companies have built their businesses on the engagement of their clients' employees. However, the transfer of business laws now provide a major deterrent to the employment by the service provider of any of the client's employees.

Consider the case of a software consultancy firm providing outsourced IT services to a Government, a mining company, an airline and a steel manufacturing company, amongst other clients. The software company no doubt has very different employment conditions to those which apply to these four client companies. Most

software companies employ staff on common law contracts, in contrast with other industries where enterprise agreements are common. The transfer of business laws expose companies involved in outsourcing to transferable instruments becoming binding upon their operations for both transferring employees and non-transferring employees. Accordingly, the laws ensure that companies will make every effort to avoid employing any employees of their clients.

Industrial instruments are very much focused on the industry and the type of business for which they were specifically designed to cover. Consequently the notion that an employer in one industry can easily adopt an industrial instrument from another industry is flawed. This notion, however, is the default position in the FW Act in relation to transfer of business.

Such a situation defies common sense and needs to be addressed.

Views expressed in writing by an Ai Group member company:

'The new transfer of business rules have deterred our organisation from proactively offering employment to employees of our client – something that we were more than willing to encourage and support under the old transfer of business arrangements.'

Many Ai Group members have needed to reconfigure their payroll systems to accommodate different entitlements and employment conditions as a result of the transfer of business laws, creating significant compliance and administration costs.

Views expressed in writing by an Ai Group member company:

'A major logistical consequence of the transfer of industrial instruments for the new employer have been significant costs associated with payroll due to a requirement to outsource the payroll for this group of employees as the current corporate global payroll solution could not be re-designed, and re-configuration to cater for the different terms and payments.'

In addition, companies are finding that administering different employment conditions as a result of transferring instruments leads to employee tension and lower morale.

Views expressed in writing by an Ai Group member company:

'In the case where we offered employment to an employee of our client this created significant challenges in managing inconsistent employment terms, particularly in circumstances where we have employees sitting beside each other performing the same work on different terms and conditions. From a cultural perspective this is difficult to manage.'

Views expressed in writing by an Ai Group member company:

‘Having separate collective agreements has also meant that cultural integration has been stymied which has lead to difficulty in engaging the staff and negatively impacts productivity and retention. On a day to day basis this has created substantial impacts, including the necessity to manage a multiplicity of inconsistent penalty payments, shift allowances, standby rates and variations in leave arrangements. In some cases staff sitting next to one another performing similar or like work are subject to different allowances or benefits. This has lead to instances of resentment and a break down in working relationships.’

Ai Group’s survey (**Annexure**) highlights the problems. 31 respondents had been involved in a transfer of business under the FW Act.⁶² Of these companies:

- 47% of employers said that the provisions of the Act had a very negative impact or somewhat negative impact on their organisation (NB. only 1 employer said that the provisions had a positive impact);⁶³
- 62% of large employers cited a very negative or somewhat negative impact; and
- 13% said that employees were made redundant who would have otherwise been employed by the new employer.⁶⁴

Ai Group’s proposed amendments to the transfer of business laws, as explained below, would substantially reduce the negative impacts

When does a ‘transfer of business’ occur?

A transfer of business occurs if each of the following four requirements are satisfied (s 311(1)):

- (a) The employment of an employee of the old employer has terminated;
- (b) Within 3 months of that termination, the employee becomes employed by the new employer;
- (c) The work the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer; and
- (d) There is a connection between the old employer and the new employer as described in s 311(3) to (6).

⁶² Survey Report, Question 22(a).

⁶³ Survey Report, Question 22(b).

⁶⁴ Survey Report, Question 22(b).

Termination of employment

Paragraph 311(1)(a) should relate only to circumstances where the old employer terminates the employment of the employee. If an employee resigns from the old employer (perhaps years after the business transfers) and applies for a job with the new employer within three months, it is unfair for the industrial instruments to transfer to the new employer.

Paragraph 311(1)(a) should be amended as follows:

‘(a) the employment of an employee of the old employer has terminated on the initiative of the old employer;’

Employment by the new employer

The three month period in s 311(1)(b) needs to be linked to the time when the business transfers. The existing provision requires that new employers establish stringent recruitment controls to avoid inadvertently hiring persons who were employed by the old employer (including years after the business transfer occurs).

‘(b) within 3 months ~~after the~~ of a connection occurring as described in any of subsections (3) to (6), the employee becomes employed by the new employer;’

Transferring work

There is a great deal of doubt about the meaning of ‘transferring work’, as referred to in s 311(1)(c). The example used in the *Explanatory Memorandum* for the *Fair Work Bill 2008* of an employee stacking shelves in a supermarket carrying out the same work as an employee operating a checkout in a supermarket is extremely broad. On any reasonable assessment, this is not ‘the same, or substantially the same’ work.

Consistent with the High Court’s decision in *PP Consultants Pty Ltd v FSU* [2000] HCA 59, a further paragraph needs to be included in s 311(1) implementing a new requirement for a transfer of business. That is:

‘(x) the character of the new employer’s business is the same as the character of the old employer’s business;’

The following note should also be inserted into s 311(1):

*‘Note: The issue of whether or not two businesses have the same character was considered by the High Court in *PP Consultants Pty Ltd v FSU* [2000] HCA 59 and by the Full Federal Court in *Stellar Call Centres P/L v CPSU* [2001] 103 IR 220.’*

Connections between the old employer and the new employer

There is a connection between the old and the new employer, for the purposes of the transfer of business laws in any of the following circumstances:

- If in accordance with an arrangement between the old employer and the new employer, the new employer owns or has the beneficial use of some or all of the assets (tangible or intangible) that the old employer owned or had the beneficial use of, and that relate to the transferring work (s 311(3));
- If the old employer outsources work to the new employer (s 311(4));
- If the old employer terminates an outsourcing arrangement, and carries out the outsourced work itself (s 311(5)); or
- If the new employer is an associated entity of the old employer (s.311(6)).

Transfer of assets

Subsection 311(3) should relate only to the transfer of the ownership of assets, not the use of assets. The existing provision is far too broad and creates widespread negative consequences and risks.

One area of debate concerns circumstances where an employee of an on-hire firm obtains permanent employment with a client company after a temporary placement with that company. This is referred to in the on-hire industry as ‘temp to perm’ transition.

Many thousands of employers engage on-hire workers for the purpose of assessing whether or not the workers are suitable for direct employment with that company – particularly where the work is of a specialised nature. Moreover if an employer is looking to engage more staff due to a change or expansion in its business, then on-hire workers are often engaged first until the company has determined its ongoing staffing needs.

Ai Group is of the view that the transition of on-hire workers from agency employment to direct employment is not an arrangement which is caught by the transfer of business laws. However, the decision of Deputy President Sams of FWA in *Whitehaven Coal Mining Limited* [2010] FWA 1142 is of concern. This decision concerned an application to FWA by Whitehaven Coal to prevent the transfer of the collective agreement of labour hire firm TESA when Whitehaven decided to directly employ 16 on-hire employees of TESA who had been working within its operations. Whitehaven made the application due to perceived doubt about whether this ‘temp to perm’ scenario would constitute a transfer of business for the purposes of the FW Act.

In his decision, Sams DP unequivocally held at para [12] that the arrangement constituted a ‘transfer of business’:

‘I have no doubt that the specific requirements referred to above have been satisfied. In particular, there can be no doubt that the employees’ employment will be terminated by TESA; they will commence employment with the new employer, Whitehaven, within three months of their terminations; the employees will be performing the same work at the mine they have been working at as they were performing before termination; and, there remains a connection between the old and new employer by virtue of their outsourcing arrangements, which are to continue: see s 311(2) to (6).’

FWA’s decision caused a great deal of uncertainty and concern amongst companies in the on-hire industry, as well as users of on-hire labour. Ai Group has a large membership in both categories.

Accordingly, Ai Group wrote to the Department of Education, Employment and Workplace Relations (DEEWR) seeking its view on whether ‘temp to perm’ scenarios were intended to be covered by the transfer of business laws. Ai Group’s letter included the following typical scenario:

‘We would appreciate your confirmation that, in the view of DEEWR, a transfer of business would not occur in the following scenario:

- 1. A labour hire company supplies a group of 10 temporary production workers to a food company;*
- 2. During the placement, the workers are integrated into the production workforce of the food company and they use the food company’s tools and equipment;*
- 3. After 3 months the food company decides to hire the 10 workers;*
- 4. The labour hire company is happy to accommodate the client, but consistent with the terms of the standard contract which labour hire companies ask clients to sign, the client is required to pay a recruitment fee to the labour hire company;*
- 5. The fee is paid and the 10 workers resign from, or are terminated by, the labour hire company and employed by the food company.’*

Whilst of course stating that the factual scenario of individual cases would need to be considered, the view expressed by DEEWR on the above typical ‘temp to perm’ scenario was that such a scenario does not fall within the transfer of business provisions of the Act. The following extract from DEEWR’s reply is relevant:

‘Section 311(3) of the Act provides that the ‘asset transfer’ connection will be satisfied where there is an arrangement between the old employer and the new employer (or their associated entities) that the new employer owns or has beneficial use of some or all of the tangible or intangible assets that the employer owned or had the beneficial use of and that relate to the transferring work.

In this instance, if there is no arrangement between the labour hire company and the client company under which some assets of the labour hire company transfer to the client company, then the section will not apply. Equally, the section will not apply if there is no asset transfer or no employees transfer.

This means that, in your example, the section would not apply if the transferring employees were only using assets of the client company; it requires the client company to own or have the beneficial use of assets which were owned or beneficially used by the labour hire company and there must be an arrangement between the two employers for that asset transfer to occur.

In relation to whether the scenario would give rise to an outsourcing or insourcing arrangement within the meaning of ss.311(4) and (5), our view is that on the information provided to us, the requirements set out under those provisions would not be satisfied. The scenario you describe does not fall within the ordinary and accepted meaning of these words. Specific examples on how these provisions are intended to operate is provided at paragraphs 1224 and 1226 of the Explanatory Memorandum of the Act”

Despite the views expressed by DEEWR, given Deputy President Sams’ decision the transfer of business laws should be amended to ensure that ‘temp to perm’ scenarios are not caught by the laws, either as a result of an on-hire firm and client using the same assets (s 311(3)) or due to outsourcing (ss 311(4) and (5)).

With regard to s 311(3), this section should be amended as follows:

‘Transfer of assets from old employer to new employer

- (3) *There is a connection between the old employer and the new employer if, in accordance with an arrangement between:*
- (a) *the old employer or an associated entity of the old employer; and*
 - (b) *the new employer or an associated entity of the new employer;*
- the new employer, or the associated entity of the new employer, owns ~~or has the beneficial use of~~ some or all of the assets (whether tangible or intangible):*

- (c) *that the old employer, or the associated entity of the old employer, owned ~~or had the beneficial use of~~; and*
- (d) *that relate to, or are used in connection with, the ~~transferring work~~ business or part of the business which has transferred.*

Outsourcing

In ss 311(4) and (5), the concept of ‘outsource’ needs to be clarified to avoid unintended consequences. Rather than ‘outsourcing’ relating to ‘work’, it should relate to a ‘part of a business’ which is much more tangible and certain concept.

The following changes are proposed:

‘Old employer outsources ~~work~~ part of its business to new employer

- (4) *There is a connection between the old employer and the new employer if the ~~transferring work is performed by one or more transferring employees, as employees of the new employer~~, transfer of business has occurred because the old employer, or an associated entity of the old employer, has outsourced the transferring work part of its business to the new employer or an associated entity of the new employer.*

New employer ceases to outsource ~~work~~ part of its business to old employer

- (5) *There is a connection between the old employer and the new employer if:*
 - (a) *~~the transferring work~~ had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced ~~the transferring work~~ part of its business to the old employer or an associated entity of the old employer; and*
 - (b) *the ~~transferring~~ work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource ~~the work~~ part of its business to the old employer or the associated entity of the old employer.’*

Associated entities

Subsection 311(6) operates as a major disincentive to transfer employees between associated entities.

Many companies are part of a broader corporate group and such groups often have a variety of employing entities. Employees often seek redeployment to different parts of their employer’s business to, for example, obtain the opportunity for a promotion or an assignment overseas, to gain skills, or to work with different technologies. Australia’s workforce is increasingly mobile both locally and globally.

Under transfer of business laws, employees who seek redeployment to another entity within a corporate group for the purposes of career progression or broader experience, risk having such opportunity stymied, because any enterprise agreement applicable to the employee's employment with the original entity would become binding upon the other entity creating potentially widespread consequences for the business.

The transfer of business laws also limit the redeployment opportunities of employees when positions become redundant. The transfer of business laws impose onerous obligations on businesses in corporate groups which employ workers of other businesses in the group. In many cases, the disruption caused is too great to allow the transfer to occur and therefore the workers are made redundant.

The following case studies have been provided by Ai Group Member companies which have encountered problems with the transfer of business laws, as they relate to associated entities.

Case study provided by Ai Group Member company:

'We decided to transfer machinery from one operating company to another within our corporate group. Both of the relevant sites had different enterprise agreements due to different ownership histories.

The team of employees which operated the machinery wanted to transfer to the other company but given that the enterprise agreement would transfer across, we were not prepared to take the industrial risk.

On this occasion the employees were retrained and redeployed within the first company due to a timely expansion in our operations, but this would not have ordinarily been possible and retrenchments would have been necessary.

The detailed knowledge and experience of the machine operators remained at the wrong site and the company had to hire and train from scratch, resulting in inefficiencies and higher costs.

The uncertainty and general frustration saw the loss a couple of experienced machine operators.'

Case study provided by Ai Group Member company:

'On two occasions we wanted to move employees from a wholly owned subsidiary to our parent company. On each occasion we decided to make an application seeking an exemption from the normal transfer of business rules so that the parent company's industrial instruments would apply to the employees. This process has been both time-consuming and costly, although in each case FWA has made the orders we sought.

On the first occasion, the entire process took 8 months, from deciding that we needed to make the application, to getting a decision. Because of the work involved in preparing the case for hearing and adequately educating the in-scope employees and

because we could not be sure how long it would take the Tribunal to make a decision, we had to put in place a complicated labour supply arrangement with the subsidiary in the interim.

The Commissioner ultimately heard the application on the papers and gave us a decision in a short timeframe, largely because the amount of preparation put in allowed him to be confident that the application should be granted. However, the total legal fees exceeded \$100,000, and this occurred in circumstances where the union did not oppose the application, all of the employees were clearly going to be better off under the parent company's conditions and all employees had indicated by closed ballot that they wanted to be employed under the parent company's terms and conditions.

Subsequent to this application, we have made a second successful application. The process has been quicker as we have been able to re-use some material, but the practicalities of educating employees and making the application has still led to delays of 4-5 months and an ultimate cost of \$45,000 in legal fees. Again, there was no union opposition and all employees had indicated their desire to be employed under the more favourable parent company terms and conditions.

In our view, the previous transmission of business rules should be restored.

For the above reasons, s 311(6) should be deleted from the Act.

FWA orders relating to transferable instruments

Under the FW Act, enterprise agreements, workplace determinations and named employer awards (i.e. 'transferable instruments') which covered the old employer, cover the new employer from the transfer time in respect of transferring employees (ss 312 and 313).

FWA has the power under s 318 to make an order:

- that the transferable instrument not cover the new employer; and/or
- that the enterprise agreement or named employer award which covers the new employer, covers the transferring employees.

FWA also has the power under s 320 to vary transferable instruments to ensure that they operate in an appropriate way for the new employer.

Despite these mechanisms being available, applications for FWA orders are not being widely sought because of the costs, uncertainties and risks involved. In almost all cases so far, FWA orders have been issued in circumstances where:

- the new employer, the employees and the relevant unions have supported the order being issued; and

- there was an established relationship between the relevant parties.

For example, see *Whitehaven Coal* [2010] FWA 1142, *Queensland Nickel* [2009] FWA 335 and *Optus Administration v ASU* [2010] 3567.

Where there is an existing relationship, new employers can more readily consult with prospective employees about any pending transfer and offers of employment. However, commercial outsourcing arrangements are frequently determined by way of a tightly regulated tendering process between an old employer and potential new employers. The tendering process is typically competitive and confidential. As such, tendering employers generally cannot publicly disclose the business being sought and have no access to the employees of the client. Accordingly, an application to FWA before the work is won is typically impossible in practice.

Views expressed in writing by an Ai Group member company:

'In the context of outsourcing arrangements, in the majority of cases initial discussions with clients are subject to strict confidentiality obligations until the commercial negotiations have been completed (particularly in circumstances involving tenders). Whilst the parties may be seeking to identify and determine the terms and conditions that will apply to employees under the outsourcing arrangements the prospect of an outsourced organisation approaching FWA for an order is simply not tenable in the context of commercial in confidence discussions with prospective clients. Furthermore, in the case of a tender, the idea of approaching FWA alone would, in most cases, be enough to have a company removed from the confidential tender process.'

The uncertainty that an application to FWA presents prior to a potential transfer of business deters companies from seeking an order.

Views expressed in writing by an Ai Group member company:

'To date our organisation has not made application for an FWA Order due to a number of uncertainties surrounding the application of the legislation. These include the question of timing. In particular, the necessity for our business to settle on a clear employee engagement strategy well before the commencement of the commercial relationship with our client.'

Whilst employers need to retain the ability to apply for FWA orders in respect of transfer of business, such orders will be unnecessary in many occasions if s 311 is amended as Ai Group has proposed to prevent inappropriate circumstances falling within the definition of 'transfer of business'.

Non-transferring employees of the new employer

If a transferrable instrument starts to cover the new employer and the new employer employs new employee/s to perform the transferring work, and no other enterprise agreement or modern award covers the new employer in relation to that

work, then the transferable instrument covers the new employee/s (s 314). FWA has the power under s 319 to make an order:

- that the transferable instrument not cover the new employee/s; and/or
- that an enterprise agreement or modern award that covers the new employer, does not cover the new employee/s.

Section 314 is very unfair upon the new employer and needs to be deleted. It is not appropriate for transferable instruments to cover employees who are not transferring employees. If s 314 is deleted, s 319 will not be needed.

Changes which need to be made:

- Paragraph 311(1) (a) should relate only to circumstances where the old employer terminates the employment of the employee, not where the employee resigns.
- The three month period in s 311(1)(b) needs to be linked to the time when the business transfers.
- Consistent with the High Court's decision in *PP Consultants Pty Ltd v FSU* [2000] HCA 59, a further paragraph needs to be included in s 311(1) implementing a new requirement for a transfer of business. That is: *'the character of the new employer's business is the same as the character of the old employer's business'*.
- The following note should also be inserted into s 311(1):
'Note: The issue of whether or not two businesses have the same character was considered by the High Court in PP Consultants Pty Ltd v FSU [2000] HCA 59 and by the Full Federal Court in Stellar Call Centres P/L v CPSU [2001] 103 IR 220.'
- Subsection 311(3) should relate only to the transfer of the ownership of assets, not the use of assets. The existing provision is far too broad and creates widespread negative consequences and risks.
- The Act needs to be amended to ensure that 'temp to perm' scenarios are not caught by the transfer of business laws, either as a result of an on-hire firm and client using the same assets or due to outsourcing.
- In ss 311(4) and (5), the concept of 'outsource' needs to be clarified to avoid unintended consequences. Rather than 'outsourcing' relating to 'work', it should relate to a 'part of a business' which is much more certain concept.
- Subsection 311(6) operates as a major disincentive to transfer employees between associated entities and should be deleted from the Act.
- Section 314 is unfair upon the new employer and needs to be deleted. It is not appropriate for transferable instruments to cover employees who are not transferring employees. If s 314 is deleted, s 319 will not be needed.

PART 2-9 – PAYMENT OF WAGES

There is a significant drafting problem which has arisen with Part 2-9 of the FW Act which is causing difficulties and risk for a large number of employers.

It is very common for employers to include provisions in written contracts of employment to the effect that:

- The employer is able to recover any overpayment which occurs as a result of a payroll error;
- On termination of employment, the employer is able to deduct from any monies owing, notice not given by the employee; and
- On termination of employment, the employer is able to deduct any annual leave, personal/carer's leave or wages which have been granted in advance to the employee.

Section 326(1) provides that terms of contracts of employment which permit deductions from an employee's pay have no effect if the deduction is for the benefit of the employer and is unreasonable in the circumstances. Regulation 2.12 specifies that a reasonable deduction for the purposes of s 326 would include: the cost of items purchased on a corporate credit card for personal use by an employee, the cost of personal calls on a company mobile phone, and the cost of petrol purchased for the private use of a company vehicle by the employee.

Despite s 326 which indicates that terms in a contract of employment which permit reasonable deductions from an employee's pay have effect, s 324 states that an employer is only permitted to make a deduction if *'the deduction is authorised in writing by the employee and is principally for the employee's benefit'* (s 324(1)(a)). Further, the authorisation can be withdrawn in writing by the employee at any time (s 324(2)).

In the first circumstance outlined above, some employees and their representatives have argued that an employer is not permitted to deduct an overpayment even where there is a provision in the contract of employment authorizing the deduction because it is not *'principally for the employee's benefit'*.

Similarly, in the second circumstance referred to above, some employees and their representatives have argued that an employer is not permitted to deduct notice not given by an employee on termination even where there is a provision in the contract of employment authorizing the deduction, because this is not *'principally for the employee's benefit'*.

In the third circumstance mentioned above, clearly granting annual leave, personal / carer's leave or wages in advance is *'for the employee's benefit'* but some employees and their representatives have argued that an employer has no ability to recover amounts paid in advance on termination because authorization was either not given,

or if it was given in the contract of employment, the authorization has been withdrawn under s 324(2).

To remove the unfairness for employers which is inherent in the existing provisions, s 324 needs to be amended to permit any reasonable deductions to be made from an employee's pay. Such an amendment would also benefit employees because employers who become aware of the problems with the existing provisions are less likely to grant leave or wages in advance to employees.

Guarantees of annual earnings

In Ai Group's experience, employers who have endeavoured to utilize the provisions of Division 3 have found them to be overly complex, difficult to explain to employees, and difficult to implement in practice.

A comprehensive safety net of legislated minimum conditions is in place through the NES and other provisions of the FW Act. It is not appropriate for modern awards to cover or apply to full-time employees earning more than the 'high income threshold' (currently defined in Regulation 2.13 as those earning more than \$118,100) or part-time employees earning more than a proportionate amount of the threshold.

Changes which need to be made:

- Delete s 324(1)(a) and replace with '*the deduction is reasonable in the circumstances*'.
- Delete ss 324(2) and (3).
- Replace Division 3 of Part 2-9 with a simple provision which states that a modern award does not cover or apply to a full-time employee who earns more than the 'high income threshold' or a part-time employee who earns more than a proportionate amount of the threshold.

FW ACT CHAPTER 3 – RIGHTS AND RESPONSIBILITIES OF EMPLOYEES, EMPLOYERS, ORGANISATIONS ETC

PART 3-1 – GENERAL PROTECTIONS

The General Protections are becoming an ever increasing burden on employers. The extremely wide scope and uncertain nature of the provisions has created substantial risks for employers and a major barrier to effectively managing their businesses.

It is vital that changes are made to implement a more balanced regime which protects employees, employers and other persons from unlawful conduct.

Adverse action and workplace rights

Section 340 of the FW Act specifies that a person must not take adverse action against another person because the other person has a workplace right, has or has not exercised that right, or proposes or proposes not to exercise that right.

Section 360 of the FW Act has the effect that, where there are multiple reasons for the action, any reason for the action, whether or not that reason is the sole or dominant reason or whether it is even a conscious reason, is taken to be the reason for the action for the purposes of the General Protections.

Section 361 of the FW Act reverses the onus of proof for proving that adverse action occurred because of a prohibited reason. That is, the employer is obliged to disprove the allegations of the claimant, without the claimant having made out a case.

The recent decision in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 by the Full Court of the Federal Court, through its extremely wide interpretation of the word ‘because’ in s 340 of the Act, has created a further major obstacle for employers to overcome when defending a General Protections claim.

The majority in *Barclay* held that the unconscious intention of the employer must be considered when determining the real reasons for the adverse action.⁶⁵ The unworkability of this approach is highlighted when s 340 is applied with ss 360 and 361 of the FW Act. For example, the claimant may allege that the real reason for the conduct is not the reason that the employer asserts, but another ‘unconscious’ reason. By the operation of s 361 of the FW Act, the employer must disprove that the adverse action was taken because of the ‘unconscious’ reason.

Logically, if a claimant is to rely on a ‘unconscious’ reason for the adverse action occurring and the employer is charged with disproving the claimant’s allegation, the employer’s knowledge and conscious intention must be given substantial weight by the Courts. This approach was referred to by Tracey J in the first *Barclay* decision and was endorsed by Lander J (dissenting) on appeal:

“[207] He then identified the test to be considered at [34]-[35]:

The task of the court, in a proceeding such as the present is, then, to determine why the employer took the adverse action against the employee. Was it for a prohibited reason or reasons which included that reason? In answering this question evidence from the decision-maker which explains why the adverse action was taken will be relevant. If it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence. If the evidence is not

⁶⁵ See decision of Grey and Bromberg JJ at [28]. The decision of the Full Court of the Federal Court is subject to an appeal to the High Court by the Board of Bendigo Regional Institute of Technical and Further Education. The hearing before the High Court is listed for 29 March 2012.

accepted the employer will have failed to displace the presumption that the adverse action was taken for a proscribed reason.

If an employer, who is alleged to have contravened one of the provisions of Part 3-1 in which the word “because” is to be found, adduces evidence which persuades the court that it acted solely for a reason other than one or more of the impermissible reasons identified in a particular protective provision, it will have made good its defence. Because of the reverse onus provision the employer will normally need to call evidence from the decision-maker to explain what actuated him or her to act to the employee’s detriment. As Buchanan J said in Seymour (at 14), the employer will usually have to provide “sworn evidence denying any [proscribed] reason...and, in most cases, an explanation of the real reason for [the adverse action] consistent with the absence of [proscribed reasons] is, in a practical sense, also necessary”. That evidence can be tested in the light of established facts. The credibility of the decision-maker will be assessed by the court.

[208] In my opinion, his Honour’s approach was correct. The question is why was the adverse action taken? That question will be answered by reference to the subjective intention of the decision maker. Ordinarily the decision maker will have to give evidence as to the reason or reasons why the adverse action was taken. If the decision maker’s evidence having regard to “established facts” is accepted, then the decision maker will have discharged the onus imposed upon the decision maker by s 361 of the Act.”

(Emphasis added)

This was not how the majority of the Full Court applied Part 3-1 of the FW Act. The outcome of the Full Federal Court’s decision, if upheld by the High Court of Australia in the upcoming appeal, is that an adverse action claim under the General Protections will be virtually impossible for an employer to defend in many cases.

‘Sole and dominant’ reason

As identified above, s 360 deems any reason for the adverse action as a reason capable of triggering s 340 of the FW Act, even an unconscious reason.

The majority in *Barclay* criticised the distinction between the proximate or immediate reasons for conduct as unhelpful and proceeded to determine that “[t]he real reason or reasons for taking the adverse action must be shown to be dissociated from the circumstances that the aggrieved person has or had the s346 attribute ..”⁶⁶

⁶⁶ *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, see [30]-[32]

This criticism, coupled with the difficulty faced by employers in disproving alleged reasons for adverse action, demonstrates the need to implement a ‘sole and dominant’ reason test.

The ‘sole and dominant’ reason test was a feature of the freedom of association provisions of the *Workplace Relations Act 1996*, and protected employers from injunctions and penalties in circumstances where there was a legitimate reason for taking the relevant action.⁶⁷

The removal of the ‘sole or dominant’ reason test through the FW Act threatens the ability of an employer to introduce necessary workplace changes. Absent the ‘sole or dominant’ reason test, unions and employees are able to stymie plans to introduce more productive and efficient business practices on the basis that employees would be adversely treated because of their entitlement to the benefits of an industrial instrument or other workplace rights.

The implementation of a ‘sole and dominant’ reason test into the General Protections will remove a major barrier to flexibility and productivity. The General Protections are currently a serious impediment to an employer’s right and ability to effectively manage its businesses, including introducing necessary workplace changes and disciplining or terminating staff when necessary.

The provisions lead to extremely unfair outcomes for employers. In numerous cases, General Protections claims are settled by the payment of ‘go away money’ by the employer even when claims are highly speculative or spurious. The quantum of the ‘go away money’ demanded by applicants is often higher than what is typically demanded in unfair dismissal cases because damages are unlimited and often applicants are represented by lawyers operating under contingency fee arrangements.

The problems are highlighted by Ai Group’s survey on the impact of the FW Act (*Annexure*).

Of the 245 respondents to the survey, 18 said that a General Protections application had been made against their company,⁶⁸ with 28 stating that they had been threatened with a claim.⁶⁹

Of those who had been subject to a General Protections application:

- 61 per cent chose to pay compensation to settle the claim before it was dealt with in Court;⁷⁰
- 77 per cent expressed the view that the claim had no merit;⁷¹

⁶⁷ Subsection 792(4) of the *Workplace Relations Act 1996*.

⁶⁸ Survey report, Question 18(8).

⁶⁹ Survey report, Question 19.

⁷⁰ Survey report, Question 18(b)(i).

- 77 per cent stated that the claim was pursued as a General Protections claim because the provisions are more favourable to employees than the unfair dismissal laws;⁷²
- 71 per cent stated that the General Protections provisions are too loose and encourage speculative claims;⁷³
- 40 per cent of respondents who had a claim decided to pay compensation, even though the claim had no merit, because the likely cost of defending the case before a Court would be too high;⁷⁴ and
- 24 per cent of respondents felt pressured to settle the claim by FWA, even though the claim had no merit.⁷⁵

Case study provided by Ai Group Member company:

'Our company has received several spurious general protections claims. All claims have been pursued via lawyers, not unions, and have background links to absenteeism, workers' compensation or redundancy claims. The claims were used as a vehicle for pursuing redundancy payments or an ex-gratia payment.'

Case study provided by Ai Group Member company:

'The General Protections are being by used workers' compensation lawyers for a second bite of the cherry for compensation. Our company was faced with a General Protections claim by an employee who had been dismissed because his/her doctor had determined that he/she had suffered permanent disablement after suffering a workplace injury and would never be able to return to full duties. We were unable to provide light duties to the employee for rest of his/her working life and therefore our only option was dismissal.'

With regard to ss 340, 360 and 361 of the FW Act, fairness to employers and workability needs to be restored through the following changes:

- In s 340, the term 'because' needs to be clarified to ensure that a person is only found to have taken adverse action against another person if the action is done consciously and with the intent of adversely treating that person because of a workplace right.
- Section 360 of the FW Act should be replaced with the following provision:
'For the purposes of this Part, a person takes action under section 342 for a particular reason if that reason is the sole and dominant reason for that action.'

⁷¹ Survey report, Question 18(b)(ii).

⁷² Survey report, Question 18(b)(ii).

⁷³ Survey report, Question 18(b)(ii).

⁷⁴ Survey report, Question 18(b)(ii).

⁷⁵ Survey report, Question 18(b)(ii).

- Section 361 should be deleted, to restore an important principle of justice that a party making a claim bears the onus of proof.

Employer rights under the General Protections

Section 341 of the FW Act specifies that a person has a ‘workplace right’ if the person:

- ‘(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
- (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
- (c) is able to make a complaint or inquiry:*
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or*
 - (ii) if the person is an employee—in relation to his or her employment.’*

The enjoyment of rights, entitlements and benefits expressed in s 341 are not limited to employees, but extend to employers as well. This is made clear by the Explanatory Memorandum to the *Fair Work Bill 2008*, which uses the term ‘entitlement’ to describe the entitlements of employers, employees, contractors and other relevant persons. For example, s 542 states:

‘542 Entitlements under contracts

- (1) For the purposes of this Part, a safety net contractual entitlement of a national system employer or a national system employee, as in force from time to time, also has effect as an entitlement of the employer or employee under this Act.*

(Emphasis added)

Nonetheless, in *Australian Industry Group v ADJ Contracting* [2011] FWA 6684, a Full Bench comprising of Harrison SDP, Richards SDP and Roe C, raised doubt about whether employers are entitled to the benefit of an industrial instrument, or simply just have obligations under such an instrument:

“[26]...To the extent the meaning of the section is unclear and resort may be had to the Explanatory Memorandum’s comments on this section all those comments refer to employee rights. It is not common to describe an employer (here a contractor) being covered by an enterprise agreement as it being entitled to the benefit of that agreement. The only place in the FW Act in which the term “entitled to the benefit of... a workplace instrument” is used

is in s.341. We do however note the terms of the now repealed s.298L(1)(h) of the Workplace Relations Act 1996 (WR Act) which described a prohibited reason as one carried out because an independent contractor is entitled to the benefit of an industrial agreement. We also note that the then s.298N made it an offence for an employee to cease work in the service of an employer because the employer was entitled to the benefit of an industrial instrument. However we were not taken to any case which has described an employer as being entitled to the benefit of an industrial agreement when speaking about the wages and conditions to be afforded to its employees.”

(Emphasis added and footnotes omitted)

Ai Group strongly disagrees with the above view expressed by the Full Bench and has sought judicial review of the decision in the Federal Court.⁷⁶

The definition of ‘workplace right’ in s 341 needs to be clarified through an amendment to the Act to ensure that it includes the rights, benefits and entitlements of employers under industrial instruments, workplace laws, etc.

Discretionary benefits and workplace rights

The definition of ‘workplace right’ under s 341 of the FW Act is extremely broad, particularly given that it includes an unqualified entitlement to benefits arising under a workplace law or workplace instrument.⁷⁷

Ai Group is concerned that, unqualified, the definition of ‘workplace right’ could give rise to an interpretation that a ‘workplace right’ includes benefits which, under the workplace instrument or otherwise, are provided to an employee at the discretion of the employer, for example bonuses.

This interpretation was adopted by Cambridge C in obiter in *TWU v TNT Australia Pty Limited* [2011] FWA 1543:

‘[17] Although the evidence established that TNT had acted to implement a “blanket” refusal to grant the discretionary benefits as retaliation for taking protected industrial action it remains necessary to determine whether such action could constitute capricious or unfair conduct that undermined freedom of association or collective bargaining. It would seem that any action which contravened or removed an established workplace right as retaliation for the taking of protected industrial action, would represent adverse action and therefore breach a general protection, specifically as contemplated by section 346 of the Act.’

(Emphasis added)

⁷⁶ *Australian Industry Group v Fair Work Australia* VID1388/2011 will be listed for hearing before a Full Court of the Federal Court in the May 2012 appellate sittings.

⁷⁷ Paragraph 341(1)(a) of the FW Act.

The nature of a discretionary benefit is that it is granted only at the discretion of the employer and is not an enforceable entitlement. Section 341 of the Act should be amended to clarify that a discretionary benefit is not a ‘workplace right’. An employer should not be found to be engaging in adverse action if it exercises its discretion to grant or not grant a discretionary benefit.

‘In relation to his or her employment’

A ‘workplace right’, for the purposes of the General Protections, extends beyond the entitlements that a person may have under a workplace law or workplace instrument and includes the right for an employee to make a complaint or inquiry ‘in relation to his or her employment’ (s 341(1)(c)(ii)).

The phrase ‘in relation to his or her employment’ is vague and uncertain. A broad interpretation of this phrase could allow a person to make a complaint about any matter with the most tenuous link to his or her employment. The phrase could include a complaint or inquiry about the employer’s legitimate disciplinary action against the employee, or a legitimate direction to or requirement upon the employee to perform work in a particular manner. An employee should not be protected from legitimate disciplinary action because the employee has made a complaint about the matter.

Case study provided by Ai Group Member company:

‘An employee claimed that the company had taken adverse action against him because the employee had, in the past, made an inquiry as to his/her working hours under the employment contract. The real reason that the company dismissed the employee was because of poor performance and because the employee was unwilling to work the hours genuinely required for the job.’

The phrase could even have the effect of protecting employees that make malicious, vexatious or even false complaints from any disciplinary action or termination on the basis of the complaint.

This is, in our view, not how Parliament intended the paragraph to operate in practice. Extracted below are the examples used in the Explanatory Memorandum to the *Fair Work Bill 2008* to explain the intention of s 341(1)(c)(ii):

“1370. Subparagraph 341(1)(c)(ii) specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. Unlike existing paragraph 659(2)(e) of the WR Act, it is not a pre-requisite for the protection to apply that the employee has ‘recourse to a competent administrative authority’. It would include situations where an employee makes an inquiry or complaint to his or her employer.

Illustrative examples

Rachel is employed in a night fill position. The ladder that she uses at work to stock the shelves is missing a rung which makes it dangerous for her to climb. Rachel raises this issue with her employer. Under subparagraph 341(1)(c)(ii) Rachel has a workplace right because she has made a complaint/inquiry to her employer in relation to her safety concerns regarding the ladder.

Paul is employed as a shop assistant. To cope with the busy holiday trade, his employer has asked him to work overtime hours. However, Paul's take home pay does not appear to reflect the appropriate penalty rates under the award for the extra hours he has worked. His employer has ignored repeated requests to provide an explanation of how his pay has been calculated.

Paul approaches his union and asks for their assistance to work out whether he is being paid the correct amount. Paul's union is a registered organisation and is entitled to represent his industrial interests. Under clause 539 of the Bill, the union is therefore able to bring an action in relation to the alleged breach. The employer finds out that he has sought the assistance of his union and dismisses him. Under subparagraph 341(1)(c)(i) Paul has a workplace right because he has made an inquiry to the union about his entitlements under the award and the union is a person or body that can seek compliance with a workplace instrument (the award) under a workplace law.

Freddy works part-time at a petrol station. He believes he is not being paid the correct award rate for a console operator. He writes a letter of complaint to the Australian Competition and Consumer Commission (ACCC) as he mistakenly believes that it is able to investigate wage underpayments. Freddy tells his manager about the letter. Following this, his hours for the next fortnight are cut in half. While the complaint would not be covered by paragraph 341(1)(c)(i) as the ACCC does not have capacity under a workplace law to seek compliance with the applicable award, Freddy would still have exercised a workplace right because he has made a complaint regarding his employment (subparagraph 341(1)(c)(ii))."

Subparagraph 341(1)(c)(ii) needs to be removed from the definition of 'workplace right'.

Individual flexibility arrangements

As outlined in the sections of this submission dealing with Part 2-3 – Enterprise Agreements and Part 2-4 – Modern Awards, the IFA provisions under the FW Act are not achieving meaningful flexibility for employers and employees.

During the development of the *Fair Work* system, the Government stated that IFAs would remove the need for individual statutory agreements because they would provide the ability for employers and individual employees to agree on arrangements which suit their needs subject to the employee not being disadvantaged. The intent and purpose of IFAs has not been achieved.

Subclause 341(3) is a barrier to the making of IFAs and achieving overall workplace flexibility because it has the effect of preventing an employer from offering an IFA as a condition of employment. This effect is expressed in the Note contained with the subclause:

“Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.”

The restriction imposed on the employer in s 341(3) removes the power for an employer to confirm flexible terms and conditions of employment before engaging a person to perform the necessary work. Instead, the employer must employ the person before flexible arrangements, suitable to the employee and the employer, can be entered into. This is counterintuitive to the purpose of IFAs, that is, to enable employers and individual employees to enter into flexible working arrangements that suit their needs.

Similar to individual statutory agreements under the *Workplace Relations Act 1996*, employers and individual employees should have the right to incorporate an IFA into the contract of employment at the commencement of employment.

A new s 341(6) needs to be inserted stating that a prospective employer does not contravene s 341(3) if an employer makes an offer of employment conditional on entering into an IFA with a prospective employee. The Note in s 341(3) also needs to be deleted.

Adverse action must exclude reasonably employer responses to protected industrial action

Standing down an employee engaged in protected industrial action is appropriately excluded from the definition of adverse action.⁷⁸ However, other reasonable employer conduct that is done in response to protected industrial action is not excluded and thereby potentially captured by the General Protections. Examples include:

- Not offering overtime on the weekend to individual employees who have taken strike action during the previous week, but offering weekend overtime to those who have not;
- Withdrawing discretionary benefits (as discussed above);
- Requiring employees who are taking industrial action to return their company vans so that other employees who are not taking industrial action can use them to service customers;

⁷⁸ See subclause 342(4) of the FW Act.

- Preventing employees utilising company telecommunications systems during periods of industrial action.

Another legitimate response to industrial action, and long-recognised right of an employer, is to apply the 'No Work, No Pay' Principle. The FW Act recognises this right in s.471(4) but the right should be expressly recognised in the General Protections. It would appear that the reference to 'stand down' in s 342(4)(b) is a reference to the rights under Part 3-5 – Stand Down, of the Act.

In *TWU v TNT Australia Pty Limited* [2011] FWA 1543, Commissioner Cambridge decided that the withdrawal of a discretionary benefit could be a form of 'employer response action' as permitted under s 411. Ai Group is of the view that the Commissioner was incorrect in this regard because employer response action must be 'industrial action' and the only form of employer industrial action which is recognised under s 19 is a lock-out.

An employer should be allowed to respond in a reasonable manner to protected industrial action by employees without breaching the General Protections. Actions often need to be taken to mitigate the effects of industrial action and to defend against it.

Subsection 342(4) should be expanded to include all lawful employer conduct which is done in response to protected industrial action.

Unlawful activities

Section 346 of the FW Act provides protection from adverse action to persons because they are engaging in, or have at any time engaged in, or proposed to engage in, industrial activity. Section 347 defines the phrase 'engages in industrial activity' for the purpose of s 346. In its current form, the definition of 'engages in industrial activity' in s 347 expressly includes certain types of unlawful industrial activity and this is highly inappropriate.

Paragraphs 347(a),(c),(d) and (e) must be deleted. Union delegates, union members and other persons should not be protected from disciplinary action if they encourage or engage in unlawful activity, even where that activity is organised or promoted by a union. A union delegate is an 'officer' of the union under s 12 of the FW Act and responsible for the actions of the union under s 363 of the FW Act.

Discrimination

Section 351 of the FW Act protects employees or prospective employees from adverse action that is done because the employee or prospective employee possesses an attribute protected by the section. Section 351 is an expansion of the protection that existed under the *Workplace Relations Act 1996* and its wide scope

duplicates the protections from discrimination in the area of employment that already exists under Commonwealth, State and Territory anti-discrimination laws.⁷⁹ Section 351 is, in effect, an additional layer of regulation as it relates to anti-discrimination law. This is not necessary or desirable since the Commonwealth, States and Territories already effectively regulate this area of the law.

The expansion of the anti-discrimination provisions implemented by the FW Act has created another layer of red tape for employers and higher costs for employers and the community. For example, the new provisions have required the establishment of an anti-discrimination section within the Office of the Fair Work Ombudsman.⁸⁰

Also, the dual coverage of grounds of discrimination in multiple jurisdictions has created the opportunity for claimants to ‘forum shop’ for the jurisdiction in which their claim would likely be more successful. This is extremely inappropriate and unfair to employers, who must ensure compliance with multiple laws covering the same subject matter but which otherwise operate within different jurisdictions and expose them to different remedies, penalties and processes.

Currently the Australian Government is undertaking a project to consolidate the Commonwealth anti-discrimination laws (*Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*) into one piece of legislation. In the context of this project, Ai Group has urged the Government to remove the anti-discrimination provisions from the FW Act, other than those provisions that have been in Federal workplace relations legislation for many years, for example, the requirement that employees not be terminated for a discriminatory reason.

Section 351 of the FW Act should be amended to limit its operation to the termination of employment of an employee.

Union nominated labour

Section 355 of the FW Act prohibits a person from coercing another to employ, engage, designate or allocate duties to a third person. The intention of the provision is to prevent the practice of union nominated labour. The Explanatory Memorandum to the *Fair Work Bill 2008* explains:

“1444. For example, clause 355 prohibits an industrial association from organising industrial action against a head contractor with intent to coerce the head contractor to engage a specific employee as a site delegate or safety officer.”

⁷⁹ See paragraph 1431 of the Explanatory Memorandum to the *Fair Work Bill*

⁸⁰ See page 2 of the *Overview of discrimination function 2009-10 Fair Work Ombudsman*, January 2011, accessed 10 February 2012 < <http://www.fairwork.gov.au/Publications/Discrimination%20overview/Overview-of-discrimination-function-2009-10-Fair-Work-Ombudsman-pdf.pdf> >

This is an extremely important provision. In the construction industry it was common for employers to be forced by unions to employ highly militant individuals as full-time union delegates or OHS officers before the union would sign a project agreement for a new construction project. OHS is a vital issue and it is essential that the most qualified person is appointed, not the person forced upon the employer by a union. This type of behaviour is creeping back into the industry and s 355 is becoming increasingly important.

Sham contracting

The General Protections include sham contracting provisions. These provisions appropriately leave the definition of ‘independent contractor’ to be determined through the application of the common law tests. Ai Group strongly opposes any change to this approach. Any attempt to devise a ‘one size fits all’ approach would cause enormous difficulties and disruption for industry and independent contractors – the vast majority of who have no wish to be employees.

The sham contracting laws are appropriate and effective, and should be retained in their existing form.

Exemptions from the General Protections

The *Workplace Relations Act 1996* (in s 364) and previously the *Industrial Relations Act 1988* (in section 170CD) excluded certain types of employees from pursuing an unlawful termination claim. A largely similar list of exclusions is included in s 789 of the FW Act but this section does not apply to those to whom the General Protections apply. It is not logical or fair that these same exemptions do not apply to General Protections applications relating to termination of employment. The absence of these exemptions encourages General Protections claims from employees who do not have access to unfair dismissal laws. Employees whose annual rate of earnings exceeds the high income threshold⁸¹ should also be exempted.

The immediate access of employees to the General Protections jurisdiction upon commencement of employment is inconsistent with the rationale for exempting employees employed for less than 6 months from unfair dismissal laws as explained in the Explanatory Memorandum to the *Fair Work Bill 2008*:

“1512. Paragraph 382(a) provides that a person must have completed a minimum employment period with his or her employer. A requirement that an employee serve a minimum period before having access to an unfair dismissal remedy enables an employer to have a period of time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period.”

(Emphasis added)

⁸¹ See section 832 of the FW Act.

Aligning the exclusions in the General Protections for termination of employment claims with the exclusions in the unfair dismissal laws would prevent claimants from undermining the unfair dismissal regime in Part 3-2 of the FW Act, as is currently occurring.

Time limit for lodging a General Protections application concerning termination of employment

Sections 366 of the FW Act allows a claimant to make a General Protections application in relation to termination of employment within 60 days of the dismissal taking effect. The unfair dismissal provisions allow a claimant only 14 days to make an unfair dismissal claim under Part 3-2 of the FW Act.⁸² There is no logical reason as to why this discrepancy exists.

In considering the statutory time limit for the making of an unfair dismissal application, the *Standing Committee on Education, Employment and Workplace Relations to the Fair Work Bill 2008* decided that a 14 day time limit is:

“more likely to provide employees with time to seek advice and will prevent the practice of unmeritorious claims being lodged as a ‘holding position’ because there has been insufficient time for proper consideration and advice. A set time limit of 14 days will also provide the certainty that allows employers to then move forward to fill the vacant position without the risk of a subsequent challenge.”⁸³

This rationale was not applied to the time limit of 60 days in the General Protections. Therefore, the General Protections have become a pseudo unfair dismissal regime for dismissed employees who do not have access to the unfair dismissal laws because they have not filed an unfair dismissal claim within the required 14 day period. This problem has been very widely identified including by numerous Ai Group members. A similar 14 day time limit needs to apply under the General Protections.

The increase in the number of General Protections applications involving dismissal is strong evidence that the unfair dismissal regime is being undermined by the General Protections in the Act. General Protections applications which involved dismissal increased from 1188 in 2009–10 to 1871 in 2010–11, an increase of almost 60%.⁸⁴

Aligning s 366 with the time limit for making an unfair dismissal application would prevent claimants from undermining the unfair dismissal regime.

⁸² See section 394(2) of the FW Act.

⁸³ See page 78 of the Report *Standing Committee on Education, Employment and Workplace Relations to the Fair Work Bill 2008* http://www.aph.gov.au/senate/committee/eet_ctte/fair_work/report/report.pdf

⁸⁴ See page 11 of FWA's 2010–11 Annual Report: http://www.fwa.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf

Time limit for making General Protections applications not involving termination of employment

Part 3-1 of the FW Act does not limit the time in which a General Protections application not involving dismissal can be made. This leaves the door open for a person to make a General Protections claim in relation to alleged adverse action occurring years earlier.

This is extremely unfair to employers. For example, an employer that is subject to a General Protections claim under s 372 for alleged adverse action that occurred, say, two years earlier would need to have documented the exact facts and state of mind of relevant staff at the time of the alleged action in order to disprove the claim. This is unlikely to have occurred when the employer was unaware that a claim would be made. As time passes, organisations change and staff move on, taking knowledge and experiences with them. With General Protections claims that are not lodged promptly the employer is often left with an almost task in disproving claims.

The FW Act should be amended to place a time limit for lodging General Protections applications which do not relate to termination of employment. Similar to our proposed time limit for General Protections claims involving termination of employment, a time limit of 14 days should apply, calculated from the time the adverse action is alleged to have occurred.

Conduct of proceedings relating to General Protections applications

General Protections claims are usually first conciliated at a conference by FWA and if unresolved, are determined by either the Federal Court or the Federal Magistrates Court. This effect of this process, over the past two years, is that the vast majority of General Protections claims are settled, usually for monetary compensation, and never proceed to a Court. While monetary settlement can be a legitimate method of dispute resolution, feedback from Ai Group members suggests that employers are being pressured to settle disputes at conciliation, even if the claim has no merit.

Results from Ai Group's Survey (*Annexure*) reveal that 50% of respondents decided to settle a General Protections claim, even though the claim had no merit, because the likely cost of defending the case would be too high. Also, 28% of respondents felt pressured to settle the claim by FWA, even though the claim had no merit.⁸⁵

A key problem experienced by Ai Group members at the conciliation stage is that the claims made by employees do not have to be substantiated, thereby turning the process into a discussion about money rather than a true resolution of the dispute.

⁸⁵ Survey report, Question 18(b)(ii).

This was a problem which the Labor Party in 2007 wanted to eradicate. In the *Forward with Fairness Policy Implementation Plan* released in August 2007, the Labor Party declared that “[u]nder Labor’s policy there will be no ‘go away money’”.⁸⁶ Unfortunately, this has not been the case under the FW Act.

This problem would be addressed if General Protections applications were required to be made directly to the Federal Court or Federal Magistrates Court. This would limit the number of General Protection claims made that are without merit and motivated only by a monetary settlement. This was the process which applied for unlawful termination and freedom of association claims under the *Workplace Relations Act 1996*, and it worked well.

Importantly, the Federal Court or Federal Magistrates Court, with the support of the parties, would be able to order mediation before proceeding to a full hearing. Also, by agreement with all parties, conciliation in FWA should be able to be ordered by Court.

We anticipate that the incidence of ‘go away money’ for spurious claims would be enormously reduced if the initial application for a General Protections claim had to be made directly to either the Federal Court or the Federal Magistrates Court.

An obvious benefit of this process is that General Protections applicants, through the Court process, would be required to articulate the details of their claim within a Statement of Claim to the Court. These details would be very useful to not only the Court, but also the respondent (usually the employer) in preparing their case. It would also assist FWA in its conciliatory role.

Furthermore, the FW Act should be amended to require that, when FWA conducts a conciliation conference, the Tribunal member must issue a certificate to the parties and provide it to the Court stating the Tribunal’s opinion on the prospects of success of the claim and whether, in the Tribunal’s view, the claim is vexatious or without merit. If the Tribunal declares that the matter has low prospects of success, is vexatious or without merit and the application is subsequently dismissed by the Court, the certificate should be available to be used by the employer for a claim for costs against the applicant or the applicant’s legal representative.

Cost orders against lawyers and paid agents

Section 376 allows a party to seek a costs order against a lawyer or paid agent of a person who has made a General Protections application if that lawyer or paid agent caused costs to be incurred by another party:

- because the lawyer or paid agent encouraged a person to make the application and it should have been reasonably apparent the application would have no reasonable prospects of success; or

⁸⁶ Australian Labor Party, ‘Forward with Fairness Policy Implementation Plan’, August 2007, page 18.

- because of an unreasonable act or omission.

While the section was “*designed to deter lawyers and paid agents from encouraging others to make speculative applications, or make applications they know have no reasonable prospects of success*”⁸⁷, it appears that some lawyers and paid agents are not discouraging claimants from pursuing speculative and spurious claims, and in fact are deriving significant income from such claims.

The FW Act should include a civil penalty for lawyers or paid agents who are found to be in breach of s 376. The former *Workplace Relations Act 1996* at s 679 imposed a civil penalty of \$10,000 if the adviser was a body corporate and a \$2,000 if the adviser was not a body corporate. A similar civil penalty should be included in the FW Act (converted to penalty units).

Remedies

Section 545 of the FW Act empowers the Federal Court and the Federal Magistrates Court to make any order it considers appropriate if it is satisfied that a person contravened the General Protections. This includes uncapped monetary compensation for loss that a person has suffered because of the contravention.⁸⁸

The unfair dismissal provisions in the FW Act specify that the monetary compensation available to an aggrieved employee cannot exceed the total amount of remuneration received by the employee, or to which the employee was entitled for any period of the employment with the employer, during the 26 weeks immediately before the dismissal.⁸⁹ A similar limit applied under the *Workplace Relations Act 1996* for unfair dismissal and unlawful termination matters.

The vast difference between the compensation available to employees under the General Protections and the compensation available under the unfair dismissal regime undermines the value and purpose of pursuing an unfair dismissal claim. The uncertainty of the amount of compensation that an employer would likely be ordered to pay if it was unable to disprove an employee’s allegation of adverse action is daunting, particularly when legal costs are also factored into the equation. The effect of this is that claims very often settle at conciliation even if the claim has no merit.

The lack of a cap on compensation under the General Protections is also inconsistent with the role and purpose of the compensation cap for unfair dismissal claims. The Labor Party’s *Forward with Fairness Policy Implementation Plan* released in August 2007, declared that under a Labor industrial relations system, “[t]here will be a cap on compensation to increase certainty and to discourage speculative claims”.⁹⁰ While

⁸⁷ Explanatory memorandum to the *Fair Work Bill*, [1497]-[1501]

⁸⁸ Paragraph 545(2)(b) of the FW Act.

⁸⁹ Subsection 395(5) and (6) *Fair Work Act*

⁹⁰ Australian Labor Party, ‘*Forward with Fairness Policy Implementation Plan*’, August 2007, page 18.

this is true for claims made under the unfair dismissal regime, a very large number of speculative claims are being pursued through the General Protections.

The FW Act should be amended so that the remedies available to employees for a General Protections claim are the same as the remedies available under the unfair dismissal regime; that is, a cap on compensation of 26 week's pay.

Interaction between personal/carer's leave and the General Protections

It has been the experience of many Ai Group members that absenteeism has increased since the commencement of the FW Act and it has become more difficult to discipline employees for failing to provide reasonable evidence to justify the taking of personal/carer's leave because of the General Protections.

Case Study provided by Ai Group Member company:

'We are currently faced with a General Protections application after we dismissed an employee for repeatedly failing to notify of absences or provide evidence in support of absences, following instructions to do so in warning letters. The employee's lawyer is claiming that the company engaged in adverse action in breach of the General Protections because the employee had taken sick leave.'

Personal/carer's leave is a workplace right arising under Division 7 of Part 2-2 of the FW Act. An employer, in accordance with s 107 of the Act has the right to request evidence from the employee that the personal/carer's leave was taken for a permissible reason under the Act, for example, the employee is suffering from a personal illness or injury. This section provides employers with some ability to manage absenteeism in the workplace. However this ability is being substantially impacted by the General Protections.

Aggrieved employees disciplined or dismissed by their employer either for failing to provide the necessary evidence required by s 107 or for the taking of excessive levels of absenteeism are often using the General Protections to claim that their employer has engaged in adverse action because of a workplace right under the FW Act.

Changes which need to be made:

- In s 340, the term 'because' needs to be clarified to ensure that a person is only found to have taken adverse action against another person if the action is done consciously and with the intent of directly adversely treating that person because of a workplace right.
- Section 360 of the FW Act should be replaced with the following provision:
'For the purposes of this Part, a person takes action under section 342 for a particular reason if that reason is the sole and dominant reason for that action.'

- Section 361 should be deleted, to restore an important principle of justice that a party making a claim bears the onus of proof.
- The definition of ‘workplace right’ in s 341 of the FW Act needs to be clarified to ensure that it includes the rights, benefits and entitlements of employers under industrial instruments, workplace laws, etc.
- Section 341 of the Act should be amended to clarify that a discretionary benefit is not a ‘workplace right’.
- Subparagraph 341(1)(c)(ii) needs to be removed from the definition of ‘workplace right’.
- A new s 341(6) needs to be inserted stating that a prospective employer does not contravene s 341(3) if an employer makes an offer of employment conditional on entering into an IFA with a prospective employee. The Note in s 341(3) also needs to be deleted.
- Subsection 342(4) should be expanded to include all lawful employer conduct which is done in response to protected industrial action.
- Paragraphs 347(a),(c),(d) and (e) must be deleted. Union delegates, union members and other persons should not be protected from adverse action if they encourage or engage in unlawful activity, even where that activity is organised or promoted by a union.
- A set of exclusions should be incorporated within the General Protections for termination of employment claims, aligned with the exclusions in the unfair dismissal laws. This would assist in preventing claimants from undermining the unfair dismissal regime in Part 3-2 of the FW Act.
- The time limit in s 366 should be aligned with the time limit for making an unfair dismissal application. Both should be 14 days. This would assist in preventing the unfair dismissal regime being undermined.
- Similar to our proposed time limit for General Protections claims involving termination of employment, a time limit of 14 days should apply to other General Protections claims, calculated from the time the adverse action is alleged to have occurred.
- General Protections applications should be required to be lodged in the Federal Court or Federal Magistrates Court, rather than in FWA. This would limit the number of General Protections claims made that are without merit and are motivated only by a monetary settlement. The Court, with the support of the parties, would be able to order mediation before proceeding to a full hearing. By agreement with all of the parties, conciliation in FWA should also be able to be ordered by the Court.
- Section 376 should include a civil penalty for lawyers or paid agents that contravene the provisions of s 376.

- The FW Act should be amended so that the remedies available to employees for a General Protections claim relating to termination of employment are the same as the remedies available under the unfair dismissal regime; that is, a cap on compensation of 26 week's pay.

PART 3-2 – UNFAIR DISMISSAL

The number of unfair dismissal claims brought under the FW Act when compared to the *Workplace Relations Act 1996* has increased substantially.⁹¹ The removal of the '100 or fewer' limitation on access to the jurisdiction necessarily enlarged the relevant constituency and opened up the possibility of an application to many more employees. Nonetheless, many employers have expressed frustration with the unfair dismissal provisions in the FW Act when trying to dismiss poor performing employees. The following comments from various Ai Group members are representative of this and highlight that change is needed:

Views expressed in writing by four Ai Group Member companies:

Employer 1: *'Too much government red tape. Good employer companies will do the right thing by their employees to keep them happy, employed and productive. We would only want to dismiss a disruptive or problematic employee.'*

Employer 2: *'I know that if I hire more people my business will grow and I will make more money. I am very eager to do this but if I get stuck with an unsuitable employee, terminating them becomes a misery. We are a small company and don't have an HR department. All the hassles come back to me. And there are further hassles keeping up with changing award conditions.'*

Employer 3: *'[There are] a lot more restrictions on the employer, especially when it comes to the dismissal of an employee because of performance. It has resulted in low staff morale and teams not working together because of one 'bad apple'.'*

Employer 4: *'Our company believes in supporting its skilled workers however we feel that many workers do not want to accept personal responsibility for their actions both at work and outside work hours. This impacts on their ability to carry out their duties effectively. If there are issues with their performance, they believe that they are being victimised and it is the fault of management. It is difficult to dismiss workers without being challenged for unfair dismissal.'*

⁹¹ See Fair Work Australia, Annual Report, 1 July 2010 – 30 June 2011, page 10.

Obligation to redeploy employee within an associated entity

If an employee has been dismissed by the employer because of a genuine redundancy, that employee is exempt from the protection of unfair dismissal in Part 3-2 of the FW Act.⁹²

According to s 389(2)(b) of the Act, a dismissal is not a 'genuine redundancy' if it would have been reasonable in all the circumstances for the employee to be redeployed within an 'associated entity' of the employer. The practical operation of this provision was considered by a Full Bench of FWA in *Ulan Coal Mines Limited v Honeysett & Ors* [2010] FWAFB 7578. Here the Full Bench agreed with the decision made at first instance that the employees' dismissal was not a genuine redundancy because they could have reasonably been deployed to an associated entity of the employer, being Xstrata Coal Pty Ltd (Xstrata). The employer was one many companies within the Xstrata group, and while each of these companies operated at different mines across NSW, the Full Bench found them to be associated entities for the purposes of s 389(2)(b) of the Act.

This broad interpretation of 'associated entity' means that many large employers, who through their parent company have a link to other 'sister' companies, will find it extremely difficult to sufficiently prove that the dismissal was a 'genuine redundancy'. This becomes even more troublesome if the employer has no dealing with the 'sister' companies.

The requirement to redeploy wherever reasonable in the circumstances, should be limited to redeployment only within the employer's enterprise.

Small business employers

Small businesses, by the introduction of the FW Act, are no longer exempt from unfair dismissal laws. Small businesses strongly support the exemption and many highlight their reluctance to employ extra staff because of the unfair dismissal laws.

It follows that small businesses satisfying the definition under s 23 of the Act, should be exempt from the requirements of Part 3-2. However, if the Panel does not support this approach the Small Business Fair Dismissal Code, and s 385(c) of the Act which provides that a dismissal which is consistent with the Code is not an unfair dismissal, must be retained.

The unfair dismissal provisions encourage 'go away money'

The application fee for unfair dismissal applications is set by regulation 3.07 of the *Fair Work Regulations*. Currently the fee is \$62.40. This fee is very low and should be increased to, say, \$150 to discourage speculative claims.

⁹² See sections 385 of the FW Act.

Conciliation conferences

Currently, when an unfair dismissal application is made to FWA, the Tribunal arranges a compulsory teleconference between the parties with the aim of trying to settle the dispute before it proceeds to a hearing.

While most respondents to the Ai Group's Survey on the impact of FW Act (*Annexure*) reported that teleconferences are an appropriate way of conciliating unfair dismissal disputes, most employers who were subject to a claim before FWA settled the claim by paying compensation to the employee, without having been ordered to by the Tribunal or a Court.⁹³

Cost orders against lawyers and paid agents

Section 402 of the FW Act allows a party to make an application under s 401 of the Act to seek a costs order against a lawyer or paid agent of a person who has made an unfair dismissal claim if that lawyer or paid agent caused costs to be incurred by another party in relation to the application, encouraged a person to make the application when it should have been reasonably apparent there were no reasonable prospects of success, or because an act or omission by them in connection with the conduct or continuation of the dispute was unreasonable.

The Explanatory Memorandum to the *Fair Work Bill 2008* explains that this section was '*designed to deter lawyers and paid agents from encouraging others to make speculative applications, or make applications they know have no reasonable prospects of success*'⁹⁴. However, it is our experience that many lawyers and paid agents are not discouraging claimants from pursuing speculative claims.

Therefore, ss 401 and 402 of the Act should be tightened. This can be done by including a civil penalty for lawyers or paid agents that are found to be in breach of these sections. The former *Workplace Relations Act 1996* at s 680 included a similar provision in relation to unlawful termination claims with a civil penalty of \$10,000 if the adviser was a body corporate and \$2,000 if the adviser was not a body corporate. A similar civil penalty should apply under the FW Act for unfair dismissal applications.

Contingency fees

Many employees make applications for an unfair dismissal remedy and are represented by a lawyer or paid agent under a contingency fee arrangement. These arrangements cause the fee to the lawyer or paid agent to become effective only if FWA finds in favour of the employee or if the matter is settled. Therefore, any risk flowing to the lawyer and paid agent is significantly lessened if the matter doesn't proceed to a hearing.

⁹³ Survey report, Question 16.

⁹⁴ Explanatory memorandum to the Fair Work Bill, [1610]-[1616]

Lawyers and paid agents should be required to disclose any contingency fee arrangements they may have with the employee. This requirement was in the *Workplace Relations Act 1996* between 2001 and 2009 and should have been included in the FW Act.

Changes which need to be made:

- The requirement to redeploy where reasonable in all the circumstances should be limited to redeployment only within the employer's enterprise.
- Small businesses, satisfying the definition under section 21 of the Act, should be exempt from the requirements of Part 3-2.
- The application fee for unfair dismissal applications is currently \$62.40. This fee is very low and should be increased to, say, \$150 to discourage speculative claims.
- Sections 401 and 402 of the Act should be tightened. This can be done by including a civil penalty for lawyers or paid agents who are found to be in breach of these sections. The former *Workplace Relations Act 1996* at s 680 included a similar provision in relation to unlawful termination claims
- Lawyers and paid agents should be required to disclose any contingency fee arrangements they may have with the employee. This requirement was in the *Workplace Relations Act 1996* between 2001 and 2009 and should have been included in the FW Act.

PART 3-3 – INDUSTRIAL ACTION

It has been several years since we have seen so much industrial action taken against multi-national companies and in the public sector. A significant proportion of the industrial action relates to union claims which would have been prohibited under the *Workplace Relations Act 1996*.

On 1 December 2011, the industrial dispute statistics for the September 2011 quarter were released by the Australian Bureau of Statistics. A substantial increase in the level of industrial disputation was reported, as follows:

Quarter	Working days lost ('000)
September Quarter 2009	29.1
December Quarter 2009	44.7
March Quarter 2010	28.8
June Quarter 2010	24.0
September Quarter 2010	46.6
December Quarter 2010	27.2
March Quarter 2011	19.7
June Quarter 2011	66.2
September Quarter 2011	101.3

Industry	Working days lost per thousand employees in the Sept 2011 quarter ('000)
Coal Mining	155.8
Other Mining	-
Metal Product Manuf.	43.9
Other Manufacturing	8.5
Construction	6.5
Transport, Postal & Warehousing	28.7
Education, Health Care & Social Assistance	23.8
Other industries	1.0

It can be seen that over the past year there has been a huge increase in the level of industrial action. The coal mining industry and the metal products manufacturing industries were the two industries with the highest levels of industrial action in the last reporting period.

Employee claim action

Paragraph 409(1)(a) is a critical provision which requires that for industrial action to be 'employee claim action', and hence protected, it must be taken 'for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters'. This requirement has been focused upon in several FWA Full Bench cases, including: *Australian Postal Corporation v CEPU*, [2009] FWA 599, *Australian Postal Corporation v CEPU*, [2010] FWA 344, *Airport Fuel Services v TWU*, [2010] FWA 4457 and *Alcoa v AWU*, [2010] FWA 4889.

Pattern bargaining

Other vital provisions of the Act deal with pattern bargaining. Industrial action cannot be taken in pursuit of pattern bargaining. Ai Group was instrumental in the introduction of pattern bargaining laws into the *Workplace Relations Act 1996*, following a number of very damaging industry-wide union pattern bargaining campaigns in the manufacturing industry between 2000 and 2003. We were also heavily involved in the development of the pattern bargaining laws in the FW Act (ss 410(4), 412 and 422). In *NTU v University of QLD*, [2009] FWA 90, Senior Deputy President Richards held that the definition of pattern bargaining in the FW Act is not significantly different to the definition in the *Workplace Relations Act 1996*. This is consistent with Ai Group's interpretation.

The pattern bargaining laws are working effectively with one important exception which needs to be addressed. Under the *Workplace Relations Act 1996*, arguments about pattern bargaining were able to be pursued at the stage when a union applied for a protected action ballot order. This is important. It is illogical to have to wait until industrial action is actually taken or about to be taken, when the action is unlawful.

In *John Holland v AMWU* [2010] FWA 526, a Full Bench concluded that there is no requirement on a union which applies for a protected action ballot order to satisfy FWA that it is not pattern bargaining, as was a requirement under the *Workplace Relations Act*. The decision means that, rather than pursuing arguments about pattern bargaining when a protected action ballot is applied for, employers need to pursue arguments about pattern bargaining at a later stage.

Given that industrial action in pursuit of pattern bargaining is unlawful, employers should be able to pursue arguments about this at the ballot order stage. They should not have to wait until industrial action is 'being engaged in, or is threatened, impending or probable' and pursue a stop order or injunction at a later stage.

Once the ballot order is issued and employees have voted in favour of industrial action there is a very strong argument that industrial action is at least 'probable'. Therefore, it is not logical for the FW Act to block employers raising pattern bargaining arguments shortly before this, at the ballot order stage. Ballots are disruptive for employers and costly for the community. Ballots should not be held for industrial action which will be unlawful.

The Tribunal's *John Holland* decision conflicts with Ai Group's understanding of the intent of the pattern bargaining and industrial action provisions of the FW Act. The interpretation of the Full Bench should be addressed through an amendment to the Act. The sensible approach in the *Workplace Relations Act 1996* needs to be reinstated through the addition of a new paragraph (c) in s 443(1), as follows:

“(c) each applicant is not pattern bargaining.”

Employer response action / lock-outs

Between 1994 and 2009, employers had a general right to lock-out employees during bargaining. These rights were logical. In an enterprise bargaining system, each party should have the right to take industrial action in pursuit of their position, but only after each party has tried hard to reach an agreement. Employers' rights to take industrial action have been substantially reduced under the FW Act. Employers are now only entitled to lock-out in response to employee / union industrial action.

The unions and the Greens have announced their intention to pursue amendments to the FW Act to require that employers give three working days' notice of a lock-out. Ai Group strongly opposes such amendments. Lock-outs are not common but it is essential that employers retain their right to lock-out without notice, in response to union industrial action.

Unions are not required to give three working days' notice of employee response action (s 414(4)). Similarly, employers are not required to give three working days' notice of employer response action. The existing provisions relating to employee response action and employer response action are equitable and should not be amended to reduce employer rights.

Common requirements for industrial action to be protected

Subsection 413(3) has been problematic since the FW Act was implemented and two very important amendments need to be made.

Firstly, the term '*genuinely trying to reach an agreement*' should be defined for the purposes of ss 413(3) and 443(1)(b). This same term is defined for the purposes of the pattern bargaining laws in s 412 but in *John Holland v AMWU* [2010] FWAFB 526, a Full Bench of FWA held that the definition in s 412 has no relevance to the interpretation of the term for the purposes of s 413(3). The following new paragraph should be added to s 413:

'(3A) For the purposes of determining whether a person referred to in s 413(3) is genuinely trying to reach an agreement, the following factors are relevant:

- (a) Whether the person has discussed with the other bargaining representatives, all of the terms which each of bargaining representative proposes for the agreement;*
- (b) Whether the person has provided information to the other bargaining representatives in support of each term which the person proposes for the agreement ;*
- (c) Whether the person has met on a sufficient number of occasions with other bargaining representatives to endeavour to reach agreement;*

(d) Whether the person has met, and is meeting, the good faith bargaining requirements;

(e) Whether the person is pattern bargaining.'

Proposed paragraphs 413(3A)(a), (b) and (c) are supported by the Full Bench decision in *Total Marine Services Pty Ltd v MUA* [2009] FWA 368. In this decision, the Full Bench overturned a decision of Commissioner Thatcher who had decided that the union was 'genuinely trying to reach an agreement' despite the fact that there had been limited face to face meetings and limited articulation of many of the claims, including the wage claim which had not been specified. The Full Bench said:

'We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted.'

Proposed paragraphs 413(3A)(d) and (e) are logical additional factors.

Secondly, in *JJ Richards v TWU* [2011] FWA 3377, a Full Bench of FWA held that a party can be 'genuinely trying to reach an agreement' and hence can take protected industrial action even though bargaining has not commenced in one of the ways identified in s 173 of the FW Act.

The *JJ Richards* case is very important. There is an important issue of principle involved. The right which existed to take industrial action regardless of the level of support amongst employees for a collective agreement was logical and fair under the voluntary bargaining system in the old legislation. Such a right has no place under the FW Act where bargaining is compulsory if the majority of employees support collective bargaining and employers have no obligation to bargain if the majority of employees do not want a collective agreement. In a workplace where only a minority of employees are union member, it is not logical or fair for the union members to be granted the right to take industrial action to coerce the employer to bargain if the majority of employees have not expressed support for the negotiation of a collective agreement.

This problem which has occurred as a result of the *JJ Richards* decision should be addressed by adding a new paragraph (8) to s 413 as follows:

"(8) The industrial action is not taken before the notification time in section 173."

Notice requirements for employee claim action

Under the FW Act a number of employers have been subjected to industrial action without any realistic ability to take defensive action to protect their business. The requirement in s 414 for unions and employees to give 72 hours notice of employee claim action is to enable the employer to take defensive action. Relevant FWA cases include the Full Bench proceedings in *Telstra v CEPU*, [2009] FWAFB 1698 and the decision of Commissioner Bissett in *Berkeley Challenge Pty Ltd T/A Spotless v United Voice* [2011] FWA 6421.

Section 414(6) should be amended to require that the nature and timing of the action be specified, as follows:

- (6) A notice given under this section must specify:*
- (a) the nature of the action including the type of action and the work locations affected;*
 - (b) the day and time when each instance of industrial action to which the notice relates will start;*
 - (c) the day and time when each instance of industrial action to which the notice relates will end unless the action is indefinite.'*

Stop orders

The provisions relating to stop orders (ss 418 to 421) are extremely important to protect employers against unlawful industrial action. These provisions are generally working effectively.

Suspension or termination of protected industrial action

Section 423

Section 423 enables industrial action to be suspended or terminated where industrial action is threatening to cause significant and imminent economic harm to the employer and the employees who are bargaining and protracted industrial action has been engaged in. Ai Group opposes any loosening of these requirements.

Compulsory arbitration of enterprise bargaining outcomes should take place only in extremely limited circumstances. If a negotiating party is aware that arbitration is available, there is less incentive for the party to make concessions in order to reach agreement. A union would be able to make a series of excessive claims which no company would agree to, organise industrial action in pursuit of those claims and then wait for a 'compromise' position to be arbitrated. This would represent a return to the old days of arbitration around ambit claims. Arbitrated outcomes (particularly those favourable to unions) would undoubtedly flow-on across industries. This would

occur as a result of unions pressing other employers to accept the arbitrated outcome and also through other similar outcomes being arbitrated by FWA and the doctrine of precedent.

Australia had a compulsory arbitration system for 90 years. By the early 1990s it had become incompatible with Australia's open economy and was replaced with a system of enterprise bargaining. In an open economy, Australia's interests are best served by employers and employees reaching agreement on wages, conditions and workplace flexibilities which suit their own unique circumstances. Compulsory arbitration of bargaining disputes is clearly inconsistent with the whole notion of enterprise bargaining. The outcome of arbitration is not an enterprise agreement, but rather a determination which all parties must comply with.

Section 424

Ai Group strongly supports section 424 and we have made several applications over the years under this section or the equivalent previous sections in the *Workplace Relations Act 1996*, during automotive industry disputes. Ai Group has always differentiated compulsory arbitration by the Tribunal under this section (where the interests of the community outweigh the interests of the bargaining parties) from regular bargaining situations where compulsory arbitration is not appropriate. The most recent application which Ai Group made under s 424 was for a dispute involving Toyota Motor Corporation Australia Ltd in September 2011 in which FWA decided not to suspend or terminate the industrial action: *Toyota v AMWU* [2011] FWA 6268.

The equivalent section in the *Workplace Relations Act* (section 170MW(3)) was the subject of proceedings before the High Court of Australia in the *Coal and Allied*⁹⁵ case in 2000 where the Court determined that a relatively high bar applies before industrial action can be suspended or terminated. The Court said:

"...a decision under s 170MW(3)(b) that industrial action is "threatening ... to cause significant damage to the Australian economy or an important part of it" (emphasis added) is not simply a matter of impression or value judgment. The presence of the words "significant" and "important" in s 170MW(3)(b) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question."

Ai Group strongly opposes any changes to s 424 which would reduce access to an order to suspend or terminate industrial action. This is a vital provision which is designed to protect the community from damaging industrial action. In circumstances where s 424 applies, the interests of the community outweigh the interests of bargaining parties. For this reason, it is not appropriate for FWA to be required to consider the motives or actions of bargaining parties in taking protected

⁹⁵ *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at 204.

industrial action, as some parties have proposed. If the economy or the life, health, safety or welfare of the population is threatened by industrial action, the community needs to be protected regardless of the motives or actions of the bargaining parties.

Section 425 has been very important on occasions and it needs to be retained: see *Nyrstar Port Pirie*, [2009] FWA 1148. One problem which has been identified is that an order suspending industrial action to allow for cooling off is only available for industrial action that 'is being engaged in'. Orders should be available where industrial action is 'being engaged in, threatened, impending or probable'.

Similarly, s 426 is a very important provision and orders suspending industrial action which is threatening to cause significant harm to a third party should be available where industrial action is 'being engaged in, threatened, impending or probable'.

With regard to ss 431 to 434, it is important that the Minister retains the right to terminate industrial action which is threatening to harm the Australian economy or the life, health, safety or welfare of the population. Even though the provision has never been used it may be needed in the future. If the need arises the Minister will need to act quickly. The President of the United States of America has a similar power.

Protected action ballots

In proceedings relating to protected action ballots, importantly FWA has decided that employers have a right to be heard: *Australian Postal Corporation v CEPU* [2009] FWA 599. This right should be confirmed in the Act.

Where an employer decides to appeal against a ballot order, FWA should have the power to issue a stay order in appropriate circumstances. Industrial action can be extremely damaging for employers and harmful to employees (including those stood down as a result of the industrial action of other employees) plus other parties. Justice dictates that FWA should be able to issue a stay order where it regards this as appropriate, applying the usual principles for the granting of such orders. Such appeals sometimes involve complex arguments and parties need time to prepare their cases, and FWA needs time to hear the appeal and make a decision. Accordingly, s 606(3) should be deleted.

Consistent with the *Workplace Relations Act 1996*, applications for a protected action ballot order should not be permitted prior to the nominal expiry date of an enterprise agreement. Therefore, in s 438(1) the wording '*must not be made earlier than 30 days before the nominal expiry date*' should be deleted and replaced with '*must not be made earlier than the nominal expiry date*'.

With regard to the cost of ballots, under the *Workplace Relations Act 1996* applicants for a protected action ballot order were required to pay 20 per cent of the cost. This had the positive effect of reducing the incidence of unwarranted industrial action. Given the significant increase in industrial action under the FW Act, the Act

should be amended to require that all ballots be conducted by the Australian Electoral Commission and that applicants for protected action ballot orders be required to pay 20 per cent of the cost.

Payments relating to periods of industrial action

Division 9 of Part 3-3: outlaws strike pay; implements a minimum period for pay deductions where unlawful industrial action is taken on a day; recognizes the 'No Work, No Pay' Principle; and deals with payments to employees during periods when bans are imposed. Ai Group supports all of these provisions.

Changes which need to be made:

- Add the following new paragraph 443(1)(c):

“(c) each applicant is not pattern bargaining.”
- Add the following new paragraph to s 413:

‘(3A) For the purposes of determining whether a person referred to in s 413(3) is genuinely trying to reach an agreement, the following factors are relevant:

 - (a) Whether the person has discussed with the other bargaining representatives, all of the terms which each of bargaining representative proposes for the agreement;*
 - (b) Whether the person has provided information to the other bargaining representatives in support of each term which the person proposes for the agreement ;*
 - (c) Whether the person has met on a sufficient number of occasions with other bargaining representatives to endeavour to reach agreement;*
 - (d) Whether the person has met, and is meeting, the good faith bargaining requirements;*
 - (e) Whether the person is pattern bargaining.’*
- Add the following new paragraph 413(8), to ensure that industrial action cannot be taken until bargaining has commenced in one of the ways specified in s 173 of the FW Act:

“(8) The industrial action is not taken before the notification time in section 173.”
- Amend s 414(6) to require that the nature and timing of the action be specified, as follows:

‘(6) A notice given under this section must specify:

- (a) the nature of the action including the type of action and the work locations affected;*
- (b) the day and time when each instance of industrial action to which the notice relates will start;*
- (c) the day and time when each instance of industrial action to which the notice relates will end unless the action is indefinite.'*

- An employer's right to be heard in proceedings relating to protected action ballots, should be confirmed in the Act.
- Delete s 606(3) to enable FWA to issue a stay order in appropriate circumstances where an appeal has been filed against a decision to make a protected action ballot order.
- Amend s 438(1) to prevent applications for a protected action ballot order being made prior to the nominal expiry date of an enterprise agreement.
- Amend the FW Act to require that all ballots be conducted by the Australian Electoral Commission and that applicants for protected action ballot orders be required to pay 20 per cent of the cost.
- When a ballot is conducted and industrial action is approved by the employees, the Australian Electoral Commission or other ballot agent should be required to advise the employer of the names of the employees who are able to take protected action, to enable the employer to identify any employees who take unlawful industrial action.

PART 3-4 – RIGHT OF ENTRY

Unions have an important representational role to play and balanced right of entry laws are appropriate.

Of the respondents to Ai Group's survey (*Annexure*):

- 28% of employers with union involvement in their workplace said that the unions had become less cooperative under the FW Act with only 5% finding them more cooperative;
- 37% of the employers said that union officials had visited their workplace more often since the Act came into operation, with only 15% experiencing less visits.

The right of entry provisions were expanded significantly under the FW Act and some problems have arisen.

Firstly, as discussed in the section of this submission dealing with Part 2-4 – Enterprise Agreements, it is important that the existing ‘unlawful term’ dealing with right of entry is tightened up in the Act regardless of the outcome of Ai Group’s application to the Full Federal Court in the *ADJ Contracting* case.

Secondly, entry rights were expanded markedly under the FW Act and the Government introduced a system of representational orders to address demarcation problems which arose. These orders have not proved to be very useful in practice: see *Shop, Distributive and Allied Employees Association v National Union of Workers* [2012] FWA 461.

To reduce the risk of demarcation disputes, a union should only have the right to enter a workplace where an enterprise agreement applies, to have discussions with employees, if the union is covered by the agreement. This was the situation which applied under the *Workplace Relations Act 1996*.

PART 3-5 – STAND DOWN

Stand down rights are rarely needed but are essential. In the Queensland floods of early 2011, stand-down provisions were utilised by many employers, in some cases to ensure business survival.

During the award modernisation process, the AIRC decided not to include stand down clauses in modern awards which reinforces the importance of the provisions in the FW Act.

Given the essential nature of stand-down provisions, it is not appropriate that employers be subject to industrial claims to limit their stand-down rights. For this reason, s 524(2) should be amended to prevent enterprise agreements and contracts of employment removing an employer’s right to stand down in the circumstances specified in s 524(1).

Further, s 525(2) should be deleted. Ai Group opposes FWA having compulsory arbitration powers in respect of stand downs, although we acknowledge that so far unions have generally been unsuccessful in using the compulsory arbitration provisions in s 526 to force employers to pay employees who have been stood down as the result of industrial action by other employees. For example, see: *AMWU v McCain Foods* [2010] FWA 6810; and *AMWU v Toyota Bokosho* [2010] FWA 1135.

Changes which need to be made:

- Subsection 524(2) should be amended to prevent enterprise agreements and contracts of employment removing an employer's right to stand down in the circumstances specified in s 524(1).
- Subsection 525(2) should be deleted which would have the effect of limiting FWA's powers to mediation, conciliation, making a recommendation or expressing an opinion as provided for in s 595(2).

PART 3-6 – OTHER RIGHTS AND RESPONSIBILITIES

Part 3-6 deals with:

- Certain obligations of an employer who has decided to make 15 or more employees redundant; and
- Employer obligations in relation to employee records and pay slips.

The redundancy obligations are similar to provisions which have been in the federal workplace relations legislation for many years.

With regard to pay slips, when the FW Act was implemented there was some confusion amongst employers regarding whether or not the legislation permitted pay slips to be issued in electronic form. Most employers now appear to understand that they are able to issue pay slips electronically even though the FW Act and Regulations do not expressly state this.

FW ACT CHAPTER 4 – COMPLIANCE AND ENFORCEMENT

PART 4-1 – CIVIL REMEDIES

We have not identified any problems with this Part.

PART 4-2 – JURISDICTION AND POWERS OF COURTS

Ai Group has not identified any problems with Part 4-2. A number of appeals against FWA decisions have been determined by the Federal Court of Australia.⁹⁶ A number of others are before the Court including an Ai Group appeal against the decision of a

⁹⁶ For example, see *Deva v University of Western Sydney* [2011] FCA 199 (9 March 2011) re. unfair dismissal; *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) re. unfair dismissal; and *Construction, Forestry, Mining & Energy Union v Deputy President Hamberger* [2011] FCA 719 (24 June 2011), re. an enterprise agreement with an opt-out clause.

Full Bench of FWA in *The Australian Industry Group v ADJ Contracting Pty Ltd*⁹⁷ which will be heard by the Full Federal Court in May. This case was discussed earlier in this submission in relation to Part 2-4 – Enterprise Agreements of the FW Act.

It is critical that s 570, which prevents costs being awarded against a party unless the party instituted the proceedings vexatiously or without reasonable cause etc, is retained. It is vital that industry representative bodies such as Ai Group are permitted to challenge unfair, unreasonable and/or unproductive interpretations of the Act by FWA and lower Courts, without the risk of crippling cost orders. It is in the interests of the whole community that the provisions of the FW Act are relatively certain, and are interpreted and applied in a flexible, productive and fair manner.

It is also critical to maintain the existing practice of Judges and Federal Magistrates not being permanently appointed to the Fair Work Division of the Federal Court or Federal Magistrates Court. Justice is best served by ensuring that all Federal Court Judges and all Federal Magistrates are able to be allocated to cases in the Fair Work Division. This practice ensures that the Courts' resources are effectively used and minimizes the risk of politically motivated appointments to the Fair Work Division of the Courts.

FW ACT CHAPTER 5 – ADMINISTRATION

PART 5-1 – FAIR WORK AUSTRALIA

FWA has an important role in the workplace relations system. The independent industrial umpire has a proud history, extending over more than 100 years. FWA generally conducts matters in an efficient and practical manner.

In recent years beneficial changes have been made to the Tribunal's filing and hearing procedures to increase access and improve efficiencies. The Tribunal's extensive use of the web, email and video-conferencing has made life much easier for Ai Group and other parties.

Powers of FWA

Ai Group strongly opposes any expansion in the arbitration powers of FWA, as set out in various sections of this submission including Part 2-2 – The National Employment Standards, Part 2-4 – Enterprise Agreements, Part 2-5 – Workplace Determinations, Part 3-3 – Industrial Action and Part 6-2 – Dealing with Disputes.

⁹⁷ [2011] FWA 6684.

Appointment of FWA Members

FWA's reputation will suffer unless the Government adopts a more balanced approach to appointing Members of FWA. So far, the vast bulk of those appointed by the Labor Government have a union background. If this unbalanced approach continues, over time there will undoubtedly be negative impacts. If an employer perceives that it will not be treated fairly by FWA, the employer will no doubt strive to avoid having FWA involved in resolving any of its disputes. Accordingly, perceptions are important.

The following approach is proposed:

- In addition to the existing practice of placing advertisements in newspapers, the Government should approach candidates with the right experience and qualities and canvass their interest in being appointed as a Member of FWA.
- Together with the existing practice of consulting State Governments and the Shadow Workplace Relations Minister, the Government should confidentially consult Ai Group, ACCI and the ACTU on proposed appointments.
- The Government should ensure that over time a roughly equal number of FWA Members with an employer and union background are appointed.

Inconsistency amongst FWA Members

A frequent complaint voiced by employers to Ai Group is the lack of consistency amongst FWA Members in dealing with matters, particularly enterprise agreements. This issue is discussed in the section of this submission dealing with Part 2-4 – Enterprise Agreements.

Appeals

For the reasons explained in the section of this submission dealing with protected action ballots, FWA should have the power to grant a stay order in relation to a decision to issue a ballot order, in circumstances where an appeal is lodged. Justice dictates that FWA should be able to issue a stay order where it regards this as appropriate, applying the usual principles for the granting of such orders. Accordingly, s 606(3) should be deleted.

Research

Ai Group supports the requirement in s 653 that the General Manager of FWA conduct research into enterprise agreements, individual flexibility arrangements and the NES. However, the initial periods in s 653(1A), (3) and (4) for the completion of the initial research reports are far too long. It is obvious that individual flexibility arrangements in modern awards and enterprise agreements have failed to deliver the Government's apparent policy intent and more timely research would have

undoubtedly confirmed this. The research would have also been valuable for the current Review of the FW Act.

Orders against State Tribunals

When the FW Act was being developed, Ai Group argued that a provision like s 117 of the *Workplace Relations Act 1996* needed to be included. This was an important provision which enabled a Full Bench of the AIRC to issue an order restraining a State industrial authority from dealing with a matter that was the subject of a proceeding before the AIRC. The absence of the provision has not yet proved to be a problem under the FW Act but Ai Group envisages that circumstances will arise in the future when the provision will be needed. Many State laws dealing with workplace relations topics are permitted to operate concurrently with the FW Act creating risks of conflicting approaches between Federal and State Tribunals. On occasions in the past, s 117 has been extremely important and the AIRC had needed to act very quickly.⁹⁸

Changes which need to be made:

- In respect of appointments to FWA:
 - In addition to the existing practice of placing advertisements in newspapers, the Government should approach candidates with the right experience and qualities and canvass their interest in being appointed as a Member of FWA.
 - Together with the existing practice of consulting State Governments and the Shadow Workplace Relations Minister, the Government should confidentially consult Ai Group, ACCI and the ACTU on proposed appointments.
 - The Government should ensure that over time a roughly equal number of FWA Members with an employer and union background are appointed.
- A provision similar to s 117 of the *Workplace Relations Act 1996* should be included in the FW Act.
- FWA should have the power to grant a stay order in relation to a decision to make a ballot order. Accordingly, s 606(3) should be deleted.

PART 5-2 – OFFICE OF THE FAIR WORK OMBUDSMAN

The Office of the Fair Work Ombudsman (FWO) carries out its functions in an effective manner and works hard to consult and maintain good working relations with employer groups and unions. The FWO regularly seeks the views of Ai Group, ACCI and the ACTU on significant issues and we welcome this consultative approach.

⁹⁸ For example, see *Boeing Australia Ltd and AWU*, Giudice J, Lawler VP and Larkin C, 23 February 2006, PR968945).

The FWO has an important educative role, particularly for employers and employees who do not belong to industry associations or unions. It makes sense for interpretations and advice to be consistent wherever possible and therefore the FWO's consultative approach with employer bodies and unions works well for industry, the unions and the FWO.

Whilst Ai Group has not always agreed with the FWO's interpretations on modern awards and the FW Act, differences of view are understandable with new legislation and awards.

On a number of occasions, Ai Group has applied to vary modern awards to clarify interpretations over which Ai Group and the FWO have disagreed. These have included FWA Full Bench proceedings to clarify the ability of employers to absorb increased costs arising from modern awards into overaward payments,⁹⁹ and Full Bench proceedings regarding employers' obligations under awards and the NES when Christmas / New Year public holidays fall on a weekend.¹⁰⁰

In nearly all instances in which Ai Group has been involved, FWO inspectors have used their powers appropriately. In the small number of cases where we have had concerns we have been able to raise our concerns at a senior level within the FWO and the matters have been resolved satisfactorily.

The system of enforceable undertakings is a very worthwhile option. These undertakings are often fairer, less costly and more effective in securing compliance than prosecution, particularly where a party has not deliberately broken the law.

In addition to its role in ensuring compliance with awards and agreements, Ai Group supports the FWO's role in investigating and prosecuting those who take unlawful industrial action. It is in the interests of the whole community that industrial action laws are adhered to. The FWO's role in this area continues to be an important influence in reducing the incidence of unlawful conduct.

FW ACT CHAPTER 6 – MISCELLANEOUS

PART 6-1 – MULTIPLE ACTIONS

We have not identified any problems with this Part.

PART 6-2 – DEALING WITH DISPUTES

The provisions within Part 6-2 are extremely important. These provisions clarify that FWA does not have the power to arbitrate under a dispute settling term in a modern

⁹⁹ [2010] FWAFB 4488.

¹⁰⁰ [2010] FWAFB 9290.

award, enterprise agreement or contract of employment without the agreement of the parties, nor have the power to deal with disputes about whether an employer had ‘reasonable business grounds’ under ss 65(5) and 76(4). Ai Group strongly supports these provisions.

Long and painful experience tells us that when compulsory arbitration is available, there is less incentive to search for a solution which is acceptable to all parties. Also, arbitrated outcomes awarded by FWA would flow on to other enterprises through the doctrine of precedent.

There is an imperative to drive productivity growth in Australian workplaces, and workplace flexibility has an important role to play. Flexibility is best achieved through employers and employees maintaining responsibility for their own workplace relations, upon a foundation of award and legislative minimum standards, rather than forcing parties to accept arbitrated outcomes.

For the above reasons, the existing Model Term for Dealing with Disputes for Enterprise Agreements in Regulation 2.08 and Schedule 6.1 of the FW Regulations is not appropriate. It includes a compulsory arbitration provision. Even though the term is only included in agreements where the parties to the agreement expressly agree to include it, the term should be consistent with Part 6-2 of the FW Act. To achieve consistency, the following additional words should be added to subclause (5)(b) of the Model Term:

‘if Fair Work Australia is unable to resolve the dispute at the first stage and the parties have agreed that Fair Work Australia may arbitrate, Fair Work Australia may then:’

We strongly oppose any change to the prohibition in s 739(2) of the FW Act on FWA dealing with disputes about whether an employer had ‘reasonable business grounds’ under ss 65(5) and 76(4), without the agreement of the parties. Granting FWA compulsory arbitration powers would impede workplace flexibility and the rights of employers to manage their businesses in an efficient manner.

During the development of the NES, the Government announced publicly that FWA would not be empowered to impose requested working arrangements on an employer. For example, the following question and answer was in the Government’s [NES Discussion Paper](#) (p.12):

“Can Fair Work Australia impose a flexible working arrangement on an employer?”

No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are ‘reasonable business grounds’. Fair Work Australia will not be

empowered to impose the requested working arrangements on an employer.”

The above educative and cooperative approach is reflected in s 739(2) of the Act. Ai Group strongly supports this provision.

The Panel needs to reject the numerous calls from unions and an array of special interest groups to increase FWA powers in this area. It is vital that employers maintain their right to manage their businesses productively and to decide what lawful working arrangements the business requires.

PART 6-3 – EXTENSION OF NES ENTITLEMENTS

We have not identified any problems with this Part.

PART 6-4 – ADDITIONAL PROVISIONS RELATING TO TERMINATION OF EMPLOYMENT

We have not identified any problems with this Part.

COMPLIANCE WITH ILO CONVENTIONS

The Australian Government has provided a number of detailed reports to the International Labour Office (ILO) setting out the reasons why the FW Act complies with relevant ILO conventions, including the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (Convention 87) and the *Right to Organise and Collective Bargaining Convention, 1949* (Convention 98), *Equal Remuneration Convention, 1951* (Convention 100), *Discrimination (Employment and Occupation) Convention, 1958* (Convention 111), *Employment Policy Convention, 1964* (Convention 122), and *Tripartite Consultation (International Labour Standards) Convention, 1976* (Convention 144).

The social partners (Ai Group, ACCI and the ACTU) have been consulted in the preparation of these detailed reports.

Ai Group agrees with the Australian Government’s view that the FW Act complies with Australia’s international labour obligations.

Ai Group assumes that the Government has made its relevant reports to the ILO available to the Panel. If not, Ai Group would be pleased to provide further information to the Panel about these issues.

THE FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) ACT 2009

It would appear that the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (FW TPCA Act) does not fall within the terms of reference for the Review. The definition of ‘*Fair Work legislation*’ in the terms of reference does not include this Act.

There are some extremely important provisions in the FW TPCA Act relating to transitional instruments, interaction rules, modern industry awards, modern enterprise awards and other matters.

In the event that the Panel decides to Review the FW TPCA Act, Ai Group requests an opportunity to express its views on key provisions.

THE FAIR WORK (REGISTERED ORGANISATIONS) ACT 2009

Ai Group is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (FW RO Act). It appears that the FW RO Act does not fall within the terms of reference for the Review.

In the event that the Panel decides to Review the FW RO Act, Ai Group requests an opportunity to express its views on the legislation.

THE BUILDING AND CONSTRUCTION INDUSTRY

The content of the following section is a joint submission of Ai Group and the Australian Constructors Association (ACA) relating to the operation of the FW Act in the building and construction industry.



17 February 2012

The Fair Work Act Review Panel

Email: fairworkactreview@deewr.gov.au

Dear Panel Members

The Australian Industry Group (Ai Group) and the Australian Constructors Association (ACA) have some substantial concerns about the impact of the *Fair Work Act 2009* (FW Act) on the construction industry.

The purpose of this submission is to address a number of particularly important issues relating to the Act.

This submission does not address all of the problems in the FW Act. It also does not deal with numerous critically important issues surrounding the Australian Building and Construction Commissioner (ABCC), the *Building and Construction Industry Improvement Act 2005* (BCII Act 2005) and the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, which would appear to largely be outside of the Terms of Reference for the Inquiry.

Ai Group represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors. Ai Group has longstanding relationships with all stakeholders in the construction industry including project owners, head contractors and subcontractors.

The ACA is a national industry association which represents Australia's major construction contractors. A list of ACA member companies is attached. ACA member companies have a combined annual revenue in excess of \$50 billion and employ over 100,000 people in their Australian and international operations.

Introduction

The building and construction industry is a much better place to work and invest today than prior to the Royal Commission into the Building and Construction Industry (2001-03). The reforms have provided huge benefits to employers, employees and the community. Unfortunately the construction industry reforms are currently being eroded day by day and there is a very real risk of the damaging and unproductive industrial relations practices of the past returning to the industry and once again becoming entrenched. The FW Act has an important role to play in this regard.

The Royal Commission made 212 recommendations in its final report, most of which were addressed in a Bill introduced into Parliament in 2003.¹⁰¹ However, that Bill was substantially amended and the package of legislative reforms was enacted through:

- The BCII Act 2005; and
- Amendments to the *Workplace Relations Act 1996*.

Given the above approach to implementing the reforms, numerous important Royal Commission recommendations were dealt with in the *Workplace Relations Act 1996* and are now dealt with in the FW Act. These recommendations address subject matters such as:

- Bargaining and agreement making;
- Industrial action;
- Right of entry; and
- Freedom of association.

Content of agreements

Currently agreements are able to include content which extends beyond 'permitted matters' so long as those matters are not 'unlawful terms'. This expansive approach to agreement content has been very damaging for the construction industry because unions have pressured employers to include a wide range of highly restrictive and unproductive provisions in agreements including, for example:

- Restrictions on the use of sub-contractors and on-hire arrangements;
- Requirements to notify unions of the names of proposed sub-contractors (which of course results in pressure upon employers to only engage those sub-contractors which the unions support);
- Wider rights for unions to enter construction sites than those in the FW Act; and
- Requirements for employers to promote union membership.

¹⁰¹ *Building and Construction Industry Improvement Bill 2003*.

The Victorian electrical contracting industry pattern agreement, which was the subject of Ai Group's appeal in the *ADJ Contracting*¹⁰² case, highlights some of the problems. The pattern agreement includes highly restrictive and inappropriate clauses dealing with the use of sub-contractors, union entry rights and the promotion of union membership by employers.

In addition to the problems relating to pattern agreements, agreement content is a major problem for employers wishing to enter into greenfields agreements for new construction projects. Unions typically refuse to sign a greenfields agreement unless the employer agrees to the clauses which the unions are pressing and have secured in other agreements. Many of the clauses demanded are most likely not 'permitted matters' under the FW Act (e.g. highly restrictive clauses dealing with the use of sub-contractors), and they would have been unlawful under the *Workplace Relations Act 1996*.

It is essential that the definition of 'permitted matters' in the FW Act is amended to only include matters pertaining to the employment relationship as determined by the High Court of Australia in the *Electrolux* case.¹⁰³ Any content which is not a matter pertaining to the employment relationship should not be able to be included in an enterprise agreement, nor should industrial action be protected if any matters are being pursued which are not matters pertaining to the employment relationship.

Further, the list of 'unlawful terms' in the FW Act should be replaced with the following:

- Matters which are not 'permitted matters';
- Clauses which impose restrictions or limitations on independent contractors, on-hire employment or outsourcing;
- Discriminatory provisions;
- Terms dealing with union right of entry (i.e. The provisions in the FW Act should not be able to be circumvented);
- Terms which deal with the provision of information about employees bound by the agreement, contractors or on-hire providers to trade unions;
- Terms about unfair dismissal (i.e. The provisions in the FW Act should not be able to be circumvented);
- Terms about industrial action (i.e. industrial action must not be permitted during the life of an enterprise agreement).

¹⁰² *The Australian Industry Group v ADJ Contracting Pty Ltd*, [2011] FWAFB 6684.

¹⁰³ *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40.

Furthermore, the definition of ‘objectionable term’ in the FW Act should be amended in line with the definition of ‘objectionable provision’ in the *Workplace Relations Act 1996* given that the Full Bench of FWA in the *ADJ Contracting* case decided that there were material differences between the two definitions and, as a consequence, the ‘union promotion’ clause in the ADJ enterprise agreement was not an objectionable term under the FW Act. The clause would have undoubtedly been an objectionable provision under the *Workplace Relations Act 1996*.

Greenfields agreements

Greenfields agreements are widely used and extremely important in the construction industry. As discussed above, the content of such agreements is currently a major problem.

A further problem is the power imbalance between unions and employers in negotiating greenfields agreements. The reality is that a head contractor usually needs to have an enforceable agreement in place to manage industrial risk on a project. Unions currently have too much power to refuse to enter into a greenfields agreement unless all their demands are met. To address the power imbalance, the following provisions should be reintroduced, as were formerly in place under the *Workplace Relations Act 1996*:

- Greenfields agreements should be able to be entered into with any union eligible to represent any employees on the project;
- Employer greenfields agreements should be reintroduced. (NB. Employer greenfields agreements in the construction industry typically included generous terms and conditions, consistent with those paid on other projects of the relevant type. The availability of these agreements was important in influencing unions to adopt a reasonable approach in greenfields agreement negotiations).

Industrial action / bogus safety disputes

Industrial disputes in the building and construction industry can be extremely costly. A one-day stoppage on a major project can cost hundreds of thousands of dollars. In addition to the more obvious direct costs of the industrial action, there are numerous other costs which arise due to delays in completion resulting from industrial action. These costs include:

- Liquidated damages;
- Damage to the contractor’s reputation which may result in the loss of future business;
- Program acceleration expenses, e.g. extra overtime;
- Daily costs of hire for rental equipment, such as cranes, mobile plant, sheds, offices and other equipment; and

- The effects of inflated sub-contractor tender prices, which tend to occur on trouble-prone projects.

One area of great concern to contractors is the additional stresses that arise due to accelerated 'catch-up' programs, which need to be implemented when delays have been caused by industrial disputes. Such programs can have a negative effect on safety and quality, plus result in significant additional costs.

In addition, industrial action taken by the employees of one company typically creates significant hardship for other companies and their employees, due the inter-related nature of the activities carried out by sub-contractors.

The BCII Act 2005 includes additional protections against unlawful industrial action which are only applicable to the building and construction industry. These additional protections will be lost if the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* is enacted. If this occurs, as appears likely, employers will need to rely solely on the provisions of the FW Act. For this reason it is vital that the protections in the FW Act are tightened up.

Bogus safety disputes are still a problem in the construction industry. Over the years OHS has often been misused by unions as an industrial weapon against employers. It is essential that strong laws remain in place to prevent this highly inappropriate and damaging tactic. Bogus safety disputes have cost the industry dearly. The misuse of OHS by unions as an industrial weapon fosters an attitude of cynicism amongst employers towards safety concerns raised by union officials and delegates. This, in turn, negatively impacts upon OHS in the industry.

The onus of proof should be on the employees and their representatives to establish that action taken over health and safety is based on a reasonable concern of the employees about an imminent risk to their health and safety.

Like the definition of 'industrial action' in the *Workplace Relations Act 1996*, the definition of 'industrial action' in section 19 of the FW Act excludes industrial action based on a reasonable concern by an employee about an imminent risk to his or her health or safety. However, unlike the FW Act, the *Workplace Relations Act 1996* placed the onus of proving that there was a reasonable concern about an imminent risk on the person alleging this. This was a direct response to findings of the Royal Commission that OHS was regularly being exploited in the industry to further industrial objectives. A similar onus of proof is included in the BCII Act 2005, but this provision will be lost if the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* is enacted.

The definition of 'industrial action' in section 19 of the FW Act needs to be amended to incorporate the approach in the *Workplace Relations Act 1996* and the BCII Act 2005. This approach would outlaw the misuse of OHS, but the rights of employees to refuse to perform duties which are genuinely unsafe would be protected.

Right of entry

Unions have an important representative role to play. Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry and inspection powers (which the Royal Commission held to be highly prevalent in the construction industry) and retaining an entry and inspection regime which enables unions to represent their members effectively. The current provisions of the FW Act do not strike the right balance.

It is essential that enterprise agreements not be permitted to circumvent the right of entry provisions of the FW Act.

As is highlighted by the decision of the majority and the minority of the Full Bench in the *ADJ Contracting* case, the existing ‘unlawful term’ relating to right of entry is too vague and problematic.

Under the *Workplace Relations Act 1996*, enterprise agreements were not permitted to include right of entry provisions. This provision should be reinstated. The FW Act includes a comprehensive scheme for union right of entry that is fair and balances the interests of all parties. Such a scheme should not be undermined through enterprise agreements, as is currently occurring in the construction industry.

General protections

The General Protections in the FW Act are causing widespread problems for employers in the construction industry. The provisions:

- Are extremely broad in nature which creates risk and uncertainty for employers;
- Impede employers in effectively managing their businesses, including limiting their ability to: introduce new work practices, take disciplinary action against a worker where necessary, etc;
- Severely restrict employers in dealing with inappropriate or unlawful industrial activities;
- Are being misused on a wide scale by employees to circumvent the unfair dismissal laws.

In Ai Group’s submission to the FW Act Review these problems are discussed in detail and legislative amendments are proposed to address them.

Transfer of business

The transfer of business provisions in the FW Act are imposing unreasonable restrictions on construction industry employers.

Consistent with the High Court's decision in the *PP Consultants*¹⁰⁴ case, the 'character of the business' test should be reinstated through an amendment to subsection 311(1).

Also, the High Court's decision in the *Gribbles*¹⁰⁵ case is extremely important for companies in the construction and contracting industries and the important principles which arose from this case need to be preserved. To achieve this, subsection 311(3) of the FW Act should relate only to the transfer of the ownership of assets, not the use of assets.

Further, the transfer of business provisions operate as a major impediment to transferring employees from one operating entity in a corporate group to another, including when a project is finished. This is particularly damaging in the construction industry given the project-nature of the work. Section 311(6), which relates to 'associated entities', needs to be deleted.

Conclusion

The reforms which have been introduced in the construction industry over the past seven years have supported a generational change in the culture of the industry. However, the construction industry reforms are currently being eroded day by day and the damaging and unproductive industrial relations practices of the past are creeping back into the industry.

The changes which we have proposed to the FW Act are essential to address these problems and risks.

Yours faithfully



Heather Ridout
Chief Executive
Australian Industry Group



Peter Brecht
President
Australian Constructors Association

¹⁰⁴ [2000] HCA 59.

¹⁰⁵ *Gribbles Radiation v HSU* [2005] HCA 9 *Gribbles Radiation v HSU* [2005] HCA 9

Members of the Australian Constructors Association

1. Abigroup Limited
2. Boulderstone Pty Ltd
3. BGC Contracting Pty Ltd
4. Brookfield Multiplex Limited
5. CH2M Hill Australia Pty Ltd
6. Clough Limited
7. Downer EDI Limited
8. Fulton Hogan Pty Ltd
9. Georgiou Group Pty Ltd
10. John Holland Pty Ltd
11. Laing O’Rourke Australia Construction Pty Limited
12. Leighton Contractors Pty Limited
13. Leighton Holdings Limited
14. Lend Lease Pty Ltd
15. Lend Lease Infrastructure Pty Ltd
16. Macmahon Holdings Limited
17. McConnell Dowell Corporation Limited
18. Thiess Pty Limited
19. United Group Limited

ANNEXURE

Ai GROUP SURVEY REPORT

FAIR WORK ACT – VIEWS AND EXPERIENCES OF EMPLOYERS



AUSTRALIAN INDUSTRY GROUP

FAIR WORK ACT SURVEY REPORT

February 2012





EXECUTIVE SUMMARY



This report examines employer experiences with the *Fair Work Act 2009* since its initial commencement on 1 July 2009. The report is based on a survey of 245 Australian employers, large and small, in a range of industries.

The survey was conducted in August 2011. The questionnaire was distributed by email to all Ai Group member companies.

The survey covered topics of direct relevance to the *Fair Work Act* including the engagement of workers, award modernisation, enterprise bargaining, wage expectations, termination of employment, the General Protections, union activity, right of entry and transfer of business.

The survey also examined the incidence of paying 'go away money' to settle unfair dismissal and General Protections claims. The views and experiences of employers, as reflected in this report, provide a good insight into some critical barriers to productivity and flexibility imposed by the *Fair Work Act*.

Of those employer respondents who had experienced an increase in productivity since the *Fair Work Act* came into operation, almost none attributed it to the *Fair Work Act*. In contrast, of the employers who had experienced a negative outcome, nearly two thirds said that the *Fair Work Act* was an important factor. Similarly, of the employers whose workplaces had become less flexible, 86% said that the *Fair Work Act* was an important factor in the loss of flexibility.

The survey reveals that many new enterprise agreements made under the *Fair Work* system contain restriction/s on flexibility and productivity which did not appear under a former enterprise agreement.

These results point to two things:

- Firstly, in itself the *Fair Work Act* has not delivered increased productivity or flexibility to Australian employers; and
- Secondly, the Act has introduced barriers to productivity growth and labour flexibility which need to be addressed.



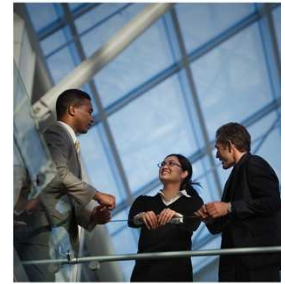
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1.

Introduction



Sections 2 to 9 of this report deal with important areas which are impacted by the *Fair Work Act*.

Section 2 examines forms of employment and the reasons why some respondents use casual workers and labour hire.

Section 3 considers the impact of the award modernisation process on respondents and whether modern awards have been beneficial to respondents' businesses.

Section 4 deals with enterprise bargaining and the experiences respondents have had under the new enterprise bargaining system introduced by the *Fair Work Act*. In particular the section looks at the impact on flexibility and productivity.

Within Section 5, the report considers the views of respondents as to the wage expectations of employees in the following year and whether these expectations are concerning to them in the context of the current economic environment.

Section 6 examines the experiences of respondents with respect to termination of employment, whether they have been subject to claims for compensation from employees under the unfair dismissal or General Protections regimes under the *Fair Work Act*, and if so, how those claims were settled.

Section 7 examines respondents' experiences with other aspects of the General Protections, including adverse action, freedom of association and discrimination. As in the previous section, Section 7 considers the dispute resolution process and why most claims are settled for monetary compensation.

Section 8 looks at respondents' experiences with unions since the commencement of the *Fair Work Act* and the incidence of union officials using the right of entry provisions under the Act.

Section 9 examines the transfer of business provisions in the *Fair Work Act* and whether they are operating to reduce employment opportunities.

The final section gives a general insight into whether the respondent businesses have become more flexible and more productive since the commencement of the *Fair Work Act* or the opposite. In particular the section considers whether the Act can in any way be held responsible for the outcomes.

The findings of the survey are based on the responses of 245 Ai Group Member companies, large and small, operating in various industries, including manufacturing, construction and services. Details of the sample used for the report are set out in the attached Data Appendix. The survey questionnaire was distributed to all Ai Group members via email.

The questions asked in the survey have been reproduced in this report, above each of the tables detailing the response received.

2. Forms of engagement of workers



This section explores the forms of engagement used by employers and their reasons for doing so.

The findings reveal that there is a high incidence of full-time employment amongst respondents.

However, the engagement of casuals, labour hire and independent contractors was identified as important to address fluctuating demand for products and services and short-term labour needs.

Question 4

What proportion of your workforce fits into the following categories?

<i>Full-time</i>			<i>Casual</i>			<i>Labour Hire</i>			<i>Independent contractor</i>		
	<i>No</i>	<i>%</i>		<i>No</i>	<i>%</i>		<i>No</i>	<i>%</i>		<i>No</i>	<i>%</i>
Less than 10%	5	2.1	Less than 10%	141	68.8	Less than 10%	132	81.5	Less than 10%	141	89.2
11-30%	10	4.1	11-20%	32	15.6	11-20%	16	9.9	11-20%	6	3.8
31-50%	12	4.9	21-30%	10	4.9	21-30%	7	4.3	21-30%	3	1.9
51-70%	17	6.9	31-50%	9	4.4	31-50%	2	1.2	31-50%	2	1.3
71-80%	23	9.5	51-80%	4	1.9	51% or more	3	1.8	51% or more	1	0.6
81-90%	35	14.5	81% or more	6	2.9						
91% or more	140	57.6									
Unsure	1	0.4	Unsure	3	1.5	Unsure	2	1.2	Unsure	5	3.2
Total response	243	99.2	Total response	205	83.7	Total response	162	66.1	Total response	158	64.5

Question 5

What percentage of your casual workforce has been employed on a regular or systematic basis for...?

	<i>Less than 6 months</i>		<i>6 to 12 Months</i>		<i>Over 12 Months</i>	
	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>	<i>No</i>	<i>%</i>
Less than 10%	93	55.7	89	64.0	79	52.0
11-20%	16	9.6	14	10.1	9	6.0
21-30%	6	3.6	9	6.5	3	2.0
31-50%	9	5.4	7	5.0	12	8.0
51% or more Unsure	43	25.7	20	14.4	48	32.0
Total number of respondents	167	66.9	139	56.7	150	52.6

Question 6

Why does your organisation employ casuals?
(Respondents were instructed to select all significant reasons)

	No	%
To maintain labour flexibility	100	42.7
Demand for the company's products/services fluctuates	102	43.6
To address skill shortages	34	14.5
The work performed is intermittent and irregular	57	24.4
Due to the cost of redundancy payments for full-time employees	30	12.8
To reduce costs	15	6.4
To address short-term labour needs	100	42.7
Due to concern about unfair dismissal claims	34	14.5
To increase productivity	15	6.4
The workers want to be employed as casuals	72	30.8
Due to corporate restrictions on employing more full-time employees	7	2.9
Other	10	4.3
We do not employ casuals	29	12.4
Unsure	4	1.7
Total number of respondents	234	95.5

Question 7

Why does your organisation use labour hire?
(Respondents were instructed to select all significant reasons)

	No	%
To maintain labour flexibility	80	34.8
Demand for the company's products/services fluctuates	59	25.6
To address skill shortages	39	16.9
Skills of the labour hire workers are specialised	12	5.2
Due to the cost of redundancy payments for employees	17	7.4
To reduce costs	10	4.3
Due to concern about unfair dismissal claims	20	8.7
To address short-term labour needs	83	36.1
To increase productivity	12	5.2
We have outsourced one or more operations to a labour hire company (eg. maintenance, canteen)	14	6.1
Due to corporate restrictions on employing more employees	7	3.0
Other	6	2.6
We do not use labour hire	97	42.2
Unsure	0	0
Total number of respondents	230	93.9

3. Award modernisation



In December 2008 the then Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, issued a request to the Australian Industrial Relations Commission to modernise several hundred industry and occupational awards that regulated the terms and conditions of employment for hundreds of thousands of Australian workers.

The Tribunal made 122 modern awards which came into effect on 1 January 2010. The award modernisation process resulted in employers being covered by fewer awards but the process in some cases increased costs for employers.

For many employers the process had little impact because the terms of the relevant modern award largely reflected the terms of the pre-modern award which they were applying.

This experience is reflected in the responses to Question 8 below, with almost half of the respondents reporting that the modern award system has not been beneficial to their organisation.

Question 8

Do you believe that the modern award system has been beneficial to your organisation?

	No	%
Yes	59	24.5
No	113	46.9
Unsure	69	28.6
Total number of respondents	241	98.4

4. Enterprise bargaining



Enterprise bargaining is at the heart of the *Fair Work* system. Prior to the *Fair Work Act*, enterprise bargaining was voluntary and employers and employees had the option of entering into collective agreements or statutory individual agreements. The *Fair Work Act* introduced a system where bargaining is compulsory if the majority of employees want a collective agreement.

Since the commencement of the new system, just over one third of respondents reported having made an enterprise agreement (34%). Of those respondents:

- 45% revealed that their enterprise agreement/s contain one or more provisions which are more restrictive than those contained in their previous agreement/s; and
- 33% revealed that their enterprise agreement/s contain a provision limiting or restricting the use of labour hire or casuals.

The survey reveals strong support for the return of statutory individual agreements to industrial law (69%). The views were even stronger amongst large employers. Over 80% of the employers with over 500 employees wanted the Act to be amended to permit statutory individual agreements.

On flexibility and productivity, overall, 44% of the respondents reported that the *Fair Work* bargaining laws have made it more difficult to negotiate flexibility or productivity improvements in enterprise agreements. Only 1.8% of respondents reported that the laws made flexibility and productivity improvements easier. Additionally, 64% of respondents believe that the *Fair Work Act* has increased union power in the enterprise bargaining process.

Question 9(a)

Has your organisation made an enterprise agreement under the Fair Work Act?

	No	%
Yes	82	33.9
No	159	65.7
Unsure	1	0.4
Total number of respondents	242	98.8

Question 9(b)(i)

If Yes: Does the agreement contain one or more provisions which are more restrictive than those in the previous agreement?

	No	%
Yes	37	45.1
No	41	50.0
Unsure	4	4.9
Total number of respondents	82	100

Question 9(b)(ii)

If Yes: Does the agreement contain any provision imposing a limitation or restriction in respect of casuals or labour hire workers (e.g. an obligation to pay site rates or to consult before engagement) other than a provision contained in the modern award which would apply if the agreement was not in place?

	No	%
Yes	27	32.9
No	51	62.2
Unsure	4	4.9
Total number of respondents	82	100

Question 9(b)(iii)

If Yes: All agreements are required to include a Flexibility Term in accordance with sections 202 and 203 of the Fair Work Act (or else a standard term is deemed to be included) which enables Individual Flexibility Arrangements (IFAs) to be made between the employer and individual employees. Has your organisation made one or more IFAs with individual employee/s in accordance with the Flexibility Term in your agreement?

	No	%
Yes	7	23.3
No	23	76.6
Unsure	0	0
Total number of respondents	30	36.6

Question 9(b)(iv)

***If No: Why has your organisation not made any IFAs?
(Respondents were instructed to select all relevant responses)***

	No	%
The Flexibility Term in the enterprise agreement allows no meaningful flexibility	9	30.0
Lack of knowledge of IFAs	4	13.3
We have flexible workplace arrangements and do not need formal IFAs	12	40.0
Uncertainty about what flexibility can be included in a IFA	0	0
Uncertainty about the Better Off Overall Test for IFAs	0	0
Concern about union opposition to IFAs	4	13.3
Concern about potential employee opposition to IFAs	2	6.6
Under the Fair Work Act employees can cancel IFAs with four weeks' notice	2	6.6
Other	5	16.6
Unsure	0	0
Total number of respondents	30	100

Question 9(b)(v)

***If Yes: Why did your organisation make the IFA/s?
(Respondents were instructed to select all relevant responses)***

	No	%
The IFA/s allow flexibility sought by employee/s (eg. to meet family responsibilities)	1	14.3
The IFA/s were proposed by the company to achieve increased flexibility and productivity and the employees agreed	0	0
Other reason	0	0
Total number of respondents	1	14.3

Question 10

Do you believe that the Fair Work bargaining laws have made it easier or more difficult to for your organisation to negotiate flexibility or productivity improvements in an enterprise agreement than the previous laws?

	No	%
Easier	4	1.6
More Difficult	104	43.5
No Change	131	54.8
Total number of respondents	239	97.5

Question 11

Do you believe the Fair Work Act has increased union power in the enterprise bargaining process?

	No	%
Yes	154	63.9
No	31	12.9
Unsure	56	23.2
Total number of respondents	241	98.3

Question 12

New Australian Workplace Agreements (AWAs) are not permitted under the Fair Work Act. Would you like to see some form of statutory individual agreement option introduced in the future?

	No	%
Yes	165	69.0
No	28	11.7
Unsure	46	19.2
Total number of respondents	239	97.5

5. Wage expectations



With the multi-speed economy and high Australian dollar, many businesses are struggling to meet costs and remain competitive. It is no surprise that an overwhelming majority of employers surveyed reported that they were very concerned or somewhat concerned about employees' wage expectations over the next 12 months.

Question 13

Are you concerned about the wage expectations of your employees over the next 12 months?

	No	%
Very Concerned	79	32.6
Somewhat Concerned	111	45.9
Not Concerned	52	21.5
Total number of respondents	242	98.8

Question 14

What average wage increase do you expect to pay your employees this year?

	No	%
Nil to 1%	10	4.1
Over 1% to 2%	8	3.3
Over 2% to 3%	61	25.2
Over 3% to 4%	107	44.2
Over 4% to 5%	36	14.9
Over 5%	10	4.1
Unsure	10	4.1
Total number of respondents	242	98.8

6. Termination of employment



This section examines employers' experiences with unfair dismissal claims pursued against them under the *Fair Work Act*.

Of the respondents 66% employ 100 employees or less and therefore, with the introduction of the *Fair Work Act*, were no longer exempt from the unfair dismissal regime. This change impacted the hiring decisions of 31% of respondents. These employers stated that the removal of the exemption had led to their organisation employing less workers than they would have otherwise employed.

Further, over a third of respondents (34%) expressed the view that the *Fair Work Act* had made it more difficult to make employees redundant. Less than 1% said it was less difficult.

Relevantly, 52% of respondents reported an increase in unfair dismissal claims against them since the introduction of the legislation.

More than a quarter of the respondents (28%) had been the subject of a claim relating to unfair dismissal since 1 July 2009. More than half (52%) of those claims were settled by the respondent having the pay compensation to the complainant despite not being ordered to do so by FWA. Of those who paid compensation, 84% did so even though they believed the termination was justified, because of the anticipated costs of defending the claim.

Question 15(a) Does your organisation employ 100 or less employees?

	No	%
Yes	158	66.4%
No	80	33.6%
Total number of respondents	238	97.1%

Question 15(b) If Yes: Has the removal of the exemption from the unfair dismissal laws which operated up to 1 July 2009 when the Fair Work Act came into operation had an impact on hiring decisions?

	No	%
It has led to our organisation employing less people than we would otherwise have employed	49	31.4
No Impact	97	62.2
Unsure	10	6.4
Total number of respondents	156	98.7

Question 16(a) Has your organisation had any claims pursued against it in FWA or a court since 1 July 2009 relating to termination of employment?

	No	%
Yes	67	27.6
No	174	71.6
Unsure	2	0.8
Total number of respondents	243	99.2

Question 16(b)(i) If Yes: How were the claims settled?

	No	%
We paid compensation, but we were not ordered to do so by FWA or a court	34	51.5
We were ordered to pay compensation by FWA or a court	5	7.6
We reinstated the employee, but we were not ordered to do so by FWA or a court	0	0
We were ordered to reinstate the employee by FWA or a court	1	1.5
The claim was rejected by FWA or the court	10	15.1
The person withdrew the claim	5	7.6
Other	5	7.6
Invalid response (circled more than 1 response)	6	9.1
Total number of respondents	66	98.5

Question 16(b)(ii)

If Yes. Which of the following statements describes your views and experiences of FWA teleconferences to conciliate termination of employment claims?

	No	%
Effective way of handling matter	32	50.8
Face-to-face conference would be more effective	14	22.2
Did not participate in FWA teleconference	15	23.8
Other	2	3.2
Total number of respondents	63	94.0

Question 16(b)(iii)

If you paid compensation, why did you decide to do so?

	No	%
We decided to pay compensation even though we believed that the termination was justified, because of the costs of defending the case	32	84.2
We decided to pay compensation because the company did not handle the termination properly	4	10.5
Other	2	5.3
Total number of respondents	38	97.4

Question 16(b)(iv)

If you answered Yes to Question 16. Has there been an increase in the number of claims made against your organisation relating to termination of employment since 1 July 2009?

	No	%
Yes	33	52.4
No	27	42.8
Unsure	3	4.8
Total number of respondents	63	94.0

Question 17(a)

Has the Fair Work Act impacted upon your organisation's ability to make employees redundant?

	No	%
More Difficult	83	34.4
Less Difficult	2	0.8
No Change	113	46.9
Unsure	43	17.8
Total number of respondents	241	98.4

Question 17(b)

If more difficult why?

(Respondents were instructed to select all relevant responses)

	No	%
The definition or "genuine redundancy" in the Act requires that we consider redeployment	43	52.4
Greater union or employee opposition	23	28.0
More risk of Unfair Dismissal claims	67	81.7
More risk of General Protection claims	31	37.8
Other	4	4.9
Total number of respondents	82	98.8

7. General protections



The General Protections in the *Fair Work Act* allow persons, including employees, to pursue claims against other persons, such as their employer, if that person has treated them adversely because of a workplace right.

Since the General Protections had only been in operation for 2 years when the survey was conducted, it is not surprising that only a small proportion (8%) of respondents reported that a General Protections claim has been pursued against them.

As with unfair dismissal claims in Section 6, of those respondents who had a General Protections claim pursued against them, the majority settled the claim by paying compensation, even though they were not ordered to do so (61%).

Given the wide scope of the General Protections in the Act, claims that are unable to be pursued via the unfair dismissal laws because of a lack of jurisdiction are often pursued instead under the General Protections. This is reflected in the survey results. An overwhelming majority of respondents indicated that the claim/s were pursued against them as General Protections claim/s because these provisions of the Act are more favourable to employees than the unfair dismissal provisions (77%).

Question 18(a) *Has your organisation had any claims pursued against it under the General Protections provisions of the Fair Work Act (eg. adverse action, freedom of association, coercion, sham contracting) in FWA or a court since 1 July 2009?*

	No	%
Yes	18	7.5
No	221	92.1
Unsure	1	0.4
Total number of respondents	240	97.9

Question 18(b)(i) *If Yes: How were the claims settled?*

	No	%
We paid compensation but were not ordered to do so	11	61.1
We were ordered to pay compensation by a court	0	0
We reversed or changed the management decision which the claim related to but were not ordered to do so	0	0
We were ordered by a court to reverse or change the management decision which the claim related to	0	0
The claim was rejected by a court	1	5.5
The person withdrew the claim	4	22.2
Other	2	11.1
Total number of respondents	18	100

Question 18(b)(ii) *If Yes: Which of the following statements describes your views and experiences regarding the General Protections claim/s made against your organisation?
(Respondents were instructed to select all relevant responses)*

	No	%
The claim/s pursued against our organisation had no merit	13	76.5
The claim/s were pursued as General Protections claim/s because the provisions are more favourable to employees than the Unfair Dismissal provisions	13	76.5
The General Protections provisions are too loose and encourage speculative claims	12	70.6
We felt pressured by FWA to pay compensation when the claim had no merit	4	23.5
We decided to pay compensation even though the claim had no merit, because of the cost of defending the case	8	40.1
We decided to pay compensation because the company did not handle the matter properly	1	5.9
Other	7	41.2
Total number of respondents	17	94.4

Question 19 *Excluding the actual claims referred to above, has an employee or union threatened to pursue a General Protections claim against your company since 1 July 2009?*

	No	%
Yes	28	12.7
No	187	85.0
Unsure	5	2.3
Total number of respondents	220	89.8

8. Union activity and right of entry



The power for unions to participate in enterprise bargaining and to enter the workplace has increased under the *Fair Work Act*.

Approximately half of the respondents reported at least one or more unions having members in their workplace (48%) and of those respondents 28% indicated that the union/s at their workplace have become less cooperative since the commencement of the *Fair Work Act*.

Almost a third of respondents reported that union organisers have visited their workplace more often since 1 July 2009, when the *Fair Work Act* was introduced, than in the year prior.

Question 20(a)

Do one or more unions have members in your workplace?

	No	%
Yes	114	47.5
No	93	38.7
Unsure	33	13.7
Total number of respondents	240	97.9

Question 20(b)(i)

If Yes: Have union/s become less cooperative in your enterprise since 1 July 2009 when the Fair Work Act came into operation?

	No	%
Less cooperative	32	28.3
More cooperative	6	5.3
No change	67	59.3
Unsure	8	7.1
Total number of respondents	113	99.1

Question 20(b)(ii)

If Yes: Have union organisers visited your enterprise more often since 1 July 2009 than in the year prior to this date?

	No	%
Much more often	8	7.1
Somewhat more often	34	30.4
Less often	17	15.2
No change	49	43.7
Unsure	4	3.6
Total number of respondents	112	98.2

9. Transfer of business



The transmission of business provisions under the former *Workplace Relations Act 1996* were replaced with much broader provisions under the *Fair Work Act*. A key element of the transfer of business laws is that enterprise agreements which are binding on the first employer become binding on the second employer if any employees transfer.

Of the survey respondents, 8% indicated that the *Fair Work Act* has been a factor in deciding not to outsource work, restructure or transfer staff to an associated entity. Since 1 July 2009, 13% of respondents had actually been involved in a transfer of business

More important are the responses detailing the experiences of employers that have been involved in a transfer of business. In total 47% of respondents indicated that the transfer of business laws had either a very negative or somewhat negative impact on the business and 12% said that one or more employees were made redundant who would have otherwise been employed by the new employer. This is significant because it brings to light that the transfer of business provisions operate as a disincentive to the transfer of staff.

Question 21

Have the transfer of business provisions of the Fair Work Act been a factor in any decision not to outsource work, restructure your business or transfer staff to an associated entity?

	No	%
Yes	20	8.4
No	190	79.8
Unsure	28	11.8
Total number of respondents	238	97.1

Question 22(a)

Has your organisation been involved in any activities since 1 July 2009 which constitute a transfer of business for the purposes of the Fair Work Act (e.g. outsourcing or restructuring in which employees transferred from one employer to another employer)?

	No	%
Yes	31	12.9
No	202	84.5
Unsure	6	2.5
Total number of respondents	239	97.5

Question 22(b)

***If Yes. What was the impact of the transfer of business provisions of the Act?
(Respondents were instructed to select all relevant responses)***

	No	%
One or more employees were made redundant who would have otherwise been employed by the new employer	4	13.3
The provisions of the Act had a very negative impact	5	16.6
The provisions of the Act had a somewhat negative impact	9	30.0
The provisions of the Act had a positive impact	1	3.3
The provisions of the Act had no impact	9	30.0
Do not know or unsure	6	20.0
Total number of respondents	30	96.8

10. Labour flexibility and productivity



This section examines the views of respondents as to whether their businesses are more or less flexible and productive because of the *Fair Work Act*.

Of the employers whose workplaces had become less flexible, an overwhelming 86% said that the *Fair Work Act* was an important factor in the loss of flexibility.

In respect of productivity, 20% reported that productivity had decreased since the commencement of the *Fair Work Act*. This was only slightly more than those who reported that productivity had increased in the period (19%). About 61% of respondents reported no change in productivity levels.

However, an overwhelming majority of those respondents who had experienced an increase in productivity (88%) did not attribute the productivity increase to the *Fair Work Act*. In those businesses where productivity had decreased (20%), more than half (57%) indicated that the *Fair Work Act* had played a role.

Question 23(a) *Overall, does your organisation have a more flexible or less flexible workforce than on 1 July 2009?*

	No	%
More Flexible	24	10.1
Less Flexible	68	28.6
No Change	146	61.3
Total number of respondents	238	97.1

Question 23(b) *If your workforce is more flexible, has the Fair Work Act been an important factor in achieving this flexibility?*

	No	%
Yes	6	25.0
No	16	66.6
Unsure	2	8.3
Total number of respondents	24	100.0

Question 23(c) *If your workforce is less flexible, has the Fair Work Act been an important factor in the loss of flexibility?*

	No	%
Yes	55	85.9
No	4	6.2
Unsure	5	7.8
Total number of respondents	64	94.1

Question 24(a) *Overall, has labour productivity (ie. output per hour worked) increased in your organisation since 1 July 2009?*

	No	%
Increased	46	19.2
Decreased	48	20.1
No Change	145	60.7
Total number of respondents	239	97.5

Question 24(b) *If your labour productivity has increased, has the Fair Work Act been an important factor in achieving this productivity?*

	No	%
Yes	2	4.9
No	36	87.8
Unsure	3	7.3
Total number of respondents	41	89.1

Question 24(c)

If your labour productivity has decreased, has the Fair Work Act been an important factor in the loss of productivity?

	No	%
Yes	27	57.4
No	12	25.5
Unsure	8	17.0
Total number of respondents	47	97.9

DATA APPENDIX

SAMPLE COMPOSITION

Question 1

Which one of the following industry groups is most relevant to your operations?

Agriculture, Forestry & Fishing	4
Mining	3
Food and Beverage Manufacturing	9
Textile, Clothing, Footwear Manufacturing	8
Fabricated Metal Products Manufacturing	50
Machinery & Equipment Manufacturing	30
Other Manufacturing	55
Paper and Printing	5
Electricity, Gas, Water & Waste	4
Construction	9
Wholesale Trade	17
Retail Trade	3
Accommodation & Food Services	0
Transport, Postal and Warehousing	8
Telecommunications	2
Computer System Design and Services	1
Financial & Insurance Services	0
Professional, Scientific and Technical Services	6
Administrative & Support Services	0
Labour Hire	6
Other Manufacturing	25

Question 2

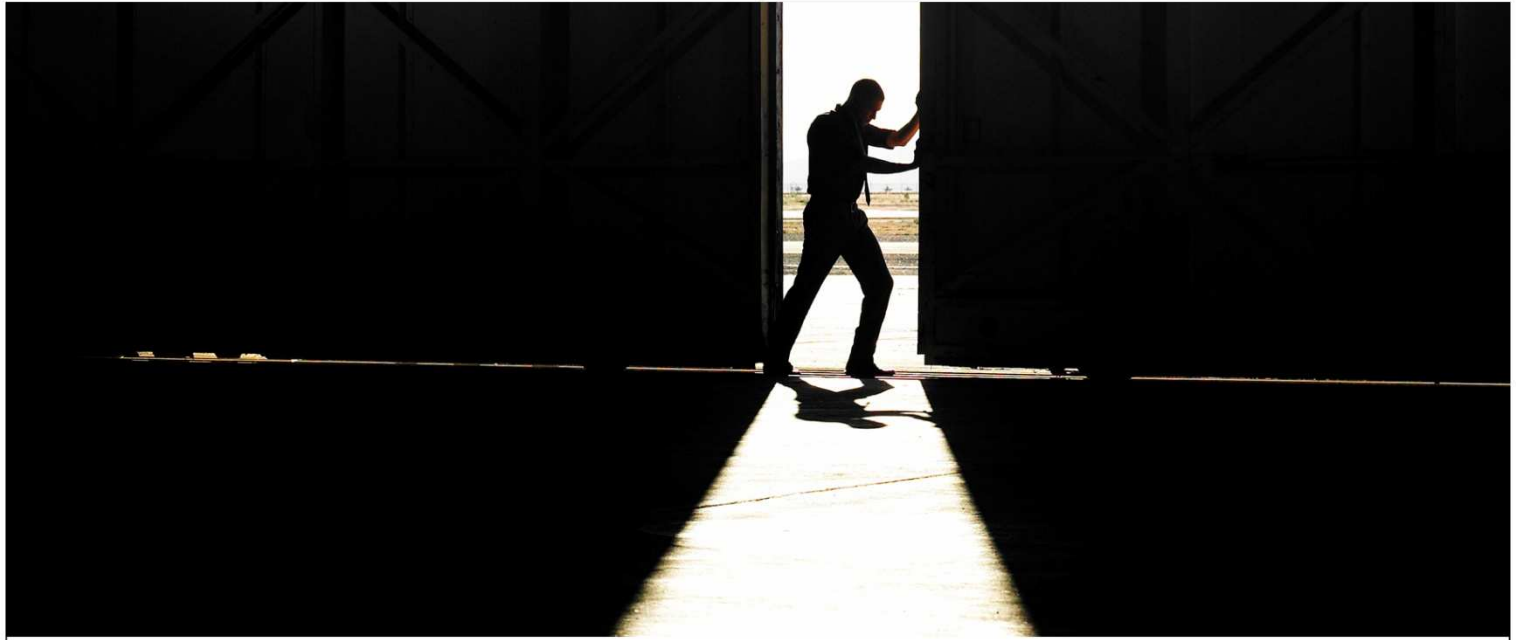
In which State or Territory does your organisation employ the most employees?

New South Wales	82
Victoria	93
Queensland	43
South Australia	19
Western Australia	5
Tasmania	-
Northern Territory	-
Australian Capital Territory	-
No answer	3

Question 3

How many people does your organisation employ in Australia?

Less than 20	55
20 to 49	60
50 to 99	47
100 to 199	26
200 to 299	13
300 to 499	14
500 to 999	13
1000 to 4999	13
5000 +	3
No response	1



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