

Ai GROUP SUBMISSION

Productivity Commission Inquiry
into the Workplace Relations
Framework

**A workplace relations framework
for the 21st Century**

MARCH 2015

Ai
GROUP

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About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Executive summary

Australia's workplace relations framework is holding Australia back. It is imposing barriers to productivity improvement, competitiveness and investment, and it is not providing the adaptability that employers and employees need.

To remain competitive in global markets, Australian businesses need to be nimble and flexible. Our businesses need to be in a position to rapidly respond to market changes and to take advantage of opportunities that present themselves. Our current workplace relations framework is pressing against these imperatives.

Australia has become a high cost country. The community regularly hears about plant closures and decisions to off-shore, but there are far too few announcements about major new investments. We are going backwards in global competitiveness and this must be set right.

Australia's productivity shortfall needs to be addressed and workforce participation must increase if we are to continue to deliver the incomes and standards of living that the Australian community has come to expect. The urgency of this has been highlighted recently by the OECD in its latest assessment of the Australian Economy and by the Australian Treasury in its latest Inter-Generational Report .

Although our workplace relations framework is not the full story, it is a major factor.

In preparing this submission, the Australian Industry Group has consulted widely with its member companies. This submission focusses on the key problems that employers have identified with the current workplace relations framework and changes that would make a real difference in improving productivity, competitiveness and employment growth, while preserving fairness for employers and employees.

Key problems identified by employers and the solutions include:

- 1. The workplace framework should not favour enterprise agreements over other types of agreement:**
 - A voluntary bargaining system should be implemented to replace the current system of mandatory collective bargaining in the *Fair Work Act 2009* (FW Act);
 - Employers and employees need to have the flexibility to enter into common law employment contracts, enterprise agreements, greenfields agreements, statutory individual agreements, and Individual Flexibility Arrangements;
 - Unlike the current framework which favours collective bargaining, the workplace relations framework should not favour one type of agreement over another.

2. Companies are locked in to unproductive and costly enterprise agreement provisions negotiated in more profitable times:

- ‘Productivity terms’ should become mandatory terms for enterprise agreements, giving employers the right to manage their businesses productively and efficiently.
- The ‘permitted matters’ for bargaining should be tightened and the ‘unlawful terms’ expanded;
- It should be easier for parties to terminate enterprise agreements after they expire;
- There should be a requirement that productivity improvements be discussed during bargaining;
- The Fair Work Commission’s (FWC’s) recent initiatives to encourage productivity improvements as a result of bargaining are welcome.

3. Industry-wide pattern agreements need to be outlawed.

4. It is too easy to take and continue industrial action:

- Industrial action must be prohibited before the formal commencement of bargaining;
- If a union is pursuing any non-permitted matters, unlawful terms or a pattern agreement, an application for a protected action ballot (PAB) order should be refused;
- There should be a requirement that bargaining claims be reasonable in order for a PAB order to be issued;
- The requirements for a PAB order applicant to be ‘genuinely trying to reach an agreement’ should be codified;
- Industrial action should be a last resort;
- The cooling-off provisions in the Act should be amended to improve access.

5. It is too difficult and costly to terminate poor performing employees:

- A higher filing fee should be implemented for unfair dismissal applications;
- Jurisdictional issues should be dealt with separately in unfair dismissal cases;
- The FW Act should contain a civil penalty for lawyers and paid agents who encourage speculative unfair dismissal or general protections applications;

- Lawyers and paid agents should be required to disclose contingency fee arrangements;
- Determinative conferences should not be conducted by the FWC without the written consent of all parties;
- General protections applications should be lodged and dealt with in the Federal Circuit Court or Federal Court;
- A list of exemptions should apply under the general protections;
- A reverse onus of proof should not apply under the general protections;
- A compensation cap should be implemented for the general protections.

6. It is too difficult and costly to terminate redundant employees:

- 'Redundancy' should be defined in the FW Act;
- The 'other acceptable employment' exception needs to be amended to improve workability;
- Retirement age redundancy caps have merit;
- Overly generous redundancy packages are impeding necessary restructuring in many workplaces;
- The Fair Entitlement Guarantee needs to be amended to improve fairness and reduce risks;
- Construction industry redundancy funds should be subject to further regulation and oversight given the inappropriate practices of some funds.

7. It is too difficult and costly to restructure businesses:

- Australia's transfer of business laws are impeding restructuring and require major amendments.

8. Australia's long service leave laws are a mess:

- A national long service leave standard of 13 weeks long service leave for 15 years of service should be implemented within the National Employment Standards (NES) and override State and Territory long service leave laws;
- The national standard should permit the cashing out of long service leave by agreement in writing between the employer and employee;

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- Enterprise agreements should be permitted to override State and Territory long service leave laws subject to a better off overall test;
- A raft of problems with the existing long service leave schemes for the construction and coal mining industries need to be addressed, and it is essential that portable long service leave schemes are not expanded as they operate, in effect, as a costly tax on employment.

9. Unlawful and unacceptable union conduct needs to be addressed:

- The construction industry workplace relations reforms that are currently before the Senate must be passed without delay;
- Union right of entry laws need to be tightened;
- The definition of 'industrial action' in the FW Act needs to be amended to address bogus safety disputes.

10. Awards are still far too complicated:

- Awards need to be much simpler and less prescriptive to provide a genuine 'minimum safety net';
- The FWC should retain its powers to set penalty rates within awards but changes should be made to the relevant criteria in s.134 of the FW Act;
- 4 Yearly Reviews should be abolished;
- Sections 157 and 160 of the FW Act provide the necessary flexibility to enable awards to be kept up-to-date.

Ai Group looks forward to ongoing participating in the Productivity Commission's inquiry.

2. The business environment in which 21st century workplaces operate

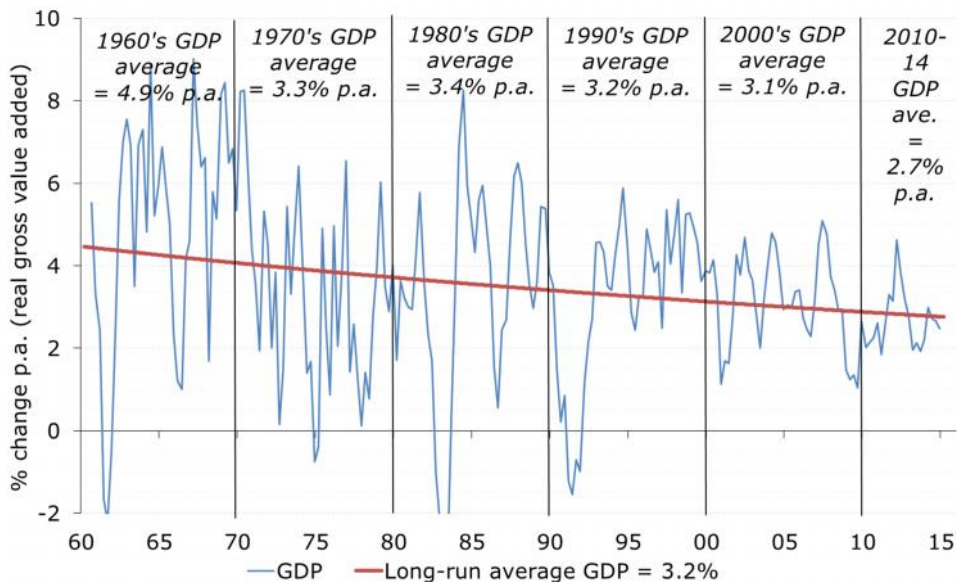
2.1 Key trends in the Australian economy

At a headline level, the Australian economy since 2010 can best be characterised as ‘slower and lower’, relative to the growth rates achieved in the decades prior to this one. This trend is evident across a range of key macroeconomic aggregate measures for Australia including growth in real GDP, business profitability, real incomes, productivity, employment and investment.

The ‘new normal’? slower growth in output, productivity and incomes

In real output (inflation-adjusted) terms, for example, GDP growth has averaged just 2.7% p.a. over the past five years and 2.5% in 2014 (chart 1). There are many factors contributing to this latest slow period, including the downswing from the ‘mining investment boom’ (2008-12) and an extended period of the Australian dollar trading above parity with the US dollar (2010-13). While it is to be hoped that this latest slow period is an aberration and we will soon return to something closer to ‘trend’ growth (3 to 3 ¼ % p.a.), it is entirely possible that GDP growth rates of 3% or under could settle in to become our ‘new normal’, for reasons including: the ageing population and falling labour force participation; global production shifts; technologies; and industry changes.

Chart 1: Australian GDP growth (real value added output)



Source: ABS, *National Accounts*, to Dec 2014

As Treasury noted in its latest Intergenerational Report (March 2015), stronger productivity growth is required if we are to overcome these headwinds to growth. This is because Australian productivity growth rates have been trending lower, in a similar pattern to real GDP growth and other key indicators. At a national level, Australian multifactor productivity has flatlined at best since the turn of this century (see Chart 2). And compared to our global competitors, Australia has performed especially poorly, with national multifactor productivity *falling* by an average of 1.2% p.a. from 2007 to 2011 and by 1.3% in 2012 and 2013, compared with global estimates of an improvement of 0.6% p.a. from 2007 to 2011, 0.2% in 2012 and -0.1% in 2013¹.

Some of this decline in national multifactor productivity since 2003-04 has been due to the unique influence of unusually large long-term investments in mining and utilities during this period that have not yet resulted in a fully commensurate increase in output volumes (e.g. due to time lags between investments and their output growth). But weak productivity growth is apparent in other industries also (see Chart 2). This suggests that Australia's productivity problem runs deeper than just this temporary capital expansion cycle in mining and utilities. It requires a response at both:

1. the national level, that is, macroeconomic policy that enhances our allocative flexibilities and efficiencies across industries and sectors; and
2. the workplace level, that is, microeconomic policy that enhances our productive flexibilities and efficiencies with regard to innovation, technologies and work practices within businesses.

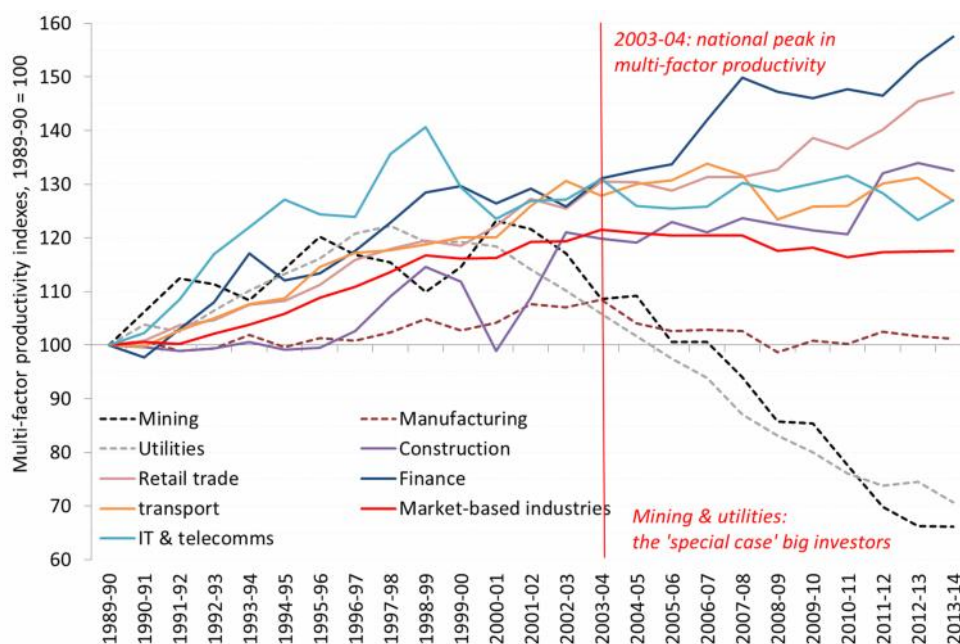
Good macroeconomic policy should aim to foster and enable flexibility and agility across the economy, such that individual workplaces are able to respond rapidly to new technologies and innovations that improve their productivity. Flexibility in the workplace is especially important to this process. As noted by the Productivity Commission in a recent working paper on productivity:

*"The magic of productivity enhancing technological and organisational change is that although it takes effort — time and money are necessary to achieve change —the pay-off exceeds the cost. ... The application of knowledge is at the heart of productivity growth."*²

¹ Productivity Commission estimates calculated from the Conference Board Total Economy Database, in PC 2014.

² Productivity Commission Staff Research Note (Feb 2015), *On Productivity: concepts and measurement*.

Chart 2: Australian multifactor productivity, selected market-based industries



Source: ABS, *Estimates of multifactor productivity, 2013-14*, (Dec 2014).

Productivity improvement at the firm level

Productivity improvement at the firm level is a well understood goal, but it can be difficult to achieve in practice and difficult to measure. Ai Group conducts an annual survey of Business Prospects which sheds light on recent success rates in achieving labour productivity improvements and the factors that may have contributed to changes (up or down) in labour productivity.

In this year’s CEO Business Prospects Survey, labour productivity improved for a net balance of 8% of all businesses in 2014 (see Chart 3). This result was below what had been initially expected for 2014, as of the end of 2013, when a net balance of around 20% of CEOs had anticipated an improvement in their own business’ labour productivity in 2014.

Across the four major industry groups included in this year’s survey, labour productivity improvement was achieved by a higher proportion of businesses in mining services in 2014 than in other industries, with a net balance of 29% of mining services CEOs indicating an improvement in 2014. CEOs in the services sectors were the next most successful group in achieving labour productivity improvements, with a net balance of 15% of respondents recording an improvement in 2014. On balance, only 6% of manufacturing CEOs reported labour productivity improvements in 2014, while 5% of construction CEOs did so.

Two fifths of businesses that reported an improvement in labour productivity in 2014 attributed their improvement to a change in business processes that helped increase their output using the same amount of labour (see Chart 4). Restructuring was listed by 16% of the CEOs who reported an improvement as the key reason for labour productivity improvement. 13% of CEOs (most of them in manufacturing) made additional capital investment during 2014, which helped increase

their output per hour of work. Higher demand (11%) and increased staff skills and capabilities (9%) were also cited as the main factor behind better labour productivity in 2014 by CEOs across all industries.

Among businesses that experienced a decline in labour productivity in 2014, around half (51%) identified a fall in demand as the key reason behind the deterioration. This indicates that their output fell by more than their labour inputs did in this period, such that their lower output increased their average labour content per unit of goods or services produced. This may simply be due to the time lags involved in adjusting inputs to match expected outputs, with labour typically taking longer to adjust (up or down) than output or material inputs, due to the time required to recruit new staff or, on the downside, to shed excess labour.

Rather intriguingly, 11% of CEOs nominated ‘unmotivated workers’ as a factor eroding their labour productivity in 2014. While there can be many factors contributing to an apparent lack of employee motivation, the very weak national labour market and subdued private sector wage growth over the past two years could be contributing to this outcome (for example, if employees would like to change jobs but cannot due to lack of opportunities elsewhere).

8% of CEOs listed regulatory compliance as the number one factor causing lower labour productivity in 2014. This partly reflected the ongoing challenges faced by Australian businesses with regards to industrial relations, but also touches on other areas of regulatory compliance costs. 7% of respondents attributed the deterioration in their labour productivity in 2014 to a lack of skilled workers.

For 2015, 39% of all CEOs expect their business’ labour productivity to improve, while 9% expect it to decline, leaving a net balance of 30% of businesses having a positive outlook for their own labour productivity in 2015. This optimism is particularly evident in the mining services industry, with a net balance of 42% expecting higher labour productivity in 2015. This is followed by the services sectors (31%), manufacturing (30%) and construction (23%) industries (Chart 3).

Chart 3: Changes in labour productivity, 2014 (actual) and 2015 (expected)

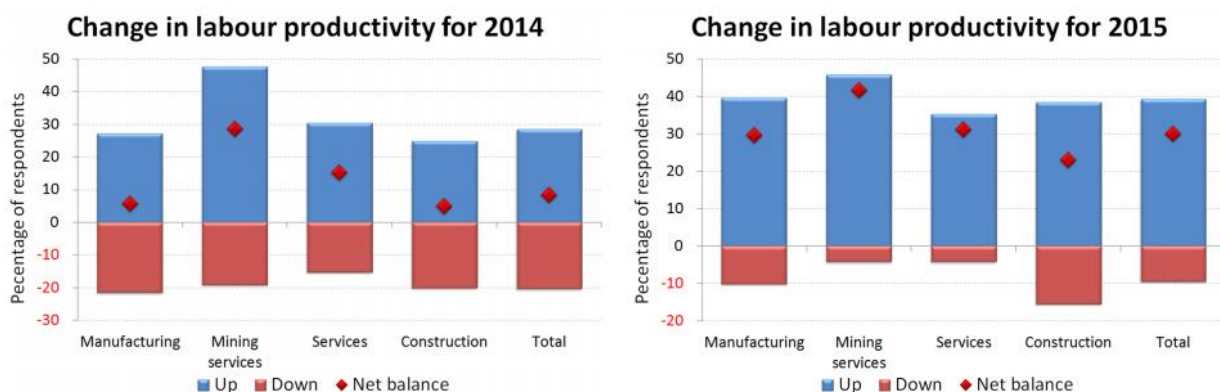
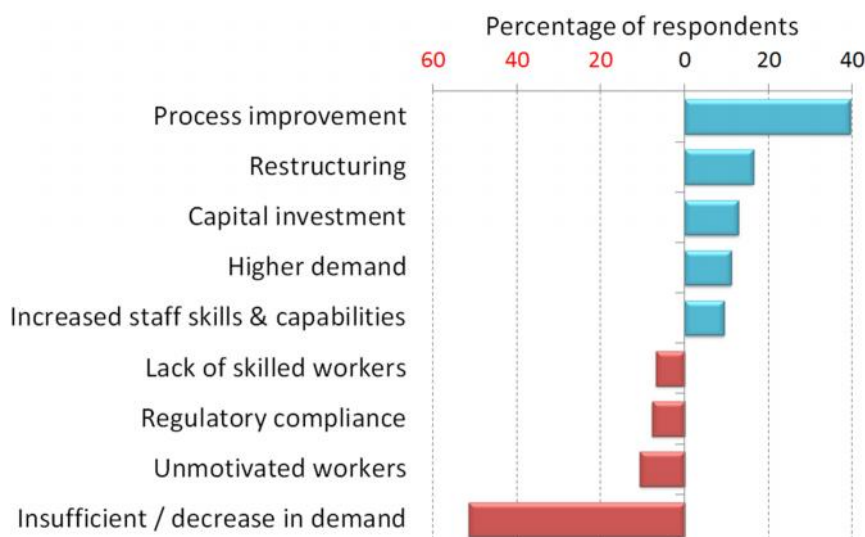


Chart 4: Reasons for changes in labour productivity in 2014



Australia’s mix of output: rebalancing is required

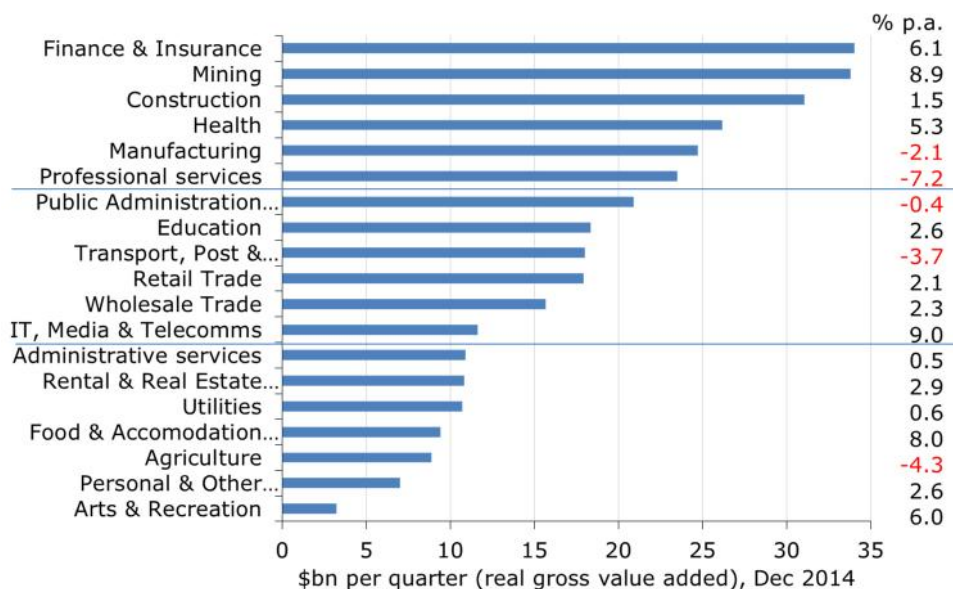
As Australia moves beyond the resources boom that has reshaped our economy over the past decade (with a large investment cycle now being followed by large increases in mining output volumes), it is becoming increasingly urgent that other, non-mining industries and sectors improve their growth in investment, employment, output and incomes. This issue lies at the heart of long-standing concerns about relatively low non-mining business investment held by the RBA, which have prompted it to cut Australia’s cash rate to a record low of 2.25% in February 2015.

In addition to this (very welcome) monetary policy response, Ai Group has been calling for some time for our national microeconomic policy framework to more actively encourage and enable the rebalancing that is now required.³ To illustrate this task, Australia’s two largest industries, finance and insurance and mining, currently contribute around 9% of GDP each, in value-added output terms (see Chart 5). They are growing more rapidly than other industries and so their dominance – and our dependence on them - is increasing. Among other large industries, construction and health services are also growing well, largely for demographic reasons. Other larger industries are faring less well however, so the range of industries that are driving our growth is narrowing.

This has unfavourable implications for future growth, in terms of its potential speed, volatility and vulnerability to risks and shocks. For example, finance and mining are both extremely capital-intensive (rather than labour intensive) and do not generate the same spread of employment as many other industries; in 2014, mining produced 9% of output volumes but directly employed less than 2% of the workforce. Mining and finance are also intensely ‘global’ in nature, potentially increasing Australia’s direct exposure to volatile commodity cycles and financial market shocks.

³ See for example, Ai Group (March 2014), *Growing and rebalancing the Australian Economy: Ai Group’s 10 point plan for a strong and diversified economy*.

Chart 5: Australian industries, value added output and latest growth rate (Q4 2014)



Source: ABS, *National Accounts*, to Dec 2014

The implications of this narrow growth base for Australia’s economic outlook were highlighted recently by the OECD. Indeed, in its latest assessment of the Australian economy, the OECD noted that “with the end of the mining boom, Australia must look toward non-resource sectors for future growth”. In order to achieve this, economic policy must seek “rebalancing to sustain growth” and that it must “enable the economy to diversify towards more sectors of high-value added activity”. The OECD recommends that in response, Australian economic policy should focus on:

“further improving the operating environment for the private sector, most importantly in infrastructure, taxation, labour skills and innovation. Improving educational and labour market opportunities for minority groups would not only reduce social exclusion but also boost growth potential.”⁴

Similarly, the Australian Treasury’s latest Intergenerational Report (March 2015) highlights the urgency of implementing policy that fosters business flexibility and sustainability. It aims for a

“policy agenda [that] will support productivity growth by helping to position Australian businesses to be flexible, competitive and robust in the face of dynamic global conditions.”

The Treasury lists this current Productivity Commission Review of workplace relations as a key step toward identifying workplace relations reforms that will support this long-term objective.

⁴ OECD (Dec 2014), *2014 OECD economic survey of Australia: rebalancing to sustain growth*, and OECD (February 2015), *Economic Policy Reforms 2015: Going for Growth* (pp. 141-144).

Australian business global competitiveness: improvement is required

The World Economic Forum’s (WEF) Global Competitiveness Index and other data sources indicate that Australia’s global competitiveness has slipped in recent years, falling to 22nd in 2014-15, from an all-time national best ranking of 15th place in 2009-10. These numbers are the statistical expression of the commonly heard comment from business leaders that “Australia has become a very expensive country in which to make things or to do business” (see Table 1).

Table 1: WEF Global Competitiveness Indexes: Australia’s ranking

Year	Overall competitiveness	Flexibility of wages	Burden of Gov. regulation	Technological readiness	Business Innovation
2007-08	19	87	68	17	22
2008-09	18	90	66	19	20
2009-10	15	75	85	20	20
2010-11	16	110	60	23	21
2011-12	20	116	75	22	22
2012-13	20	123	96	19	23
2013-14	21	135	128	12	22
2014-15	22	132	124	19	25

Source: WEF Global Competitiveness Reports

This loss of competitiveness is not simply a temporary or relative cost story that can be put down to the high dollar, after several years of ‘over parity’ trading ranges for the Australian dollar. While the high Australian dollar has most definitely contributed to the tough trading conditions facing Australian business in recent years (arguably, a case of ‘Dutch disease’), it is not the only factor. Relative to most other comparable advanced economies, Australian businesses also face:

- Higher labour costs directly, through wages and salaries;
- Higher labour costs indirectly, through workplace inflexibilities and working arrangements;
- Rising energy costs;
- Higher land and property costs and higher redevelopment and new building costs;
- A higher burden in time and costs due to Government regulation, including from labour market regulation and labour force reporting requirements;
- A higher corporate taxation burden; and
- A failure to achieve aggregate productivity improvements (and/or to reduce unit production costs) in order to cover all of these sources of increased input costs.

Arguably Australia’s loss of global competitiveness in an overall sense has been partly due to other countries doing better and moving up the ranks, but in some areas Australia’s performance has deteriorated in absolute terms (e.g. in the burden of Government regulation and in the cost of staff redundancies). With regard to the WEF series and other global data, it is sometimes argued that Australia’s relatively poor performance is a matter of perception rather than measurable

reality. In the global context however, perception matters almost as much as reality, since expectations and impressions play a significant role in the decision-making of businesses and individuals regarding when and where to place their next investment in labour and capital.

The WEF and similar data sources can help to pinpoint Australia's relative strengths as well as our (aggregate) weaknesses, when it comes to global business decision-making and relative competitiveness. In the WEF Global Competitiveness Indexes for 2014-15, Australia did well on:

- 1st for secondary education enrolment rates;
- 1st for the Legal Rights Index (which indicates the strength and reliability of legal rights);
- 1st for our central bank's ability to manage inflation;
- 3rd for the "soundness of banks";
- 4th for the number of mobile broadband subscriptions per 100 people;
- 5th for the number of days required to start a business and 10th for the number of procedures to start a business;
- 6th for tertiary enrolment rates;
- 8th for efficacy of corporate boards; and
- 8th for the intensity of local competition.

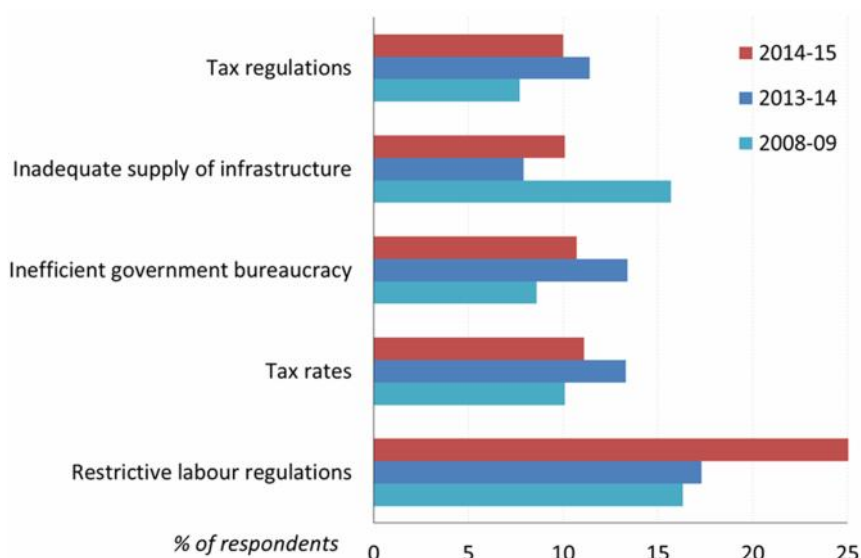
The five key weaknesses that the WEF series identifies as impeding Australian businesses' global competitiveness in 2014-15 (Chart 6) and as requiring a response are:

1. 25.4% of businesses nominated restrictive labour regulations. A restrictive labour market has topped the list of key business impediments in Australia in each of the WEF's Global Competitiveness Reports since 2008-09, but a far higher proportion of business leaders said it is an impediment in 2014-15 than in previous years. This suggests that labour regulations have become a greater impediment to competitiveness in Australia in 2014-15, instead of improving.
2. 11.1% of businesses nominated tax rates, reflecting the relatively high rate of corporate taxation in Australia (as opposed to the total tax burden, which is around the average of OECD countries).
3. 10.7% of businesses nominated inefficient Government bureaucracy, highlighting the burden that government regulation and reporting requirements (including labour regulation) place on businesses, in terms of its time and cost to business.
4. 10.1% of businesses said an inadequate supply of physical infrastructure (e.g. in transport and telecommunications) is impeding Australian business competitiveness.
5. 10.0% of businesses nominated tax regulations, reflecting the complexity and reporting requirements associated with Australia's taxation system.

Other 'problematic factors for doing business in Australia' identified by the WEF Global Competitiveness Report in 2014-15 that relate to the labour market or to labour relations include:

- Poor work ethic in national labour force (9.2% of businesses commenting on Australia);
- Insufficient capacity to innovate (5.3%); and
- Inadequately educated workforce (3.7%).

Chart 6: “Most problematic factors for doing business in Australia” (top 5)



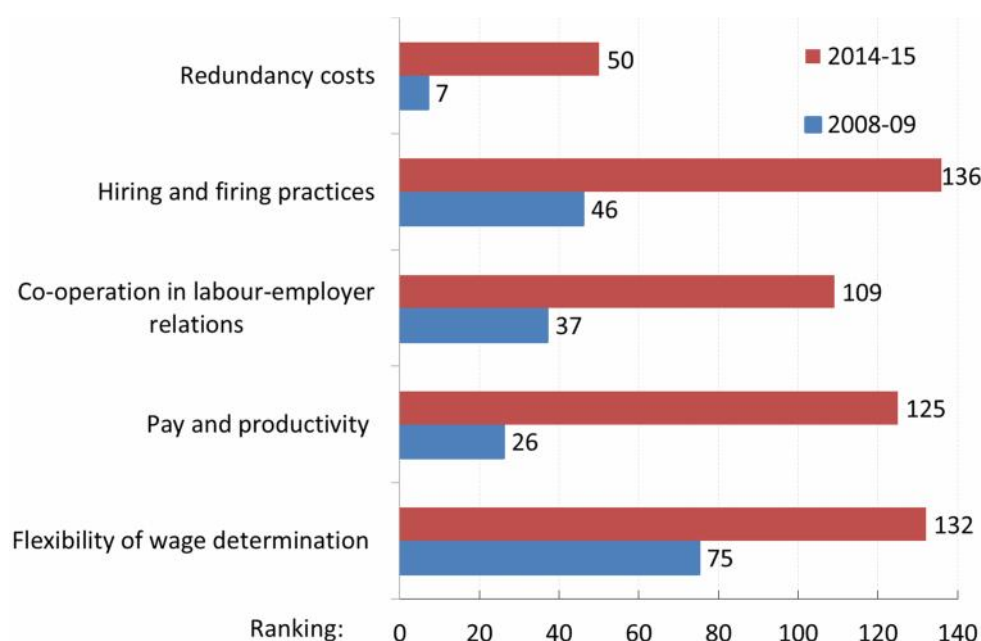
Source: WEF Global Competitiveness Reports

Delving deeper into the labour market indicators contained in the WEF Global Competitiveness series, Australia ranked 56th (of 144 countries) in 2014-15 for the ‘labour market efficiency’ pillar, which is comprised of 10 separate indicators of labour market efficiency. In order of best to worst performance on these labour market indicators in 2014-15, Australia ranked:

- Reliance on professional management 13
- Country capacity to attract talent 16
- Country capacity to retain talent 28
- Redundancy costs (measured by weeks of salary) 50
- Women in labor force (measured by ratio to men) 54
- Effect of taxation on incentives to work 80
- Cooperation in labor-employer relations 109
- Pay and productivity 125
- Flexibility of wage determination 132
- Hiring and firing practices 136

The WEF Global Competitiveness series suggests that on this set of labour market indicators, Australia’s relative performance has deteriorated in recent years (see Chart 7). This relative deterioration is partly due to labour market reforms in other countries that have improved their ranking relative to Australia’s, but also due to an outright decline in Australia’s score on some key measures. These include the flexibility of wage determination (reflecting the continuation of Australia’s centralised wage setting processes); hiring and firing practices (reflecting relatively more restrictive access to casual and contract workers); pay and productivity for workers (reflecting the failure to reduce unit labour costs and improve labour productivity); and cooperation in workplace labour relations.

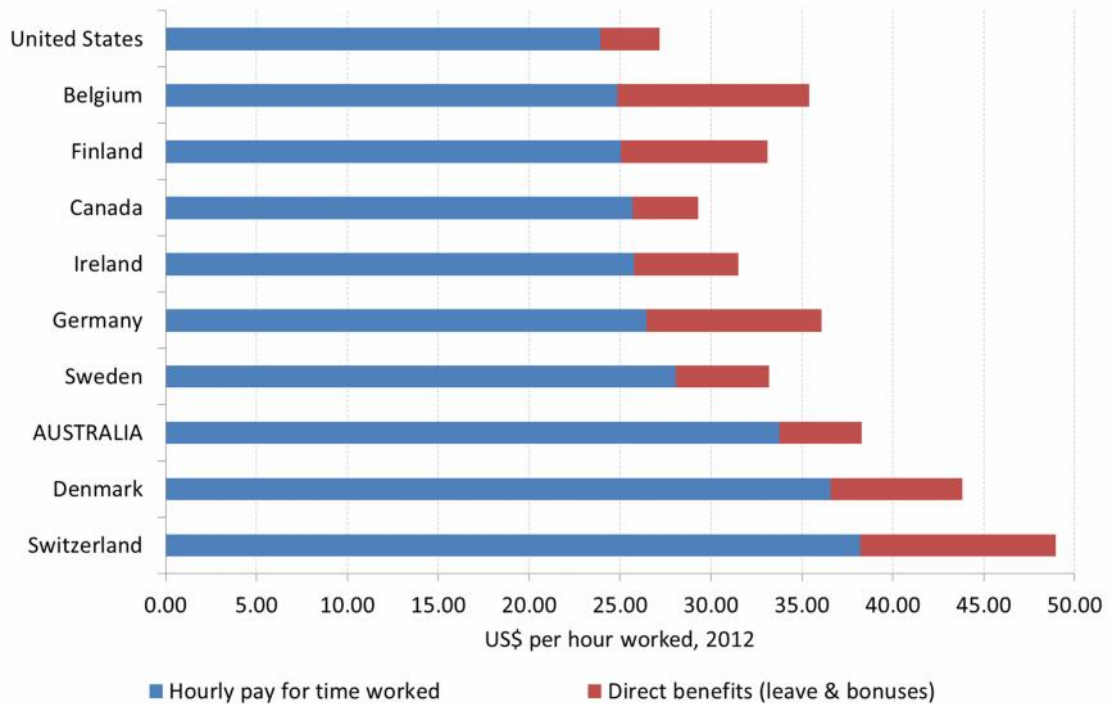
Chart 7: Australia’s global ranking on selected labour market indicators



Source: WEF Global Competitiveness Reports

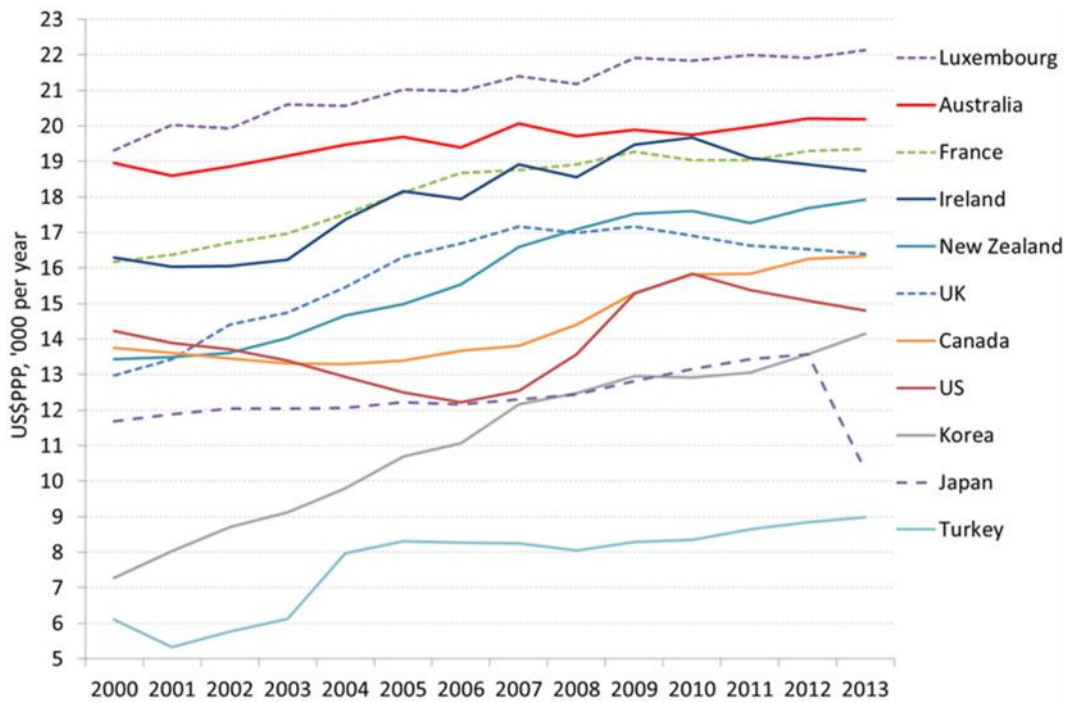
The WEF Global Competitiveness series does not directly compare labour costs, except in relation to ‘pay and productivity’. On direct costs, other data sources suggest Australian labour costs are relatively high. The Conference Board database indicates that in 2012, Australia had the third highest average hourly labour costs in manufacturing (see Chart 8). 2012 was, however, a year in which the Australian dollar was at a high level. On a PPP basis, Australian manufacturing labour costs look lower, but are still among the highest globally. Similarly, OECD data show that Australia’s national minimum wage were the second highest in the world in 2013 (second only to Luxembourg), on a PPP basis (see Chart 9).

Chart 8: Average hourly labour costs in manufacturing, US\$, 2012



Source: Conference Board, International Labor Statistics database.

Chart 9: National minimum wage, purchasing power parity (PPP) basis



Source: OECD, Stat database (data to March 2013).

2.2 Key trends in the Australian labour market

Employment, unemployment, under-employment and participation

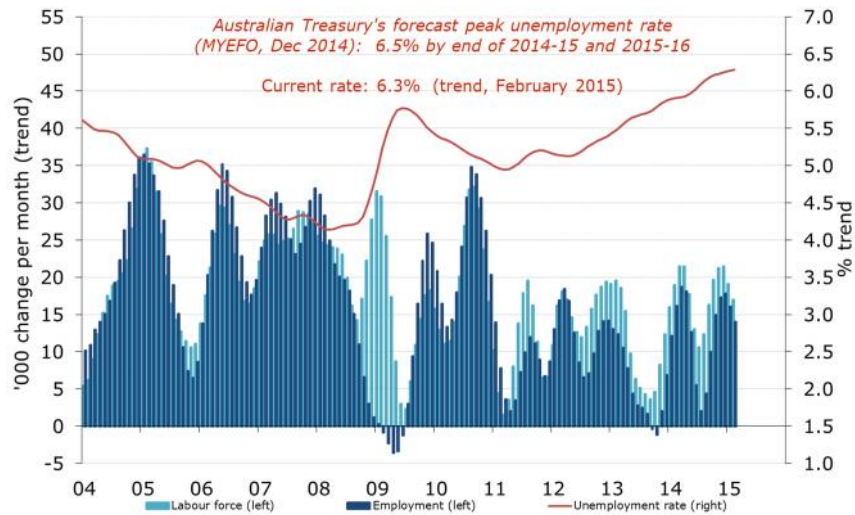
The following trends in the Australian labour market set out the broad parameters in which to consider how best to improve labour productivity and labour force participation – as required to ensure ongoing growth and prosperity - in an efficient, equitable and sustainable manner:

- Total employment growth has been weak since 2011, with annual growth rates of 1.3% or less since September 2011 (trend). This equates to monthly net jobs growth numbers of 15,000 to 18,000 at best, compared with net jobs growth that regularly exceeded 30,000 per month in the decade up to 2011 (see chart 10). Recent job ads numbers (e.g. from ANZ Bank and SEEK) suggest employment growth may pick up in the second half of 2015, albeit slowly.
- Part-time work is rising. As of February 2015, part-time work (defined by the ABS as less than 35 hours per week) had reached 30.8% of the workforce (trend), the highest rate recorded in the current labour force data series (see chart 11). And of the 363,000 net additions to the workforce in the three years to February 2015, 250,000 (69%) were part-time. On the demand side, this increase in part-time work relate to the industry mix, with stronger labour demand from industries that have higher needs for shift work, part-time work and flexible arrangements. On the supply side, increased workforce participation among women with childcare responsibilities and older people means that more workers prefer to work part-time rather than full-time or not at all. Indeed, the latest available data on under-employment suggest that up to 70% of those currently working part-time are not able to work more hours.
- Unemployment numbers and the unemployment rate are trending higher. As of February 2015, the unemployment rate was 6.3% (trend, highest since July 2002) and the number of active jobseekers had reached 781,600 (trend), the highest such number since April 1997.
- A further 8.7% of the workforce were ‘under-employed’ in February 2015 (that is, in work but willing and able to work more hours) (trend). This is the highest such rate in the history of this data series, dating back to 1978. This rise in under-employment is directly related to the rise in part-time work as a proportion of the labour force. Within the part-time workforce, the proportion of workers who are reported to be underemployed has been relatively stable, at around 26% since 2009, but rising to 29% in February 2015. The converse of this seemingly high under-employment number implies that the majority of part-time workers – around 70% in Feb 2015 – are not willing and/or able to work more hours than their current employment.
- The participation rate is drifting lower as the population ages. It has, however, fallen by a greater margin for men over the past three years than it has for women. This suggests a cyclical effect may be at play, leading to greater numbers of ‘discouraged workers’ among men than among women. Calculations based on recent participation rates suggest that up

to 150,000 men may have dropped out of the labour force as ‘discouraged workers’ since 2010 versus around 28,000 women (Chart 12). This disparity in labour force experiences may reflect the trends in demand for part-time work and demand across industries, as noted above.

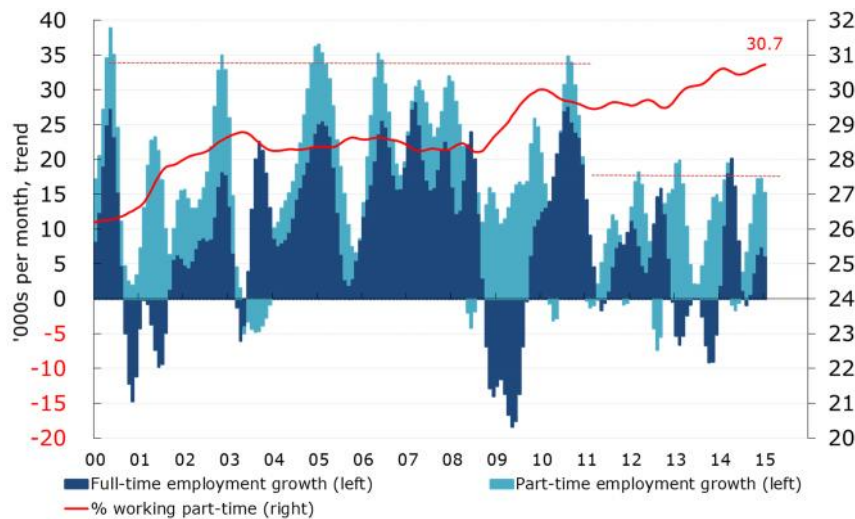
- The national employment to population ratio fell to 60.6% in February 2015 (trend), its lowest rate since December 2004.

Chart 10: Employment, labour force and unemployment growth (trend)



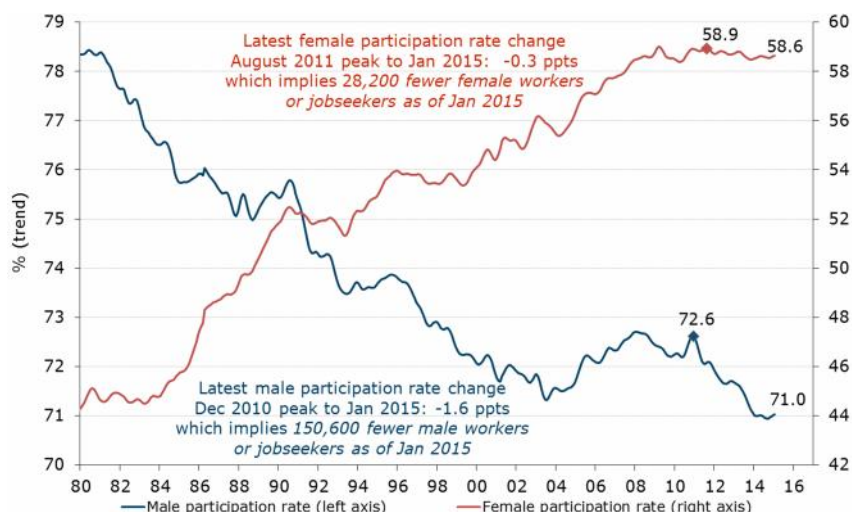
Source: ABS, Labour Force Australia, to Feb 2015

Chart 11: Full time and part time work (trend)



Source: ABS, Labour Force Australia, to Jan 2015

Chart 12: Labour market participation rates, by sex (trend)



Source: ABS, Labour Force Australia, to Jan 2015

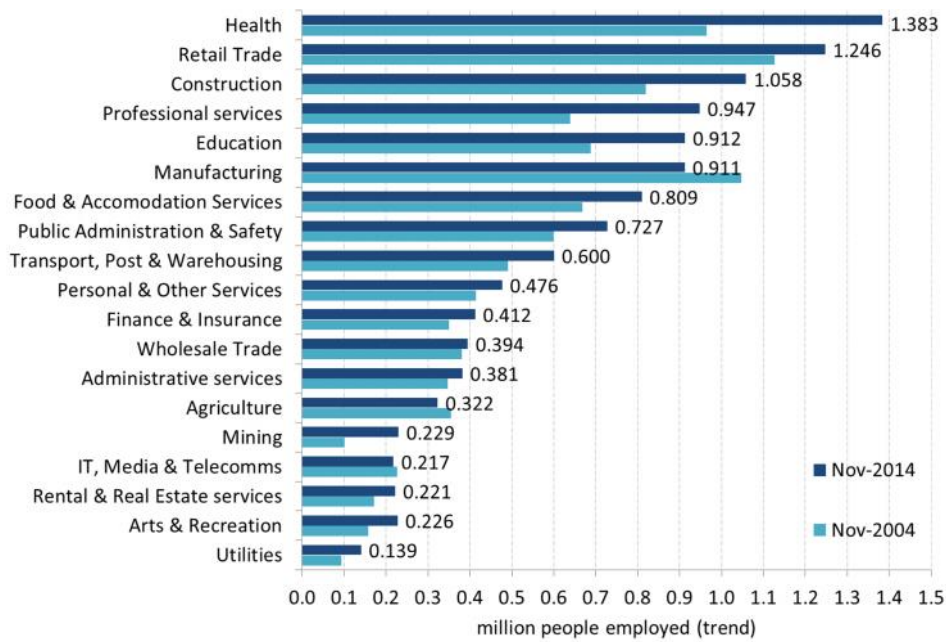
Employment trends by industry

Employment has been growing more strongly in services sectors than in the industrial sectors for some time. **Healthcare and social services** is Australia’s single largest employing sector, with just under 1.4 million employees as of November 2014, equal to 12% of the workforce, or 1 in 12 workers nationwide (chart 13). Health sector employment grew by an average of 3.8% p.a. over the decade to 2014, adding an average of 43,300 workers each year. This industry has the highest proportion of female workers in Australia, at 78% of the workforce in 2014 (chart 14). It also has one of the highest rates of part-time work, with around 45% of healthcare workers working part-time (ranging from 35% in hospitals to 57% in residential care services). Actual hours of work per employee in healthcare averaged 28.7 hours per week as of November 2014, versus the all-industry average of 33.3 hours. Over the five years to November 2014, 24% (190,000 jobs) of the 797,000 net additions to the workforce were in health.

In second place came **professional services**, which added 124,000 jobs in the five years to November 2014, or 15% of total net employment additions over that period. Professional services employees work 35.6 hours per week on average and earn above-average salaries. Other relatively large industries that employ large numbers of part-time workers - **retail trade** and **hospitality** – have also grown relatively strongly in recent years. These two industries increased their employment numbers by 74,000 and 70,000 respectively over the five years to November 2014, accounting for 9.3% and 8.7% of total net employment growth over that period.

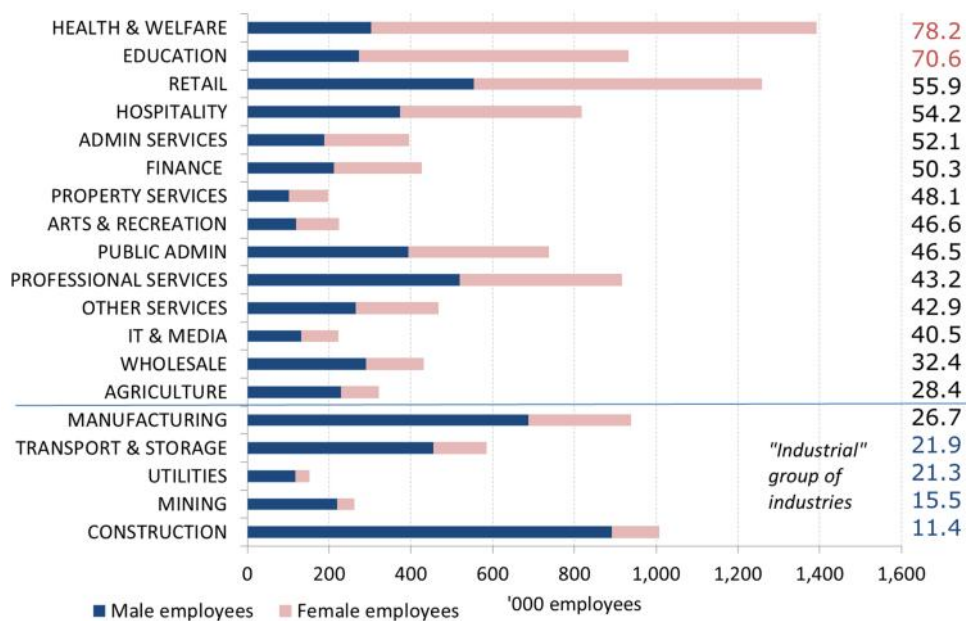
The dominance of these four sectors in recent employment growth (collectively accounting for 58% of net employment growth over the five years to Nov 2014) means that their labour demand characteristics go a long way to explaining recent trends in headline employment, including the rising share of part-time and female workers. These trends all look set to continue. In turn, this pattern of demand can be expected to further elevate the importance of flexible work and especially flexible work hours arrangements in enabling stronger employment growth.

Chart 13: Industry employment, 2004 to 2014 (trend)



Source: ABS, Labour Force Australia, detailed quarterly, to Nov2014

Chart 14: Industry employment by sex (2014)

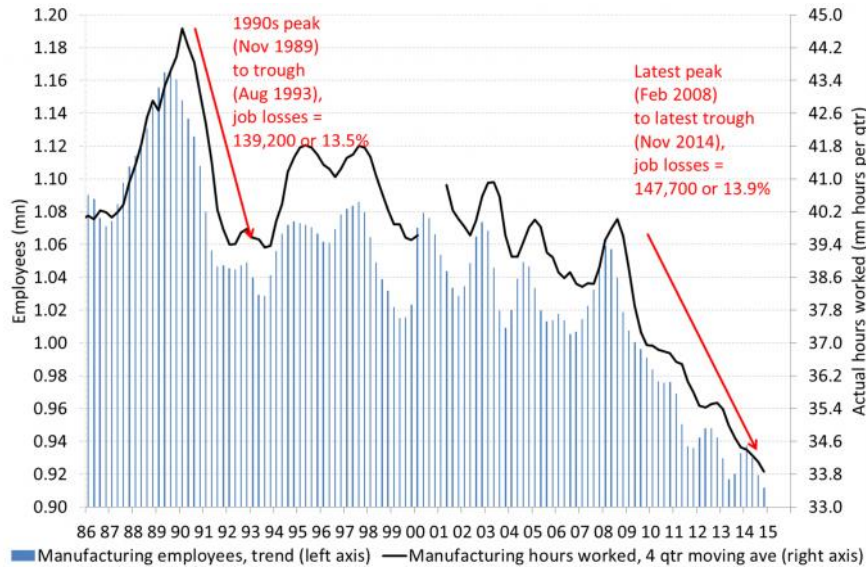


Source: ABS, Labour Force Australia, detailed quarterly, to Nov2014

Conversely, among Australia’s largest employing sectors, **manufacturing** stands out as the epicentre of labour shedding over the past decade, with an especially large plunge over the past three years. In total, manufacturing has shed 147,700 positions since 2008 (equivalent to around 14% of its 2008 workforce), including 80,000 jobs gone in the three years to November 2014. Around three quarters of manufacturing workers were male in 2014, and in 2013 19% were aged over 55 years (versus 17% for all industries). This workforce profile, together with this history of large-scale labour shedding, may help to explain why so many more men (up to 150,000) than women (up to 28,000) have apparently ‘dropped out’ of the labour force over the past five years.

This suggests that a more flexible range of re-skilling and re-employment options is required in to enable this potentially large group of ‘discouraged jobseekers’ back into the workforce.

Chart 15: Manufacturing employment and total hours worked (trend)



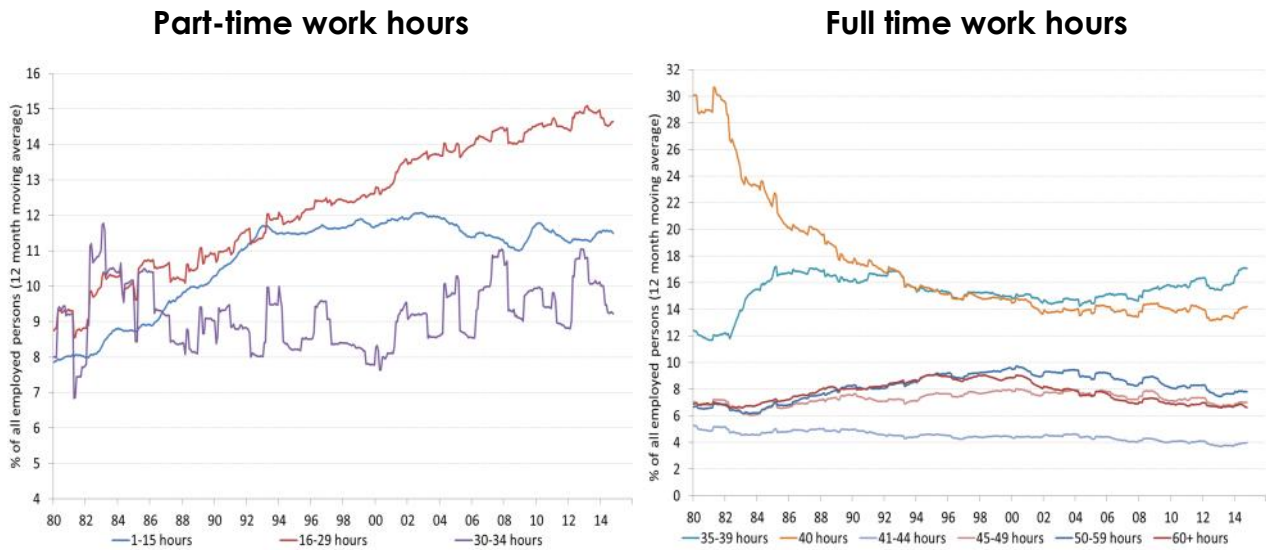
Source: ABS, Labour Force Australia, detailed quarterly, to Nov2014

Employment trends in weekly work hours

Reflecting the employment trends discussed above, the weekly work hours bracket that has shown the strongest growth over the past decade (and more) has been the 16 to 29 hours per week bracket, which approximately equates to three work days per week. Around 15% of the workforce worked these hours by 2012, dropping slightly to 14.6% in 2014 (Chart 16). More detailed analysis indicates that around 22% of all female workers worked 16 to 29 hours per week in 2014, as did 9% of men (Chart 17).

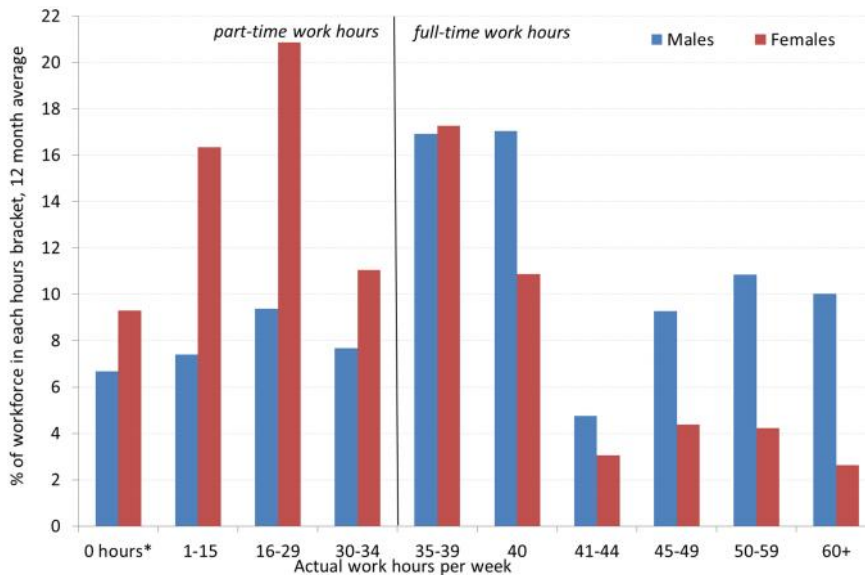
At the other end of the working week, a smaller proportion of the workforce now work extremely long work hours, with 7.8% of the workforce doing 50-59 hours per week and 6.6% doing 60+ hours per week in 2014, down from peaks of 9.7% and 9% respectively in the year 2000 (Chart 16). As in the past, men are far more likely to work long weekly hours than women in 2014 (Chart 17).

Chart 16: Average actual work hours, proportion of total workforce



Source: ABS, Labour Force Australia, to Oct 2014

Chart 17: Average actual work hours, by sex (2014)



* '0 hours' indicates workers who are employed but did not work in the reference week due to leave or illness.
Source: ABS, Labour Force Australia, to Oct 2014

Timing of work: shiftwork, weekends and flexible hours

The latest available ABS survey of Working Time Arrangements found that in November 2012 there were 9.3 million employees in their main job (excluding owner managers). Of these:

- 78% had paid leave entitlements;
- 75% could choose when their holidays were taken, with a further 12% who could sometimes choose;
- 40% had some say in their start and finish times;

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- 36% were able to work extra hours in order to take time off;
- 34% usually worked extra hours or overtime, of which 26% (823,400) were not compensated for the extra hours worked;
- 16% usually worked shift work;
- 7% usually worked the majority of their hours between 7pm and 7am in all of their jobs;
- 25% had earnings / income that varied from one pay period to the next; and
- 37% had hours that varied weekly or they were usually required to be on call or standby.

For the 9.5 million employees who held one job only:

- 66% usually worked five days a week;
- 4% usually worked seven days a week, and a further 7% usually worked six days a week;
- 14% usually worked on Saturdays and 8% usually worked on Sundays;
- 16% reported the days of the week they worked usually varied; and
- 70% worked on weekdays only, while 29% worked on both weekdays and weekends.

For the 563,800 people who were multiple jobholders (6% of all employees in 2012):

- Compared to single jobholders, they were more likely to work on weekends, and to work six or seven days a week:
- 39% usually worked five days a week;
- 19% usually worked seven days a week, and a further 19% usually worked six days a week;
- 37% usually worked on Saturdays and 26% usually worked on Sundays;
- 20% reported the days of the week they worked usually varied; and
- 42% worked on weekdays only, while 57% worked on both weekdays and weekend.

Forms of employment: employees, casuals, contractors and operators

The latest relevant ABS data on 'forms of employment' (Nov 2013) show that within the total paid workforce (see table 2):

- The proportion who are permanent employees (employees with paid leave entitlements, regardless of the number of hours they work) has been drifting up slowly over many years.

63.3% of the paid workforce were permanent employees in November 2013, up from 59.6% in 2004 and 60.8% in 1998.

- The proportion who are working on a casual basis (employees with no entitlement to paid leave, regardless of the number of hours they work) has been reasonably stable since 1998 at 19% to 20% of all workers. Indeed, it may have fallen a touch, with an average of 19.3% of workers in casual employment from 2008-2013, versus an average of 20.3% for the period from 1998 to 2007 (albeit with incomplete annual data in these earlier years). The proportion of employees with no leave entitlements peaked at 20.9% in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0% in 2012.
- The proportion who are self-employed independent contractors gently declined from 9.1% in 2008 to 8.5% by November 2013. This probably reflects lower employment in construction between these years, as the residential construction cycle moved into a lower phase of activity. It may also relate to adjustments since the GFC.
- The proportion who are business owners (defined in the data since 2008 as 'business operators' who operate a business and may or may not employ others) declined from 10% in 2008 to 8.8% in November 2013. The reasons for this decline are not entirely clear, but may relate to the ongoing effects of the GFC from around 2008. It may also relate to the recent rise in prominence in the Australian economy of industries such as mining and finance, which are not as amenable to widespread small business ownership (see discussion below).

There are significant differences in the distribution of employment arrangements across gender and age brackets. As a broad generalisation, ABS data confirm that in 2013, casual workers (that is, employees with no paid leave entitlements) were more likely to be female and aged 15 to 24 years old, while independent contractors and business operators were more likely to be male and in the older age brackets (see chart 18). This distribution is unlikely to have changed since 2013.

Age appears to be more significant than gender in this distribution, although within each age bracket, a higher proportion of women than men are casuals (employees without paid leave) and a higher proportion of men than women are independent contractors or business operators.

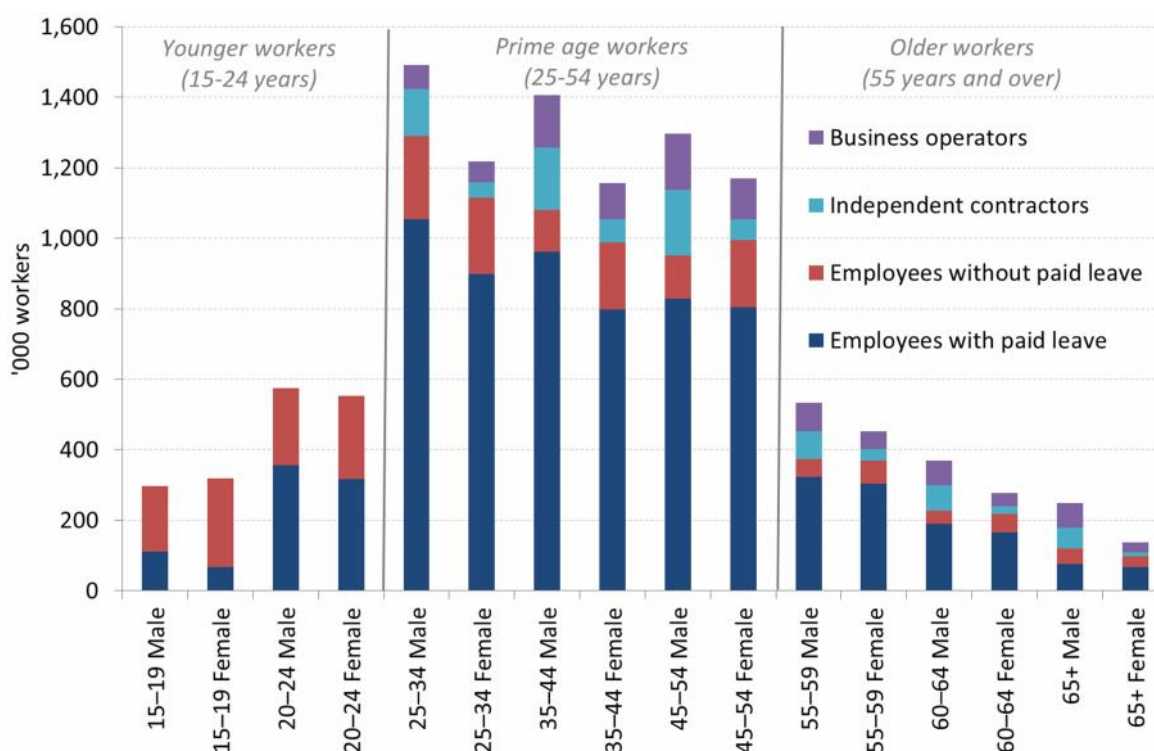
These differences in the demographic distribution of forms of employment reflect the normal progression of individual career paths over a typical life cycle, as well as the gender and age distribution of workers across the economy. For example, more women work in health and retail, which typically employ more part-time and casual workers, while more men work in construction and IT, which typically employ more independent contractors.

Table 2: Forms of employment in Australia, 1998 to 2013

% of all employed, status in main job	Employees		Non-employee workers			
	With paid leave	Without paid leave	Owner-managers of unincorporated businesses		Owner-managers of incorporated businesses	
			With employees	Without employees	With employees	Without employees
Aug 1998	60.8	20.1	3.5	9.3	4.0	2.2
Nov 2001	60.6	19.9	3.7	8.7	4.6	2.4
Nov 2004	59.6	20.6	3.1	9.6	4.5	2.6
Nov 2006	60.8	20.4	3.0	9.1	4.3	2.3
Nov 2007	60.9	20.9	2.9	8.9	4.1	2.4
			Independent contractors		Business operators	
Nov 2008	61.8	19.1		9.1		10.0
Nov 2009	61.4	19.8		9.6		9.1
Nov 2010	61.6	19.3		9.8		9.2
Nov 2011	62.2	19.3		9.0		9.2
Nov 2012	63.4	19.0		8.5		9.0
Nov 2013	63.3	19.4		8.5		8.8

Source: ABS, Forms of Employment, to Nov 2013

Chart 18: Forms of employment: age and gender distribution (2013)



Source: ABS, Forms of Employment, to Nov 2013

Across the major industry groups, there are concentrations of employees, casual workers, contractors and self-employed business operators (see Table 3) that clearly reflect the typical operational requirements of each industry.

- Permanent employment (with paid leave entitlements) accounts for very high proportions of employment in mining (88%), utilities (84%), finance and insurance (84%) and public administration (89%). These industries tend to be extremely capital-intensive and concentrated into a small number of very large corporations. Both of these characteristics are likely to limit the opportunities for people to establish themselves as self-employed contractors or business operators. These industries also tend to have relatively low proportions of part-time employees, which might reduce their need to offer the casual work arrangements common to some other industries.
- Casual employment (without paid leave entitlements) is the dominant form of employment in accommodation and food services, with 58% of workers (440,000 people) in the hospitality industry in this form of employment. For women in this industry, 61% are in casual employment (265,000 women). Of these female casuals, 85% (227,000 women) work part-time. This single group – part-time women in hospitality work – account for 18% of all female casual workers and 10% of all casual workers in the Australian workforce. Other industries that have relatively high proportions (and numeric concentrations) of casual workers include retail trade (36%), arts and recreational services (33%) and administrative services (22%).
- Independent contractors are concentrated in construction (30% of construction workers), administrative services (22%) and professional services (17%). Numerically, the single largest groups of independent contractors are male construction workers (293,000 men and 30% of all independent contractors in 2013) and male professional service workers (100,000 men and 10% of all independent contractors). Among women, the largest concentrations of independent contractors are in professional services (49,000 women) and health services (38,000 women). Industries with very low rates of independent contracting include mining, wholesale trade, retail, hospitality, finance, education and healthcare (Table 2).
- Business operators are most common in agriculture, where they make up 46% of a relatively small national workforce. This reflects the typical ownership structure of small to medium sized farms across Australia. Outside of the agricultural sector, business operators make up a relatively higher proportion of the workforce in real estate services, professional services, administrative services, wholesale trade and ‘personal and other services’ (which includes for example, hairdressers, car mechanics and other consumer service businesses). Numerically, the largest groups of business operators can be found in professional services (110,000 people) and retail trade (107,000 people). These industries typically have relatively low barriers to entry and low capital requirements.

The occupational profile of people working in various forms of employment largely reflects their industry distribution (Chart 19):

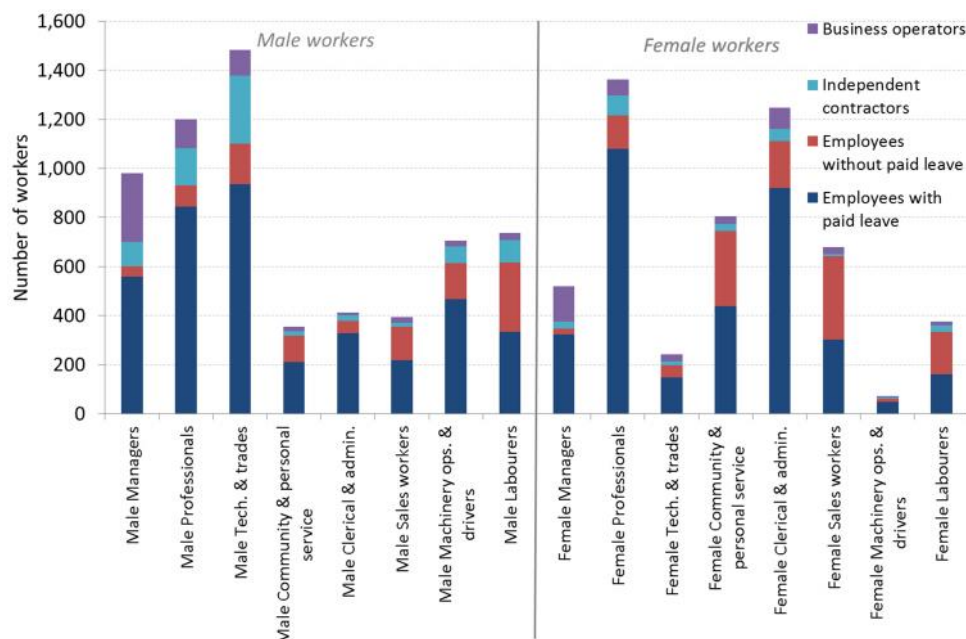
- A higher proportion of casual workers are employed in sales occupations (44% of this occupation and 50% of women in this occupation), labouring (41% of this occupation and 46% of women in this occupation) and community and personal service occupations (35% of this occupation and 38% of women in this occupation).
- A higher proportion of independent contractors are employed in technicians or trades (17% of this occupation), labouring (10%), machinery operators/drivers (10%) and professional occupations (9%).

Table 3: Forms of employment, major industries (2013 & 2014)

Industry (ANZSIC groups)	All employees (May 2014)			Forms of employment (Nov 2013)			
	People '000	Part-time %	Female %	Paid leave %	No paid leave %	Independent contractors %	Business operators %
Agriculture	321.4	27.4	28.4	24.3	21.7	7.6	46.3
Mining	264.6	3.5	15.5	87.8	9.3	2.5	0.4
Manufacturing	921.5	14.1	26.7	72.3	14.6	4.4	8.7
Utilities	144.2	9.0	21.3	84.2	11.8	2.7	1.3
Construction	1,029.2	15.5	11.4	48.1	12.7	29.7	9.5
Wholesale trade	385.6	17.1	32.4	73.8	10.5	3.1	12.6
Retail trade	1,228.9	49.1	55.9	53.5	35.9	2.0	8.6
Accomm. & food services	765.2	58.9	54.2	31.6	57.7	1.1	9.6
Transport & post	590.0	19.6	21.9	62.9	18.8	12.9	5.4
IT & telecomms	195.6	21.8	40.5	75.0	12.5	9.2	3.4
Financial & insurance	404.0	17.5	50.3	84.4	5.1	4.8	5.8
Real estate services	229.5	24.3	48.1	62.0	13.9	7.9	16.3
Professional services	937.6	20.6	43.2	61.9	8.7	17.0	12.5
Administrative services	397.1	41.4	52.1	45.4	22.1	21.8	10.6
Public admin. & safety	730.2	17.1	46.5	88.8	9.1	1.4	0.8
Education	902.5	38.1	70.6	75.5	17.2	4.2	3.2
Healthcare & social services	1,392.9	43.9	78.2	73.8	16.9	4.4	4.9
Arts & recreation services	183.5	48.2	46.6	45.9	32.7	14.0	7.4
Personal and other services	506.6	29.7	42.9	58.3	12.1	11.7	17.9
All industries	11,529.9	30.4	45.7	63.3	19.4	8.5	8.8

Source: ABS, Forms of Employment, to Nov 2013

Chart 19: Forms of employment, major occupation groups (2013)



Source: ABS, Forms of Employment, to Nov 2013

3. The workplace relations framework should not favour enterprise agreements over other forms of agreement

The workplace relations system should not favour one form of agreement over another as this reduces flexibility for employers and employees.

An employer should have the flexibility to decide what form of agreement/s best suits the nature of its business, and seek to enter into such agreement/s with its employees. In some cases, common law contracts or statutory individual agreements will be the most suitable (e.g. for a professional services firm). In other cases an enterprise agreement negotiated with a union will be appropriate (e.g. in a heavily unionised manufacturing plant). In many cases, an enterprise agreement negotiated directly with employees will be most appropriate (e.g. where there are no union members or a minority of union members).

Employees want flexibility as much as employers. The needs of individual employees for particular working arrangements are of course very different depending upon an employee’s age, family responsibilities, lifestyle choices, and a myriad of other factors. It is not appropriate to force majority outcomes on individual employees if the individual employee and the employer want to agree on a different outcome for that individual, say, through a statutory individual agreement or an Individual Flexibility Arrangement (IFA).

In the FWC's 2014 Australian Workplace Relations Study, overwhelmingly the most important driver of job satisfaction identified by employees was 'Balancing work and non-work commitments' – ranked highest by 37% of females and 26% of males (32% across all employees). This was followed by 'The work itself' (19% of employees), 'Job security' (17% of employees) and 'Total pay' (18% of employees). Flexibility for individual employees to reach agreement with their employer on arrangements to suit their unique needs is obviously central to enabling employees to balance their work and non-work commitments.⁵

There is no "one size fits all" approach. A variety of different forms of collective and individual agreements need to be available and each form needs to be afforded equal weight in the workplace relations system.

3.1 Objects of the Act

For many years the objects of the main workplace relations statute did not favour one type of agreement over another and this flexible approach needs to be reinstated.

The objects of the *Workplace Relations Act 1996* between 1996 and 2006 included the following:

"3(c) *enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act;"*

The WorkChoices amendments in 2006 modified the above object in the *Workplace Relations Act 1996* to:

"3(e) *enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances;"*

Nowadays the FW Act includes the following blatantly political and inappropriate object:

"3(c) *ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system;"*

The FW Act also includes the following inappropriate object which emphasises collective bargaining ahead of other forms of agreement making:

"3(f) *achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;"*

⁵ See <https://www.fwc.gov.au/first-findings-report/6-employee-experiences/key-drivers-job-satisfaction>

Subsection 3(c) of the pre-Work Choices *Workplace Relations Act 1996* should be reinstated because this object makes clear that forms of agreement dealt with in the Act should not be regarded as more desirable than common law contracts and other forms of agreement that are not specifically dealt with in the Act.

3.2 Voluntary bargaining system

Between 1994 and 2009 Australia had a voluntary bargaining system. The introduction of compulsory bargaining was a retrograde step and a voluntary system should be reinstated.

Employers and employees in workplaces of the 21st century need flexibility. Employers and employees should be free to agree upon employment arrangements under common law contracts, individual statutory agreements, unregistered collective agreements or formal enterprise agreements. This flexibility was available up to 2009 and needs to be reinstated.

A flexible agreement-making system is vital to enable employers to work with their employees to improve productivity and competitiveness. It is also vital to assist employers to accommodate individual employees' needs for flexible working arrangements to suit their individual circumstances

The reasons why a compulsory bargaining system is not appropriate were examined in detail in the 1994 *Asahi Case*⁶, by a five Member Full Bench of the Australian Industrial Relations Commission. The decision is as compelling today as it was in 1994. The Commission 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 Commission found that there was nothing unfair about having a voluntary bargaining system. As pointed out by the Full Bench in its *Asahi* decision, a right to strike exists to allow employees who want a collective agreement to apply lawful pressure on their employer in pursuit of such an agreement. Also, a fair and relevant safety net of minimum conditions exists for those not covered by a collective agreement.

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

Far from improving democracy in workplaces, compulsory bargaining systems ignore the rights of individual employees. In workplaces in which 51 per cent of employees have voted in favour of a collective agreement, 49 per cent have not voted in support of the collective agreement. If an employee wants to enter into an individual agreement with the employer it is unfair to prevent this.

⁶ Print L9800.

Bargaining orders and scope orders are incompatible with a voluntary bargaining system and these instruments, which were introduced in 2009 under the FW Act, should be abolished.

3.3 Common law employment contracts

The employment relationship is of course governed not only by the provisions of the FW Act (and the *Fair Work System* generally) but also by the common law. The common law features more prominently for employees engaged under ‘common law employment contracts’ which typically arise from an employer’s letter of offer and the employee’s acceptance of such offer.

A large proportion of Australian workers are engaged on ‘common law employment contracts’. In May 2014, 36.6% of employees had their pay set by “individual arrangement”. For full-time employees, 44.6% of employees had their pay set by individual arrangement.⁷

Prior to the introduction of the FW Act and the abolition of Australian Workplace Agreements (AWAs), the ABS reported on the number of employees who had their pay set by “unregistered individual arrangements” (i.e. common law contracts) and “registered individual arrangements”. In August 2008, 36.5% of employees had their pay set by an “unregistered individual arrangement” and 2.7% of employees had their pay set by a “registered individual arrangement”.⁸ It can be seen that even during the time when AWAs were available a very large proportion of employees were engaged under common law contracts – much higher than those engaged under AWAs.

Many employers prefer to engage their employees under common law contracts because of the flexibility that such contracts provide. Many employees also prefer common law contracts because typically pay is set and reviewed on the basis of individual performance rather than via an “across the board” wage increase paid to all employees regardless of performance.

While the FW Act recognises the existence of common law contracts,⁹ the Act inappropriately emphasises collective bargaining.¹⁰

The FW Act needs to be amended to remove barriers which inhibit the engagement of employees under common law contracts.

3.4 Enterprise agreements with unions and enterprise agreements directly with employees

Under the FW Act, unions have far too much power to interfere with collective agreements which employers have negotiated with their employees, even if they do not have any members or have only one or two members.

⁷ ABS, 6306.0 - *Employee Earnings and Hours*, Australia, May 2014 (released 22/1/2015)

⁸ ABS, 6306.0 - *Employee Earnings and Hours*, Australia, August 2008 (released 17/6/2009)

⁹ For example, see the reference to contracts of employment in s.326(1).

¹⁰ See s.3(f) and the compulsory bargaining system in Part 2-4 of the Act.

Ai Group has been involved in numerous FWC cases in which unions have sought to frustrate the approval of an enterprise agreement which a company has reached directly with its employees.

Prior to the FW Act, employers had the option of entering into an Employee Collective Agreement, without a union being covered, by agreement with the majority of employees. Under the FW Act, even if a union has only one member in a workplace it is generally entitled to be covered by the enterprise agreement in that workplace. This is not appropriate.

While it is appropriate that a union have the right to represent those of its members who want the union to represent them in the bargaining process, a union should not have the right to:

- Represent an employee in negotiations over the agreement unless the employee expressly appoints the union as his or her bargaining representative (i.e. a union should not be a default bargaining representative for its members under s.176(1)(b) of the FW Act);
- Be covered by an enterprise agreement unless the majority of the employees want the union to be covered. This could be achieved by varying section 183 of the FW Act with the effect that a union is only 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;
- Intervene in FWC proceedings relating to the approval of an enterprise agreement if the union was not a bargaining representative for any of the employees covered by the agreement at the time the agreement was made.

3.5 Greenfields agreements

Greenfields agreements are widely used in some industries, particularly the construction industry.

A major 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.

Between 1996 and mid-2009, greenfields agreements were able to be made under the *Workplace Relations Act 1996* between an employer and any union eligible to represent any employee on a new project. The ability for an employer to reach a greenfields agreement with any union eligible

to represent any employee on a project operated to reduce the incidence of unreasonable union claims. For example, if the Construction, Forestry, Mining and Energy Union (CFMEU) was pursuing unreasonable claims the head contractor was able to reach a greenfields agreement for the project with the Australian Workers Union (AWU) or vice versa. The previous provisions worked effectively unlike the current FW Act provisions which are not working effectively.

The availability of employer greenfields agreements was important in removing some of the power imbalance which unions have when construction projects are about to start. The availability of these agreements influenced unions to adopt a more reasonable approach in greenfields agreement negotiations .

Employer greenfields agreements should:

- Be required to pass the Better Off Overall Test (BOOT) and not contravene the National Employment Standards (NES).
- Have a maximum term of four years. This is important because often projects continue for at least four years and the expiry of the agreement during the construction of the project would create significant industrial risk.
- Be available if an employer has not reached agreement with a union after eight weeks of negotiations with that union. The eight week period should automatically commence from the time of the first meeting between the parties to negotiate the agreement.

Ai Group does not support the additional criterion included in the *Fair Work Amendment Bill 2014* which is before the Senate, i.e. that employer greenfields agreements must meet “prevailing pay and conditions within the relevant industry for equivalent work”. This concept would lead to a raft of problems including:

- Unions would have the power to delay and frustrate the approval of greenfields agreements;
- Major delays would be experienced in commencing projects;
- There would be flow-on of many unproductive and inflexible clauses which currently appear in union agreements;
- Unnecessary disputation and litigation would result;
- Individual Fair Work Commission (FWC) Members would have wide discretion to reject greenfields agreements on the basis of their own individual views on what the prevailing standards are;
- Employers would have no certainty about whether their greenfields agreement would be approved by the FWC; and

- Inconsistent decisions would be made by different FWC Members given the vagueness of the criteria.

No doubt the construction unions would argue that “prevailing pay and conditions within the relevant industry for equivalent work” would comprise the very costly and inflexible conditions in union pattern agreements in the construction industry. Similarly, undoubtedly the mining unions would argue that “prevailing pay and conditions within the relevant industry for equivalent work” would comprise the very costly and inflexible conditions in union agreements in the mining industry. This proposed criterion in the *Fair Work Amendment Bill 2014* is unworkable.

3.6 Statutory individual agreements

As argued above, employers and employees need to have the flexibility to enter into a form of agreement which suits their needs. The choices available should include statutory individual agreements.

Statutory individual agreements, in the form of AWAs, were introduced into the Australian workplace relations framework in 1996 with the enactment of the *Workplace Relations Act 1996* and they played an important and not particularly controversial role for 10 years, covering 3-5 per cent of the workforce. AWAs between 1996 and March 2006 had to meet a ‘no disadvantage test’ against the relevant award and were subject to the statutory minimum conditions in the Australian Fair Pay and Conditions Standard (AFPC Standard).

The controversy over AWAs following the introduction of the Work Choices legislation in 2006 resulted from the removal of the ‘no disadvantage test’. A fairness test was introduced one year later in 2007 but by that time the unions had succeeded in demonising AWAs and swinging public opinion against them as part of their anti-Work Choices campaign.

The ability to enter into a new statutory individual agreement was abolished in 2009 through the FW Act. This option needs to be reintroduced to provide more flexibility to employers and employees in terms of the types of agreements available. Such agreements should be required to pass the Better Off Overall Test (BOOT) against the relevant award and comply with the National Employment Standards (NES).

Statutory individual agreements have some advantages for both employers and employees over common law contracts are highlighted in the following table:

	Common law contracts	Statutory individual agreements
Would be vetted and approved by a statutory agency or Commission	No	Yes
Would be required to meet the BOOT	No	Yes
Would have a maximum nominal term	No	Yes
Would be easy to enforce through the Fair Work Ombudsman (FWO)	No	Yes
Specific penalties would apply for breaches	No	Yes
Could override award provisions subject to the BOOT	No	Yes
Could override enterprise agreements subject to the BOOT	No	Yes

Between 1996 and March 2006, under the *Workplace Relations Act 1996*, substantial protections were in place to prevent unfairness to employees covered by statutory individual agreements and these protections should be reinstated:

- It was unlawful for an employer to coerce or apply duress to an employee in connection with a statutory individual agreement;
- It was unlawful to terminate an employee’s employment for refusing to make, sign, extend, vary or terminate a statutory individual agreement;
- The terms of a statutory individual agreement were required to be no less favourable than the statutory minimum conditions (now known as the NES);
- Statutory individual agreements were subject to a no disadvantage test (now the BOOT);
- Statutory individual agreements were vetted and approved by a Statutory agency to ensure that legal requirements were met; and
- An employee negotiating a statutory individual agreement was entitled to appoint a bargaining representative.

Consistent with common law contracts, statutory individual agreements should be able to be offered as a condition of employment as this is an efficient way of making these types of agreements. Employees are able to freely decide whether or not they want the job on those terms.

At the time when they were abolished in 2009, over one million statutory individual agreements had been made and they were playing an important role in delivering flexibility to employers and employees.

Statutory individual agreements need to be reinstated.

3.7 Individual Flexibility Arrangements

Individual Flexibility Arrangements (IFAs) were inserted into the FW Act by the former Labor Government purportedly to provide necessary flexibility given the abolition of AWAs. The reality has been that IFAs have not provided an adequate replacement for statutory individual agreements. Despite this, with some modifications, they could provide useful flexibility for employers and employees covered by awards and enterprise agreements.

Key amendments required to the IFA framework are included in the *Fair Work Amendment Bill 2014* which is currently before the Senate. The key amendments include:

- Clarification that in satisfying the Better Off Overall Test (BOOT), non-monetary benefits can be taken into account. For example, an employee may genuinely prefer to start work at 5am due to family responsibilities in the afternoon and want to reach an IFA with the employer allowing this. An IFA which permitted the employee to start work at 5am without the payment of penalty rates between 5am and the commencement of the spread of ordinary hours in the relevant award (typically around 6am) would not pass the BOOT if only monetary benefits were able to be taken into account. The Explanatory Memorandum (EM) for the *Fair Work Bill 2008* makes it clear that the policy intent with IFAs is to allow non-monetary benefits to be taken into account when determining whether an employee is better off overall (e.g. see the Illustrative Example after paragraph 867 in the EM).
- Prescribing that if an enterprise agreement includes terms that deal with any of the following matters, the flexibility term in the agreement must allow IFAs to be entered into varying the effect of those terms:
 - arrangements about when work is performed,
 - overtime rates,
 - penalty rates,
 - allowances, and
 - leave loading.

Leave should also be added to the list because leave entitlements are commonly included in enterprise agreements and flexibility regarding the taking of leave is commonly sought by employers and employees.

This amendment addresses a major problem that is currently occurring; unions are routinely refusing blocking the inclusion in enterprise agreements of flexibility terms that provide any meaningful flexibility.

- Extending the maximum notice period for terminating an IFA from 28 days to 90 days.
- Providing a statutory defence for employers who enter into an IFA reasonably believing that the IFA complied with the Act. This will increase certainty and reduce risk for employers thereby encouraging more employers to enter into IFAs with their employees.

Information about the use of IFAs and other mechanisms to implement flexible work arrangements is included within the First Findings Report for the FWC's 2014 Australian Workplace Relations Study.¹¹

4. Companies are locked in to unproductive and costly enterprise agreement provisions negotiated in more profitable times

During Ai Group's consultation with member companies in the preparation of this submission a very common, major problem identified was that many companies are locked in to unproductive and costly enterprise agreement provisions negotiated in more profitable times, but which now leave them uncompetitive and unable to implement the most efficient and productive work practices.

In the initial days of enterprise bargaining in the early to mid-1990s, the bargaining system delivered substantial productivity improvements. In these early years there was widespread recognition amongst employers, employees and unions that enterprise bargaining involved coming to an agreement on wage increases and on measures to increase productivity and flexibility.

However, by the late 1990s many unions had decided that they had had enough of productivity bargaining and the catch cry of 'no trade-offs' became their bargaining mantra. Worse still, pattern bargaining was vigorously pursued by the unions in the construction and manufacturing sectors. Pattern bargaining stifles the opportunity for individual employers and their employees to agree on arrangements which suit their needs. The unions succeeded in entrenching pattern

¹¹ See <https://www.fwc.gov.au/first-findings-report/4-employment-practices/workforce-management-practices/flexible-working>

bargaining in the construction industry but they failed in the manufacturing industry after 3-4 years of industry-wide battles between manufacturers (led by Ai Group) and the manufacturing unions, the first round of which the unions called *Campaign 2000*.

By the early 2000s many employers with unionised workforces had come to the view that bargaining was disruptive and potentially damaging for businesses, and the best approach was to complete agreement negotiations as quickly as possible by rolling over the terms of the previous agreement, paying fair wage increases, and conceding as few of the demands on the unions' latest log of claims as possible. Despite this attempt to minimise damage, with each bargaining round many employers were coerced by unions to accept provisions in their agreements which impose significant barriers to productivity improvement and high cost structures.

It is now 2014 and the reality is that in unionised enterprises many employers have enterprise agreements with provisions that were negotiated in more prosperous times and which now leave them in an uncompetitive position.

This is particular a problem for large companies in the manufacturing, construction, transport and other sectors with militant unions.

Common enterprise agreement provisions which are often cited by employers as imposing major barriers to productivity, efficiency and competitiveness include:

- Clauses which restrict the engagement of subcontractors and labour hire, e.g. by requiring that contractors pay 'site rates' and requiring consultation / agreement with the union/s on which contractors will be used;
- Restriction on the engagement of casual employees;
- Excessive union rights to interfere in management decision-making processes;
- Excessive union powers in the workplace;
- Expansive rights for the unions to enter the workplace for various purposes;
- Excessive redundancy provisions which impede restructuring;
- Restrictive working hours arrangements which result in high overtime payments;
- No extra claims clauses which the unions argue have the effect of preventing management introducing changes.

Companies can of course seek to negotiate more appropriate enterprise agreements when their agreements expire, but their employees are often represented by militant unions and there is the risk of protected industrial action which can be very damaging. It is easy for armchair commentators with no idea about the circumstances of the individual businesses concerned to criticise employers who, quote, 'cave-in' to union demands rather than just saying 'No'. Often

employers do say 'No' but sometimes commercial decisions have to be made when damaging industrial action is taken or threatened. Industrial action can cripple a business, its customers and its suppliers. Chief executives, company directors and senior managers are appointed to make decisions in the interests of shareholders and the company. In some circumstances just saying 'No' to all union claims is not a sound commercial decision.

Regardless of the differing views on the concessions that some employers have made in the past during bargaining, the fact remains that there is a problem that needs to be solved and the workplace relations framework needs to provide the solution.

This major problem needs a multi-faced solution as outlined in the following sections.

4.1 Mandatory terms of enterprise agreements – productivity term

Part 2-4, Division 5 of the FW Act identifies a series of mandatory terms for enterprise agreements, including:

- Flexibility terms (ss.202, 203 and 204); and
- Consultation terms (s.205).

There are also a number of terms in Part 2-4, Division 4 which can be considered mandatory, or mandatory in certain specified circumstances:

- Nominal expiry date (s.186(5));
- Dispute settling term (s.186(6));
- Shiftworkers (s.196);
- Pieceworkers (ss.197 and 198);
- School-based apprentices and school-based trainees (s.199); and
- Outworkers (s.200)

Ai Group proposes that a further mandatory term be included in all enterprise agreements to ensure that employers have the right to manage their businesses in an efficient and productive manner. This is in the interests of employers, employees and the broader community. We propose the following additional section of the FW Act:

'205A ENTERPRISE AGREEMENTS TO INCLUDE A PRODUCTIVITY TERM

205A(1) *An enterprise agreement must include a term (a **productivity term**) that gives the employer the right to introduce workplace changes, including changes in production, programs, organisation, structure, technology, suppliers, customers, skills, hours of work, staffing levels, different forms of employment or engagement,*

outsourcing, relocation, downsizing and expansion.

- 205A(2)** *The productivity term does not remove the obligations which the employer has under the consultation term in the agreement to consult the employees to whom the agreement applies about workplace changes referred to in section 205.'*
- 205A(3)** *If an enterprise agreement does not include a productivity term, the model productivity term is taken to be a term of the agreement.*
- 205A(4)** *The regulations must prescribe the **model productivity term** for enterprise agreements.*
- 205A(5)** *A term of an enterprise agreement has no effect to the extent that it is inconsistent with the productivity term in the agreement.*

The inclusion of this term should go a long way towards giving those employers who have unfortunately lost the right to manage their businesses efficiently and productively, their right back. Employers would still be required to implement workplace changes in a consultative manner, and the dispute settlement term in the agreement would set out the process to be followed if a dispute arose over the introduction of the changes.

4.2 Permitted matters and unlawful terms

An essential 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) in the FW Act and to tighten the relationship between these two concepts. Numerous bargaining disputes since the FW Act was implemented have revolved around these concepts.

The 'permitted matters' for enterprise agreements need to be defined in accordance with the High Court's *Electrolux*¹² 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 since 2009 when the FW Act was introduced 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, the FWC 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:

¹² *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.

- 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 similar to the prohibited content item in Regulation 8.7 in the former *Workplace Relations Regulations 2006*.

- **A term which imposes restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement**

There is similar to the prohibited content item in Regulation 8.5(1)(h) in the former *Workplace Relations Regulations 2006*. 'Independent contractor' is defined in the FW Act to include individuals and contracting firms, as was the case under the *Workplace Relations Act 1996*.

- **A term which imposes restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency**

This is similar to the prohibited content item in Regulation 8.5(1)(i) in the former *Workplace Relations Regulations 2006*.

- **A discriminatory term**

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

- **An objectionable term;**

This is an existing unlawful term (s.194(b)) but this term needs to be defined in the same way as the former definition of 'objectionable provision' in the *Workplace Relations Act 1996*. In *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 ("The ADJ Contracting Case"), Ai Group argued before the Full Federal Court that the following clause in an industry-wide pattern agreement was an objectionable term:

‘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 they should similarly be an ‘objectionable term’ under the FW Act. Clauses like this 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 (backed up by penalties if the requirement is not met) 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.

- **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 terms dealing with right of entry (s.194(f) and (g)) has been highly problematic and a central issue in various FWC appeals¹³ in which Ai Group has been involved, as well as in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (“The ADJ Contracting Case”) before the Full Federal Court.

- **A term which requires the provision of information to unions about employees, independent contractors, labour hire providers or suppliers**

This has some similarity to the prohibited content item in Regulation 8.5(1)(k) in the former *Workplace Relations Regulations 2006*.

- **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 in s.194(c) and (d).

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

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

¹³ Including *Australian Industry Group v Dunlop Foams* [2010] FWAFC 4337, and *CFMEU v Moyle Bendale Timber Pty Ltd* [2011] FWAFC 6761.

- **A term that is inconsistent with the MySuper reforms**

This unlawful term should be worded in the same manner as the existing unlawful term in s.194(h).

- **A term that is inconsistent with the productivity term in the agreement**

Productivity terms are discussed in Section 4.1.

- **A term which impose restrictions on particular types of supplies or suppliers**

This would prevent, for example, terms which required the employer to only purchase Australian-made products.

- **A term that requires particular products or services to be acquired from particular suppliers**

This is intended to deal with the current widespread misuse by unions of the bargaining provisions in the FW Act to force employers to purchase specified products and services at grossly inflated prices (e.g. income protection insurance) where the providers are paying massive commissions to unions. This issue is discussed in Section 5 in the context of industry wide pattern agreements but the problem is not limited to the construction industry or just to pattern agreements.

The existing unlawful term in s.194(ba) relating to 'opt-out' clauses in enterprise agreements should be deleted. This provision unnecessarily removes flexibility for employers and employees.

An important issue relating to the judicial review of FWC decisions concerning unlawful terms is discussed in Section 13.9 below.

4.3 Termination of enterprise agreements

Enterprise agreements continue indefinitely until replaced or terminated, but very few companies have succeeded with applications to the FWC or its predecessors to terminate expired agreements without the support of the employees and any relevant unions.

The extremely high bar that the FW Act and decisions of the FWC have placed on applications to terminate an enterprise agreement after its nominal expiry date needs to be addressed.

Typically towards the end of the nominal term of an enterprise agreement the relevant employer and employees seek to agree upon a replacement agreement. However, if agreement is not able to be reached on a replacement agreement, the employer needs to be able to apply to the FWC to have the expired agreement terminated, and to have genuine prospects of the application being accepted.

Sections 225 and 226 of the FW Act give the FWC very broad discretion when deciding whether to terminate an agreement after the nominal expiry date.

Section 226 of the FW Act should be amended to add some additional criteria which the Commission should be required to consider when determining an application to terminate an agreement after the nominal expiry date, including whether the agreement is having:

- A substantial negative impact on the productivity or competitiveness of the employer covered by the agreement; or
- An adverse effect on the survival or revival of the employer covered by the agreement.

4.4 Requirement that productivity improvements be discussed during bargaining

Ai Group supports the proposal in the *Fair Work Amendment (Bargaining Processes) Bill 2014* that bargaining parties be required to discuss productivity improvements during enterprise agreement negotiations. The Bill is currently the subject of a Senate Committee inquiry.

This proposal would assist in focussing the attention of all parties on the importance of improving productivity and the role that enterprise agreements can play in assisting this. The proposal would assist in countering the practice of some unions of refusing to discuss productivity improvements during bargaining.

Ai Group is concerned that, despite the amendment, some unions will simply refuse to meaningfully consider productivity improvements proposed by the employer. Accordingly, we have proposed in our submission to the Senate Committee that the word 'genuinely' be inserted before 'discussed' in the proposed s.187(1A). The word 'genuinely' has been successfully used in the bargaining provisions of the national workplace relations statutes since at least 1996 in the context of the requirement to 'genuinely try to reach an agreement' before industrial action is taken. The addition of the word 'genuinely' would assist in ensuring that a bargaining representative does not refuse to meaningfully consider productivity improvements proposed by another bargaining representative. The addition of the word 'genuinely' would of course not require that any concessions be made.

4.5 FWC's role in encouraging productivity improvements as a result of bargaining

Ai Group supports the initiatives which the FWC is implementing to encourage parties to focus on productivity improvements during bargaining including:

- Publishing information about innovative clauses in enterprise agreements, including clauses designed to achieve productivity improvements;
- Developing interest-based bargaining services;

- Conducting workshops on interest-based bargaining.

No doubt a lot more could be done, particularly if unions changed their approach and recognised that companies need to have more flexible and productive enterprise agreements if they are to remain competitive.

The changes to the FW Act proposed in sections 4.1 and 4.5 above would give increased impetus to the FWC's initiatives to assist employers and employees to agree on workplace relations measures to enhance productivity.

4.6 Other measures

Other important measures that will assist in enabling changes to be made to enterprise agreement provisions in expired agreements which impose major barriers to productivity and competitiveness are set out in other sections of this submission, particularly the need to:

- Outlaw industry-wide pattern bargaining as discussed in Section 5;
- Tighten the provisions of the FW Act regarding protected industrial action, as outlined in Section 6.

5. Industry wide pattern agreements need to be outlawed

Industry-wide pattern agreements negotiated between construction unions and some State-based employer groups have a major negative impact on productivity, flexibility and competitiveness. With each bargaining round, a raft of very costly, inflexible and uncompetitive provisions are included in these pattern agreements which are implemented across the industry through unions coercing employers to sign enterprise agreements which are in precisely the same terms as the industry-wide pattern agreement. Ai Group does not negotiate industry-wide pattern agreements.

The supporters of industry-wide pattern agreements argue that they create a level playing field for the employers and workers covered by the agreements. Such a playing field benefits unions and those employers who are unable or unwilling to negotiate more competitive arrangements, but the playing field operates very unfairly for innovative employers and their employees who are capable of, and want to, negotiate more flexible and competitive provisions aligned to the needs of their enterprise, their employees and their customers. Of course the playing field also operates very unfairly for consumers and businesses which must pay the higher prices and suffer the reduced service levels which result from the terms of the pattern agreement.

The award system sets a safety net of wages and conditions in each industry and this is appropriate to prevent unfairness to workers. However, it is not appropriate to set over-award wages and conditions across an industry. Paid rates awards were abolished many years ago for good reasons. Industry-wide pattern agreements are, in effect, a massive price-fixing mechanism

to fix the price of labour across an industry. Such a mechanism is not in the community's interests and must be stamped out.

Unions in the construction industry, and some other industries, are deriving very lucrative and inappropriate revenue streams from products that employers are forced to purchase at grossly inflated prices (e.g. income protection insurance) and from funds that employers are forced to contribute to (e.g. redundancy funds such as Incolink and Protect which regularly pay "surplus" amounts to unions) through the terms of industry-wide pattern agreements. These revenue streams need to be closed off to break the current business model of some unions where compliance with the law is not seen as necessary or important, and fines for unlawful conduct are budgeted for as part of their normal business operations. The adverse outcomes for employers, employees and the community include:

- Revenue streams from inappropriate sources which unions are able to divert to militant industrial activities and political activities;
- Higher costs for construction projects with reduced capacity for Governments to fund vital community infrastructure;
- Higher costs for businesses, with consequent negative effects on their competitiveness and their ability to retain or increase employment levels;
- A higher incidence of unlawful industrial activity than would otherwise be the case; and
- Disadvantages to employees who would, in many cases, receive more favourable insurance arrangements if their employer was free to choose the best insurance provider, rather than the provider forced upon them by unions.

The outlawing of industry-wide pattern agreements is consistent with the recommendations of the Royal Commission into the Building and Construction Industry. In his Final Report,¹⁴ Commissioner Cole identified the following reasons for his rejection of the contentions of those who argue that pattern bargaining is justified in the building and construction industry:

- Pattern bargaining is, by its nature, imposed in a compulsory manner without the involvement of the employer or employees in the employment relationship;
- It denies employers the capacity for flexibility, innovation and competitiveness;
- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, flexible working hours and other mutually acceptable arrangements;

¹⁴ Volume 5, p.53.

- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity;
- It assumes that third parties such as unions understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are;
- It assumes that employees are not capable of negotiating satisfactorily on their own behalf; and
- In areas where pattern bargaining does not occur, there is nothing to suggest that the industry operates inefficiently or that the working conditions are not satisfactory for the employer or the employees.

The industry-wide pattern agreement which has been periodically negotiated between the Communications, Electrical and Plumbing Union (CEPU) and the National Electrical and Communications Association of Victoria (NECA) highlights these problems. This pattern agreement has traditionally been the first of the major construction industry pattern agreements to be negotiated each bargaining round, with key provisions flowing across the construction industry. Many hundreds of Victorian electrical contracting companies have adopted the terms of the pattern agreement directly, and key provisions influence the terms of other pattern agreements in the industry.

When the CEPU / NECA pattern agreement was negotiated in 2010, the 200 page document contained many new costly and highly restrictive provisions. Ai Group challenged three clauses in the pattern agreement in cases before Fair Work Australia (now the Fair Work Commission) and in the Full Federal Court.¹⁵ The relevant clauses provided for:

- Very tight restrictions on subcontractors and labour hire which, in effect, prevented employers from engaging subcontractors and labour hire providers that did not have an agreement with the CEPU;
- Expansive union entry rights which undermined the right of entry provisions in the FW Act; and
- A requirement that employer parties to the pattern agreement actively encourage union membership, with exposure to penalties if they did not.

Unfortunately, Ai Group did not succeed with its arguments that the above clauses were “unlawful terms” under s.194 of the FW Act, nor did the Full Federal Court accept that the terms of the agreement breached section 45E and 45EA of the *Competition and Consumer Act 2010*. The Court’s decision highlights that changes are needed to existing laws.

¹⁵ *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (“The ADJ Contracting Case”).

While the FW Act contains important provisions outlawing industrial action in pursuit of pattern bargaining, industrial action in pursuit of pattern bargaining has not been a significant problem over the past decade. Rather, the problem has been the pattern agreements willingly reached between unions and some State-based employer groups, and imposed on thousands of individual employers and their employees.

Industry-wide pattern agreements need to be differentiated from project-specific framework agreements developed by head contractors for major projects (typically in the form of greenfields agreements). Commonly head contractors and subcontractors support the use of project-specific framework agreements on major projects as industrial risk is reduced and working conditions can be aligned with the needs of the project. There is nothing unlawful or inappropriate about a head contractor developing a greenfields agreement for a project, and then making that agreement available to subcontractors to adopt as an enterprise agreement should they choose to do so. It is unlawful under the FW Act for a head contractor to coerce a subcontractor to make a particular type of enterprise agreement, but provided that the adoption of the project-specific agreement is genuinely voluntary the law is not broken.

6. It is too easy to take and continue industrial action

Statistics on the overall level of industrial action in Australia mask the damage that is inflicted upon individual businesses because it is too easy to take and continue industrial action.

Industrial action should be a last resort after extensive efforts have been made to reach agreement. Unions should not be allowed to obtain a protected action ballot (PAB) order early in the negotiations, to give them the upper hand in the negotiations, as they are commonly doing at present.

There are several key problems with the industrial action and related provisions of the FW Act that need to be addressed.

6.1 Industrial action and the commencement of bargaining

Ai Group supports the important amendment proposed within the *Fair Work Amendment Bill 2014* (Item 56) that would ensure that protected industrial action cannot be taken until bargaining has commenced. The circumstances in s.173(1) of the FW Act are the logical point in time to commence the time period over which attempts to reach an agreement are to be made if a PAB order is to be granted, as highlighted by the requirement in s.173 to give the employees the Notice of Employee Representative Rights at this time.

Item 56 in the Bill is consistent with Recommendation 31 of the 2012 Fair Work Act Review.

Item 56 is also consistent with the following views expressed by Jessup and Tracey JJ in *JJ Richards & Sons Pty Ltd v Fair Work Australia* ([2012] FCAFC 53). While the judges held that the existing industrial action provisions of the FW Act enable industrial action to be taken before bargaining has formally commenced, both judges highlighted the merits of a more logical, ordered and consistent approach:

Justice Jessup said:

“29 Additionally to the matters to which I have just referred, I consider there is much to be said for the applicants’ case, as a matter of broad statutory purpose. The Act provides a detailed, carefully-structured, regulatory environment for the making of enterprise agreements, and for the maintenance of the integrity of the system of collective bargaining which conventionally leads to such agreements. In the sense that protected industrial action must, necessarily, relate to a proposed enterprise agreement (see s 408), it is legitimate to point out, as the applicants did in their submissions, that the ability to take protected industrial action is to be seen as part and parcel of the statutory regime for bargaining in pursuit of, or in resistance to, the making of such agreements. This way of looking at the legislation is amply justified by the parliament’s own words in identifying the object of the Act: see s 3(f).”

Justice Tracey said:

“34 I also share Jessup J’s reservations about the Full Bench’s observation that there was “nothing in the legislative provisions to suggest that a bargaining representative should not be permitted to organise protected industrial action to persuade an employer to agree to bargain.” The other provisions of the Act to which his Honour refers suggest that a less confrontational and more ordered process was available to the Union had it wished to avail itself of it.”

It is entirely fair and reasonable to require that a union obtain a majority support determination if an employer does not initiate or agree to bargain. A union should not be granted the right to organise industrial action to coerce an employer to bargain if the majority of employees do not support the negotiation of a collective agreement, for example, because they would prefer to continue to have their wages reviewed annually on the basis of individual merit.

A secret ballot should be held to determine majority support unless the employer, employees and the relevant union/s agree to a different approach.

Obtaining the support of the majority of employees in a workplace before industrial action can be taken by any of the employees is a key requirement in many other countries, including the US and the UK. It is not in Australia’s interests to have wider industrial action rights than comparable overseas countries. Australia has a relatively poor international reputation regarding industrial dispute and this needs to be addressed.

6.2 Protected action ballot requirements – non-permitted matters, unlawful terms and pattern bargaining

It is not sensible or in the community's interests for a PAB order to be issued by the FWC in circumstances where a claim being pursued by the applicant union cannot be the subject of protected industrial action. To do so means that the employer must wait until industrial action is 'happening', 'threatened', 'impending' or 'probable' (see s.418) and then apply for a stop order or injunction. This is unfair upon employers; the industrial action should not have been allowed to be authorised in the first place through the granting of the PAB order enabling a ballot to be held.

Ai Group has proposed that this problem be addressed through an amendment to the *Fair Work Amendment (Bargaining Processes) Bill 2014* to include the following additional provision in s.443 of the FW Act:

'(2A) Despite subsection (1), the FWC must not make a protected action ballot order if a claim of an applicant:

- (a) is not about a permitted matter or is not reasonably believed to only be about a permitted matter;*
- (b) is to include an unlawful term in the agreement; or*
- (c) is part of a course of conduct which is pattern bargaining.*

Note: Industrial action is not protected industrial action in the above circumstances. See paragraph 409(1)(a), subsection 409(3) and subsection 409(4).'

The above amendment to s.443 has become even more important given the recent decision of the FWC in *Esso Australia Pty Ltd v AMWU and Others* [2015] FWCFB 210, which has, in effect, overturned some earlier Full Bench decisions which had held that a PAB order cannot be issued if the applicant is pursuing any claims which are not 'permitted matters'.

The amendment also addresses the problematic decision of the Commission in *John Holland v AMWU* [2010] FWAFB 526 where a Full Bench concluded that there is no requirement on a union which applies for a PAB order to satisfy the Commission that it is not pattern bargaining. This means that, again, the employer would need to wait until the industrial action is happening, threatened, impending or probable and then apply for a stop order or injunction. This is unfair upon the employer, and any employees who may not support the industrial action and could be stood down as a result of it. It is also unfair on the employer's customers and suppliers. At that late stage there is very little time to stop the action because unions are only required to give three working days' notice of industrial action (s.414).

6.3 Protected action ballot requirements – claims must be reasonable

The *Fair Work Amendment (Bargaining Processes) Bill 2014* includes the proposal that an applicant for a PAB ballot must not be pursuing claims that are ‘manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates’ or that ‘would have a significant adverse impact on productivity at the workplace’.

The Bill would make a useful change to the bargaining laws although the use of the word ‘manifestly’ would appear to set an extremely high bar. Ai Group has proposed to the Senate Committee which is currently conducting an inquiry into the Bill that the word ‘manifestly’ should be replaced with ‘clearly’.

The Bill should also make it clear that in determining whether claims are ‘clearly excessive’, the level of existing wages and conditions should be considered as well as claims for improved wages and conditions.

6.4 Protected action ballot requirements – genuinely trying to reach an agreement

A key requirement for a PAB order to be granted is that the applicant ‘has been, and is, genuinely trying to reach an agreement’ (s.443(1)(b)). The key authority on what this phrase means is *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWA 368.

Ai Group supports the codification of key concepts drawn from this decision as provided for in the *Fair Work Amendment (Bargaining Processes) Bill 2014*. The relevant provision in the Bill states:

‘(1A) For the purposes of paragraph (1)(b), the FWC must have regard to all relevant circumstances, including the following matters:

- (a) the steps taken by each applicant to try to reach an agreement;*
- (b) the extent to which each applicant has communicated its claims in relation to the agreement;*
- (c) whether each applicant has provided a considered response to proposals made by the employer;*
- (d) the extent to which bargaining for the agreement has progressed.’*

6.5 Protected action ballot requirements – industrial action should be a last resort

To date, the main gateway for being granted a PAB order is the requirement to be ‘genuinely trying to reach an agreement’. This requirement alone is not an appropriate gateway because industrial action should be a last resort after extensive efforts have been made to reach agreement.

A last resort requirement should be included in s.443 requiring that the FWC be satisfied that a union applicant for a PAB order is applying as a last resort after making extensive efforts to reach agreement. Relevant criteria could be included in the Act to increase certainty.

6.6 Protected action ballots – other important amendments

There are a number of other important amendments that need to be made to the PAB provisions of the Act including:

- The two day timeframe in s.441 for determining applications is not reasonable upon employers and should be extended to seven days to allow time for employers to seek advice, arrange representation and appropriately respond to an application for a PAB order;
- When an appeal is lodged against the making of a PAB order, justice dictates that the FWC 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 the FWC needs time to hear the appeal and make a decision. Accordingly, s 606(3) should be deleted;
- Employers need to be given access to the roll for PABs once the employees have voted to take industrial action. Currently this is not occurring and therefore the employer has no way of knowing which of the employees who do not attend work are taking protected action and which employees may be taking unlawful industrial action. This prevents the employer taking steps to secure the attendance at work of those employees who are not entitled to take protected action;
- 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 a positive effect of reducing the number of ballots. Given the widespread union tactic of applying for a PAB order and obtaining a (publicly funded) ballot to put pressure on the employer in the negotiations, but not proceeding with industrial action, applicants for PAB orders should be required to pay 20 per cent of the cost.

6.7 Cooling-off periods

Section 425 is a very important and sensible provision but the bar is currently too high for access.

Subsections 425(1)(b), which refers to ‘the duration of the protected industrial action’ should be deleted to provide more flexibility and clarify that a cooling-off period can be ordered by the FWC in appropriate circumstances even if the industrial action has only occurred for a short period. In some cases, even a one day stoppage can lead to millions of dollars of losses.

Also, the FWC should be able to order a cooling-off period, not only for industrial action that is ‘being engaged in’ (s.425(1)) but also action that is ‘threatened’, ‘impending’ or ‘probable’.

7. It is too difficult and costly to terminate poor performing employees

The unfair dismissal laws and the general protections laws within the FW Act expose employers to the ongoing risk of costly litigation following the termination of an employee. Claims can very easily be made and be very costly to defend.¹⁶ Given this, the termination of poor performing employees often becomes costly and difficult for employers, and this has an impact on productivity and competitiveness of businesses, as well as on employment growth given that employers are more cautious about taking on new employees.

The Explanatory Memorandum to the *Fair Work Bill* suggested that the processes for dealing with unfair dismissal claims under the FW Act would be simpler and more efficient than the previous regime. Unfortunately the experience of employers is that this has not been the case.¹⁷ The sheer volume of unfair dismissal claims and termination of employment claims made under the general protections have sky rocketed since the commencement of the FW Act. For example, in the 2009-2010 year (the first year of the FW Act) 14,242 dismissal claims (including unfair dismissal and general protections claims dealing with dismissal) were lodged with Fair Work Australia.¹⁸ In the previous year, under the former legislation, there were 7,994 claims lodged.¹⁹ Moving forward to the 2013-2014 year, 17,676 dismissal claims were lodged, an increase of 3,434 since the commencement of the FW Act²⁰ The increasing number of claims lodged since the commencement of the FW Act is in itself demonstrable of the fact that the current regulatory

¹⁶ See for example the comments from Freyens and Oslington (2013), ‘A First Look at Incidence and Outcomes of Unfair Dismissal Claims under Fair Work, WorkChoices and the Workplace Relations Act’, Australian Journal of Labour Economics, Vol. 16, No. 2, p.296. Also see the Explanatory Memorandum to the Fair Work Bill 2008 at r.252.

¹⁷ Explanatory Memorandum to the Fair Work Bill 2008 at r.253.

¹⁸ See Freyens and Oslington (2013), Table 1.

¹⁹ Ibid.

²⁰ See Fair Work Commission Annual Report 2013-2014, Tables 6 and 12. Of the 17,676 dismissal claims lodged in the 2013-2014 year 14,797 were lodged as unfair dismissal claims and 2,879 were lodged as General Protections claims relating to dismissal. The total of 17,676 claims does not include the 130 unlawful termination claims lodged in the same year.

regime in respect to dismissals has increased costs for employers and has made the termination of poor performing employees difficult.

A factor contributing to the cost of dismissals for employers is the expectation of many applicants that the employer will agree to a monetary settlement to resolve the claim or 'make it go away'. The most recent data from the FWC reveals that for the period 1 July 2013 to 30 June 2014, 6,607 unfair dismissal applications (of a total of 8,659 applications) were resolved at conciliation with the payment of a monetary sum.²¹ In that year, 27% (the majority) of applications resolved by the payment of a monetary sum involved a payment of between \$2,000 and \$3,000.

This data is not available for general protection applications involving dismissal, however it is Ai Group's experience that the quantum of 'go away money' demanded by applicants in general protections matters is typically higher than what is demanded in unfair dismissal cases because damages are unlimited and often applicants are represented by lawyers operating under contingency fee arrangements.

The problem of 'go away money' was one which the Labor Party in 2007 wanted to eradicate. In its *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'.²² Unfortunately, this has certainly not been the case under the FW Act.

The current dismissal regime is costly, inefficient and unproductive, not only for individual businesses, but also for the FWC. The following changes are necessary to address the problems inherent with the current system:

- Implement a higher filing fee for unfair dismissal applications, while maintaining appropriate exemptions for those applicants that genuinely need fee exemptions.
- Amend the FW Act to legislate that jurisdictional issues relating to unfair dismissal matters must be dealt with separately and prior to the substantive issues.
- Amend the FW Act to impose a civil penalty on lawyers and paid agents to deter them from encouraging speculative applications.
- Amend the FW Act to require lawyers and paid agents to disclose contingency fee arrangements.
- Amend the FW Act to prevent determinative conferences being conducted by the FWC without the written consent of all parties.

²¹ See <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>, this figure includes monetary only settlement, non-monetary + monetary settlement, reinstatement + monetary settlement and reinstatement + monetary + non-monetary settlement.

²² Australian Labor Party, 'Forward with Fairness Policy Implementation Plan', August 2007, page 18.

- Require that general protections applications be dealt with, including lodged, with the Federal Circuit Court or Federal Court.
- A list of exemptions under the general protections should be inserted into the FW Act.
- Amend the FW Act to remove the reverse onus of proof in general protections matters.
- Amend the FW Act to introduce a compensation cap for general protections matters involving dismissal.

These issues are discussed below.

7.1 Changes to deter speculative and unmeritorious claims

At present there are far too many speculative and unmeritorious claims and this must be addressed. The following changes are proposed:

- **Higher filing fee for unfair dismissal matters**

The application fee for an unfair dismissal application is set by Regulation 3.07 of the *Fair Work Regulations*. Currently the fee is \$67.20. This fee is very low and should be increased to, say, \$150 to discourage speculative and spurious claims. The FWC should have the ability to waive the fee in exceptional circumstances where the fee would impose hardship on an applicant.

- **Jurisdictional issues to be dealt with separately and prior to the substantive issues**

The FW Act should be amended to require the FWC to determine jurisdictional issues regarding an unfair dismissal claim prior to dealing with the substantive claim. Where questions about lack of jurisdiction arise, the parties to the application should not be required to undertake the costly preparation for a substantive hearing, which would involve the gathering of evidence and the preparation of submissions on the merits of the claim, if there is a possibility that the matter will be dismissed for lack of jurisdiction.

- **Civil penalties for lawyers and paid agents who encourage speculative applications, and disclosure of contingency fee arrangements**

A number of sections of the FW Act enable parties to seek costs orders, including against:

- A party to a general protections dispute involving dismissal in accordance with s.375B of the FW Act;
- A lawyer or paid agent involved in a general protections matter in accordance with s.376 of the FW Act;
- A party to an unfair dismissal matter in accordance with s 400A of the FW Act;

- A lawyer or paid agent involved in an unfair dismissal matter in accordance with s.401 of the FW Act; and
- A person who has made an application, or responded to an application, vexatiously or without reasonable cause, or if a person's application or response had no reasonable prospects of success, in accordance with s.611(2) of the FW Act.

Despite the above deterrents, employers are still commonly required to deal with speculative and unmeritorious unfair dismissal applications.

The Explanatory Memorandum to the *Fair Work Bill* explains that the sections dealing with costs against lawyers and paid agents (now ss.376 and 401) were '*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*'.²³ However, it is our experience that many lawyers and paid agents are not sufficiently deterred.

The introduction of a civil penalty for lawyers or paid agents that are found to be in breach of ss.376 and 401 of the FW Act would deter lawyers and paid agents from encouraging speculative applications or applications with no reasonable prospects of success. 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 and general protections applications.

Further, in circumstances whereby an employee is represented by a lawyer or paid agent for the purposes of the employee's unfair dismissal or general protections application, it is not uncommon for the lawyer or paid agent to be engaged under a contingency fee arrangement. These arrangements cause the fee to the lawyer or paid agent to become effective only if the FWC finds in favour of the employee or if the matter is settled. Therefore, any risk flowing to the lawyer or paid agent is significantly lessened if the matter does not proceed to a hearing and a monetary settlement is reached between the parties.

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

²³ Explanatory memorandum to the Fair Work Bill, [1610]-[1616]

7.2 Determinative conferences

In 2013, the FWC introduced a process for ‘determinative conferences’ whereby the Commission would determine the outcome of an unfair dismissal claim at a conference of the parties, as opposed to a hearing. This practice is set out in the FWC’s Unfair Dismissal Practice Note.²⁴

The FWC can also hold a determinative conference to deal with a general protections matter involving dismissal where the parties agree.²⁵

Ai Group opposes ‘determinative conferences’, unless the parties have agreed in writing and understand the consequences of their decision. Determinative conferences increase the risk that parties will be denied procedural fairness. Courts and the Commission have long recognised the need for the Commission to act in a judicial manner and apply the rules of natural justice / procedural fairness.

The potential risk of denying a party procedural fairness by the conduct of a determinative conference as opposed to a fair and proper hearing is compounded by the narrower appeal rights which apply to unfair dismissal decisions (s.400) than the appeal rights that apply to other Commission decisions (s.604).

The FW Act should be amended to prevent ‘determinative conferences’ being conducted without the written agreement of all parties.

7.3 General protections applications should be lodged and dealt with in the Federal Circuit Court or Federal Court

General protections claims dealing with both dismissals and non-dismissals are currently lodged with the FWC. In respect of claims dealing with dismissals, the FWC’s role includes mediating, conciliating, making recommendations or expressing an opinion about a claim before it proceeds to the Federal Circuit Court or Federal Court for hearing. More recently the FWC has obtained the power to deal with such claims by arbitration if both parties agree, thereby removing the role of the Courts.²⁶

After the FWC has dealt with a general protections application, the matter may be referred to the Federal Circuit Court or Federal Court. It is not uncommon for the parties at this stage to be referred to further mediation by the Court prior to a hearing of the matter. However the vast majority of general protections matters never proceed to Court as they are usually settled (in our experience by the payment of a monetary sum to the employee) at the FWC stage.

²⁴ <https://www.fwc.gov.au/at-the-commission/how-the-commission-works/practice-notes/unfair-dismissal-proceedings>

²⁵ See Fair Work Commission, General Protections Benchbook, p.145, <http://benchbooks.fwc.gov.au/generalProtections/>.

²⁶ See Fair Work Amendment Act 2013.

The number of general protections claims made that are without merit and motivated only by a monetary settlement would undoubtedly be enormously reduced if general protections applications were required to be made directly to the Federal Circuit Court or Federal Court. This was the process which applied for unlawful termination and freedom of association claims under the *Workplace Relations Act 1996*, and it worked well.

The Federal Circuit Court and Federal Court, with the agreement of the parties, would be able to order mediation before proceeding to a full hearing.

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 the Court and the respondent (usually the employer) in preparing its case.

7.4 Exemptions under the general protections

The *Workplace Relations Act 1996* (in s.364) and previously the *Industrial Relations Act 1988* (in s.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 for unlawful termination claims against non-Constitutional corporations. 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 the unfair dismissal laws which also contain exemptions.

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.

7.5 Burden of proof in general protections matters

Section 361 of the FW Act places the burden of proof on the employer to disprove an allegation of a breach of the general protections once an application is made by an employee or former employee.

The 'reverse onus' makes it very easy for employees or former employees to pursue general protections applications alleging adverse action by the employer regardless of the validity, reasonableness or prospects of success of their claim. An employee, at the time of making a general protections application is merely required to identify a 'prima facie' case. The burden then shifts to the employer to disprove the allegation, usually by preparing an evidentiary case to justify the actions of the employer were not done because the employee has or had a workplace right. This can be a costly process for an employer, which is often why a significant number of general protections claims are resolved by way of monetary settlement before making it to the Court system.

7.6 Compensation cap for general protections matters

Section 545 of the FW Act empowers the Federal Circuit Court or Federal Court to make any order it considers appropriate if it is satisfied that a person contravened the general protections, including an order awarding compensation. Similarly s.369(2) of the FW Act empowers the FWC to make an order for the payment of compensation arising from a consent arbitration proceeding. Such orders for compensation include uncapped monetary compensation for loss that a person has suffered because of the contravention.

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.²⁷ 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 integrity of unfair dismissal system

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 "[t]here will be a cap on compensation to increase certainty and to discourage speculative claims".²⁸ While 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.

²⁷ Subsection 395(5) and (6) *Fair Work Act*

²⁸ Australian Labor Party, '*Forward with Fairness Policy Implementation Plan*', August 2007, page 18.

8. It is too difficult and costly to terminate redundant employees

The redundancy provisions in the NES, awards and enterprise agreements are leading to significant problems for employers which need to be addressed.

8.1 Definition of redundancy

The widely recognised definition of “redundancy” comes from the 1984 *Termination, Change and Redundancy Test Cases*.²⁹ The definition was affirmed by a Full Bench of the Australian Industrial Relations Commission (AIRC) in the 2004 *Redundancy Case*.³⁰ The Redundancy Case led to the following wording being included in the Definitions Clause in numerous federal awards:

“Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and that decision leads to the termination of employment of the employee, except where this is due to the ordinary and customary turnover of labour.”³¹

Nowadays, most awards do not contain redundancy provisions given that redundancy entitlements, largely consistent with the previous federal award standard, are included in the NES.

In the recent decision of *CFMEU, CEPU and AMWU v Spotless Facility Services Pty Ltd T/A Spotless*,³² a Full Bench held that the FW Act does not define ‘redundancy’; it simply provides redundancy entitlements, and contains certain exclusions and related provisions. The effect of this for Spotless was that the redundancy provisions of the company’s enterprise agreement (in which ‘redundancy’ was not defined) were held to apply even in circumstances where the termination was due to the ordinary and customary turnover of labour (e.g. where a company in a contracting industry loses a contract and the employee has been engaged to work on that contract). Section 119 of the FW Act provides that the NES redundancy provisions do not apply to employees terminated due to the ordinary and customary turnover of labour, but the Full Bench held that this was an exclusion and not part of any definition of ‘redundancy’ in the FW Act.

Similar to Spotless, many employers do not define ‘redundancy’ in their enterprise agreements. It is important that the FW Act include an appropriate definition to provide more clarity. The test case award definition reproduced above should be included in the Act.

²⁹ *Termination, Change and Redundancy decision*, Print F6230 ((1984) 8 IR 34) and *Termination, Change and Redundancy Supplementary decision*, Print F7262 ((1984) 9 IR 115).

³⁰ Print PR032004 (26 March 2004) and Print PR062004 (8 June 2004).

³¹ See Print PR062004 (8 June 2004) at Appendix A.

³² [2015] FWCFB 1162.

8.2 'Other acceptable employment' exception

Section 120 of the FW Act allows an employer to make an application to the FWC for an order to reduce or exclude the employer's redundancy pay obligation if the employer 'obtains other acceptable employment' for the employee or cannot pay the amount. The Courts and the FWC have imposed an extremely high bar on the granting of such orders, even when employers have gone to significant lengths to assist employees to secure new jobs. In particular, the word 'obtains' has been interpreted in a very narrow way.

For example, Commissioner Roe of the FWC recently decided that Serco Sodexo Defence Services (SSDS) had not satisfied the test in s.120 of the FW Act for an order exempting it of the obligation to pay redundancy pay because it had not obtained other acceptable employment for its employees who were being terminated as a result of the loss of a number of Defence Department contracts to other contractors.³³ The Commissioner made this finding despite SSDS assisting employees:

- By arranged opportunities for the employees to participate in the recruitment processes undertaken by the new contractors;
- By providing time off for employees to attend interviews with the new contractor;
- By providing information about employment opportunities with the new contractors;
- To complete and prepare job applications with the new contractors;
- To access general information on resume writing hints and tips;
- To access online resume, application letter and interview templates and tips;
- By providing them job readiness information sheets;
- Through the SSDS Employee Assistance Program.³⁴

Despite the assistance and support provided by SSDA and despite the fact that many of the employees obtained jobs with the new contractors, Commissioner Roe held this was not enough to invoke the exception in s 120 of the FW Act because ultimately SSDA was not a '*strong, moving force towards the creation of the available opportunity*'.³⁵

The FW Act needs to be amended to make the exception in s.120 more accessible and workable. Otherwise there is no incentive for employers to assist redundant employees to obtain new jobs.

³³ *Serco Sodexo Defence Services Pty Ltd (SSDS)* [2014] FWC 7678.

³⁴ *Ibid* at [37].

³⁵ *Ibid* at [54]. This phrase is used by Marshall J in *Allman v Teletech International* [2008] 178 IR 415, by a Full Bench of the AIRC in *Re Clothing Trades Award 1982* (1990) 140 IR 123, and by a Full Bench of the FWC in *Maritime Union of Australia v FBIS International Protective Services (Aust) Pty Ltd* [2014] FWCFB 6737

8.3 Retirement age and redundancy cap

Between 1984 and 1 January 2010, federal awards generally limited redundancy pay to the amount payable until an employee reached a particular age (60 or 65) or the ‘normal retirement age’. In a number of cases over the years, such provisions have been held by the AIRC to not be discriminatory.³⁶

These clauses address a concern that many employers have raised, and are increasingly raising, i.e. the expectation of a growing number of aged workers that if they delay retirement long enough they will receive a generous redundancy package from their employer.

Recently Justice Buchanan of the Federal Court ruled in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 136 that a clause in the *Black Coal Mining Industry Award 2010*, which caps the amount of redundancy pay to an amount not more than the employee would have received had the employee remained in employment until the age of 60, is discriminatory. At this stage it is unknown whether the decision will be appealed to a higher Court.

In Ai Group’s view there is merit in including a provision in the FW Act which implements a cap on redundancy pay for employees approaching retirement. As the Full Bench stated in the 2004 *Redundancy Case* decision:³⁷

“[163] We have decided to reject the ACTU's claim to delete the retirement date limitation. In our view the current provision should be retained. The original purpose of the provision - to ensure that employees who are retrenched in reasonable proximity to their projected retirement date should not receive more than they would have earned had they remained employed until retirement - is still apposite. The principle underpinning the existing provision is sound. The amount of money paid to a retrenched employee by way of severance pay should not cause that individual to be better off than if they had never been retrenched.”

8.4 Definition of “genuine redundancy” under unfair dismissal laws

A termination for reasons of a ‘genuine redundancy’ is exempted from the unfair dismissal laws. However, s.389(2) of the FW Act significantly limits the utility of the exemption because of the onerous obligation upon the employer to search for redeployment opportunities, both within the employer’s business and within ‘associated entities’.

³⁶ *Re Coal Mining Industry (Production and Engineering) Consolidated Award 1997*, Print S8070, 13 July 2000, Wilks C; *Re. Metropolitan Daily Newspapers Redundancy Award 1996*, Print S8526, 25 July 2000, Giudice J; and *Redundancy Case*, Print PR032004, 26 March 2004, Full Bench.

³⁷ Print PR032004.

The practical operation of s.389(2) 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. The employer was one many companies within the Xstrata group and each of these companies operated at different mines across NSW.

Many large employers, through their parent company, have a link to other companies. These employers find it extremely difficult to prove that the dismissal is a 'genuine redundancy' and that they have met the requirements of s.389(2).

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

8.5 Overly generous redundancy entitlements

Overly generous redundancy entitlements often present a significant barrier to business restructuring. Sometimes an employer's redundancy liabilities are so great, with unions and employees refusing to implement more appropriate redundancy provisions, that the only option is business closure. The problems include:

- In more profitable times, many employers acceded to union claims for very generous redundancy arrangements (e.g. 4 weeks per year of service, often without a cap on payments) and now find that they cannot afford to restructure or downsize;
- The *Fair Entitlements Guarantee Act 2012* implements a very generous level of redundancy protection (4 weeks' pay per year or service) which encourages unions to pursue claims for this excessive level of entitlements;
- The recognised exclusions in the FW Act are often not included in enterprise agreements due to union pressure, oversight by employers or inadequate drafting (e.g. those exclusions in sections 119(1)(a), 120, 121, 122 and 123, resulting in redundancy obligations for employers when none should arise in the circumstances).

8.6 Fair Entitlements Guarantee

The *Fair Entitlement Guarantee Act 2012* (FEG Act) was introduced by the former Labor Government to replace the General Employee Entitlements and Redundancy Scheme (GEERS). The Act has been problematic and has fueled union claims for higher redundancy packages. The Act also creates major funding and moral hazard risks for the community.

Ai Group supports the *Fair Entitlements Guarantee Bill 2014* which is currently before the Senate. The Bill would restore the former cap on redundancy pay of 16 weeks' under GEERS. The 16 week cap mirrors the entitlement to redundancy pay under the NES.

The level of redundancy protection in the FEG Act (i.e. up to four weeks per year of service with no cap, other than the salary cap) is at the top end of entitlements even in unionised workplaces. This excessively generous level of protection fuels union claims for employers to agree to a similar level of redundancy benefits in enterprise agreements with a consequent increase in enterprise bargaining disputation and reduction in the ability of companies to restructure to remain competitive.

Redundancy packages have typically been negotiated when a business has needed to adjust staffing levels to remain efficient and competitive. The idea that every employee would some day become entitled to the redundancy package was not contemplated or intended, particularly if the business became insolvent. Tax-payer funded protection of 16 weeks' redundancy pay cushions the blow for employees, and enables them to search for another job over a reasonable period without experiencing hardship.

A further concern relates to the obvious moral hazards associated with the existing FEG Act provision. There is nothing to prevent an employer under industrial duress in the lead up to insolvency agreeing to a redundancy package of four weeks' per year of service and leaving the tax-payer to pick up the tab.

It is unfair for a publicly funded scheme to pay extremely generous compensation to the employees of one insolvent company and much less to those working for another company. Generous over-award redundancy packages tend to operate in large, unionised workplaces. However, a much larger number of employees work in small, non-unionised enterprises. The inequity in the current level of redundancy entitlement protection can be seen in the fact that 75 claimants have recently received redundancy payments of more than \$100,000 with one claimant receiving approximately \$300,000 for redundancy pay.³⁸ Prior to the change in 2011, the highest payment for redundancy was \$43,200.

8.7 Construction industry redundancy funds

Construction industry redundancy funds had relatively modest beginnings but they now control billions of dollars and the existing governance arrangements are not appropriate.

The inappropriate practices of some construction industry redundancy funds are identified in Volume 10 (Reform – Funds) of the Final Report of the Royal Commission into Building and Construction Industry. Unfortunately the inappropriate practices were not addressed following the handing down of Commissioner Cole's Final Report in 2003 and since this time the problems have worsened.

³⁸ See the Explanatory Memorandum to the Bill, p.3.

The inappropriate practices of many construction industry redundancy funds include:

1. Coercion of employers to contribute to these funds through the terms of pattern agreements (see Section 5);
2. Inadequate governance arrangements, including:
 - The absence of specific legislation setting out the duties of Directors / Trustees / Office-bearers of employee entitlement funds;
 - The absence of oversight by an appropriate regulatory body such as the Australian Prudential Regulation Authority (**'APRA'**);
 - Inadequate privacy protections to prevent unions gaining access to information about contributing employers and fund members;
 - The failure to make key information readily available to the public including:
 - Annual reports and financial statements;
 - Details of the financial relationship that sponsoring unions and employer associations have with insurance companies and other providers of benefits offered by the funds;
3. Distribution of 'surpluses' from the redundancy fund (typically annually) to the unions and employer association sponsors of the fund, as criticised by Commissioner Cole in his Final Report:³⁹

"Distribution of surplus income

180 Excepting ACIRT, surpluses generated by each of the funds are paid to their sponsors or for other purposes, for example education, welfare and training...

195 Those administering the funds appear to have lost sight of the fundamental premise that employer contributions are to fund redundancy entitlements. It follows that contributions, and returns on investments of the fund, should be held by the fund and distributed only for the purpose of paying redundancy entitlements.

197 If funds were used only for the purposes for which they were established, contributions could be reduced – thus reducing building costs – or benefits to employees could be increased."

³⁹ Volume 10 (Reform – Funds), pp.278-281.

4. Allowing unions to receive millions of dollars each year in commissions and so called 'management fees' from providers of insurance products that are linked to the redundancy funds and which employers are coerced through the provisions of pattern agreements to purchase (see Section 5);
5. Making payments to fund members in circumstances where they are not redundant, including:
 - Enabling employees to access redundancy payments if they resign or are terminated by an employer for poor performance, as opposed to being made redundant;
 - Sending fund members a cheque each Christmas for a share of the investment earnings instead of crediting each employee's account with an annual return;
 - Providing a wide and ever-expanding range of payments to fund members which provides an incentive to unions to push for higher and higher contribution rates;
 - Paying welfare payments to striking workers which is very closely aligned to the payment of strike pay;
6. The absence of a scale of redundancy benefits within redundancy funds to avoid employers being coerced to contribute amounts that exceed what is required to provide reasonable redundancy benefits; and
7. Discriminating against non-union members when providing fund benefits in breach of freedom of association principles.

The problems associated with construction industry redundancy funds and proposed solutions are discussed in a submission that Ai Group made to the Royal Commission into Trade Union Governance and Corruption in August 2014 which is available on the Royal Commission's website.

The proposed solutions include:

- Similar to superannuation, specific legislation should be enacted to implement and enforce appropriate governance, reporting and supervision arrangements for construction industry redundancy funds and other worker entitlement funds; and
- Bargaining claims and enterprise agreement provisions relating to redundancy funds which do not meet stringent governance, reporting and supervision standards should be outlawed.

9. It is too difficult and costly to restructure businesses

In order to remain competitive in global and local markets, it is essential that businesses remain agile and flexible. A key part of this is the ability to quickly restructure to take advantage of new markets and opportunities, to adjust during market downturns, to merge with other businesses, and to outsource where other businesses can perform functions more efficiently.

As highlighted by Chart 4 in section 2 of this submission, restructuring is one of the most important ways in which businesses improve productivity.

The FW Act is imposing major barriers to business restructuring. These include:

- The transfer of business laws;
- Onerous redundancy obligations. See section 8 above;
- Access by unions to injunctions and uncapped compensation under the general protections which can frustrate restructuring proposals. The general protections need to be tightened, including removing the reverse onus of proof. See section 7 above.

9.1 Transfer of business laws

Since the introduction of the FW Act, Ai Group has expressed major concern about the transfer of business provisions in the Act, seeking both substantive changes and important technical amendments. Ai Group has made countless representations on behalf of member companies concerning the transfer of business laws in the FW Act, including a lengthy submission to the FW Act Review Panel in 2012. The problems identified in 2012 remain, with no positive changes occurring to the laws despite ongoing calls from employers.

These issues are not theoretical; our member companies are expressing continual, strong concerns about the adverse impact of the transfer of business laws on their businesses.

A 'transfer of business' under the FW Act occurs when an employee ceases employment with the old employer and within three months becomes employed by a new employer in circumstances where there is a business 'connection' between the two employers and the employee performs the same or substantially similar work for the two employers. The types of 'connection' between the old and new employer that can give rise to a transfer of business are:

- A transfer of assets between the old employer and the new employer, in accordance with an arrangement between the employers, where the new employer owns or has the beneficial use of tangible or intangible assets owned or used by the old employer;
- Where the old employer outsources work to a new employer;
- Where the new employer ceases to outsource work to the old employer; and

- Where the new employer is an associated entity of the old employer.

Subject to any order of the FWC, if there is a transfer of business, the new employer must observe and comply with any transferring industrial instrument (typically an enterprise agreement) that covered the work performed by transferring employees. Also, generally the new employer must recognise the past service of the employees of the old employer for various entitlements.

Even though a new employer may seek an order from the FWC that the transferring industrial instrument does not apply to the new employer, this process is cumbersome and not aligned with the nature of business transfers where often confidentiality issues arise.

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 providing outsourced services (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; and
- Imposing multiple and inconsistent employment conditions on employers resulting in higher costs, more red tape and reduced productivity, efficiency and staff morale.

These problems have arisen due to the design of the transfer of business laws, including basing the laws on the concept of 'work performed' rather than the former 'character of the business' test which operated under the *Workplace Relations Act 1996*.

Similarity of work test v the former character of the business test

Industrial instruments are very much focused on the industry and the type of business for which they were specifically developed. 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.

The transfer of business laws in the FW Act reinstated the concepts which caused so many difficulties for industry in the late 1990s and early 2000s, 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.

The transfer of business laws are operating against the interests of both employers and employees. The laws result in a lose-lose-lose scenario when 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.

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 often result in outsourced service providers making every effort to avoid employing any employees of their clients.

Transfers of employees between associated entities

The transfer of business laws operate as a major disincentive to transfer employees between associated entities.

Many companies are part of a broader corporate group and these 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 the transfer of business laws, employees who seek redeployment to another entity within the group risk having the 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.

This problem would be addressed if the *Fair Work Amendment Bill 2014* is passed by Parliament. Ai Group supports the modest but important amendment to section 311 proposed in the Bill. The amendment is consistent with Recommendation 38 of the 2012 Fair Work Act Review.

FWC orders preventing the transfer of instruments

The FWC has the power under s.318 of the FW Act to make an order that the transferable instrument not cover the new employer. The Commission 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, in many instances these orders are not being sought by employers because of the costs, uncertainties and risks involved. Unfortunately, the easier approach for the new employer is often to not employ any employees of the old employer. In most of the cases where FWC orders have been issued under s.318, the new employer, the employees and the relevant union/s have supported the order being issued. Where there has been union opposition, applications for orders have often been rejected or the employer has decided not to apply for an order.

There is also the problem of 'conditional employment offers'. Given the adverse consequences for many businesses of transferable instruments becoming binding on them in respect of transferring employees and other employees, it is in everyone's interests to allow applications to be made and orders granted in circumstances where an employer's decision to employ the transferring employees is conditional on an order being granted under s.318. In a recent case, *Lend Lease Building Contractors Pty Ltd (formerly known as Boulderstone Pty Ltd)* [2014] FWC 9192, Vice President Hatcher of the FWC refused to grant orders preventing the transfer of a number of enterprise agreements from the old employer to the new employer. The Vice President decided that the FWC does not have the jurisdiction to make an order if the employment offer by the new employer to the transferring employees is conditional upon the order being granted. Other FWC Members have adopted a different position and granted orders in these circumstances.

Application of transferable instruments to new, 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 employer in relation to that work, then the transferable instrument covers the new employee/s (s.314 of the FW Act).

Section 314 is very unfair upon the new employer and needs to be deleted. This provision is particularly problematic for professional services providers and other businesses which employ award-free staff under common law employment contracts.

10. Australia's long service leave laws are a mess

Australia's long service leave laws are a mess. The interaction between the long service leave provisions in the NES, State and Territory laws and enterprise agreements is so complex that employers and employees find it difficult to navigate and determine entitlements.

Also, sensible and longstanding long service leave flexibilities which benefited employers and employees were removed through the FW Act.

The long service leave provisions in the FW Act have the following effects:

- As a stop-gap measure until a national long standard leave standard was developed, section 113 of the FW Act was implemented to preserve the long service leave terms in pre-modern awards as provisions of the NES.
- Except for the limited NES provisions in ss.113 and 113A, long service leave provisions in enterprise agreements cannot override State long service leave laws (ss.26, 27 and 29).

The stop-gap measure was implemented by the former Labor Government based on an expressed intention at the time to work with the State and Territory Governments to develop a national long service leave standard. This has not occurred and there is no sign that the Governments will ever have the political will to agree on such a standard, given significant differences in entitlements in some States and Territories.

From 1993 to 31 December 2009, employers and employees were free to include provisions in enterprise agreements to implement nationally consistent long service leave provisions. This flexibility was lost from 1 January 2010 under the FW Act. The loss of this flexibility is not in the interests of employers or employees.

While subsections 113(4), (5) and (6) of the FW Act provide a very limited and cumbersome mechanism to preserve nationally consistent long service leave provisions in pre-FW Act enterprise agreements, these provisions have failed, as is evident from the fact that they have not been used.

The following changes are needed:

- Enterprise agreements should be permitted to override relevant State and Territory long service leave laws, but the laws should be taken into account for the purposes of the BOOT. This is the system that operated up to 31 December 2009. It has obvious merit for employers and employees.
- The FW Act should be amended to implement a national long service leave standard within the NES. The standard should reflect the previous standard federal long service leave provisions, i.e. 13 weeks long service after 15 years of service, with pro-rata entitlements after 10 years. The 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; this important given Australia's increasingly mobile workforce.
- In implementing the proposed national standard, employees should retain any long service leave accrued up to the date of implementation. For example, if an employee in South Australia had accrued 13 weeks of long service leave as a result of 10 years of service this entitlement should not be lost but future long service leave would accrue on the basis of 13 weeks for 15 years of service which is the accrual rate that current applies in most jurisdictions.
- 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.
- The national long service leave standard should not contain a general exclusion for employers and employees covered by the existing portable long service leave schemes for the construction industry, the coal mining industry and parts of the contract cleaning industry. The coverage of some of these schemes is extremely vague and problematic (e.g. the Victorian Construction Industry Portable Long Service Leave Scheme administered by CoINVEST). The coverage typically creeps wider over time through changes to coverage Rules and through unreasonably expansive interpretations of existing coverage rules adopted by bodies like CoINVEST over which unions have a great deal of influence given the composition of their Boards.
- To remove existing uncertainties and risks for maintenance services providers to coal mining companies about the coverage of the coal mining portable long service leave scheme, a Regulation should be made for the purposes of the definition of 'eligible employee' in s.4 of the *Coal Mining Industry (Long Service Leave) Administration Act 1992*

clarifying that the scheme does not apply to employers and employees covered by the *Manufacturing and Associated Industries and Occupations Award 2010* and other relevant awards.

The expansion of portable long service leave schemes is certainly not the answer to resolving the complexity with Australia's long service leave laws. These schemes are typically twice as costly for employers as traditional long service leave schemes because employers are required to pay a levy of about 3% on the wages of every employee, from the day that they commence employment. Under the regular long service leave laws, the employer's liability only arises once the employee has several years of service with the employer.

Portable long service leave levies are, in effect, a tax on employment. They impose a significant cost burden on employers which impacts their ability to take on more employees.

Long service leave is intended to reward employees for long and faithful service with one employer and this intention needs to be retained. This is not reflected in the portable long service leave schemes. Portable long service leave schemes were implemented in the construction industry on the premise that workers were typically terminated at the end of a project and did not have the opportunity to obtain long service leave in the regular manner. This is no longer the case. These days most workers in the construction industry are employed by subcontracting firms and workers are typically relocated to other projects when work on a project is complete.

11. Unlawful and unacceptable union conduct needs to be addressed

In some industries, notably construction, the unions are breaking the law on a very regular basis. As Justice Merkel of the Federal Court said some years ago in *Australian Industry Group v AFMEPKIU and others* [2000] FCA 629, when penalising two militant Victorian union leaders for contempt of court after they ignored a Federal Court order:

"The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes.....it also requires that parties comply with the orders made by the courts in determining those disputes".

A number of changes are needed to address unlawful and inappropriate union conduct.

11.1 Construction industry

Ai Group strongly supports the *Building and Construction Industry (Improving Productivity) Bill 2013* which is currently before the Senate.

The Bill would repeal Labor's *Fair Work (Building Industry) Act 2012* ('FWBI Act') and restore largely similar arrangements to the very successful arrangements which were in place between 2005 and 2009 following the Royal Commission into the Building and Construction Industry. During this period the construction industry had never been a better place to work and invest, the rule of law prevailed, and infrastructure was more affordable. From 2009 the former Labor Government watered down the powers of the Regulator, replacing the Australian Building and Construction Commissioner (ABCC) with Fair Work Building and Construction (FWBC). The strong and effective Implementation Guidelines for the National Construction Code were replaced with the benign *Building Code 2013*, and penalties were reduced to one third of what they were.

This has led to many unacceptable work practices of the past being reintroduced to the great detriment of construction industry contractors, subcontractors, clients and the broader community. There have been many recent instances of unlawful coercion by unions and unlawful industrial action and pickets organised by unions.

The community has a legitimate and direct interest in ensuring that construction costs are reasonable and that taxes are well spent, including on infrastructure. The community also has a direct interest in ensuring that the rule of law is upheld. The current inadequate laws and arrangements are resulting in higher construction costs which of course reduce the ability of Federal and State Governments to deliver vital community infrastructure.

The compulsory interrogation powers of FWBC, which are so vital to the maintenance of the rule of law in the construction industry, are set to expire on 1 June 2015 under a sunset provision in Labor's FWBI Act. The compulsory interrogation powers have been in place since the early 2000s and there is no valid case for their abolition when the CFMEU and other construction unions continue to break the law on a very regular basis. The powers are similar to those possessed by ASIC, the ATO and the ACCC despite the misinformation circulated by the construction unions. Prior to the powers being implemented the CFMEU adopted a blanket policy of its officers, staff and delegates refusing to be interviewed by the Regulator, which frustrated many investigations into unlawful conduct.

The CFMEU receives millions of dollars each year in revenue from construction industry redundancy funds and from insurance products which employers are forced to pay for through pattern agreements that they are coerced by unions to sign (see Sections 5 and 8). This revenue enables the CFMEU to pursue a business model involving regular law breaking and budgeting for the consequent fines. Laws need to change to address this unlawful behaviour.

As a result of the current inadequate laws there has been an outbreak of unlawful industrial action and unlawful coercion on building sites by construction industry unions such as the CFMEU. The situation is worsening by the day.

The rule of law needs to be re-established in the construction industry without delay to protect employers, employees, independent contractors and the community from unlawful and inappropriate conduct.

The current laws are operating as a major barrier to small subcontractors carrying out work on major construction projects. The current laws are not effective in preventing union coercion of small subcontractors to sign up to very costly and inflexible industrial arrangements. The laws are also not effective in stopping unions coercing major contractors to only subcontract with those who have agreements with unions.

The pattern agreements which the construction unions are currently coercing employers to accept contain very unproductive and inflexible provisions, and give far too much power to the unions on building sites. This needs to be addressed through a strong and effective Building Code as is provided for in the *Building and Construction Industry (Improving Productivity) Bill 2013*.

11.2 Role of the FWO

The FWO needs to take an active role in enforcing the law when unlawful coercion and unlawful industrial action occurs outside of the construction industry, as FWBC does for the construction industry. Addressing underpayment of wages is important but so too is ensuring that damage inflicted upon businesses and the community by unlawful industrial action and coercion is investigated and, in appropriate cases, prosecuted.

11.3 Right of entry

There are two significant problems that are occurring with right of entry laws and these are contributing to unlawful and unacceptable union conduct. The problems are:

- The right of entry laws in Part 3-4 of the FW Act need to be tightened; and
- The 'unlawful terms' in s.194 of the Act need to be tightened to prevent unions coercing employers to include provisions in enterprise agreements which undermine the right of entry laws.

Union rights of entry were expanded under Labor's *Fair Work Amendment Act 2013* from 1 January 2014. These changes had no merit; they were announced out of the blue without any consultation with employer representatives. The changes were not recommended by the 2012 Fair Work Act Review. The changes need to be reversed as provided for in the *Fair Work Amendment Bill 2014* which is before the Senate, including:

- Removing the absolute right of union officials to conduct union meetings in lunchrooms. This is not appropriate or fair. Lunchrooms (and other break areas) are used by all employees, including those who are not union members and those who do not wish to participate in union discussions. Only 12% of employees in the private sector are union members. Under the provisions in the Bill, and the provisions which operated prior to 1

January 2014, unions would have the right to challenge the location proposed by the employer in the FWC if they regarded the location as unreasonable. There have been very few disputes about this issue over the years because employers typically are reasonable;

- Restoring an employer's right to reasonably request that interviews be conducted and discussions held in a particular area of the workplace;
- Removing the requirement for employers to provide accommodation and transport to union officials for remote locations.

Also, consistent with the *Fair Work Amendment Bill 2014*, a union official should have the right to enter premises to hold discussions with employees who are eligible to be a member of the union and who wish to participate in the discussions, in the following circumstances:

- If the union is covered by an enterprise agreement which applies to work performed on the premises; or
- If a member or prospective member of the union has invited the union to send a representative to the premises to hold discussions with the employees.

Further, given the widespread misuse of Work Health and Safety (WHS) entry rights by construction industry unions during the pursuit of bogus safety disputes (see subsection 11.4 below), all union access to a site for WHS purposes should be subject to the same notice period in the FW Act as the notice period for entry to investigate suspected breaches of workplace relations laws or to hold discussions with employees, i.e. not less than 24 hours. If an employee has a concern about an urgent safety matter then this concern should of course be raised immediately with the employer and if the matter is not addressed then the employee should raise the issue with a Workcover / WHS inspector. A 24 hour notice requirement would not create risks to WHS; it would address current risks. The widespread misuse by construction unions of WHS entry rights for industrial purposes is creating WHS risks because it understandably leads to employer cynicism about safety issues raised by unions.

Finally, it is essential that enterprise agreements are not used to undermine the right of entry scheme in the FW Act. Section 194 of the FW Act needs to be amended to prevent enterprise agreements including any provisions about union right of entry to workplaces, as was the case under the *Workplace Relations Act 1996* prior to the implementation of the FW Act.

11.4 Bogus safety disputes

The definition of "*industrial action*" in the FW Act needs to be amended to incorporate a reverse onus of proof, whereby persons who stop work and allege that their actions are based on a reasonable concern about an imminent risk to their health or safety would bear the onus of proving that such imminent risk existed.

The change is important to deal with the union tactic of using bogus safety disputes to justify the taking of unlawful industrial action. Bogus safety disputes lead to cynicism about safety issues raised by unions and union members, which is not in the interests of maintaining safe workplaces.

This proposal is included in the *Building and Construction Industry (Improving Productivity) Bill 2013*, which is before the Senate, but it should be incorporated into the FW Act and apply to all industries.

11.5 Nominated labour

The outlawing of ‘nominated labour’ claims was a key reform arising from the Royal Commission into the Building and Construction Industry. Such claims became unlawful in 2005 in the (now repealed) *Building and Construction Industry Improvement Act 2005*, and the proscription remains in place today, albeit in a watered down form in s.355 of the *Fair Work Act*.

Before ‘nominated labour’ claims were banned, the CFMEU routinely forced constructors to employ individuals they nominated as full-time delegates and work health and safety officers. These individuals were often highly militant with a history of causing industrial problems and drumming up bogus safety disputes on projects.

Employers must be able to hire the best people for the job; those that will contribute to lifting productivity and the vitally important goal of improving workplace safety, not militant unionists forced on them by unions.

Nominated labour claims have re-emerged over the past few years.

During the Grocon dispute in 2012, the CFMEU attempted to coerce Grocon to employ militant unionists that the union nominated and to appoint them as safety officers. The company rightly refused as to do so would have compromised safety and broken the law, but the union inflicted great damage upon the company, its suppliers and the community in an attempt to force Grocon to capitulate.

Section 355 of the FW Act is a very important provision but a higher penalty is needed for non-compliance. Ai Group proposed that the current maximum penalty be doubled.

12. Awards are still far too complex

Ai Group has been a very active participant in the ongoing evolution of the award system in Australia. Indeed, we have taken the leading role amongst employer groups during the:

- Award modernisation process between 2008 and 2010;
- The Modern Awards Review 2012 which was conducted throughout 2012 and 2013, and into 2014;
- The 4 Yearly Review which commenced in early 2014 and is set to continue at least throughout 2014, 2015 and 2016.

Massive resources have been devoted to the above exercises by Ai Group, including tens of thousands of hours of time by Ai Group's professional staff. Of course, massive resources have also been devoted by the Commission, as well as by unions and other employer groups.

Despite all this effort we still have not achieved anything like a modern and simple award system. What we have is 122 industry and occupational awards of approximately 50 pages each. The modern awards are set to be longer rather than shorter after the current 4 Yearly Review as additional detailed schedules are being added to them by the Commission.

The purpose of award modernisation was to modernise and simplify Australia's award system.⁴⁰ Awards, while they are significantly less in number than in the past, remain complex and lengthy. They are not simple or easy to understand despite these attributes featuring within the modern awards objective.⁴¹ Many ambiguities and uncertainties continue to exist within awards, including in regard to coverage.

12.1 Modern awards terms and conditions do not reflect a minimum safety net

Modern awards are intended to provide, together with the NES, a fair and relevant '*minimum safety net*' of terms and conditions of employment. The level of detail in awards in areas such as types of employment, hours of work, breaks, leave, countless allowances, and numerous other areas causes problems for employers, employees, the FWO and representative bodies.

Australia is the only country in the world that has an award system and given the current complexity it is not surprising that not even one other country has adopted a similar system. New Zealand abandoned its award system many years ago.

⁴⁰ See Explanatory Memorandum to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

⁴¹ See FW Act, s 134(1)(g).

In its current highly complex and prescriptive state, the award system cannot be genuinely regarded as constituting a 'minimum safety net'.

In addition to the National Minimum Wage in the National Minimum Wage Order, Australia's award system includes more than 1000 minimum wage rates for different jobs. Numerous awards deal with topics comprehensively dealt with in the NES such as annual leave and personal/carer's leave.

Ai Group is not arguing for the abolition of the modern award system but a major simplification of it. This will only occur with a great deal of direction from Parliament about what can and cannot be included in awards.

Part 2-3 of the FW Act needs major re-drafting to ensure that awards become a genuine minimum safety net. For example, an award should specify the average number of ordinary hours of work (usually 38) and provide broad parameters about the maximum number of ordinary hours that can be worked on a day, but it is not necessary to specify precise details about how those hours should be arranged. Further, for most categories of employees (but not for award-covered professionals) it will be appropriate to specify penalty rates for working overtime and on weekends, as well as shift loadings for working at night, but it is not necessary to include a raft of restrictions and detailed provisions about such matters.

Even if it is a little more difficult for the FWO to enforce awards that do spell out every precise detail, it is in the community's interest to have awards that are simple and easy to understand for employers and employees.

The simpler the content is in awards and the more that awards resemble a genuine minimum safety net, the easier it will be to reduce the number of awards from the existing number of 122.

It is important that awards are flexible so that businesses can be productive and competitive, and so that employers are able to reach agreement with individual employees on arrangements which suit their unique needs and preferences.

The level of complexity in the award system adds significant complexity to the enterprise agreement-making system through the application of the BOOT.

12.2 Penalty rates

There needs to be a sensible debate in Australia about penalty rates. Australian consumers expect to be able to go out for a meal, to buy a coffee, or go shopping on any day of the week, and they expect to pay reasonable prices when they do. It is a reasonable expectation.

The debate needs to encompass the penalty rates that should apply in particular industries (e.g. time and one quarter, time and one half), the days on which the penalty rates should be paid, and at what times of the day or night.

At present many employers are paying penalty rates due to a lack of working hours' flexibility in the relevant award. For example, often overtime penalties need to be paid at times that could readily be worked as ordinary time if the hours of work provisions were more flexible and employers were able to roster different employees to work their 38 ordinary hours across a wider band of hours.

In some industries such as fast food, restaurants and retail, many employers, particularly small businesses, struggle to keep their doors open because of the level of weekend penalty rates in the relevant awards. In many cases the employees who work on the weekend in these industries are young people who are not available to work during the week due to study commitments and would be happy with the rate of pay which applies on week days. A high proportion of employees get their first job in the fast food, retail or restaurant industries, regardless of what industry they end up building their careers in.

As the Government has rightly said, the FWC is the body which should remain responsible for setting penalty rates because different approaches are necessary for different types of employees in different industries. Awards can cater for these differences much better than legislation or regulations can. However, the central role of awards and of the FWC in setting penalty rates does not mean that there is no role for legislation. The former Labor Government changed the modern awards objective in s.134 of the FW Act, to reinforce penalty rates in awards. The amendment could make it harder for employers to succeed with arguments in the FWC to reduce penalty rates in appropriate cases. Section 134(1)(da) of the Act should be repealed.

12.3 4 Yearly reviews should be abolished

The modern awards objective requires that modern awards be stable.⁴² In conflict with this objective, since 2008 the award system has been in a constant state of review with no end in sight.

4 Yearly Reviews encourage unions to dream up a vast shopping list of costly new entitlements and inflexibilities which, if granted, would make businesses far less productive and competitive.

Employer representatives, including Ai Group, have used the review processes to press for necessary flexibilities and some penalty rate relief in a few industries but this would not be necessary if awards were much simpler and penalty rates were set at appropriate levels to reflect the intended 'minimum safety net' nature of awards. For example, the modern award that was applied to the glass industry increased the rates for evening work, more than threefold, in an industry where evening work is essential for many employees. The decision has had a direct impact in driving many glass industry jobs offshore and increasing imports of glass. Also, in the fast food industry, the modern award imposed penalty rates upon employers for a substantial part of the week when no penalty rates previously applied in some states.

⁴² See FW Act, s 134(1)(g).

Sections 157 and 160 of the FW Act permit parties to seek a variation to awards at any time provided that the variation is necessary to meet the modern awards objective or the variation is to remove an ambiguity or uncertainty or to correct an error. These provisions provide the necessary flexibility to keep awards up-to-date.

Section 156 of the FW Act should be repealed. 4 Yearly Reviews are not necessary or in the public interest.

13. Other issues

13.1 Annual Wage Review and the National Minimum Wage

Australia's National Minimum Wage is very high compared to other nations (see Chart 9 in section 2). It also needs to be borne in mind that the national minimum wage in Australia is not the minimum wage that applies to the vast majority of Australian workers. In effect, the award system provides more than 1000 different minimum wages which are higher than the National Minimum Wage.

In Ai Group's view, the Expert Panel of the FWC should maintain responsibility for setting the National Minimum Wage. However, following changes are proposed:

- Section 284 of the FW Act should be amended to include the following additional factor that the Expert Panel must take into account when varying minimum wages:

"The level of minimum wages in Australia compared to minimum wages in other developed countries including Australia's major trading partners".

- Section 285 of the FW Act should be amended along the lines of the following to make it clear that the Expert Panel is not required to increase wages each year:

"(d) may decide to leave minimum wages at existing levels or increase wages".

- The Act should be varied to enable the FWC to grant an order to an individual business, a group of businesses or an industry sector, delaying a minimum wage increase for a specified period based upon incapacity to pay.
- The proposal in section 13.7 below should be implemented regarding appointments to the FWC.
- The Government should ensure that adequate funding is available to enable the FWC to conduct research of specific relevance to Annual Wage Reviews.

13.2 Casual employment

The bogus scourge of ‘job insecurity’ is being used by the union movement and an array of misguided interest groups and academics to pursue further workplace restrictions on businesses, particularly in relation to casuals. In reality, there is no such problem.

The flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for the businesses’ products or services. The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers.

It is commonly but incorrectly stated by the unions that the Australian workforce is increasingly being casualised. The proportion of people who work on a casual basis has been reasonably stable since 1998 at 19% to 20% of all workers. The proportion peaked at 20.9% in 2007 then fell to 19.0% in 2012 and was 19.4% in November 2013 (Table 2 and Chart 18 in Section 2).

Nowadays it is widely recognised that many casuals work on a long-term, regular and systematic basis and most have no desire to convert to permanent employment. This principle underpins the NES entitlements relating to the right to request and unpaid parental leave, as well as the unfair dismissal laws, which apply to long term casuals who are employed on a regular and systematic basis. This principle also underpins the casual conversion clauses which are found in numerous awards which give employees the right to request to convert to permanent employment with only reasonable refusal allowed by the employer. Despite casual conversion clauses being included in awards since 2000, employer after employer has reported that whenever they give their employees the option to convert to permanent employment almost none (less than one per cent) want to. Casuals do not want to lose their flexibility or their casual loading.

Unions often erroneously claim that it is employers who are somehow forcing their employees to become casuals. While it is true that many employers need a mix of casual and permanent employees to provide necessary flexibility, in a large proportion of cases it is the employees who want to be casuals because they like the flexibility and the 25 per cent loading. Many people prefer casual employment as it allows them to participate in the workforce when they would otherwise be unable to, and to better balance work with family responsibilities or study commitments.

There is no ‘insecure work’ problem in Australia. The problem is the campaign by unions to convince the public that there is a problem so that they can impose a raft of new restrictions on employers.

13.3 Independent contractors and sham contracting laws

As set out in Table 2 in Section 2 of this submission, the proportion of workers who are self-employed independent contractors declined from 9.1% in 2008 to 8.5% in 2013. The proportion who are business owners declined from 10% in 2008 to 8.8% in 2013.

These independent contractors include the carpenters, plumbers, electricians, truck drivers and IT professionals who we all know. The vast majority of these have absolutely no desire to be employees. Some of them predominantly work for one client but it suits them to do so as they receive a regular flow of contracting work.

Ai Group was heavily involved in the development of the *Independent Contractors Act 2006* (IC Act). The Australian Government accepted Ai Group's submissions that the meaning of 'independent contractor' must be left to the common law to determine. The common law is far better equipped to assess the substance of particular relationships than any statutory definition could. Any 'one size fits all' definition of an 'independent contractor' would prevent the facts and circumstances of individual cases being fully considered.

Any statutory definition of an 'independent contractor' would disrupt a very large number of existing contractual arrangements which are legitimate under common law, to the detriment of all parties to these contracts.

The definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, but they would not be workable for the purposes of defining an 'independent contractor' under the IC Act or the FW Act. The vast majority of contractors who are required to be treated in a similar manner to employees for taxation and/or superannuation purposes due to the pattern and type of engagement, are genuine independent contractors.

Tough sham contracting laws are included within the general protections in the FW Act to deal with any arrangements which are not genuine.

Just like their campaigns against casual employment, the unions are attempting to demonise independent contracting arrangements that provide flexibility for the principals and the contractors, and which are valued by both parties. There are few union members in these categories of workers (perhaps the reason why the unions are so focussed upon imposing restrictions upon them).

13.4 Annual leave payments and accruals

The *Fair Work Amendment Bill 2014*, which is before the Senate, includes two amendments to the leave provisions of the NES that were recommended by the 2012 Fair Work Act Review. Both are important and necessary.

- **Payment for annual leave**

The Bill includes an amendment to s.90 to clarify the calculation of annual leave payments on termination. The existing provision has been the subject of a great deal of debate and uncertainty between industrial parties and with the FWO. The amended provision states that an employer must pay an employee on termination not less than the base rate of pay for the employee's untaken annual leave. However, modern awards and enterprise

agreements are able to supplement the minimum standard in s.90 and require that additional payments such as leave loading be paid.

- **Taking or accruing leave while receiving workers' compensation**

The Bill would amend s.130 to provide that an employee is not entitled to take or accrue any leave under the NES during a workers' compensation period. Existing s.130(2) in the FW Act is unclear and inappropriate, and should be repealed as reflected in the Bill. There are many cases where employees remain on workers' compensation for a number of years and it would not be appropriate or consistent with longstanding and widespread industry practice for annual leave to accrue during this period.

13.5 Important technical amendments – bargaining representatives

In section 3.4 of this submission the following important changes are proposed relating to the rights of bargaining representatives:

- A union should not have the right to represent an employee in negotiations over the agreement unless the employee expressly appoints the union as his or her bargaining representative (i.e. a union should not be a default bargaining representative for its members under s.176(1)(b) of the FW Act);
- A union should not have the right to be covered by an enterprise agreement unless the majority of the employees want the union to be covered; (This could be achieved by varying section 183 of the FW Act with the effect that a union is only 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); and
- A union should not have the right to intervene in FWC proceedings relating to the approval of an enterprise agreement if the union was not a bargaining representative for any of the employees covered by the agreement at the time the agreement was made.

There are two other amendments that are required to the bargaining representative provisions to address problems that have arisen:

1. A union bargaining representative's right to be covered by an agreement

If section 183 of the FW Act remains in its present form and a union is entitled to be covered by an agreement if it was a bargaining representative during the negotiations for an agreement, the Act should clarify that this right only applies to a union that was a bargaining representatives at the time when the agreement was made.

This issue arose in two major cases in 2014 in which the President of the FWC invited Ai Group, ACCI and the ACTU to intervene, and in which Ai Group made detailed submissions. In the *Peabody*⁴³ and *Collinsville*⁴⁴ cases, the unions argued that because a union was a default bargaining representative for a very short time after the Notice of Employee Representative Rights was given to the employees and before all employees appointed themselves or work colleagues as their bargaining representatives, the union had the right to be covered by the agreement under s.183 of the Act. The Full Bench declined to rule on the matter in the *Peabody* case, but in the *Collinsville* Case, the Full Bench decided:

“[28] The CFMEU submitted that s.183 operates so that an employee organisation that was at any time during the bargaining for a proposed agreement a bargaining representative of an employee, is entitled to give notice that it wants to be covered by the agreement. This is said to be so even if at the time the notice is given the employee organisation is no longer a bargaining representative.....

[29] Collinsville submitted that s.183 should be interpreted so that an employee organisation would only have standing to provide written notification if it was a bargaining representative for the proposed Agreement at the time the agreement was made. It submitted that a contrary construction would lead to improbable and irrational results in that an employee who evinced an intention that an employee organisation not be a bargaining representative by appointing the employee or someone else as a bargaining representative would have the wish contradicted by the capacity of the employee organisation to later be covered by the Agreement....

[37] When read in context the reference to "was a bargaining representative for the proposed agreement" in s.183 does not operate in the narrow manner suggested by Collinsville. We think it is sufficient for a valid notice to be given under s.183 that an employee organisation was at some point a bargaining representative of an employee for the proposed agreement for which approval of the Commission is sought.”

The decision of the Full Bench in the *Collinsville* case has resulted in the situation whereby a union which is only a default bargaining representative for 5 minutes between the time that an employee receives the Notice of Employee Representational Rights (which sets out the employee’s right to appoint a bargaining representative) and the time when the employee appoints another bargaining representative, has the right to be covered by the enterprise agreement. Clearly, this is not desirable and the Act needs to be amended. The best way for the issue to be addressed is for the default bargaining representative provision in s.176(1)(b) to be removed.

⁴³ *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042

⁴⁴ *CFMEU v Collinsville Coal* [2014] FWCFB 7940

2. Bargaining representatives' conflict of interest

Situations have arisen where a union officer who works for a union in a part-time capacity but works for a company on a full-time basis, has been appointed as a bargaining representative for the employees of a direct competitor of the bargaining representative's employer. In such circumstances there is a clear conflict of interest and an added problem that sensitive information cannot be shared with the bargaining representative. No doubt there are other circumstances where a conflict of interest could arise with a particular bargaining representative appointed by employees.

In circumstances where a conflict of interest is alleged by the employer, the Act should permit an application to be made by the employer to have the person's status as an employee bargaining representative revoked. If this occurred, the employees could readily appoint another bargaining representative e.g. an alternative officer of their union who does not have a conflict of interest.

13.6 Anti-bullying laws

To date, the anti-bullying laws in the FW Act have not had an adverse impact on most businesses. The reasons for this include:

- Importantly, there is no compensation payable under the jurisdiction and therefore employees are discouraged from making unmeritorious claims and lawyers are unable to offer representation on a contingency fee basis;
- The FWC has made it clear publicly that no compensation is payable under the jurisdiction and its mediators will not be involved in facilitating monetary settlements; and
- To access the jurisdiction, an employee must remain employed and most employees are reluctant to pursue FWC claims against their employers.

One area of risk and uncertainty for employers that will need to be monitored is bullying on social media sites by one employee against another employee, including situations where one of the employees is a supervisor or manager.

The December 2014 decision by a Full Bench of the FWC in the *DP World*⁴⁵ case highlights the need for employers to implement clear policies on the acceptable use of social media sites like Facebook by their employees.

The Full Bench decided that the Commission's anti-bullying jurisdiction is limited to circumstances where a worker has been bullied while 'at work' and that this will generally be at a time when the worker is performing work for the employer or engaged in some other activity which is authorised

⁴⁵ *Bowker, Coombe and Zwarts v DP World, MUA and Others*, [2014] FWCFB 9227.

or permitted by the employer. However, with posts on social media sites the Full Bench has decided that for the purposes of the Commission's jurisdiction to issue anti-bullying orders:

- There is no requirement that the person who made the posts be at work at the time the comments were posted;
- Posts which constitute bullying behaviour result in the behaviour continuing for the entire time that the posts remain on the social media site; and
- It is sufficient that the worker who accessed the posts be at work at the time.

13.7 Appointments to the FWC

The FWC's reputation suffers when Governments of either of the major parties adopt an unbalanced approach to appointing Members. The majority of appointments by the former Labor Government had a union background.

An unbalanced approach to appointments, over time, leads to negative impacts. For example, if an employer perceives that it will not be treated fairly by the FWC, the employer will no doubt strive to avoid having the FWC involved in preventing or settling 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 FWC. The workplace relations system is very complicated and appointees need to have an excellent knowledge of industrial laws and practices, as well as demonstrating fairness, wisdom and practicality during their careers.
- Together with the existing practice of consulting State Governments and the Shadow Workplace Relations Minister, the Government should confidentially consult the peak councils (Ai Group, ACCI and the ACTU) on candidates that the Government is proposing to appoint. The peak councils have a deep involvement in the workplace relations system and daily contact with the FWC. They are particularly well-placed to identify any problems with any particular candidate that the Government is proposing to appoint, and their views should be considered before the Government makes a final decision.
- The Government should ensure that over time a roughly equal number of FWC Members with an employer and union background are appointed.

13.8 Powers of the FWC

Ai Group does not support any expansion in the determination / arbitration powers of the FWC, including any expanded powers under:

- The right to request provisions of the NES;
- Sections 423 and 424 of the FW Act;
- Part 6-2 of the FW Act.

The powers of the Commission were significantly expanded under the FW Act and any further expansion is not warranted.

The provisions within Part 6-2 of the FW Act are extremely important. These provisions clarify that the FWC 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). 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 the FWC 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 paragraph (5)(b) of the Model Term:

'if the Fair Work Commission is unable to resolve the dispute at the first stage and the parties have agreed that the Fair Work Commission may arbitrate, the Fair Work Commission may then:

- (i) arbitrate the dispute; and*
- (ii) make a determination that is binding on the parties.*

The following additional words should also be added to paragraph (7) given some recent Federal Court decisions which have held that decisions made by the FWC pursuant to the powers given to the Commission under the dispute settling term of an enterprise agreement are not subject to judicial review:

“(7) The parties to the dispute agree to be bound by a decision made by the Fair Work Commission subject to the right to apply to a relevant Court for judicial review of the decision.”

Ai Group strongly opposes any change to the prohibition in s.739(2) of the FW Act on the FWC 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 compulsory arbitration powers to the FWC would impede workplace flexibility and the rights of employers to manage their businesses in an efficient manner. It is vital that the Productivity Commission reject the numerous calls from unions and an array of special interest groups to increase the FWC’s powers in this area. Employers need to maintain their right to manage their businesses productively and to decide what lawful working arrangements the business requires.

13.9 Judicial review of FWC decisions

Decisions of single Members of the FWC can be appealed to a Full Bench of the FWC (merit review). Most decisions of a Full Bench of the Commission can be the subject of judicial review by the Federal Court (s.563 of the FW Act).

The current judicial review process for FWC decisions can involve the following steps:

1. Judicial review by a Federal Court single judge
2. Judicial review by the Full Federal Court
3. Judicial review by the High Court (if special leave is granted)

In Ai Group’s view, access to judicial review by the Federal Court and the High Court (subject to special leave being granted) serves the interests of justice and leads to more consistency and better decision-making by the FWC.

There is currently a problem in the FW Act regarding judicial review of decisions of the FWC concerning the inclusion of unlawful terms in an enterprise agreement. The problem revolves around s.253 of the Act which deems any ‘unlawful term’ in an agreement to be of ‘no effect’. In *The Australian Industry Group v Fair Work Australia*,⁴⁶ (the ‘ADJ Contracting Case’) the Full Federal Court expressed the view that because s.253 provides an in-built remedy if the FWC approves an agreement with an unlawful term, a decision to include such a term would most likely not constitute a jurisdictional error so long as the Commission did not deliberately include the

⁴⁶ *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108, [41]-[50].

unlawful term. Given the Full Federal Court's decision, it is important that the reference to unlawful terms in s.253 is removed so that aggrieved parties have genuine access to judicial review of any FWC decision which approves an agreement containing an unlawful term.

Section 570 of the FW Act is a very important provision as it enables representative bodies like Ai Group to seek judicial review of problematic decisions made under the FW Act without significant risk of adverse costs orders. Section 570 was amended through the *Fair Work Amendment Bill 2012* with the support of Ai Group and the ACTU after the Full Federal Court placed a narrow interpretation on the previous provision in *CFMEU v CSBP Limited (No 2)*.⁴⁷ Following the amendment to s.570, the longstanding previous position has been reinstated. Parties generally bear their own costs when matters arise under the FW Act. This approach facilitates just outcomes.

13.10 Fair Work Ombudsman

The 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 on significant issues and we welcome this consultative approach.

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 from time to time are understandable. 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.⁴⁸

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. However, in Ai Group's view, the FWO adopts an overly rigid approach to enforceable undertakings requiring that an employer *'admit the*

⁴⁷ [2012] FCAFC 64.

⁴⁸ These have included FWC Full Bench proceedings to clarify the ability of employers to absorb increased costs arising from modern awards into overaward payments ([2010] FWAFB 4488) and Full Bench proceedings regarding employers' obligations under awards and the NES when Christmas / New Year public holidays fall on a weekend ([2010] FWAFB 9290).

contravention'.⁴⁹ The ACCC, which makes extensive use of enforceable undertakings, adopts a more flexible approach, requiring that the party acknowledge that the conduct '*constitutes or was likely to constitute a breach*'.⁵⁰ If the FWO adopted the ACCC's more flexible approach there would be increased scope for the use of enforceable undertakings as an alternative to Court proceedings with a significant saving in legal costs for the publicly funded FWO and for employers.

The FWO's role in relation to unlawful industrial action and coercion is discussed in Section 11.

13.11 Interaction between workplace relations laws and competition laws

The existing boundaries between anti-competitive practices outlawed under the *Competition and Consumer Act 2010* (CC Act) and anti-competitive practices permitted by workplace relations laws and exempted from the CC Act, should be redrawn

The CC Act (and the *Corporations Act 2001*) should govern relations between businesses and should ensure that unions cannot block or impede supply and acquisition between businesses. The CC Act should only contain reasonable exemptions for anti-competitive practices permitted by workplace laws – not wholesale exemptions which permit highly anti-competitive arrangements to be imposed across entire industries in the form of industry-wide pattern agreements.

The FW Act should not govern the relations between businesses. The FW Act should govern the relations between employers and employees and should not give rights to unions or employees which have the effect of blocking or impeding supply and acquisition between businesses.

In *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 ("The ADJ Contracting Case") the Full Federal Court dismissed Ai Group's application for judicial review of a decision of a Full Bench of Fair Work Australia (now the FWC). The case related to whether a number of clauses in a union pattern agreement negotiated between the CEPU and NECA were unlawful under the FW Act and the CC Act.

Section 192 of the FW Act provides that the FWC may refuse to approve an enterprise agreement if the FWC considers that compliance with the terms of the agreement may result in a person committing an offence against a law of the Commonwealth or being liable to pay a pecuniary penalty under such a law. Amongst other arguments, Mr Stuart Wood SC on behalf of Ai Group argued that compliance with a clause in the pattern agreement which imposed very substantial restrictions on the engagement of contractors (including contracting firms) would breach section 45EA of the CC Act. Sections 45E and 45EA of the CC Act prohibit contracts, arrangements and understandings being reached with a union for the purpose (or for purposes including) preventing or hindering a business from acquiring goods or services from another business with which it is

⁴⁹ FWO, *Enforceable Undertakings Policy*, Guidance Note 4, 1 December 2011.

⁵⁰ Australian Competition and Consumer Commission, *Section 87B of the Trade Practices Act – Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission*, 2009, 6.

accustomed to dealing. These provisions of the CC Act are directed towards ensuring that trade unions, through the exercise of significant power, do not prevent or hinder business dealings. Ai Group argued that:

- The enterprise agreement made between ADJ Contracting Pty Ltd and the CEPU (which reflected an industry-wide pattern agreement) operated as an 'arrangement or understanding', within the meaning of ss.45E and 45EA of the CC Act.
- At least one of the purposes of the arrangement or understanding was to prevent or hinder ADJ Contracting from acquiring services from existing contractors.

The Court rejected Ai Group's arguments and decided that an enterprise agreement was not a 'arrangement or understanding' for the purposes of s.45E and 45EA

There is no logical reason why a less formal arrangement or understanding entered into by a union which prevents or hinders supply or acquisition of goods or services between businesses should be outlawed under s.45E and s.45EA but an enterprise agreement should not.

Several years ago the ACCC pursued a successful case against the CEPU for entering into an arrangement with a contractor in the Latrobe Valley to only use subcontractors that had an agreement with the CEPU.⁵¹ The union paid over \$300,000 in fines and ACCC costs.

Provisions in enterprise agreements which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business should be outlawed including, for example:

- Clauses which impose restrictions on the engagement of independent contractors (including contracting firms);
- Clauses which impose restrictions on the engagement of labour hire contracting firms or conditions on the engagement of labour hire workers;
- Clauses which impose restrictions on particular types of supplies or suppliers (e.g. a requirement that Australian-made supplies must be used);
- Clauses which nominate that particular products or services be acquired from particular suppliers (e.g. costly income protection products offered by insurance providers which pay large commissions to unions). (Note: Consistent with superannuation legislation, enterprise agreements should be able to specify particular complying superannuation funds.

⁵¹ *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 2)* [2007] FCA 11; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 3)* [2007] FCA 144; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* [2006] FCA 1777.

13.12 Road Safety Remuneration Tribunal

The maintenance of an efficient and competitive road transport industry is of crucial importance to the Australian economy.

The significance of the road transport industry is not simply a product of its size but of its linkages with other sectors of the economy. The overwhelming majority of Australia's freight task is moved by road transport at some time. Significant increases in road transport costs damage the competitive position of businesses in the supply chain, particularly those that face international competitive pressures such as the manufacturing and retail sectors which are highly reliant upon road transport services. Rural and regional areas experience a disproportionate burden when road transport costs increase given their heavy reliance on road transport.

The *Road Safety Remuneration Act 2012* and the Road Safety Remuneration Tribunal are imposing anti-competitive arrangements on industry and are distracting Government and industry attention and resources away from the measures which are widely recognised as improving road safety such as: risk identification and control, improved roads, fatigue management, education and training, drug and alcohol policies, use of technology, and strong compliance mechanisms.

Under the RSR System the Tribunal is afforded the power to regulate both the road transport industry and the broader supply chain. Its decisions will have major impacts on road transport companies, on businesses which use road transport and on Australian consumers.

Orders flowing from the RSR Tribunal are likely to have the following adverse effects over time:

- Undermining of the NES, modern awards and enterprise agreements;
- Interference with normal commercial arrangements between transport companies and their clients;
- Increased costs imposed upon road transport companies;
- Increased transport costs imposed upon the manufacturing, construction, retail and other industries;
- Higher prices for goods as a result of the increased transport costs;
- Imposition of an unreasonable compliance and red tape burden upon road transport companies and/or businesses which use road transport;
- Undermining of the integrity, objectives and operation of a raft of State laws and initiatives relating to matters such as work health and safety, general transport regulation and contractual conditions of drivers; and
- Undermining of the Heavy Vehicle National Law.

The RSR Act and Tribunal are likely to lead to significantly increased transport costs without delivering any tangible improvement in safety. Improving safety in the road transport industry requires a whole-of-government approach rather than a narrow focus on the method and quantum of remuneration. It requires an approach which has broad support, including the support of the Federal Government, State and Territory Governments, and industry. The RSR System does not have broad support. It is a flawed system which was implemented by the previous Federal Labor Government in response to the Transport Workers Union's *Safe Rates, Safe Roads* industrial campaign.

In contrast to the flawed RSR System, Ai Group strongly supports the Heavy Vehicle National Law and the National Heavy Vehicle Regulator which have the support of the Federal Government, State and Territory Governments and industry, and which were developed following extensive consultation with stakeholders.

The RSR Act should be repealed and the RSR Tribunal should be disbanded without delay.

13.13 Compliance with ILO Conventions

The former Labor Government 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),
- The *Right to Organise and Collective Bargaining Convention, 1949* (Convention 98),
- The *Equal Remuneration Convention, 1951* (Convention 100),
- The *Discrimination (Employment and Occupation) Convention, 1958* (Convention 111),
- The *Employment Policy Convention, 1964* (Convention 122), and
- The *Tripartite Consultation (International Labour Standards) Convention, 1976* (Convention 144).

Ai Group, ACCI and the ACTU were consulted in the preparation of those detailed reports.

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

None of Ai Group's proposals in this submission would lead to non-compliance with ILO Conventions or any other obligations under international law.



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