

Ai GROUP SUBMISSION

Productivity Commission Inquiry
into the Workplace Relations
Framework

Response to draft report

September 2015



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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

This submission responds to the Productivity Commission's Draft Report on Australia's Workplace Relations Framework (**Draft Report**) released in August 2015. The Draft Report has facilitated an important community debate about the shape of Australia's workplace relations system. The Commission's Final Report will be extremely important in identifying the changes that are needed to the workplace relations framework to remove barriers to productivity improvement, competitiveness and investment.

While Ai Group is not proposing that the *Fair Work Act 2009* (**FW Act**) and the modern award system be scrapped, some major changes are needed. Australia's current workplace relations system is not delivering the adaptability that employers and employees need.

Ai Group maintains that more flexible workplace relations arrangements are fundamental to the improved productivity that is so important to our national competitiveness and our capacity to further improve Australian living standards.

While the Commission has pointed out that, Australia's workplace relations arrangements are far from dysfunctional, there are substantial improvements that can and should be made to enable more productive performance in individual businesses. This is certainly the view from the coal-face where, as we pointed out in our March 2015 submission, business owners and managers participating in the WEF Global Competitiveness surveys consistently rank restrictive labour regulations as leading the list of most problematic factors for doing business in Australia.

There are some very good proposed reforms in the Draft Report, including:

- Outlawing clauses in enterprise agreements that impose restrictions on the engagement of contractors, labour hire and casuals;
- Introducing a new form of enterprise agreement called the Enterprise Contract;
- Implementing measures to expand the use of Individual Flexibility Arrangements;
- Reducing the emphasis on procedural issues in enterprise agreement making and unfair dismissal matters;
- Imposing a six month compensation cap on general protection matters;
- Reducing Sunday penalty rates in the retail, hospitality, restaurants, cafés and entertainment industries (including in the fast food section of the retail industry);
- Discontinuing the 4 Yearly Reviews of Awards; and
- Protecting employers from increased costs where State Governments decide to proclaim additional public holidays.

However, we have concerns about a minority of the recommendations, as currently drafted. In these areas, we have put forward different or amended proposals to address the issues of concern identified by the Productivity Commission. The following subject areas fall within this category:

- The proposed restructuring of the Fair Work Commission (**FWC**) into two Divisions;
- Long service leave;
- Greenfields agreements; and
- The changes to s.423 of the FW Act regarding industrial action which threatens to significant harm the bargaining parties.

Finally, there are a number of areas where we urge the Productivity Commission to recommend more substantial changes than those proposed in the Draft Report. These include:

- Tightening the general protections and implementing additional measures to discourage speculative claims;
- Fixing the transfer of business laws which are operating as a major barrier to business restructuring and outsourcing;
- Tightening industrial action rights so that industrial action becomes more of a last resort during bargaining;
- Outlawing industry-wide pattern bargaining; and
- Tightening union rights of entry by reversing the changes that the former Labor Government implemented from 1 January 2014.

Since the Draft Report was published, Ai Group has been through an extensive consultation process with Ai Group member companies around the country to discuss the Productivity Commission's draft findings and recommendations. These consultations have been very valuable in informing the content of this submission.

2. Developments in Australia's labour market

With regard to forms of work, Ai Group agrees with the following important findings in Chapter 2 of the Draft Report:

- The unions' views on non-standard work are overly negative;
- Many people like casual work because it suits their personal circumstances and/or can act as a stepping stone to more secure employment;
- Casual work is now a critical part of the labour market; and

- The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed.

Ai Group agrees with the following important conclusions in Chapter 2 regarding Australia's workplace relations system:

- There is a need to increase the adaptability of Australia's workplace relations system;
- The system needs to be made simpler and more flexible; and
- There needs to be range of work arrangements available to employers and employees that allow them to develop arrangements that suit their circumstances.

While Ai Group is not proposing that the FW Act and the modern award system be scrapped, some major changes are needed. Australia's current workplace relations system is not delivering the adaptability that employers and employees need.

The reality is that Australia needs a workplace relations system that is consistent with the needs of 21st century workplaces. Many of the trends that will reshape the workplace of the future are already apparent, including the following:

- The 'sharing economy' is a new way of organising production, consumption and the use of assets, enabled by cheap computing and ubiquitous communications. Services like Uber and Airbnb create huge efficiencies and new possibilities. They also create working arrangements that do not necessarily fit into old categories of employment. The workplace relations framework needs to catch up and meet the needs of service providers and customers.
- Automation is moving well beyond the factory floor to shake up an ever wider set of activities, including many personal and professional services. Some kinds of jobs will disappear, but many more will transform as workers shift focus to managing machines and programs to augment and increase their total productivity. The workplace relations framework must support constant evolution in the nature of jobs and the reskilling and redeployment of workers necessitated by automation.
- The ageing of our population will put a premium on workplace flexibility. An increase in the ratio of dependents to workers will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential.

In short, we need an agile workplace relations system that can rapidly respond to changes in markets, the economy, technology and demographics.

Workplace relations arrangements are fundamental to the improved productivity that is so important to our national competitiveness and our capacity to further improve Australian living standards. In recent years, the emphasis on improving productivity performance has lifted as

productivity outcomes across a wide range of industries have trended down and, particularly in the face of demographic factors, the relative importance of improved productivity as a source of growth has risen.

While the Commission has pointed out that, both from an historical perspective and in terms of aggregate measures – including of working time lost, and economy-wide and sectoral wage outcomes, Australia’s workplace relations arrangements are far from dysfunctional, there are substantial improvements that can and should be made to enable more productive performance in individual businesses. As highlighted in our March 2015 submission, business owners and managers participating in the WEF Global Competitiveness surveys consistently rank restrictive labour regulations as leading the list of most problematic factors for doing business in Australia.

3. Institutions

3.1 Structure of the FWC

As a peak council under the FW Act and as registered organisation under the *Fair Work (Registered Organisations) Act 2009*, Ai Group has a great deal of experience in the FWC, both in representing Ai Group members and other employers collectively, and in representing individual employers. Ai Group’s workplace relations staff are involved in hearings and conferences before the FWC virtually every day. Invariably Ai Group is involved in numerous different FWC cases at any one time.

The types of FWC matters that Ai Group is often involved in include:

- Annual Wage Reviews;
- Appeals and other major cases;
- Reviews of awards;
- Applications to vary awards;
- Unfair dismissal matters;
- General protections matters;
- Applications for the approval of enterprise agreements;
- Applications for the FWC to assist during bargaining negotiations;
- Applications for scope orders, majority support determinations and bargaining orders;
- Enterprise bargaining and other disputes;
- Applications for protected action ballots;
- Applications for stop orders when unlawful industrial action is taken;
- Applications to suspend or terminate protected industrial action; and
- Applications by registered organisations to change their rules.

Draft Recommendation 3.1 would divide the FWC into two divisions. A Minimum Standards Division would be responsible for minimum wages and modern awards, with all other functions remaining with a Tribunal Division. Ai Group is not convinced that this Recommendation is appropriate for the following reasons:

- The Annual Wage Review is already carried out by an Expert Panel that includes part-time FWC Members with an economic and research background, as well as full-time FWC Members with industrial relations backgrounds. Ai Group has not identified any deficiencies with the skill sets of the Members on the Expert Panel. Having diversity of backgrounds amongst the Members of the Expert Panel is important. For example, in the most recent Annual Wage Review, the issues canvassed at the final consultations included economic matters as well as legal arguments about the correct construction of relevant provisions of the FW Act.
- Award matters often involve complex jurisdictional arguments, which are in effect legal arguments. The proposed skill sets of Members of the Minimum Standards Division could create risks for employers and employees of the FWC exceeding its jurisdiction when determining what changes should be made to awards.
- Given the costly nature of many of the entitlements in awards, it is essential that award clauses are very carefully drafted to avoid risks for employers and employees. Drafting problems could easily occur if the FWC Members responsible for determining award matters do not have appropriate qualifications and experience in drafting award clauses.
- The appeal processes would become a lot more complicated.
- Currently, FWC Members are typically allocated to Panels which enable them to gain detailed knowledge and experience in particular industries. This knowledge and experience is relevant to the full range of FWC matters that arise for parties in an industry including award matters, industrial disputes, enterprise agreements, etc.
- The history associated with particular award provisions, including relevant cases, is often very important for employers and employees when the FWC is determining the merits of proposed changes to the provisions. The establishment of a new Minimum Standards Division with new FWC Members could result in insufficient regard being given to why existing award provisions exist and why they are drafted in the current manner.

3.2 Five year terms and the appointment process for FWC Members

Draft Recommendation 3.2 would implement five year terms for new FWC Members, with the possibility of re-appointment based on a merit-based performance review carried out by an appointment panel. Under Draft Recommendation 3.3, the appointment panel would prepare a short-list of candidates for appointment as an FWC Member and the Minister would be required to select from the short-list.

The independence of the FWC is vital and, for this reason, Ai Group does not support Recommendations 3.2 and 3.2. The following risks would arise:

- The risk of decisions of FWC Members being influenced by political factors given that they could be removed at the end of their five year term;
- The risk of the Government of the day “stacking” the appointment panel, with consequent “stacking” of the FWC;
- The risk of FWC Members being removed at the end of the five year term as a result of political factors, even if they have performed well;
- The risk that many high quality candidates may not accept appointment as an FWC Member if five year terms were implemented; and
- The risk that a great deal of valuable experience would be lost if there was a frequent turnover of FWC Members.

In Ai Group’s March 2015 submission, Ai Group proposed the following appointment process for FWC Members which we continue to support:

- 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 the 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.

With regard to the Productivity Commission’s recommendation that a performance review process should be implemented for FWC Members, Ai Group does not oppose the establishment of highly objective criteria against which the performance of FWC Members could be validly assessed, and the publication of annual performance results for each Member, such as:

- The number of times each Member’s decisions have been overturned on appeal in the 12 month period;

- Whether or not each Member met the benchmark that the FWC set regarding the handing down of decisions in a timely manner in the 12 month period.

If the above information was made publicly available, FWC Members that are clearly not performing to an acceptable standard could be more easily identified and appropriate action taken by the President of the FWC under s.581A, the Minister under s.641A, or the Commonwealth Parliament under ss.641 or 642.

For the reasons outlined in section 3.1 above, Ai Group does not support Draft Recommendation 3.4. While greater diversity amongst FWC Members would be worthwhile, all persons who are appointed need to have an excellent knowledge of industrial laws and practices. They also need to have demonstrated fairness, wisdom and practicality during their careers. These skills are necessary for award matters, as well as other matters handled by the FWC.

3.3 Improving conciliation processes and transparency

Ai Group supports Draft Recommendation 3.5 which would require the FWC to publish more detailed information about conciliation outcomes and processes, and to commission an independent review of these matters.

4. National Employment Standards

4.1 Portability of long service leave entitlements

Ai Group welcomes the fact that the Draft Report does not recommend the extension of portable long service leave entitlements beyond the existing schemes which operate in the construction and coal mining industries.

Ai Group very strongly opposes any extension of portable long service leave entitlements. Portable long service leave schemes conflict with the fundamental purpose of long service leave which is to reward an employee with a period of rest after a long period of loyal service with one employer. The focus of portable long service leave schemes is on an employee's entitlement to a lump-sum payment, not on an entitlement to a period of rest.

Extending portable long service leave entitlements to other industries would be very damaging for industry.

In a recent [submission](#) to the Victorian Parliamentary Inquiry into the Portability of Long Service Leave Entitlements, an analysis of the costs of portable long service leave schemes is set out. The analysis highlights that portable long service leave schemes are four times as costly as traditional long service leave schemes and the imposition of a levy across the Victorian workforce of the same magnitude as the existing levy in the Victorian Construction Industry Portable Long Service Leave Scheme would cost Victorian employers over \$4 billion per annum.

Regular long service leave in Victoria costs less than a quarter (approximately \$927 million) of this \$4 billion annual cost. Long service leave currently costs Victorian employers in the manufacturing industry around \$115 million per year, which is about a quarter of the \$458 million per year cost of a portable long service leave scheme in the industry. For employers in the health care and social assistance industry, the current long service leave cost is \$82 million per year which is less than a quarter of the \$358 million per year cost of portable long service leave in the industry.

The regular long service leave laws already impose a significant cost burden on Australian employers and reduce international competitiveness, without the imposition of the major cost burden of portable long service leave entitlements. When long service leave was widely introduced in Australia in the 1950s, Australia's economy operated behind high tariff barriers. Today, Australia has one of the most open economies in the world and international competitive pressures are intense.

The implementation of a portable long service leave scheme would, in effect, impose a massive new tax on employment through the imposition of a portable long service leave levy. The adverse impacts on firms would be felt through lower employment, downsizing and plant closures.

Long service leave which accrues in the regular way provides a significant benefit to employees and may provide some benefit to employers. There is an incentive for employees to remain with their existing employer and hence the employer may benefit from lower turnover. In contrast, portable long service leave does not provide a benefit to employers; it simply imposes a substantial cost burden. Portable long service leave schemes provide no incentive to employees to remain with their current employers. An employer may spend several years providing professional support and development to a worker only to lose them to another employer.

The ABS statistics cited in Ai Group's submission to the Victorian inquiry show that 25 per cent of employees have remained with the one employer for at least 10 years and a further 19 per cent have remained with one employer between five to 10 years. Workers are less likely to move between jobs as they age and the median age of workers is increasing in Australia. The ABS statistics demonstrate that there is no justification to extend portable long service leave entitlements into other industries.

Also, arguments by unions that portability of long service leave is warranted because of the alleged casualization of the workforce are false and misleading. The proportion of persons who are working on a casual basis has been reasonably stable for the past 17 years at 19-20 per cent of workers. In any event, long-term casuals are typically entitled to long service leave in the regular way. Also, workers employed on a casual basis are entitled to a 25 per cent loading to compensate for the inability of some casuals to not accrue long service.

With regard to the idea of adding an extra two days to the National Employment Standards (**NES**) annual leave entitlement in lieu of portable long service leave, as mentioned on page 178 of the Draft Report, Ai Group Members have widely expressed the view that this would not be practicable. Despite employers incurring the substantial cost of the additional NES annual leave entitlement, the unions would no doubt seek the retention of long service leave entitlements

through enterprise agreements and State and Territory laws.

Ai Group urges the Productivity Committee to emphatically reject any extension of portable long service leave entitlements in its Final Report.

4.2 Towards a national uniform long service leave standard

In Ai Group's March 2015 submission we argued in support of a national long service leave standard implemented through the NES. We continue to support such a standard as outlined in our submission.

The national standard should reflect the previous federal award long service leave standard, 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 is 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.

If a national standard is not achievable in the short term then the following arrangements should apply in the meantime:

1. It is very important that the existing long service leave provisions in the NES are not removed. Contrary to the view expressed by the Productivity Commission on page 181 of its Draft Report, the removal of these provisions would not reduce complexity for businesses. The removal of these provisions would significantly increase costs for employers in the metal, graphic arts, vehicle, food and other industries where the major pre-modern awards contained long service leave entitlements, and these provisions now operate as terms of the NES. If the NES provisions are removed, thousands of employers will lose the nationally consistent long service leave provisions which they are currently applying and be forced to apply inconsistent State and Territory laws. This would significantly increase their costs, particularly in respect of their employees in States and Territories where more generous long service leave laws apply (e.g. South Australia and Northern Territory).
2. State and Territory long service leave laws should be harmonised in key areas, including:
 - Allowing leave to be cashed out by agreement with the employer;
 - Allowing leave to be taken, by agreement with the employer, in any number of periods including single days;

- Implementing a consistent definition of “ordinary pay” for the payment of long service leave entitlements; and
 - Clarifying that overseas service is not counted.
3. Enterprise agreements need to be able to override State and Territory long service leave laws, subject to a no disadvantage test, as this is an effective mechanism for an enterprise to achieve nationally consistent provisions.

4.3 Public holidays

Ai Group supports Draft Recommendation 4.1 which would ensure that all award-covered employees are able to reach agreement with their employer to substitute a day proclaimed as a public holiday for an alternative day.

Ai Group also supports Draft Recommendation 4.2 which would amend the NES to ensure that employers are not required to pay for leave or additional penalty rates for any newly designated State and Territory public holidays.

4.4 Do workers get enough leave?

In Ai Group’s view, the answer to this question is clearly “Yes”. Accordingly, Ai Group opposes Draft Recommendation 4.3 which proposes that the Federal, State and Territory Governments periodically consider whether to extend the existing 20 day annual leave entitlement in the NES. There are no grounds for such an extension. The entitlement is already very generous, and many shift workers receive an additional week of annual leave.

4.5 Sick and annual leave for casual workers

On page 197 of the Draft Report, the Productivity Commission has requested information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (e.g. personal/carer’s leave). If any arrangement like this was to be implemented, it should only operate by agreement between the employee and the employers as there would be a significant administrative burden for the employer.

Issues like this are perhaps best addressed through Individual Flexibility Arrangements (IFAs) where the parties can ensure that the interests of both parties are protected. To ensure that IFAs are able to legitimately deal with this issue, there would be merit in adding “casual loadings” to the list of items in the model award flexibility clause in awards and the model flexibility term in the *Fair Work Regulations 2009*.

4.6 Major drafting problems with the leave provisions of the NES which are creating huge problems for employers

There are some major drafting problems with the personal/carer's leave and annual leave provisions of the FW Act. These issues have huge cost implications for employers and we urge the Productivity Commission to recommend the necessary changes as outlined below.

1. Accrual of personal /carer's leave

The 11 May 2015 decision of a Full Bench of the FWC in [RACV v ASU](#) [2015] FWCFB 2881 is causing considerable concern and uncertainty for employers of employees whose 38 ordinary hours are structured on the basis of 8, 10 or 12 hour days or shifts.

The interpretation of s.96 of the FW Act adopted by the Full Bench in the decision conflicts with the interpretation widely adopted by employers regarding personal/carer's leave accruals. The interpretation also conflicts with a number of previous FWC decisions.

Section 96 states:

Entitlement to paid personal/carer's leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

Ai Group's understanding of s.96 is that, for example, an employee working an average of 38 ordinary hours per week on the basis of 12 hour shifts would be entitled to 76 hours of personal/carer's leave per year, not 120 hours of leave. The 10 day entitlement in s.96(1) of the Act needs to be read in conjunction with the accrual provisions in s.96(2). The Explanatory Memorandum for the *Fair Work Bill* supports this interpretation. It states:

"The concept of an employee's ordinary hours of work is central to the paid personal/carer's leave entitlement as it determines the rate at which the entitlement accrues and also the entitlement to payment when leave is due.

Therefore, a full-time employee who works 38 hours a week over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works 38 ordinary hours over four days per week. Over a year of service both employees would accrue 76 hours of paid personal/carer's leave."

Contrary to the above explanation and the understandings when the FW Act was being developed, in the *RACV* case the Full Bench decided that the reference to “10 days” in s.96 should be given its “ordinary meaning” consistent with the union’s submissions.

The issue came up in the earlier case of [AWU v BP Refinery](#) [2012] FWA 3730 and, in that matter, Deputy President Asbury of the FWC decided that s.96 is to be interpreted in the manner contended by Ai Group rather than the interpretation pursued by the union.

The issue came up again in [ASU v Hobson Bay City Council](#) [2013] FWC 10161. In this case, Commissioner Wilson cited the decision of Deputy President Asbury in *AWU v BP Refinery* and adopted the same principles. The decision of Commissioner Wilson was upheld on appeal by a Full Bench of the Commission ([\[2014\] FWCFB 2823](#)).

When the FW Act was being developed there was considerable discussion about how the personal/carer’s leave entitlements in the NES should be expressed in the Act. In its submissions at the time, Ai Group urged the previous Labor Government to express personal/carer’s leave entitlements in the NES in terms of hours rather than days. The Government chose to continue to express the entitlement in terms of days but responded to Ai Group’s concerns by inserting wording into the Explanatory Memorandum (see above) to clarify that the entitlement for an employee working 38 ordinary hours per week is 76 hours per year regardless of the pattern of hours over which a 38 hour week is arranged.

As the situation now stands there are two inconsistent Full Bench decisions of the FWC on this issue. Neither of those decisions take priority over the other and both were made in the context of settling disputes that arose about specific provisions in each organisation’s enterprise agreement.

Ai Group disagrees with the interpretation adopted by the Full Bench in the *RACV* case. The interpretation conflicts with the decisions of the FWC in the other cases referred to above and it conflicts with the understandings when the FW Act was being developed.

Section 96 of the FW Act needs to be amended to clarify the correct interpretation and to overcome the decision of the FWC in the *RACV* case.

2. Leave accruals during workers’ compensation absences

Section 130 of the FW Act deals with whether or not an employee is entitled to accrue annual leave and personal/carer’s leave during a workers’ compensation absence. The recent decision of the Full Federal Court in [Anglican Care v NSW Nurses and Midwives' Association](#) [2015] FCAFC 81 has interpreted s.130 of the FW Act in a problematic manner for employers.

Subsection 130(1) of the Act provides that generally employees are not entitled to take or accrue leave under the NES during a workers’ compensation absence but s.130(2) goes on to state that an employee is not prevented from taking or accruing leave under the NES, “*if the taking or accruing of the leave is permitted by a compensation law*”.

The arguments in the case revolved around the meaning of the word “*permitted*” in s.130(2). Prior to this Full Federal Court decision, Ai Group, the Fair Work Ombudsman (**FWO**) and most other parties interpreted s.130(2) to mean that where the relevant workers’ compensation legislation is silent on leave accruals, then leave does not accrue. The basis for this interpretation was a series of Court and Commission decisions interpreting the word “*permits*” in other legislative provisions to mean expressly permitting or authorising, not simply being silent on the relevant issue.

In the *Anglican Care* case, the Court has interpreted s.130 of the Act to mean that an employee is entitled to accrue annual leave or personal/carer’s leave under the NES unless the relevant State, Territory or Commonwealth workers’ compensation law expressly states that such leave does not accrue. None of the workers’ compensation laws expressly state that leave does not accrue during a workers’ compensation absence and therefore the Court has decided that leave accrues.

The Federal Court’s decision conflicts with the apparent intention of the FW Act, and conflicts with a key recommendation (Rec. 2) of the 2012 Fair Work Act Review.

The *Fair Work Amendment Bill 2014*, which is currently before the Senate, would repeal s.130(2) of the FW Act. If the Bill is passed, annual leave and personal/carer’s leave would not accrue during future workers’ compensation absences. We urge the Productivity Commission to support this legislative amendment in its Final Report.

3. The taking of annual leave

The decision of the Full Federal Court in [*Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union*](#) [2015] FCAFC 100 has interpreted s.90(2) of the FW Act in a manner which conflicts with the apparent intention of the Act, and conflicts with a key recommendation (Rec. 6) of the 2012 Fair Work Act Review.

The Court decided that s.90(2) of the *Fair Work Act* is to be interpreted to mean that annual leave on termination of employment is to be paid at a rate which reflects the amount that would have been payable to the employee if the annual leave had been taken. In many cases this will be a higher rate than the base rate of pay, e.g. if the employee is entitled to leave loading or a car allowance during a period of annual leave that is taken.

The Federal Court’s decision means that the provisions in many awards and enterprise agreements which specify that leave loading is not payable on termination of employment will generally be invalid and inoperative (although the specific terms of any provision would need to be considered).

The *Fair Work Amendment Bill 2014*, which is currently before the Senate, would amend s.90 of the *Fair Work Act* to provide that an employer must pay an employee on termination not less than the base rate of pay for the employee’s untaken annual leave. We urge the Productivity Commission to support this legislative amendment in its Final Report.

5. Unfair dismissal

Ai Group concurs with the Productivity Commission's findings that further changes to the unfair dismissal laws are needed to:

- Prevent spurious claims resulting in financial settlements by introducing more effective upfront filters that focus on the merits of claims; and
- Prevent the FWC favouring form over substance when determining unfair dismissal claims.

5.1 Lodgment fees

The Productivity Commission has sought further views on possible changes to lodgment fees for unfair dismissal matters.

The application fee for an unfair dismissal matter is very low and should be increased to at least \$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.

The Productivity Commission has suggested that an additional fee could apply if the matter proceeds to arbitration. Ai Group supports this approach provided that the additional fee is paid by the applicant.

5.2 Consideration of applications “on the papers” or via a more merit focused conciliation process

Draft Recommendation 5.1 in the Draft Report would provide the FWC with greater discretion to consider unfair dismissal applications “on the papers” prior to conciliation, or alternatively would introduce a more merit focused conciliation process. These two proposals are not mutually exclusive and both have merit.

The proposal to give the FWC greater discretion to determine matters “on the papers” has some similarity to Ai Group's proposal, set out in our March 2015 submission, for jurisdictional issues relating to unfair dismissal matters to be dealt with separately and prior to the substantive issues. Such an approach would improve the cost effectiveness and efficiency of the unfair dismissal system.

5.3 The balance between procedural and substantive issues

Ai Group supports the apparent intent of Draft Recommendation 5.2 which would ensure that an employee could only receive compensation if they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct. Procedural errors by an employer would not result in reinstatement or compensation but could, at the discretion of the FWC, lead to either counselling or education of the employer, or financial penalties.

It is not clear from the Draft Recommendation who would do the counselling or education. This is a role perhaps more aligned with the FWO's functions than the FWC's. Also, the maximum penalty would need to be imposed by a court as the FWC cannot exercise judicial powers. The maximum penalty should be set at a reasonable level (e.g. \$5,000). An excessive penalty would discourage small businesses from taking on new staff.

Consideration should be given to how this recommendation would operate in respect of redundancy matters. It is not unusual for an unfair dismissal application to be pursued when an employee is made redundant. If the termination of employment constitutes a "genuine redundancy" (as defined in s.389 of the FW Act), the termination is excluded from the unfair dismissal laws (see s.385(d)). However, if the termination is not a "genuine redundancy", for example because the employer did not redeploy the employee in circumstances where it would have been reasonable to do so, the employee can currently pursue an unfair dismissal claim.

As argued in Ai Group's March 2015 submission, the definition of "genuine redundancy" in s.389 of the FW Act needs to be amended. Section 389(2) of the FW Act imposes an excessively onerous obligation upon an employer to search for redeployment opportunities, both within the employer's business and within "associated entities". The practical operation of s.389(2) was considered by a Full Bench of Fair Work Australia in *Ulan Coal Mines Limited v Honeysett & Ors* [2010] FWA 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 of 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 a 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; not associated entities.

5.4 The removal of reinstatement as the primary remedy

Ai Group supports Draft Recommendation 5.3 that the emphasis on reinstatement as the primary remedy under the unfair dismissal laws should be removed.

As has been identified by the Productivity Commission in its Draft Report, compensation is more commonly awarded as a remedy, as opposed to reinstatement. In many instances reinstatement is not practicable because the dismissal has caused the employment relationship to break down.

The FW Act ought to be amended to remove the emphasis on reinstatement to enable the FWC to freely determine whether reinstatement or compensation is more appropriate in circumstances where a dismissal is unfair.

5.5 Small Business Fair Dismissal Code

Ai Group does not support Draft Recommendation 5.4 which would remove the Small Business Fair Dismissal Code, conditional on the other recommended changes to the unfair dismissal laws being implemented.

In Ai Group's experience most unfair dismissal claims pursued against small employers do not succeed and the Fair Dismissal Code has had an important role to play in this regard. While it is easy to point to a small number of cases where a dismissal by a small employer has been held to not be consistent with the Code, in the vast majority of cases the Code has not been problematic.

The Code lowers the procedural hurdles for a small business to overcome when dismissing an employee. This is appropriate because small businesses do not typically have access to dedicated human resources staff. To the extent that there are any deficiencies in the Code, these should be addressed through amending the Code, not abolishing it.

5.6 Civil penalty for lawyers and paid agents who encourage speculative applications

A civil penalty should apply in circumstances where a lawyer or paid agent encourages a person to pursue a speculative application or one with no reasonable prospects of success. Given the high incidence of payment of "go away" money, lawyers and paid agents have a significant financial incentive to encourage the pursuit of speculative applications, and this needs to be addressed.

The former *Workplace Relations Act 1996*, at s.680, provided for a civil penalty to be imposed on a lawyer or paid agent who encouraged a speculative application or an application with no reasonable prospects of success in relation to unlawful termination claims. The maximum penalty was \$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 claims.

6. The general protections

The general protections in the FW Act are becoming an ever increasing burden on employers. The extremely wide scope and uncertain nature of the provisions has created substantial risks for employers and a major barrier to effectively managing their businesses. It is vital that changes are made to implement a more balanced regime of protections.

In order to determine what changes should be made to the laws, it is important to understand some basic facts about how the laws have developed. The FW Act cobbled together a number of previously separate laws and called the combined set of new laws the "General Protections". This was not a sound approach to take when drafting the FW Act because the previous laws were quite different; they had different inclusions, exclusions and qualifications; some had a reverse onus of proof and others did not; some had a "sole and dominant reason test" and others did not; some had a cap on compensation and others did not.

The previously separate laws under the *Workplace Relations Act 1996* which were cobbled together as the general protections in the FW Act included:

- The unlawful termination provisions in Part 12, Division 4, Subdivision C of the *Workplace Relations Act 1996*;
- The freedom of association provisions in Part 16 of the *Workplace Relations Act 1996*; and
- The sham contracting arrangements provisions in Part 22 of the *Workplace Relations Act 1996*.

The former unlawful termination laws have been incorporated into Division 5 (ss.351 and 352) and Division 8 (ss.365-378) of Part 3-1 (General Protections) of the FW Act.

The former freedom of association laws have been incorporated into Division 3 (ss.340-345), Division 4 (ss.346-350), Division 5 (ss.353-356) and Division 7 (ss.360-364) of Part 3-1 (General Protections) of the FW Act.

The former sham contracting laws have been incorporated into Division 6 (ss.357-359) of Part 3-1 (General Protections) of the FW Act.

When analysed in the above light, the deficiencies in the general protections laws, including the illogical approach to drafting that was taken, can be readily seen. This is discussed in more detail in the subsections below.

6.1 General protections claims involving dismissal

As explained above, the provisions of the general protections relating to dismissals (Division 5 (ss.351 and 352) and Division 8 (ss.365-378) of the FW Act) were derived from the former unlawful termination laws (Part 12, Division 4, Subdivision C of the *Workplace Relations Act 1996*).

The unlawful termination provisions were introduced in 1993 at the same time as the unfair dismissal provisions via the *Industrial Relations Reform Act 1993*, and both sets of provisions were located in the same part (Part VIA) of the *Industrial Relations Act 1988*.

Between 1993 and 2009, the unfair dismissal provisions and the unlawful termination provisions contained the same exclusions (e.g. for short-term casuals, fixed term employees, fixed task employees, high-income award-free employees, etc) and had the same cap on compensation of six months' pay.

There is no rational reason why the exclusions and the compensation cap under the unfair dismissal laws should not apply to general protections matters involving dismissal. The absence of such provisions is causing many of the current problems because persons who wish to challenge their dismissal are encouraged to pursue a general protections claim rather than an unfair dismissals claim. The general protections are very obviously undermining the unfair dismissal regime. This needs to be addressed without delay.

A largely similar list of exclusions to those under the unfair dismissal provisions and the unlawful termination provisions of the *Workplace Relations Act 1996* is included in s.789 of the FW Act, but these provisions have very limited application; they apply only to unlawful termination claims pursued by employees of non-Constitutional corporations.

The following changes to the FW Act are essential:

- The same exclusions in ss.382, 383 and 384 of the unfair dismissal laws should apply to general protections matters involving dismissal; and
- Consistent with Draft Recommendation 6.4 in the Draft Report, the six month cap on compensation in s.392 of the FW Act for unfair dismissal claims should apply equally to general protections claims involving dismissal.

Further, a civil penalty should apply in circumstances where a lawyer or paid agent encourages a person to pursue a speculative application or one that has no reasonable prospects of success. Given the high incidence of payment of “go away” money, lawyers and paid agents have a significant financial incentive to encourage the pursuit of speculative applications, and this needs to be addressed. The former *Workplace Relations Act 1996*, at s.680, provided for a civil penalty to be imposed on a lawyer or paid agent who encouraged a speculative application or an application with no reasonable prospects of success in relation to unlawful termination claims. The maximum penalty was \$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 general protections claims.

6.2 Reverse onus of proof

The “reverse onus of proof” in s.361 of the FW Act makes it very easy for persons to pursue general protections applications regardless of the validity, reasonableness or prospects of success of their claim.

We note what the Productivity Commission has said about the reverse onus of proof in its Draft Report. If the Commission is not prepared to recommend the abolition of the reverse onus of proof for all general protections matters, we urge the Commission to recommend its abolition for general protections matters involving dismissal. Similar to the list of exclusions and the compensation cap, the reverse onus of proof is operating to encourage persons to pursue general protections claims rather than unfair dismissal claims, and undermining the operation of the unfair dismissal laws.

6.3 Discovery processes

Ai Group supports Draft Recommendation 6.1 which would align the discovery processes used in general protections cases with those provided in the Federal Court’s Rules and Practice Note 5.

6.4 Tightening the meaning and application of “workplace right”

Ai Group supports Draft Recommendation 6.2 which would modify s.341 of the FW Act to tighten the meaning and application of a “workplace right”, including:

- More clearly defining how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person’s employment; and
- Requiring that complaints be made in good faith, and that the FWC decide this via a preliminary interview with the complainant prior to any conference being convened.

6.5 Frivolous and vexatious complaints

Ai Group supports the apparent intent of Draft Recommendation 6.3 which would introduce exclusions for complaints which are frivolous or vexatious. Subsection 611(2) allows costs orders to be made where an application to the FWC (including a general protections application) is made vexatiously or without reasonable cause, or has no reasonable prospects of success.

The concepts of “frivolous” and “vexatious” have been interpreted by the FWC and its predecessors as imposing a very high bar. Therefore, in addition to retaining s.611, the former Labor Government inserted s.400A into the unfair dismissal laws from 1 January 2013 consistent with a recommendation of the 2012 Fair Work Act Review. Section 400A gives the FWC wider powers to award costs against parties who act unreasonably in unfair dismissal matters. A similar provision should be inserted into the general protections.

Also, the changes proposed in section 6.1 above would assist in discouraging frivolous, vexatious and unmeritorious complaints.

6.6 Improvements to reporting arrangements

Ai Group supports Draft Recommendation 6.5 which would require the FWC to report more information on general protections matters.

7. Anti-bullying

Ai Group’s views on the anti-bullying provisions of the FW Act are set out in subsection 13.6 of our March 2015 submission. Essentially, our views are that, to date, the anti-bullying laws have not had an adverse impact on most businesses.

The Draft Report does not recommend any changes to the anti-bullying laws.

A post-implementation review of the laws is currently being conducted, with submissions due on 14 October 2015.

8. Minimum wages

Ai Group welcomes the important discussion of minimum wages in the Draft Report. In particular we support the focus on the risks of disemployment that can be associated with minimum wage increases.

These risks, which are likely to be borne disproportionately by underemployed employees; the unemployed; and those with marginal attachment to the workforce, have not been given sufficient weight in minimum wage deliberations to date. The deliberations have instead focussed upon the living standards of people in paid employment and have given too little emphasis to the risks that the quantity of labour available in the economy may be lower than otherwise when minimum wages rise.

These risks are transmitted to the underemployed, the unemployed, and those with marginal attachment to the workforce through the stifling impacts of higher wages and on-costs on those employers who would otherwise offer more hours of work.

An area that might have been considered in the Commission's discussion of minimum wages is the range of impacts on small businesses and their owners when the business is unable to pass on cost rises in the market. For example, increases in minimum wages may adversely impact more or less immediately on low-margin businesses in industries exposed to international competition. In many cases, the business owner may absorb short and medium-term impacts of wages rises with a loss of business income.

Ai Group supports Draft Recommendation 8.1 which proposes that in making its annual wage review decision, the FWC should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.

We propose that in refining this recommendation the Productivity Commission reinforces its argument that employment risks can manifest themselves not just in employment and unemployment but also in the quantity of labour available to underemployed workers.

Further we propose that the Commission also recommend that the analytical framework for the FWC's annual wage review decisions be broadened so that impacts of wage rises on the business income of small business owners is systematically considered.

9. Variations from uniform minimum wages

9.1 Temporary relief

Ai Group supports Draft Recommendation 9.1 which would enable the FWC to make temporary variations in award wages in "exceptional circumstances" after an annual wage review has been completed.

Ai Group also proposes that the FW Act be amended to enable the FWC to grant an exemption to an individual employer or groups of employers, on application, who do not have the capacity to pay an annual wage review increase. This capacity was available for many years through National Wage Decisions of the Australian Industrial Relations Commission (**AIRC**) but is not available under the FW Act. The former Incapacity to Pay Principle of the Wage Fixation Principles of the AIRC stated:

“ECONOMIC INCAPACITY

Any respondent or group of respondents to an award may apply to reduce and/or postpone the application of any increase in labour costs determined under the principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested.”

9.2 Junior pay rates

Ai Group agrees with the views of the Productivity Commission that there are “good reasons for retaining some form of discounted wages for young workers”.¹ Ai Group also supports the conclusions reached by the Productivity Commission on pages 355 and 356 of the Draft Report that without junior rates of pay:

- “In most cases employers would be likely to employ adults rather than young workers”;
- “Many young workers would be priced out for the labour market, foregoing the benefits that some early employment, even on a part-time basis, can bring”;
- Some young people may cease continuing education, and thereby “potentially hampering their future employment prospects”;
- “Many young people, particularly teens, are not as reliant on wages as are adults”.

In addition, it is generally accepted that younger workers, aged between 15 and 20, lack the maturity of older workers and have less capacity to enter the workforce with the same levels of work experience and training as workers aged 21 and older. This has a direct impact on productivity and efficiency of younger workers. This is acknowledged by the Productivity Commission in section 9.2 of the Draft Report.

In 2013, Ai Group participated in a major Junior Rates Case before the FWC. The case was initiated by the Shop, Distributive and Allied Employees Association which sought an increase in the rates of pay for 20 year olds covered by the *General Retail Industry Award 2010*. Many of the points raised by the Productivity Commission report with respect to the appropriateness of a junior rate of pay were also raised by Ai Group in its [submission](#) in the case.

¹ Draft Report, page 355.

With regard to the Information Request on page 359 of the Draft Report, Ai Group opposes the structure of junior rates being changed to a model other than age, such as experience or competency or a combination of the two. Any move away from age-based junior rates would undoubtedly disadvantage young people in the employment market.

9.3 Arrangements for apprentices and trainees

A Full Bench of the FWC in 2013 significantly increased apprentice minimum rates of pay within those modern awards which contained apprentice wages. For example in the manufacturing industry an increase of around \$58 per week was awarded to some first year apprentices commencing their apprenticeship on or after 1 January 2014. In the hairdressing industry, apprentice rates of pay increased by more than \$147 per week for new apprentices.

Ai Group, in its submissions to the Full Bench presiding over the Apprentices' Case, warned that such significant increases in apprentice rates of pay would discourage employers from employing new apprentices, thereby resulting in falling commencements of apprenticeships.² Ai Group's concerns appear to have materialised, with the National Centre for Vocational Education Research detailing in its latest annual report that apprenticeship commencements in 2014 decreased 21.9 percent to 192,000, from 245,800 in 2013.³

A more coordinated policy approach with respect to payments or incentives provided to apprentices and their employers by Federal and State Governments, such as Trade Support Loans and Living Away From Home Allowance, is desirable.⁴ Government incentives, such as those detailed in Table 9.3 of the Draft Report, are an important and effective mechanism for increasing the number of apprentices and achieving higher completion rates.

Ai Group supports Draft Recommendation 9.2 for a comprehensive review into Australia's apprenticeship and traineeship arrangements. Ai Group has been an active participant in past reviews of the apprenticeship and traineeship systems and would have significant involvement in any subsequent reviews undertaken by the Australian Government.

10. Measures to complement minimum wages

Ai Group commends the Commission for opening up the debate about the relative merits of income support arrangements (including possible earned income tax credits) and adjustments to minimum wages in achieving some of the objectives sought from Australia's minimum wage arrangements.

² Australian Industry Group, Submission to the Fair Work Commission in reply to 'common claims' before the Apprentices, Trainees and Juniors Full Bench in the Fair Work Commission, 28 February 2013.

³ NCVER 2015, Australian vocational education and training statistics: apprentices and trainees 2014 — annual, NCVER, Adelaide.

⁴ See Draft Report, Table 9.3.

For many years Ai Group has argued that using changes to minimum wages as a means of improving household income distribution and improving living standards for the low paid is likely to be of considerably higher social and economic cost than fine-tuning income support arrangements. Admittedly income support arrangements have budgetary costs and their financing would require higher taxation and an associated increase in deadweight losses. Nevertheless, the use of minimum wage increases as a means of improving household income distribution and improving living standards of the low paid also has a number of important drawbacks. These include:

- The risks of adverse impacts (in terms of unemployment and underemployment) on low-income people;
- The degree to which increases in minimum wages are dispersed across the household income distribution; and
- The wedge between the additional costs imposed on employers (which are larger than the increased wage rates but also include extra costs such as payroll tax, workers' compensation premiums and superannuation payments) and the actual change in disposable incomes of low income people (which are less than the increased wages paid due to additional income tax liabilities and reduced income support entitlements). Thus for example, an employer may have to pay around \$1.20 to deliver an increase in household disposable income of a minimum wage employee of \$0.60 after taking into account loss of family tax benefit and additional income tax.

We understand that complementary measures are not without complications but urge close consideration of them.

A particular area of concern and one that is acknowledged in the Draft Report is the impacts on work incentives of the income-tested withdrawal of complementary measures. Already our existing income support system in combination with our income tax arrangements can impose overlapping and interacting income tests to produce very high effective marginal tax rates. These can be a disincentive to work and can also adversely impact on employment costs and labour turnover.

The design of any complementary measures would need to be closely integrated with existing income support and income tax arrangements to ensure that additional complications from further income tests were kept to a minimum.

In this context we have reservations about the Commission's argument that, while recipients of direct income support payments may feel stigmatised, people with an entitlement to earned income tax credits (EITC) would not. We doubt this would be the case for a couple of reasons.

Firstly, Australia has a relatively high tax-free threshold (currently \$18,200) and in addition the Low Income Tax Offset operates to further reduce tax liabilities for low income earners. Currently an individual with a taxable income of a little over \$20,900 would have no income tax liability and,

to be effective, an EITC would have to be delivered as a direct payment. Similarly people with incomes above this level, but with income tax liabilities less than the amount of their EITC entitlement, would also need to receive the residual EITC as a direct payment. Many of the people that complementary measures would be aimed at (part-time workers for instance) would have incomes in these ranges.

Secondly, partly because of the extensive familiarity with direct payments of Family Tax Benefits, there is in any case little reason to think that the level of stigma would be significantly different if complementary measures were construed as tax credits or as direct payments.

For these reasons and for administrative efficiency, including in the management of effective marginal rates of withdrawal, it may be preferable for complementary measures to be in the form of direct payment.

11. Role of awards

Ai Group agrees with the Productivity Commission that Australia's award system requires repair, not replacement.

In Ai Group's March 2015 submission, we argued for a major simplification of awards. Experience shows that this will only occur with a great deal of direction from Parliament about what can and cannot be included in awards.

The simpler the content of 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 122.

While it is true that the number of "award reliant" workers is decreasing, awards remain important to a much broader cross section of the workforce. For example, awards apply to workers who receive over award payments and are not covered by an enterprise agreement. Also the Better Off Overall Test ensures that awards play an integral role in enterprise bargaining. This is acknowledged by the Productivity Commission in its Draft Report.

It is important that awards are flexible so they do not impose barriers to productivity and competitiveness, and so that employers and employees are able to reach agreement on arrangements which suit their unique needs and preferences.

The level of complexity in the award system adds significant complexity to the enterprise bargaining system through the application of the Better Off Overall Test.

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.

12. Repairing awards

Chapter 12 of the Draft Report considers mechanisms to “repair awards”

12.1 Award assessments

The Draft Report’s commentary and recommendations for repairing awards are substantially framed around the establishment of a Minimum Standards Division of the FWC. Ai Group’s views on this matter are set out in Chapter 3 of this submission.

Ai Group supports the FWC commissioning more of its own research but to do so the Federal Government would need to increase funding to the FWC. Ai Group, along with ACCI, the ACTU, ACOSS, the Federal Government, and State Governments, are represented on the FWC’s Minimum Wage Research Group which considers research proposals and oversees research which has been commissioned by the FWC. There is no shortage of worthwhile research proposals but over recent years funding has only been available for a relatively small number of research projects.

The Draft Report proposes that a wider range of parties become involved in award matters. Ai Group does not oppose this idea. In fact parties of all types are free to participate in annual wage reviews and award reviews (e.g. see ss.289 and 590 of the FW Act). However, the reality is that few parties are able to devote the necessary resources to play a significant role in major FWC cases – many of which continue for months or even years. Ai Group, other employer representatives and the unions devote huge resources to award cases and, if we did not, the FWC would not have before it the detailed evidence and arguments that it needs to make sound decisions.

Ai Group has played a leading role in the ongoing evolution of the award system in Australia, including in:

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

The resource burden upon Ai Group of the 4 Yearly Review is highlighted by the fact that in the 12 month period between 1 July 2014 and 30 June 2015, Ai Group participated in at least 125 days of FWC conferences and hearings and filed thousands of pages of submissions and evidence relating to the Review. The workload has not decreased since 1 July, and is set to continue at similar levels until at least the end of 2016.

Ai Group is taking the lead role amongst employer groups during the 4 Yearly Review. The Review involves individually reviewing each of the 122 modern awards, as well as providing the vehicle for a large number of major cases (common issues cases) dealing with entitlements across the award system. The common issue cases which are underway or scheduled during the Review include:

- ***Annual Leave Common Issue Case***

A Full Bench of the FWC handed down a decision in this case on 11 June 2015. Ai Group was successful in convincing the FWC to give employers new rights to direct employees to take excessive accrued annual leave, and to allow cashing-out of annual leave for award-covered employees by agreement with their employer. The decision provides important new rights for employers and important flexibilities for employers and employees. The specific variations to each award have not yet been resolved.

- ***Award Flexibility Common Issues Case***

A Full Bench of the FWC handed down a decision in this case on 16 July 2015. Ai Group was successful in convincing the FWC to insert time-off-in-lieu of overtime provisions into nearly all modern awards that contain overtime provisions. The specific variations to each award have not yet been resolved.

- ***Casual Employment Common Issue Case***

This case will be heard before a five-Member Full Bench of the FWC. The unions are pursuing numerous claims to restrict flexibility and increase employers' costs associated with employing casuals. Ai Group is strongly opposing the unions' claims, and is also seeking to increase flexibility for employers and reduce red tape. Submissions and evidence will be filed in October this year before hearings commence in early 2016.

- ***Part-time Common Issue Case***

This case will be heard in conjunction with the Casual Employment Common Issue Case. The unions are pursuing claims to give part-time employees more entitlements. Ai Group is strongly opposing the unions' claims and is seeking to increase flexibility regarding part-time employment.

- ***Family and Domestic Violence Clause Common Issue Case***

The ACTU is seeking the inclusion in all awards of a clause that would provide, amongst other aspects, an entitlement to up to 10 days of paid leave per year to an employee who experiences family violence. Ai Group has filed initial submissions opposing the ACTU's claim on the basis that the FWC does not have the jurisdiction to grant it. In response to Ai Group's jurisdictional submissions, the ACTU dropped some elements of its claims (e.g. a requirement for every employer to appoint a domestic violence contact officer) but the unions are proceeding with their main claim for 10 days of paid leave. A hearing was held on 13 August 2015 to deal with the jurisdictional issues and the Full Bench has reserved its decision.

- ***Family Friendly Work Arrangements Common Issues Case***

The ACTU is seeking an absolute right for an employee to return to work on a part-time basis after parental leave. This case also includes a claim for additional paid leave to attend pre-

natal, pre-adoption or permanent care order appointments. Ai Group has filed initial submissions opposing the ACTU's claim on the basis that the FWC does not have the jurisdiction to grant it. A hearing was held on 13 August 2015 to deal with the jurisdictional issues and the Full Bench has reserved its decision.

- ***Accident Make-up Pay Case***

This case involved a review of the accident make-up pay provisions that were included in modern awards on a transitional basis until 31 December 2014. The case also included union claims to insert national accident pay entitlements applicable to all employees covered by about 40 modern awards. A number of decisions have been handed down by the Full Bench which has heard the case, the most recent one in August 2015.

- ***District Allowances Case***

This case is related to the Accident Make-up Pay Case discussed above. The hearings were adjourned earlier this year to await the outcome of a relevant Federal Court case.

- ***Public Holidays Common Issues Case***

This case involves a review of public holiday provisions in modern awards including various union claims for new entitlements. Ai Group is strongly opposing the unions' claims. It is anticipated that these proceedings will commence in early 2016.

In addition to the above common issue cases, there is a major Penalty Rates Case underway involving a review of penalty rates in the fast food, retail and hospitality industries. Ai Group is representing fast food industry employers in this case.

Award changes can impose major cost increases and inflexibilities on employers and there is an ongoing need to reduce the existing regulatory burden imposed by awards. Therefore, it will always be important for Ai Group to play a major role in award cases.

Ai Group strongly supports the first dot point in Draft Recommendation 12.1 which would remove the requirement for the Commission to conduct 4 Yearly Reviews. This can be easily done by repealing s.156 of the FW Act. Sections 157, 158 and 160 should be retained in the Act to empower the FWC to vary awards at any time, on its own motion or on application by a relevant party to:

- Ensure that awards continue to meet the modern awards objective (s.157); and
- Remove ambiguity, uncertainty or errors (s.160).

The modern awards objective requires that modern awards be “stable”.⁵ In conflict with this objective, since 2008 the award system has been in a constant state of review with no end in sight. The abolition of 4 Yearly Reviews will further the modern awards objective.

12.2 Making awards easier to use

The Draft Report suggests that future reviews of awards should aim to:

- Improve the accessibility and ease of use of all awards;
- Promote interactive platforms to guide award users through award content;
- Consider other methods of providing support to users of awards, such as online chat functions, or award- and classification-specific pay calculators that calculate pay based on entered hours workers.

The accessibility and usability of awards have been improved significantly over recent years through the work of the FWC, the FWO, Ai Group and other employer representatives, and unions. Nonetheless continuous improvement in this area is important, particularly as technology develops.

Ai Group’s Workplace Advice Service provides advice and resources to member companies concerning awards. This includes telephone advice, interactive wage calculators, annotated guides to awards, and updates on award changes.

The FWO also regularly consults Ai Group regarding award interpretations.

12.3 Assessment of minimum wage rates and classifications in awards, including the complex and critical issues

With regard to Draft Recommendation 21.2, minimum wages are appropriately adjusted during annual wage reviews. Any increases to wages at other times should be required to meet the criteria in s.157(2) of the FW Act, that is:

- The variation must be justified by work value reasons (as defined in s.156(4)); and
- The variation must be necessary to achieve the modern awards objective (as set out in s.134).

“Work value” is an extremely important consideration in the making and varying of award minimum wages. If this requirement was removed, the safety net or minimum wages across awards could be distorted and destabilised. Since 1989, a vast amount of work has been done in achieving consistency and equity in the classifications and wage rates within and across awards.

⁵ See FW Act, s.134(1)(g).

The 1991 *National Wage Case Decision* (Print J7400) provides the following account of the lack of fairness which existed in award classification structures and wage rates prior to 1989 and the problems which such inequity caused. The extract also explains the structural efficiency exercise which was embarked upon from 1989 to address the problems (emphasis added):

"The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.

There is a further dimension to the problem. Employers have introduced and will continue to introduce wage relativities both as between employees employed under the same award and employees covered by other awards in a particular establishment. These relativities can vary from workplace to workplace and may bear no resemblance to the relativities set in the award or awards concerned."

The Commission noted that this situation had inevitably caused feelings of injustice leading to industrial disputation and "flow-on" settlements and:

". . . has also led to economically unsustainable general wage increases, particularly when attempts have been made to move away from a highly centralised system, which have severely affected the state of the national economy."

The Commission concluded that this situation had to be corrected; otherwise continuing instability within and between awards would seriously reduce the effect of moves to modernise those awards. Consequently it determined that:

". . . minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards".

The Commission stated in its August 1989 National Wage Case decision that its decision had to be read in conjunction with the August 1988 National Wage Case decision and the February 1989 Review decision. It also elaborated on what had been said in the February 1989 Review decision about the requirement to review relationships between classification rates and supplementary payments in minimum rates awards, stating:

". . . we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be \$356.30 per week with a \$50.70 per week supplementary payment. The minimum classification rate of \$356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established."

The outcomes of the abovementioned structural efficiency exercise are embedded in the wage rates and classification structures in modern awards. To a large extent modern award wage and classification structures still bear a relationship to the wage rate for a base tradesperson (C10) under the Metal Industry Award (now the Manufacturing Modern Award).

Moving away from the work value requirement would risk the reinstatement of the wage leapfrogging and inequity problems that existed prior to 1989. These problems have not existed since that time.

Ai Group does not agree with the view expressed by the Productivity Commission on page 440 that the work value requirements should be removed to enable the FWC to roll rarely used allowances into minimum wage rates. If an allowance is rarely used there can be no justification for extending that payment to all employees covered by the award.

The Productivity Commission on page 451 notes *"that the FWC should take a forensic approach to unemployment and business risks for different groups of awards, and be open to decreases (or slower increases) in wage rates if this is likely to preserve jobs"*. Ai Group agrees with this comment in the context of annual wage review outcomes. The existing "exceptional circumstances" provisions in s.287(3) are very restrictive and should be relaxed to give the Expert Panel more flexibility to award lower wage increases in sectors where jobs are at risk.

Also, as proposed in Ai Group's March 2015 submission:

- Section 284 of the FW Act should be amended to include the following additional factor that the Expert Panel should be required to 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".

In its Draft Report, the Productivity Commission has emphasized a number of factors it considers important in the setting of award minimum wages, including the extent to which award minimum wages are similar to those that would emerge if bargaining power between employers and employees were equal, and the level of wages provided by enterprise agreements.

Award minimum wages must not replace “bargained rates”. Award minimum wages represent a safety net. Therefore consideration of the level of “bargaining power” between employers and employees or the level of wages provided by enterprise agreements should not be a determinative factor in the setting of award minimum wages. It is important that award minimum wages are not set at a level which limits the scope or motivation for enterprise bargaining. Indeed s.134 of the FW Act (the modern awards objective) requires the FWC to consider the need to encourage collective bargaining when considering the terms and conditions of awards (s.134(b)). The FWC takes this factor into account in each annual wage review.

12.4 Assessments of conditions and entitlements in awards

As discussed in section 11 above, it is important that awards are flexible so that they do not impose barriers to productivity and competitiveness, and so that employers and employees are able to reach agreement on arrangements which suit their unique needs and preferences.

The conditions and entitlements in awards need to be much simpler. 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.

13. Penalty rates for long hours and night work

The Draft Report considers penalty rates for long hours and night work separately to penalty rates for weekend work. While the Draft Report suggests that penalty rates currently applicable to Sunday work in selected customer service industries should be reduced to reflect the Saturday rate, the Draft Report considers that penalty rates for long hours and night work are justified.

While Ai Group does not seek to argue that penalty rates for long hours and night work should be reduced across the board, some awards have excessive penalty rates for such work. For example, prior to the implementation of modern awards, the afternoon shift penalty in the glass industry was 15 per cent. During the award modernisation process, the AIRC decided to include the glass industry within the *Joinery and Building Trades Award 2010*. The effect of this was to impose a 50 per cent afternoon shift penalty on employers. This has had a direct effect on employment in the

industry with some companies reducing production in Australia and winding back or abolishing afternoon shift work.

The FWC 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.

Ai Group supports the views of the Productivity Commission expressed on pages 528 and 529 of Chapter 14 of the Draft Report with respect to section 134(1)(da) of the FW Act and the need for legislative amendment. In particular Ai Group supports the following comments made by the Productivity Commission on page 529:

“However, the FWC interprets its freedom as partial, noting that the modern award objective ‘requires additional remuneration for working on weekends’ ([2014] FWCFB 1996, para 295). The wording of the FW Act may contribute to the ambiguity by stipulating the ‘need to provide additional remuneration’. It would be unfortunate if this required the wider adoption of weekend penalty rates even in circumstances where the context of other industries did not require that. Legislative amendment appears necessary to achieve this.

It would be unfortunate if the existing framework for determining penalty rates were to spread throughout awards that currently do not have any, recognising that awards can provide compensation through average wage rates, rather than through special time-dependent wage rates.

If the Modern Awards Objective is not simplified more broadly (chapter 12), then there are grounds to amend the FW Act so that it is clear that the FWC would not be obliged to incorporate weekend penalty rates into all awards, taking account of the fact that awards should be seen as a package of benefits”

The most appropriate remedy to the problem identified by the Productivity Commission is to repeal s.134(1)(da) of the FW Act.

13.1 Reasonable additional hours

The Draft Report considers the notion of “reasonable additional hours”. This concept was the subject of a major AIRC test case in 2001-02⁶ in which Ai Group played a leading role in representing employers. After considering extensive evidence and submissions, the AIRC rejected the unions’ attempts to impose specific restrictions on working additional hours, in favour of a

⁶ *Working Hours Case 2002 114 IR 390*

model award clause setting out criteria against which reasonable and unreasonable hours could be assessed. The AIRC's reasonable hours clause was the basis for the reasonable additional hours provisions in the Australian Fair Pay and Conditions Standard in the *Workplace Relations Act 1996* (s.226(4)) and the reasonable additional hours provisions of the NES (s.62(2) and (3)). A similar concept has been adopted with the public holiday provisions of the NES (s.114(4)).

The reasonable hours provisions in the NES are well-understood and work effectively. Ai Group does not see a need for any additional guidelines.

14. Regulated weekend penalty rates for selected consumer services

14.1 Weekend penalty rates

Ai Group supports Draft Recommendation 14.1 which states:

"Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees"

Ai Group understands that the Productivity Commission, in its reference to the hospitality, entertainment, retail, restaurants and café industries, includes the fast food sector of the retail industry. This sector has its own modern award and we urge the Commission to expressly refer to the sector in the list of industries to which Recommendation 14.1 relates.

Ai Group is currently representing fast food employers in a major FWC case concerning the review of penalty rates in the *Fast Food Industry Award 2010*. Fast food industry employers are seeking a reduction in the Sunday penalty rate to align with the Saturday penalty rate; an outcome consistent with Draft Recommendation 14.1.

The evidence filed by the fast food employers in support of their case includes a [Fast Food Employee Survey](#) and a [Fast Food Employer Survey](#).

The *Fast Food Employee Survey 2015* reveals that:

- Most commonly employees are aged 15 years old (24.8%) while 54.5% are 16 years or younger and 81.6% are younger than 20 years.
- Just on three-quarters live with one or both of their parents (76.4%).

- 67.4% of employees identify as full-time students.
- Nearly all employees who are students attend their educational institutions on one or more week days (99.6%), while only 2.8% attend at some time on weekends.
- Most commonly employees work 1 to 10 hours per week (49.3%), while 82.3% work 20 hours or less per week.
- Those aged 16 and younger are slightly less likely to work on week days and slightly more likely to work on weekends.
- A majority of employees would prefer to work a mixture of week days and weekends (63.2%).
- For those who indicated a preference to work weekends (either as a mix with week days or weekends only), most prefer to work both Saturdays and Sundays (44.7%) while 28.6% prefer Saturday only and 26.7% prefer Sunday only.
- Of those who work on a Saturday, most commonly they work 6 hours or less (78.3%).
- Of those who work on a Sunday, most commonly they work 6 hours or less (80.4%).
- Most commonly, working on a Sunday either has *no impact* (49.5%) or *some negative impact* (37.5%) on spending time with family or friends.
- The most common reasons for choosing to work on Sunday over Saturday were that more friends are available to socialise with friends on Saturday rather than Sunday (50.4%), sporting commitments on Saturday (42.6%), a preference to spend time with family on Saturday (38.2%) and study commitments on Saturday (31.1%).

The *Fast Food Employer Survey 2015* reveals that most franchisees (67.4%) find it easy to get enough employees to work on a Sunday.

14.2 Preferred hours clause

The Productivity Commission seeks views on a “preferred hours” clause in modern awards which would only oblige employers to pay penalty rates when it requested an employee to work outside his or her nominated “preferred hours”. Ai Group would support this approach so long as it would only operate in circumstances where an employee prefers to work ordinary hours at times that would otherwise attract penalty rates, and would not operate to require that penalty rates be paid for ordinary hours worked during the spread of ordinary hours in the relevant award.

If a “preferred hours” clause was to be inserted into modern awards, the clause would need to provide sufficient certainty. For example, if the employee was able to unilaterally terminate a “preferred hours” arrangement this would significantly limit the uptake of such arrangements.

15. Enterprise bargaining

15.1 Undue emphasis on procedural requirements at the approval stage

Ai Group concurs with the Productivity Commission's view that there is currently an undue emphasis placed on procedural requirements when the FWC is determining whether to approve an agreement.

Accordingly, Ai Group supports Draft Recommendation 15.1 which would give the FWC greater discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement. This would include defects relating to Notices of Employee Representational Rights.

15.2 Pattern agreements and pattern bargaining

The Productivity Commission has sought feedback on whether there is a mechanism that would only restrain pattern bargaining where it is imposed through excessive leverage or is likely to be anti-competitive, while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.

Pattern bargaining is obviously anti-competitive where it is engaged in across an entire industry sector. Such pattern bargaining should be outlawed, despite the views of those with vested interests who negotiate and promote industry sector pattern agreements.

As highlighted by the Heydon Royal Commission into Union Governance and Corruption, many unions (and some other parties) derive very lucrative revenue streams (millions of dollars each year) from products that employers are forced to buy 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) under the terms of industry sector pattern agreements.

The supporters of industry sector 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 which result from the terms of industry sector pattern agreements. Further, in Ai Group's experience, a large proportion of the employers who sign pattern agreements do not do so because they perceive the agreements are in their interests, but rather because they perceive they have no other choice.

Industry sector pattern agreements are, in effect, a massive price-fixing mechanism to fix the price of labour across an industry sector. Such a mechanism is not in the community's interests and must be stamped out.

The Cole Royal Commission into the Building and Construction Industry recommended that a precondition for the approval of an enterprise agreement should be that the AIRC (now the FWC) is satisfied that the enterprise agreement is not a pattern agreement.⁷ At the time, Ai Group and other construction industry representatives did not support the recommendation because of the need to preserve the ability for head contractors to develop project-specific framework agreements 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. What was not sufficiently recognised at the time was that Commissioner Cole's recommendation could have been readily modified to only outlaw industry sector pattern agreements, and not project-specific framework agreements, rather than abandoning the proposal completely.

The following modified version of Commissioner Cole's proposal should be recommended by the Productivity Commission:

- Section 186 of the FW Act should be amended to require that before approving an enterprise agreement the FWC should be satisfied that the enterprise agreement is not an industry sector pattern agreement.
- An "industry sector pattern agreement" should be defined as follows:

An "Industry sector pattern agreement" is a pattern agreement that is published, distributed, promoted, pursued or agreed to by an industrial association (as defined in the FW Act), or related entity or agent of the industrial association, which is intended to apply to all or a substantial proportion of the employers operating in an industry sector. An "industry sector pattern agreement" does not include published drafting tips and guidelines which do not contain wage rates, wage increases or other substantive conditions of employment.

In addition to the above changes which deal with the approval of certain types of pattern agreements, changes are needed to provide more protection for employers faced with industrial action in pursuit of a pattern agreement, including the following:

- When dealing with an application for a protected action ballot order, the FWC should be required to be satisfied that none of the claims of the applicant union are part of a course of conduct which is pattern bargaining. This requirement applied under the *Workplace Relations Act 1996* (s.461(1)(c)) prior to the implementation of the FW Act.
- The changes proposed in the section 19 of this submission should be implemented.

⁷ Recommendation 4(a)

15.3 Non-permitted matters

On page 565 of the Draft Report the view is expressed that “no extra claims clauses” have no binding effect as a result of the *Toyota* decision of the Full Federal Court. It would be very beneficial if this was the case but, in Ai Group’s view, this is not an accurate description of the outcome of the case. The Court decided that the “no extra claims clause” did not prevent the employer reaching agreement with its employees on a formal variation to the agreement. However, in other respects, the Court did not question the validity of the clause and the impediments that it may impose on the employer in introducing workplace changes.

Consistent with the arguments in section 4.2 of Ai Group’s March 2015 submission, 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) 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*⁸ decision, that is, as “matters pertaining to the employment relationship”. This was the principle which applied between 1994 and 2009. Electrolux is a member of Ai Group and we funded the employer’s costs in the case given the importance of the case for all employers.

The experiences of employers since 2009 when the FW Act was introduced have clearly demonstrated that moving away from the *Electrolux* principle was a damaging step.

The FWC should not be able to approve an agreement unless it is satisfied that the agreement does not include any non-permitted matters.

Currently, agreements can deal with matters which are not permitted matters, so long as those matters are not “unlawful terms”. There are two particularly negative effects of this approach:

- Firstly, this approach leads to a great deal of uncertainty about the rights of employers and unions when industrial action is taken and/or the parties cannot agree on the content of the agreement; and
- Secondly, when the unions have a great deal of bargaining power the unions are able to pressure the employer into agreeing to highly restrictive and costly clauses, the content of which are, in many cases, not “permitted matters”.

Ai Group does not agree with the view expressed on page 565 of the Draft Report that reintroducing the longstanding former requirement that enterprise agreements only include “matters pertaining to the employment relationship” would impose a substantial burden on the

⁸ *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.

agreement approval process. This requirement applied prior to the FW Act and the benefits far outweighed any increased complexity. The FWC has a great deal of experience in determining which provisions are “matters pertaining to the employment relationship” and which are not. There are a large number of relevant Court and Commission decisions which have clarified this concept, including the *Electrolux* decision and many others that were handed down in the few years following the High Court’s decision.

15.4 Mandatory terms

Ai Group strongly supports Draft Recommendation 15.2. This recommendation would require that enterprise flexibility terms in enterprise agreements permit IFAs to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. This recommendation addresses the problem that is currently occurring of unions routinely blocking the inclusion in enterprise agreements of flexibility terms that provide any meaningful flexibility.

In addition, as argued in Ai Group’s March 2015 submission, a further mandatory term should be included in all enterprise agreements to ensure that employers have the right to manage their businesses in an efficient and productive manner, including introducing workplace changes. The term could be called a “Productivity Term”, a “Workplace Change Term”, a “Right to Manage Term”, or any other suitable title. The proposed wording for the relevant legislative provision is included in our March 2015 submission.

If an agreement does not include such a term, a model term in the Regulations should be taken to be a term of the agreement. Any other term of the agreement should be deemed to have no effect to the extent that it is inconsistent with the “Productivity Term” in the agreement.

Some employers faced with an excessive amount of union power, have unfortunately lost the right to manage their businesses efficiently and productively. The proposed mandatory term would go a long way towards giving such a right back to these employers.

Employers would still be required to implement workplace changes in a consultative manner, and the dispute settlement term in the agreement would apply if a dispute arose over the introduction of workplace changes.

These proposed changes are the interests of employers, employees and the broader community.

15.5 Duration of enterprise agreements

Ai Group supports Draft Recommendation 15.3 which would allow an enterprise agreement to specify a nominal expiry date of up to five years from the date of approval of the agreement, or exceeding five years for a greenfields agreement if the project exceeds five years and the FWC is satisfied that the longer period is justified.

15.6 Promotion of productivity improvements through enterprise bargaining

Ai Group does not agree with Draft Finding 15.1 in the Draft Report that the case for imposing a statutory requirement for employers and employees to discuss productivity improvements as part of the bargaining process is not strong.

Ai Group's view on this issue is set out in the following extract from Ai Group's submission to the Senate Committee inquiry into the *Fair Work Amendment (Bargaining Processes) Bill 2014* that is currently before Parliament:

"A requirement that productivity improvements be discussed during bargaining would be worthwhile to focus attention on the importance of improving productivity. Some unions have adopted the practice of refusing to discuss productivity improvements during the bargaining process viewing bargaining as a "one way street" where employees' entitlements are improved without any offsets.

Ai Group is concerned that, despite the amendment, some unions will simply refuse to meaningfully consider productivity improvements proposed by the employer. Accordingly, we propose that the word "genuinely" be inserted before "discussed" in 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" in s.187(1A) 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."

This issue has some relevance to the proposed codification of the "genuinely trying to reach agreement" requirement in s.443 of the FW Act, as discussed below in section 19 of this submission.

15.7 Better Off Overall Test / No Disadvantage Test

Ai Group has represented employers in a number of important FWC Full Bench cases concerning the application of the Better Off Overall Test (**BOOT**), including in:

- *McDonald's Australia Pty Ltd v SDA*, [2010] FWA 4602;
- *Armacell Australia Pty Ltd, Wilmaridge Pty Ltd as Trustee for the O'Neill Family Trust t/a Direct Paper Supplies, Downer EDI Works Pty Ltd*, [2010] FWA 9985; and
- *Solar Systems Pty Ltd*, [2012] FWA 4381.

The principles that have flowed from these decisions have reinforced the requirement that a global approach must be taken by the FWC when applying the BOOT and not a line by line approach.

In Ai Group's experience, the problems that have occurred since 2009 with the BOOT have not, for the most part, been the result of significant problems with the wording of the Act but rather the manner in which a minority of FWC Members have applied the BOOT. Despite this, Ai Group sees merit in Draft Recommendation 15.4 which would replace the BOOT with a new No Disadvantage Test.

The new No Disadvantage Test should incorporate the following elements:

- The comparison should be against the relevant modern award;
- The "test time" should be the time the application for approval of the agreement is made (as currently applies under s.196(3));
- In applying the test, the employees covered by the agreement would ideally be considered as a whole or, if not, classes of employees should be considered – not individuals.

As argued in section 4 of this submission, enterprise agreements should be permitted to override State and Territory long service leave laws. If Ai Group's proposal is adopted, in addition to a comparison against the relevant modern award, the No Disadvantage Test should include a comparison against State and Territory long service leave laws. The No Disadvantage Test that applied under the FW Act between 1 July 2009 and 31 December 2009 (i.e. during the "bridging period" prior to the NES coming into operation on 1 January 2010) included a comparison both against the relevant pre-modern award and the relevant State / Territory long service leave laws (see Item 4 of Schedule 7 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

15.8 Bargaining representatives

Ai Group does not oppose Draft Recommendation 15.5 which would:

- Enable a reasonable period to be specified in which nominations to be a bargaining representative must be submitted; and
- Only enable a person to be a bargaining representative if they represent a trade union with member/s covered by the proposed agreement or if they were nominated by a least 5 per cent of the employees covered by the proposed agreement.

No doubt there are circumstances where an employer would support the inclusion of one or more employee representatives in bargaining negotiations who do not represent at least 5 per cent of the employees, but this would not be precluded by the recommendation. The effect would simply be that such persons would not have the formal status of bargaining representatives under the FW Act.

In addition to Draft Recommendation 15.5, the Productivity Commission should recommend that amendments be made to the FW Act to address the important technical amendments relating to bargaining representatives raised in subsection 13.5 of Ai Group's March 2015 submission.

15.9 Greenfields agreements

Ai Group agrees with the finding in the Draft Report that unions wield excessive power under the existing greenfields agreement arrangements.

Draft Recommendation 15.6 would subject bargaining representatives for greenfields agreements to the good faith bargaining requirements in the FW Act. This proposal has been the subject of a great deal of debate during the development of the *Fair Work Bill 2008* and since the FW Act was implemented. The Bill as originally introduced into Parliament imposed good faith bargaining obligations on bargaining representatives for greenfields agreements but the provisions were removed from the Bill before it was passed by Parliament. The reason for this was because, as drafted, the provisions in the Bill would have allowed any union which was eligible to represent any employee on a project to become involved in the negotiations for the greenfields agreement, and to apply to the FWC for a bargaining order indefinitely delaying the making of the agreement.

The *Fair Work Amendment Bill 2014* appropriately addresses this issue. The following extract from Ai Group's submission to the Senate Committee inquiry into the Bill is relevant:

"Item 23 inserts a new s.177. This is an important provision that identifies the bargaining representatives for a proposed greenfields agreement. Importantly, a union is only a bargaining representative if the employer agrees to bargain with the union. Any other approach would not be workable. If all unions eligible to represent any employee on the project were given bargaining rights, each union would have the right to pursue bargaining orders in the FWC and would have the ability to frustrate the negotiations between the employer and other unions and delay the approval of the agreement."

Draft Recommendation 15.7 would amend the FW Act to enable an employer who had not reached agreement with a union after three months to:

- Continue negotiating with the union;
- Request that the FWC undertake "last offer" arbitration; or
- Submit the employer's proposed greenfields agreement for approval with a 12 month nominal expiry date.

Ai Group supports the recommendation with the following modifications:

- The minimum three month negotiating period with a union should be two months. (Three months is too long to delay the commencement of a project, particularly when further delays would occur in having the agreement approved, regardless of what option was chosen by the employer at the conclusion of the period).
- The minimum negotiating period should commence as soon as the employer initiates bargaining, or agrees to bargain, with the union.

- If a head contractor makes a greenfields agreement to create a project-specific framework agreement for the project, the minimum negotiation period should not apply to the subcontractors' agreements as this would result in lengthy project delays.
- The maximum 12 month nominal expiry date for employer greenfields agreements should be three years. 12 months is too short as this would create too much uncertainty on the project.

15.10 Termination of enterprise agreements

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.

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 high bar that the FW Act places on applications to terminate an enterprise agreement after its nominal expiry date needs to be addressed. If agreement is not reached on a replacement agreement after an agreement expires, 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.

16. Individual arrangements

16.1 Statutory individual agreements

Ai Group urges the Productivity Commission to recommend changes to the FW Act to create the option of a genuine statutory individual agreement for employers and employees, as existed between 1996 and 2009. Such agreements should be required to pass a No Disadvantage Test against the relevant modern award.

Statutory individual agreements have significant advantages for both employers and employees over Individual Flexibility Arrangements (IFAs) as highlighted in the following table:

	Statutory individual agreements	IFAs
Vetted and approved by a statutory agency or Commission	Yes	No
Required to pass the BOOT / NDT	Yes	Yes
Provides certainty and protection for both parties up to the expiry of the nominal term	Yes	No, because IFAs can be terminated with a relatively short period of notice
Applies indefinitely after the nominal expiry date	Yes	No, not if entered into under an enterprise agreement and the enterprise agreement is re-negotiated

The controversy over AWAs following the introduction of the Work Choices legislation in 2006 occurred as a result of the removal of the No Disadvantage Test. A fairness test was introduced one year later in 2007.

The demonization of AWAs by the union movement, based on unsubstantiated assertions of a large number of substandard agreements being entered into for the short period when a No Disadvantage / Fairness Test was not in place, should not be allowed to block the reintroduction of a sensible and fair industrial instrument which meets the needs of many employers and employees.

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 much needed flexibility to employers and employees.

Statutory individual agreements need to be reinstated. Given the baggage associated with the name “Australian Workplace Agreements”, they could simply be called “Statutory Individual Agreements” (SIAs).

16.2 Individual Flexibility Arrangements

In its Draft Report, the Productivity Commission has correctly identified that the existing framework for IFAs has a number of major deficiencies that need to be addressed.

Ai Group supports the following Draft Recommendations in the Draft Report:

- Draft Recommendation 16.1, which would allow a default termination notice period of up to 12 months to be agreed up in an IFA;
- Draft recommendation 16.2, which would implement a new No Disadvantage Test for IFAs, and require the FWO to provide more detailed guidance on the application of the Test; and
- Draft recommendation 16.3, which would require the FWO to develop an information package on IFAs.

With regard to Draft Recommendation 16.2, the No Disadvantage Test should be applied differently for an IFA than an enterprise agreement. The only employee that is relevant when assessing the No Disadvantage Test for an IFA is the individual employee bound by the IFA, and that employee's personal preferences should be given significant weight when deciding whether the employee is disadvantaged. 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 No Disadvantage Test if only monetary benefits were able to be taken into account. The Explanatory Memorandum 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 Explanatory Memorandum).

There would be benefit in the FWO offering an optional vetting process for IFAs. An employer should have the option of providing a copy of a proposed IFA to the FWO and obtaining confirmation that, in the opinion of the FWO, the IFA complies with the FW Act.

There would also be benefit in the FW Act being amended (as provided for in the *Fair Work Amendment Bill 2014*) to implement a statutory defence for employers who enter into an IFA reasonably believing that the IFA complies with the Act. This would reduce risk and increase certainty for employers thereby encouraging more employers to enter into IFAs with their employees.

In addition to the Draft Recommendations in Chapter 16 of the Draft Report, Ai Group strongly supports Draft Recommendation 15.2. This recommendation would require that enterprise flexibility terms in enterprise agreements permit IFAs to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties.

16.3 Objects of the Act

The following blatantly political and inappropriate object in s.3 of the FW Act needs to be repealed:

"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 above object should be replaced with the following object which was in the *Workplace Relations Act 1996* between 1996 and 2006:

“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 above object gives equal weight to individual and collective forms of agreement, and makes clear that forms of agreement dealt with in the FW 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.

17. The enterprise contract

Ai Group supports the concept of Enterprise Contracts and commends the Productivity Commission on developing this new agreement-making option. As Ai Group understands the concept proposed in the Draft Report:

- An Enterprise Contract would follow a template applicable to a class or group of employees.
- The Enterprise Contract would apply on an individual basis to an employee within the specified class or group.
- The Enterprise Contract would need to be offered to all existing employees in the specified class or group.
- The Enterprise Contract could be offered as a condition of employment to new employees in the specified class or group.
- The employer would deal directly with the employees.
- An Enterprise Contract would need to conform to requirements specified in the FW Act or Regulations.
- Sample templates (e.g. for each award) would be made available on the FWC website. An employer would not be required to use a template so long as the template developed by the employer met the requirements of the Regulations.
- Comprehensive employee protections would apply including:
 - A prohibition on the coercion of existing employees to enter into an Enterprise Contract;

- The employer would need to provide the Enterprise Contract to the employee in writing, with sufficient time for the employee to assess and understand it before agreeing to it;
 - A No Disadvantage Test would apply;
 - The Enterprise Contract would be subject to the NES; and
 - The base wage rate for an employee covered by an Enterprise Contract would not be able to fall below the relevant award rate (or the national minimum wage for award free employees).
- An Enterprise Contract would operate for a specified term (for example, three years).
- An Enterprise Contract would continue indefinitely after the expiry of the nominal term until terminated or replaced.
- An employee would have the option to return to an existing arrangement after a minimum period specified in the Regulations (for example, 12 months) or at the expiry of the Enterprise Contract, whichever was shorter.
- The employer would be required to lodge the Enterprise Contract (as it applies to the class or group of employees) with the FWC but would not need to identify the individual employees covered by it.
- An Enterprise Contract would override any award that covers the employee.
- An Enterprise Contract would override any enterprise agreement that covers the employee.
- The enterprise bargaining provisions of the FW Act would not apply to the making of Enterprise Contracts (e.g. the provisions relating to bargaining representatives, bargaining orders, good faith bargaining requirements, etc).
- Prior to the expiry of the Enterprise Contract, the employee would not have the right to participate in enterprise agreement negotiations in the workplace or to take protected industrial action in pursuit of an enterprise agreement.
- For transparency purposes, the FWC would periodically publish the Enterprise Contracts that had been lodged.
- An Enterprise Contract would commence at the time when it is lodged by the employer with the FWC.
- The FWO would provide a support and education role, and would be able to scrutinize Enterprise Contracts for the purposes of compliance and enforcement

Ai Group proposes the following additional / amended elements:

- An Enterprise Contract would have a nominal term of up to five years. (In Ai Group's view, the three year period used in the Draft Report as an example of what might be in the Regulations, is too short. The maximum term should align with what the Productivity Commission has proposed for enterprise agreements).
- The employee would have the option to return to an existing arrangement after three years or at the expiry of the Enterprise Contract, whichever was shorter. (In Ai Group's view, the 12 month period used in the Draft Report as an example of what might be in the Regulations, is too short. Such a short period would create too much uncertainty and would deter employers from hiring employees on the basis of Enterprise Contracts).
- Enterprise agreement clauses which prohibit the offering or making of an Enterprise Contract for any of the employees covered by the enterprise agreement should be unlawful terms under the FW Act.

With the amendments and additions proposed above, Ai Group envisages that Enterprise Contracts would become a well-utilised and widely supported agreement-making option for employers and employees.

18. Public sector bargaining

Ai Group has some involvement with public sector bargaining matters. We provide bargaining services to a number of public sector agencies. We also have as members a large number of companies which are impacted by the outcomes of public sector bargaining, for example:

- Companies which take over outsourced public sector work and which are impacted by the transfer of public sector enterprise agreements;
- Companies which are impacted in various ways as suppliers to governments due to restrictions in public sector enterprise agreements (e.g. restrictions on contractors, labour hire and outsourcing); and
- Companies which are impacted by union claims which are pressed on the basis that such claims have been conceded by governments for their own employees.

The Draft Report does not recommend any changes to public sector bargaining laws and arrangements. If any changes are subsequently proposed, the impact on public and private sector organisations needs to be considered.

19. Industrial disputes and right of entry

19.1 Requiring bargaining to commence before authorising protected industrial action

Ai Group supports Draft Recommendation 19.1 which would amend s.443 of the FW Act to require that bargaining have commenced by mutual consent or through a Majority Support Determination, before a protected action ballot can be granted by the FWC. This reform is included in the *Fair Work Amendment Bill 2014* which is before Parliament.

The arguments in support of this Recommendation are set out in some detail in subsection 6.1 of Ai Group's March 2015 submission.

19.2 Simplifying protected action ballot order procedures

With regard to the Information Request on page 680 of the Draft Report, Ai Group strongly opposes the three potential simplifications suggested.

The suggestion that protected action ballots not specify particular types of industrial action would be unfair on employees and employers:

- An employee might support the imposition of a ban on overtime or a one day stoppage, but strongly oppose an indefinite strike.
- An employer is entitled to know at the ballot stage (and not just when 72 hours' notice is given of the taking of the action) what types of protected industrial action may be taken. This is important to enable the employer to exercise its right to implement measures to mitigate the effects of the industrial action.

The suggestion that the current 30 day 'use it or lose it' rule could be extended or removed would be unfair to employees and employers:

- If industrial action is not taken within 30 days (or as extended up to 60 days), the composition of the workforce may have changed since the ballot was conducted, or a majority of employees may no longer support the taking of the industrial action.
- An employer is entitled to know at the ballot stage (and not just when 72 hours' notice is given of the taking of the action) of the time period in which industrial action may be taken. This is important to enable the employer to exercise its right to implement measures to mitigate the effects of the industrial action. The existing period is already quite lengthy and any extension is not warranted.

Also, given the very costly and damaging nature of industrial action for employers and employees, Ai Group opposes the suggestion in the Draft Report that the FWC be given the power to overlook minor defects or unmet requirements in the ballot process.

19.3 Determining whether a party is “genuinely trying to reach an agreement”

Ai Group strongly disagrees with the draft findings on pages 681 and 682 of the Draft Report, that codifying the “genuinely trying to reach an agreement” requirement in s.443 is not justified.

One day of industrial action can cost an employer, its suppliers and customers hundreds of thousands or even millions of dollars. The notion that tight requirements on protected industrial action are a compliance burden is not sustainable. Any compliance burden is insignificant compared to the costs and losses inflicted upon employers, employees, suppliers, customers and the broader community by industrial action. The industrial action requirements in the Act need to be tightened to provide more protection for all parties, not loosened on the basis of a flawed notion that tight requirements are a compliance burden. It not surprising that unions are using flawed arguments about compliance burdens, in order to press for wider powers to take industrial action in pursuit of their industrial objectives.

A key requirement for a protected industrial action ballot order to be granted is that the applicant union 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 the “genuinely trying to reach an agreement” requirement, drawing upon key concepts drawn from the FWC’s decision in the *Total Marine Services* case, 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.’*

19.4 It is illogical to allow ballots to be conducted in support of industrial action which would be unlawful

It is not sensible or in the community’s interests for a protected action ballot 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 problem should be addressed through an amendment to s.443 of the FW Act as follows:

“(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).”

19.5 Grounds for termination and arbitration of industrial disputes

Ai Group does not agree that the phrase “significant harm”, as used in s.423 and 426 of the FW Act, needs to be defined as queried in the Information Request on page 689 of the Draft Report.

It is appropriate that a high bar apply in all circumstances where the right to take industrial action is terminated and arbitration can be imposed, because the concept of compulsory arbitration is inconsistent with enterprise bargaining. The outcome of arbitration is of course not an enterprise agreement but an outcome which is imposed on the parties by a third party.

The principle underpinning s.424 is that when industrial action is threatening harm to the community or an important part of it, the interests of the community outweigh the interests of the bargaining parties. In such circumstances, compulsory arbitration is appropriate. This same principle does not apply under s.423 because this section deals with industrial action which is inflicting significant harm on the bargaining parties.

Ai Group does not support Draft Recommendation 19.2 that s.423 of the FW Act should be amended to refer to significant harm to “either” party, rather than “both” parties. Such a proposal was debated at great length when the *Fair Work Bill* was being developed and ultimately rejected because it would have enabled employees to commence strike action and shortly thereafter seek arbitration on the basis that their industrial action was significantly harming them. Any change to s.423 would need to prevent employees gaining access to arbitration as a result of their own industrial action.

The following extract is from a submission made to then Deputy Leader of the Opposition, the Hon Julia Gillard MP, in relation to a similar proposal to Draft Recommendation 19.2 in Labor’s *Forward with Fairness Policy*:

“Under Labor’s policy, if industrial action is causing significant harm to one of the parties, Fair Work Australia would have the power to end the industrial action and arbitrate an outcome. This would apply even if the party is inflicting the harm upon itself through the

taking of strike or lock-out action. When employees are on strike they can of course end the harm at any time by returning to work. Similarly, when a company has locked out its employees it can end the harm at any time by ending the lock-out. It is inappropriate and unfair to allow access to arbitration based upon harm to one of the bargaining parties - particularly where the harm is self-inflicted by the party who wants arbitration.

After several days of strike action a union would be able to readily argue that employees are struggling to pay their mortgages and car payments and therefore that significant harm is occurring to one of the bargaining parties. Accordingly, the Commission would have the power to arbitrate and impose an outcome on the parties.

Arbitration should only be available in extremely limited circumstances because once a workplace agreement outcome is arbitrated against the will of one or more of the parties it is, of course, no longer “an agreement”. Arbitration under the current system (and under the Keating Government’s laws) is accessible only in the very limited circumstances where a dispute is threatening to damage an important part of the economy, or the safety or welfare of the Australian population. The rationale for arbitration in such circumstances is that the interests of the community outweigh the interests of the bargaining parties.

If a negotiating party is aware that arbitration is available, there is less incentive for the party to make concessions in order to reach agreement. A union would be able to make a series of excessive claims which no company would agree to, organise industrial action in pursuit of those claims and then wait for a “compromise” position to be arbitrated. This would represent a return to the old days of arbitration around ambit claims. Arbitrated outcomes (particularly those favourable to unions) would undoubtedly flow-on across industries. This would occur as a result of unions pressing other employers to accept the arbitrated outcome and also through other similar outcomes being arbitrated by Fair Work Australia and the doctrine of precedent.

On page 15 of Labor’s policy, it is stated that parties would not be forced to make concessions during bargaining or sign up to an agreement if they do not agree to the terms - but allowing unions to have ready access to arbitration would enable similar unacceptable outcomes to be imposed upon employers.”

With regard to the Information Request on page 692 of the Draft Report, Ai Group strongly opposes any dilution of the existing requirements in s.424 of the FW Act. Ai Group has represented the relevant employers in a number of cases relating to applications under s.424 or predecessor provisions under the *Workplace Relations Act 1996*. The predecessor provisions to s.424 were the focus of the High Court’s decision in the *Coal and Allied* case.⁹ The FWC imposes a very high bar when determining applications under s.424. The phrases “endanger”, “significant damage”, “the population”, “economy” and “important part” have been consistently interpreted by the FWC and its predecessors in a very rigorous manner which prevents suspension or

⁹ [2000] HCA 47

termination in any circumstances other than where a threat is serious and widespread. Very isolated examples provided to the Productivity Commission by unions, of alleged lack of rigour by the FWC in dealing with s.424 applications, must not allowed to water down this critical provision of the FW Act which protects the community from harm.

19.6 Aborted strikes

Ai Group supports Draft Recommendation 19.3 which would enable employers who have implemented a reasonable contingency plan in response to a notice of industrial action, to stand down employees without pay for the duration of the contingency response, if the employees withdraw their notice.

Ai Group also supports Draft Recommendation 19.4 which would give the FWC the discretion to withhold a protected action ballot order for up to 90 days where employees have repeatedly withdrawn industrial action as an industrial tactic.

19.7 Strike pay arrangements

Ai Group strongly opposes Draft Recommendation 19.5.

The current 4 hour minimum deduction period when unlawful industrial action is taken is a very important and useful provision which operates as a significant deterrent to the taking of unlawful industrial action. Any relaxation of the requirements will lead to more unlawful industrial action. For example, lunch time union meetings which would have been completed within the half hour lunch break will continue for 45 minutes and the employer would be pressured to pay the employees for the extra 15 minutes. This is precisely the reason why the four hour minimum was implemented in the first place by the Howard Coalition Government and retained under the FW Act by the former Labor Government.

With regard to the Information Request on page 696 of the Draft Report, Ai Group supports the proposal that employers be allowed to deduct a minimum of 25 per cent of normal wages for the duration of partial work bans. This is a practical, sensible and fair proposal that would significant reduce the complexities associated with calculating deductions.

19.8 Employer responses

Ai Group concurs with the Productivity Commission's finding that the options for employers to respond to protected industrial action are too limited. However, with regard to the Information Request on page 698 of the Draft Report, the main problem is not in the protected action provisions of the Act but rather the general protections. "Adverse action" must exclude reasonable employer responses to protected industrial action.

Standing down an employee engaged in protected industrial action is appropriately excluded from the definition of "adverse action" (s.342(4)). However, other reasonable employer conduct in response to protected industrial action is not expressly excluded from the meaning of "adverse

action” in s.342 and thereby potentially captured by the general protections. Examples include:

- Not offering overtime on the weekend to individual employees who have taken strike action during the previous week, but offering weekend overtime to those who have not;
- Withdrawing discretionary benefits (e.g. bonuses);
- Requiring employees who are taking industrial action to return their company vans so that other employees who are not taking industrial action can use them to service customers; and
- Preventing employees utilising company telecommunications systems during periods of industrial action.

Another legitimate response to industrial action, and a long recognised common law right of an employer, is to apply the “No Work, No Pay” Principle. The FW Act recognises this right in s.471(4) but the right should be expressly recognised in the general protections. It would appear that the reference to “stand down” in s.342(4)(b) is a reference to the rights under Part 3-5 – Stand Down, of the Act, not the right to stand aside in accordance with the “No Work, No Pay” principle.

Employers need to be able to respond to protected industrial action by employees without breaching the general protections. Actions often need to be taken by employers to mitigate the effects of industrial action and to defend against it. Subsection 342(4) should be expanded to include all lawful employer conduct in response to protected industrial action.

19.9 Remedies for unlawful industrial action

Ai Group strongly supports Draft Recommendation 19.6. The existing penalties for unlawful industrial action are far too low when industrial action often inflicts huge losses on employers, customers, suppliers and others in the community.

19.10 Right of entry

Ai Group supports Draft Recommendation 19.7 which would amend the requirements associated with applications for FWC orders dealing with disputes about right of entry to implement more relevant requirements.

Ai Group also supports Draft Recommendation 19.8 which would restrict a union from entering premises to hold discussions with employees to up to two occasions every 90 days, where the union does not have any members and is not negotiating an enterprise agreement at an enterprise.

In addition, the amendments made by the former Labor Government to the right of entry laws from 1 January 2014 (including the right to hold discussions with employees in lunchrooms) were not warranted and need to be reversed. In Ai Group’s consultations with member companies

during the preparation of this submission, this issue was widely raised by employers as a major issue of concern.

20. Alternative forms of employment

20.1 Independent contracting and the sham contracting laws

Section 13.3 of Ai Group's March 2015 submission makes the following important points about independent contracting:

- The vast majority of independent contractors 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.
- The common law is far better equipped to assess the substance of particular relationships than any statutory definition of an "independent contractor" could. Any "one size fits all" definition of an "independent contractor" would prevent the facts and circumstances of individual cases being fully considered, and 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 proportion of workers who are self-employed independent contractors declined from 9.1% in 2008 to 8.5% in 2013. The proportion of workers who are business owners declined from 10% in 2008 to 8.8% in 2013.

Ai Group opposes the replacement of the "recklessness" test in the sham contracting laws with a "reasonableness test". The small number of sham contracting cases which have been pursued by the FWO to date highlights that the laws are not being widely breached.

The sham contracting laws were tightened when the FW Act was implemented and a further tightening is not justified.

20.2 Limitations on the use of subcontractors and labour hire

Ai Group strongly supports Draft Recommendation 20.1, as it relates to the prohibition of terms in enterprise agreements which restrict the engagement of independent contractors and labour hire, or regulate the terms of their engagement. As explained in Ai Group's March 2015 submission, this recommendation would reinstate the prohibitions which were in place in these areas prior to the FW Act.

In addition to prohibiting such provisions in enterprise agreements, similar restrictions should apply to the content of awards, as were in place prior to the FW Act.

20.3 Casual employment

Section 13.2 of Ai Group's March 2015 submission makes the following important points about casual employment:

- 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.
- 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.

Ai Group strongly supports the apparent intent of Draft Recommendation 20.1, as it relates to casual employment, that terms which restrict the engagement of casual workers should constitute unlawful terms under the FW Act. However, given that it is common for enterprise agreements to "regulate" casual employment (e.g. by providing that a casual loading of 25% should be paid), Ai Group proposes that Draft Recommendation 20.1 be separated into two recommendations in the PC's Final report as follows:

- Terms that restrict the engagement of independent contractors or labour hire, or regulate the terms of their engagement, should constitute unlawful terms under the FW Act.
- Terms that restrict the engagement of casuals should constitute unlawful terms under the FW Act.

Similar restrictions should also apply to the content of awards. Awards should not be able to restrict the engagement of casuals, or require that casual employees be converted to permanent employees after a particular period of employment, as the unions are endeavouring to impose on employers through the *Casual Employment Case* during the 4 Yearly Review of Award.

20.4 Outworkers

As identified in Box 20.7 in the Draft Report, Ai Group opposed the *Fair Work Amendment (Textile, Clothing and Footwear) Act 2012*. As argued in our submission to the Post-implementation Review of the legislation, the provisions are operating against the interests of TCF businesses, TCF workers and the broader community.

20.5 Internships and work experience

It is essential that the Productivity Commission does not disturb the very large number of arrangements that exist whereby students undertaking study through universities, colleges and schools are placed with employers for a period to gain work and industry experience. If employers are forced to pay the students for such placements, the obvious effect will be a very significant reduction in such opportunities for students.

20.6 Contractor road transport drivers and the Road Safety Remuneration Tribunal

The Road Safety Remuneration Tribunal has published a [Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016](#) (Draft Minimum Payments RSRO) and accompanying [Statement](#) on minimum payments for contractor drivers. The draft order has an operative date of 1 January 2016. Submissions and evidence in response to the draft order must be lodged by 25 September 2015.

The coverage of the Draft Minimum Payments RSRO is the same as the coverage of the [Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014](#) which the Tribunal made in December 2013. The Draft Minimum Payments RSRO would apply to contractor road transport drivers in relation to items destined for sale or hire by a supermarket chain and to long distance operations.

In addition to the obligations imposed on hirers of contractor drivers, the Draft Minimum Payments RSRO would impose very onerous obligations on supply chain participants regarding the terms of their contractual arrangements, including auditing of other parties in the supply chain.

The Draft Minimum Payments RSRO contains separate schedules with minimum payments for contractor drivers engaged in: (1) distribution operations (not including long distance operations); and (2) long distance operations. The order would effectively require the payment of an hourly rate as well as a “per kilometer” rate, which would be determined by various factors including the employee’s classification, the type of trailer, the class of vehicle and whether it is supplied by the driver.

As argued in section 13.12 of Ai Group’s March 2015 submission, 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.

The *Road Safety Remuneration Act 2012* and the Tribunal should be disbanded without delay.

21. Migrant workers

The FW Act and awards apply to overseas workers working in Australia. In addition, the work rights of working visa holders are protected by the *Migration Act 1958* (**Migration Act**). For example, a 457 visa holder must be paid no less than that of any Australian employee who is performing the same role as the visa holder in the workplace and must not be required to reimburse the work sponsor for the costs relating to being the approved work sponsor, including recruitment and migration agent costs.

Ai Group agrees with the proposition in the Draft Report that migrant workers are more vulnerable to breaches of the FW Act than other workers. We also agree that tough penalties should apply to employers who deliberately underpay migrant workers. However, in Ai Group's experience only a small number of employers deliberately underpay migrant workers. The majority of employers are complying with their obligations under the various visa categories and under the FW Act.

Australia has a vigorous enforcement regime for employers that breach the Migration Act or the FW Act. The FWO is tasked with protecting the working rights of visa holders and, as highlighted by the statistics on enforcement activities in the Draft Report, it actively does.

Given that the vast majority of employers do not underpay migrant workers, it would not be appropriate to impose a more onerous compliance burden on all employers. Any changes should be directed at those employers who deliberately underpay migrant workers. Consistent with this view, Ai Group does not oppose Draft Recommendation 21.1 which proposes that:

- The FWO be given additional resources for investigation and audits of employers suspected of underpaying migrant workers; and
- The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

22. Transfer of business

Ai Group's March 2015 submission urged the Productivity Commission to recommend changes to the transfer of business laws to address the legitimate and strong concerns of employers. As explained in our submission, 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;
- 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*.

The transfer of business 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.

We urge the Productivity Commission to consider the concerns raised by Ai Group in our March 2015 submission and the sensible and practical proposals for change advocated by Ai Group, including:

- **Replacing the "similarity of work" test with the former "character of the business" test**

Whether a "transfer of business" has occurred requires a consideration of the similarity between the work performed for the old employer and the new employer by the transferring employees.

The current "similarity of work" concept in section 311(1)(c) of the FW Act is unworkable, impracticable and unfair on employers and employees as it gives no weight to whether a business which takes over outsourced work has the same character as the one which outsourced the work.

The “similarity of work” concept was rejected by the High Court and Full Federal Court in the *PP Consultants* and *Stellar Call Centres* cases¹⁰ in 2000 and 2001, in favour of the more appropriate “character of the business” test.

- **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 any new employees to perform the transferring work, and no other enterprise agreement or modern award covers the employer in relation to that work, the transferable instrument covers the new employees (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.

22.1 Ease of obtaining FWC orders

The Productivity Commission, on page 756 of the Draft Report, has sought further information on the ease (or otherwise) of obtaining orders that transferable instruments not transmit, or variations to transferrable 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 most cases these orders are not 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 typically been rejected, or the employer has decided not to apply for an order and chosen not to employ any employees of the old employer.

On page 756 of the Draft Report the Productivity Commission refers to conditional employment offers. Such offers are a legitimate and natural consequence of the ill-conceived nature of the existing transfer of business laws. If the transfer of the instruments to the new employer would cause major difficulties, it is rational for the new employer to refuse to employ the transferring employees unless the FWC grants the employer’s application under s.318. The FW Act expressly gives the new employer this right in s.341(5). If this mechanism was not available there would be fewer job offers by employers in transfer of business situations.

¹⁰ See *PP Consultants Pty Ltd v FSU* [2000] HCA 59 and *Stellar Call Centres v CPSU* [2001] 103 IR 220. A summary of these cases can be found in section 9.1 of Ai Group’s March 2015 Submission.

A number of FWC Members have granted applications under s.318 in circumstances of conditional employment offers. However, in *Lend Lease Building Contractors Pty Ltd* [2014] FWC 9192, Vice President Hatcher 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 taken a different view.

22.2 Transfer of business between State and national system employers

The Draft Report acknowledges that there is potential threat of job losses when transfers of business occur between State Government entities and national system employers in the private sector. This is because the industrial instruments that apply to State Government entities are often more generous and less flexible than the conditions of employment offered by private sector employers.

The FW Act provisions dealing with transfer of business from State Government entities to national system employers were introduced in 2012 via the *Fair Work Amendment (Transfer of Business) Act 2012*. In 2014, Ai Group made a [detailed submission](#) to the Federal Government's Post-Implementation Review of the *Fair Work Amendment (Transfer of Business) Act 2012* which urged the Government to repeal the legislation given its damaging effects.

22.3 Workers who transfer voluntarily

Ai Group supports Draft Recommendation 22.1 which would prevent transfer of business implications when an employee voluntarily transfers to a new employer at his or her own instigation. This approach is sensible and fair to all parties.

One relevant circumstance where this Recommendation has obvious merit is where an employee wants to transfer to a related entity of the first employer. 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. Under the current 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.

23. International obligations

Ai Group's view on the issue of whether the current workplace relations system complies with relevant International Labour Office (ILO) conventions is set out in section 13.13 of our March 2015 submission. In short, the current laws do comply and none of the proposals which Ai Group has put forward during this inquiry would lead to non-compliance.

It is important that the longstanding, current approach of the Australian Government to the ratification of ILO conventions is not disturbed. That is, an ILO convention should not be ratified unless Australia's federal and state laws already comply with the convention.

24. Interactions between competition policy and the workplace relations framework

The Draft Report discusses the intersection between competition laws and workplace relations laws. In this regard, Ai Group strongly supports Recommendations 36 and 37 of the Competition Policy Review (**Harper Review**) as set out in the following extract from Ai Group submission of May 2015 to the Federal Government:

"Recommendation 36 – Secondary Boycotts

Ai Group strongly supports Recommendation 36 in the Final Report.

We agree that the prohibitions on secondary boycotts in sections 45D to 45DE of the CCA should be maintained and effectively enforced by the Australian Competition and Consumer Commission (ACCC) with the increased vigour comparable to that which the ACCC applies in pursuing other contraventions of the CCA.¹¹ While not mentioned in Recommendation 36, the ACCC needs to also enforce sections 45E and 45EA with vigour.

Ai Group also agrees that the ACCC should be required to publish in its annual report the number of complaints made to it involving secondary boycott behaviour and the number of those complaints investigated and resolved each year.¹² Again, a similar approach should be taken with sections 45E and 45EA.

Further, Ai Group concurs with the Panel that there is "no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law".¹³

The Panel supported the current arrangements whereby there is access to secondary boycott remedies through both Federal and State jurisdictions.¹⁴ Ai Group shares this view, however, we also believe, consistent with the recommendations of the Royal Commission into the Building and Construction Industry in 2003, that Fair Work Building and Construction (or its intended replacement – the Australian Building and Construction Commission) should be given shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts in the building and construction industry.

¹¹ See Harper Review Report at pages 68, 387 and 392.

¹² See Harper Review Report at pages 68, 391 and 392.

¹³ See Harper Review Report at page 68. Also see Report at page 391.

¹⁴ See Harper Review Report at page 391.

Recommendation 37 – Trading restrictions in industrial agreements

Ai Group strongly supports the recommendation that sections 45E and 45EA of the CCA be amended so that the prohibitions within those sections apply to awards and industrial agreements.¹⁵ Ai Group agrees with the Panel that “businesses should generally be free to supply and acquire goods and services, including contract labour if they choose”.¹⁶

Currently section 45E of the CCA prohibits an employer from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. Section 45EA prohibits the employer from giving effect to such a contract, arrangement or understanding. The decision of the Full Federal Court in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (**ADJ Case**) has significantly narrowed the scope of these provisions to the detriment of industry and the broader community.

In the ADJ Case the Full Federal Court considered a clause in a union pattern agreement which limited the use of contractors or labour hire by each employer party to the pattern agreement (i.e. hundreds of employers). It found that such a clause did not offend sections 45E and 45EA of the CCA because, amongst other things, an enterprise agreement has statutory force and therefore is not a contract, arrangement or understanding within the meaning of section 45E and 45EA.

These types of ‘contractor clauses’ are frequently pursued by unions during enterprise agreement negotiations. They stifle competition and impose major inefficiencies on employers. It is in the community’s interest that they be stamped out. Such clauses were expressly outlawed under the Workplace Relations Act 1996, prior to the implementation of the Fair Work Act 2009 (**FW Act**).

We agree with the Panel that the problem of ‘contractor clauses’ could be stamped out if sections 45E and 45EA are amended so that they apply to awards and enterprise agreements. However, there is an important issue that needs to be considered when drafting the relevant provisions. The Panel has recommended that the prohibitions in sections 45E and 45EA should apply to awards and industrial agreements except to the extent that they relate to “remuneration, conditions of employment, hours of work or working conditions of employees”.¹⁷ These concepts need to be very carefully defined to avoid union arguments that, for example, enterprise agreement clauses which restrict the engagement of contractors or require that “site rates” be paid to employees of contractors are aimed at the job security of the employees covered by the relevant enterprise agreement and hence “relate to” “remuneration” or “conditions of employment”. Ai Group

¹⁵ See Harper Review Report at pages 69, 395 and 396.

¹⁶ See Harper Review Report at pages 69, 394 and 396.

¹⁷ See Harper Review Report at page 69, 395.

is not convinced that the draft clauses on pages 512 and 513 of the Final Report achieve the apparent policy intent underpinning Recommendation 37.

Ai Group also agrees with the observation of the Panel that in addition to amendments to sections 45E and 45EA, the exception in paragraph 51(2)(a) of the CCA may need to be amended so that it applies to sections 45E and 45EA.¹⁸

Further, Ai Group agrees with the other elements of Recommendation 37 that:

- The current limitation in sections 45E and 45EA that the prohibition applies only to restrictions affecting persons with whom an employer “has been accustomed, or is under an obligation” to deal should be removed.¹⁹*
- The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA of the CCA;²⁰*
- A protocol should be established between the ACCC and the Fair Work Commission;²¹ and*
- The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the CC Act.²²*

With regard to the Information Request on page 783 of the Draft Report:

- Ai Group regards the changes discussed in the above extract to s.45E and 45EA as more important than modifications to s.45DD(1) and (2); and
- As discussed in the above extract, Ai Group supports Fair Work Building and Construction being granted a shared jurisdiction to investigate and enforce secondary boycott provisions in the building and construction industry.

25. Compliance costs

The costs of complying with the FW Act and the modern award system are unacceptably high for businesses.

In Ai Group’s *National Survey of Regulatory Burden 2014*, Australian CEOs generally expected various government regulations to place a medium to high cost on their businesses in 2014 (Chart 1). In particular:

¹⁸ See Harper Review Report at footnote 650 on page 395.

¹⁹ See Harper Review Report at pages 69, 395 and 396.

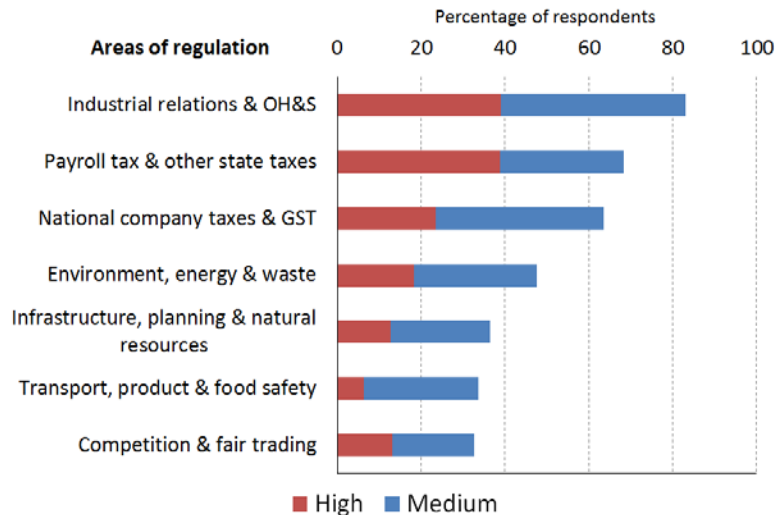
²⁰ See Harper Review Report at pages 69, 395 and 396.

²¹ See Harper Review Report at page 69, 395 and 396.

²² See Harper Review Report at pages 69 and 396.

- The areas of industrial relations, employment, workcover and OH&S were expected to place the largest burden on businesses in 2014, with 83% of CEOs stating the associated regulatory cost burden in these areas was medium or high.
- Compliance with payroll and other state taxes (68%), as well as national company taxes and GST compliance (64%), was also assessed as placing a medium or high cost on business in 2014.

Chart 1: Expected degree of regulatory burden in 2014



Source: Ai Group, 2014.

Across the major industry sectors in 2014:

- Manufacturing businesses said they face a medium to high degree of regulatory burden from industrial relations and OH&S (85%), payroll and other state taxes (70%), national company taxes and GST (67%) and environment and energy (55%) related regulations in 2014.
- Among services businesses, industrial relations and OH&S (80%), payroll and state taxes (65%) and national company taxes and GST (58%) were the most likely areas to impose a medium to high burden.
- Construction sector CEOs said they experience a medium to high regulatory burden as a result of industrial relations and OH&S (95%), payroll and other state taxes (79%), as well as national company taxes & GST (74%).
- The top three areas of regulatory burden for mining services businesses in 2014 included industrial relations and OH&S (69%), payroll and state taxes (62%) and national taxes (62%).

When examined by company size, industrial relations and OH&S was nominated as the single largest area of regulatory burden by both large (100 employees or more) (Chart 2) and small and medium-sized businesses (less than 100 employees) (Chart 3).

Chart 2: Expected degree of regulatory burden in 2014, 100 employees or more

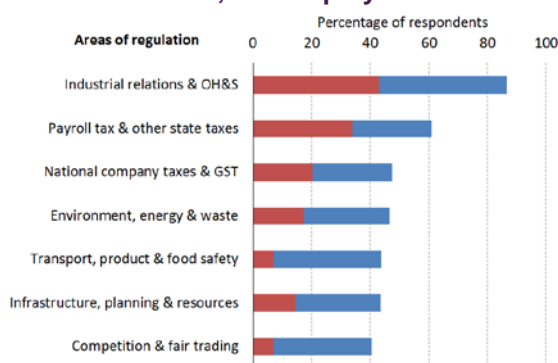
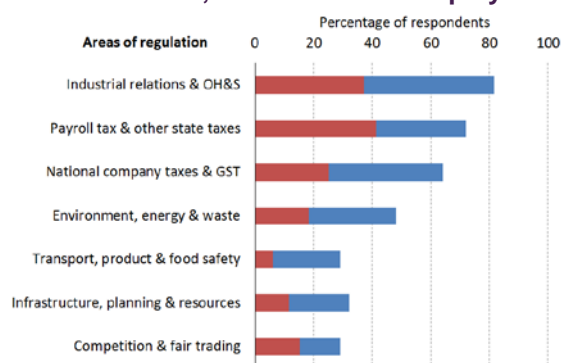


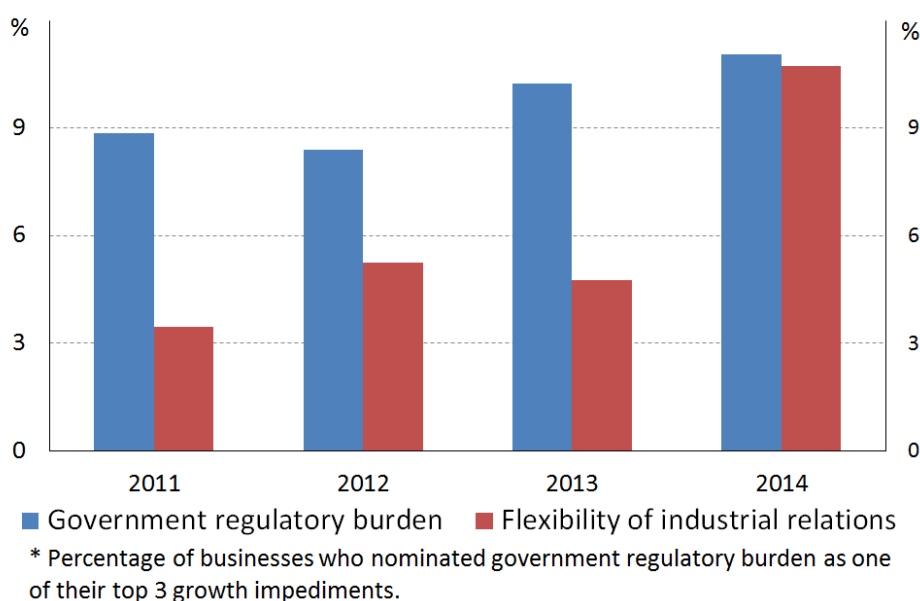
Chart 3: Expected degree of regulatory burden in 2014, fewer than 100 employees



Comparison with similar data from Ai Group's CEO surveys conducted between 2010 and 2013 indicate that businesses' assessment of their regulatory burden has worsened over time, with more businesses nominating 'government regulation' as a significant impediment to growth in 2014, than in the past (Chart 4).

2014 also saw a strong rise in businesses nominating 'industrial relations flexibilities' as a major impediment to growth in our CEO Survey.

Chart 4: The rising regulatory burden*



26. Impacts and international data comparisons

At page 218 of the Draft Report, the Productivity Commission notes the following international data comparisons (emphasis added):

"Drawing on the perceptions of business leaders, international comparisons of the relative restrictiveness of Australia's dismissal arrangements are also published as part of the Global Competitiveness Report (World Economic Forum 2014). The surveyed businesses ranked Australia relatively poorly in the capacity of employers to hire and fire employees compared with other developed economies. However, the OECD measure and business

perceptions do not coincide for Australia. Countries rated by the OECD as having highly restrictive systems compared with Australia — Mexico, Sweden and Norway — were rated by business leaders as having much easier arrangements (figure 5.6). Similarly, while the OECD categorises the New Zealand and Australian systems as similarly unrestrictive, business leaders perceive them to be very different.

There is some research into the unreliability of business surveys in this area.²³ That said, such material may indicate the level of business disquiet about a system, but not a measure of its cost nor its effectiveness. Of course, if those perceptions are firmly held they will impact on hiring behaviour.

At page 804 of the Draft Report, the Productivity Commission notes the following international data comparisons (emphasis added):

“An additional challenge is that there are several measures of employment protection and the particular choice can make a large difference to empirical results (box 26.1). For instance, the literature generally shows that strict employment protection can adversely affect employment. World Economic Forum data (which draw heavily on perceptions of Chief Executive Officers) places Australia at the high level of restrictiveness. It might therefore be inferred that Australia’s regulatory regime has adverse effects on employment. However, this would only be true if the World Economic Forum data are reliable. Every indication is that they are not. The Organisation for Economic Co-operation and Development (OECD) data that are the primary basis for the findings of the literature place Australia at the lower, not higher, end of restrictiveness, and this corresponds well with Australia’s relatively lower unemployment rate.

²³ The unreliable nature of business surveys regarding unfair dismissal laws is discussed in some detail in Oslington (2005) and Freyens and Oslington (2007).

Box 26.1 *Comparative measures of employment protection in Australia*

There are a number of organisations that publish international cross-country comparisons of the relative level of employment protections. These include the OECD, the World Bank, the International Organisation of Employers and the World Economic Forum. Reports of this kind tend to rely on composite indexes, which assign scales to the various elements within a country's employment laws, and then compare the aggregated totals that result.

The OECD's indicators on the strictness of Employment Protection Legislation are the most commonly used of such measures. These are made up of four sub-indicators on, respectively: regulation of individual dismissal of workers with regular contracts; additional restrictions for collective dismissal; regulation of standard fixed-term contracts; and regulation of temporary work agency employment. In 2013, the OECD updated its collection methodology, which had previously relied heavily on questionnaire responses from member governments, to also include a detailed analysis by the OECD itself of legislation, collective bargaining agreements and case law.

Other measures, such as those used by the World Economic Forum in its annual World Competitiveness Report, tend to rely more heavily on surveys of businesses within the various countries reported on.

As discussed in chapter 5, different index constructions and, most importantly, different methodologies, can affect the reliability and comparability of such measures. In regard to unfair dismissal laws, for example, the OECD measure ranks Australia at the relatively less restrictive end of the scale, while results from the World Competitiveness Report suggest Australia is more restrictive in relative terms. Given its methodology, the latter is likely to be unreliable, with compelling evidence of its flaws (Aleksynska and Cazes 2014).

Sources: OECD (2013b) and World Economic Forum (2014).

The Productivity Commission correctly notes that there are differences in the international rankings produced by the OECD and the WEF for similar (but not identical) labour-related indicators.

Ai Group agrees with the Commission that these differences in results reflect the different methodologies and data sources utilised by the OECD relative to the WEF. In particular, the OECD draws its comparisons from information provided by Governments, whereas the WEF draws on a range of data sources including the OECD, IMF and ILO databases, but also from a global survey of business leaders that has been conducted annually over many years.

Ai Group strongly rejects the inference by the Productivity Commission that information collected globally from business is inherently less reliable and of lesser value than information collected from Governments. The differences in results between the WEF and OECD and ILO comparisons are acknowledged by the WEF. They reflect:

- a. Differences in the survey populations, with a business survey included in the WEF (along with other data sources), but only Government sources of information used by the OECD.
- b. The OECD comparisons include OECD member countries, while the WEF series includes a larger and broader group of countries. The WEF then weights the results from this larger sample of nations, according to the level of development of each country. Australia is

weighted as an advanced ‘innovation driven economy’, along with 37 others. This ‘advanced’ weighting tends to push Australia’s ranking lower, relative to other countries.

- c. Differences in the aspect of labour relations being compared. The WEF asks businesses about the labour relations *environment* (e.g. workplace co-operation and behaviour), rather than about labour *laws* per se, which are the focus of the OECD comparisons.
- d. The WEF asks businesses how labour relations affect their competitiveness in *practice*, which is a different (but related) question to the strictly legal restrictions reported by Governments to the OECD. The OECD measures tend to focus on how regulations apply in *theory and intent* rather than in practice. This is an important distinction. Arguably, the practical effects of labour relations on business and competitiveness are best examined by asking businesses and employees themselves, not by asking the regulators or legislators.
- e. The importance of the *perception* of labour relations by business and individuals, as noted by the Productivity Commission at page 218 of its Draft Report. In practice, labour relations are about attitudes and behaviours as much as they are about legal settings, so ‘perception’ matters a great deal.

For these methodological reasons, the WEF measures are not directly comparable to the OECD and ILO measures that are apparently preferred by the Productivity Commission. They provide related, but not identical, indicators of Australia’s relative performance. In this regard, it is not correct to conclude that the WEF ranking contradicts the OECD findings and that it “*places Australia at the high level of restrictiveness*” (p.804). Rather, the WEF’s relatively lower rankings for Australia tell us that relative to other countries, Australia’s labour relations environment (including workplace attitudes and behaviours as well as labour laws) is *less supportive of business competitiveness*, at a global level.

Ai Group cautions that the WEF data should not be dismissed out of hand simply because one of the sources of the data is business and not Government. Indeed, this direct input from business is precisely the strength of this information source, because it gives us a meaningful global comparison of the *practical* effects of labour relations, at the coalface.

Another key strength of the WEF’s global competitiveness data is its internal consistency over time. As noted above, the WEF’s global business survey has a different focus from the Government-based research by the OECD, but it has remained constant over many years, within the WEF global competitiveness framework. This consistent time series gives us:

- a. An insight into how Australia’s competitiveness is changing over time on each indicator, rather than just a single static snapshot;
- b. The ability to compare labour relations indicators to other competitiveness indicators, in order to assess the relative strength of each area of business performance and to identify priorities for reform by business and/or Government;

- c. An insight into whether Australia's relative performance is changing because Australia itself has changed, or because other countries have changed relative to Australia (that is, has Australia stood still while other countries have improved or deteriorated?).

The WEF labour market indicators that are of most relevance to this inquiry are shown in Table 1 and Figure 1 below. These results indicate that Australia's performance on these labour relations measures has deteriorated over time, relative to other countries (the ranking) *and* relative to its own history (the index score). This suggests that Australia's labour relations environment has deteriorated absolutely and not just relatively. Importantly, some of the factors highlighted by these data relate to workplace behaviour (e.g. 'cooperation in labour-employer relations'), and the practical application of labour laws (e.g. the flexibility of wage determination') and not just to the legal framework itself (e.g. 'redundancy costs').

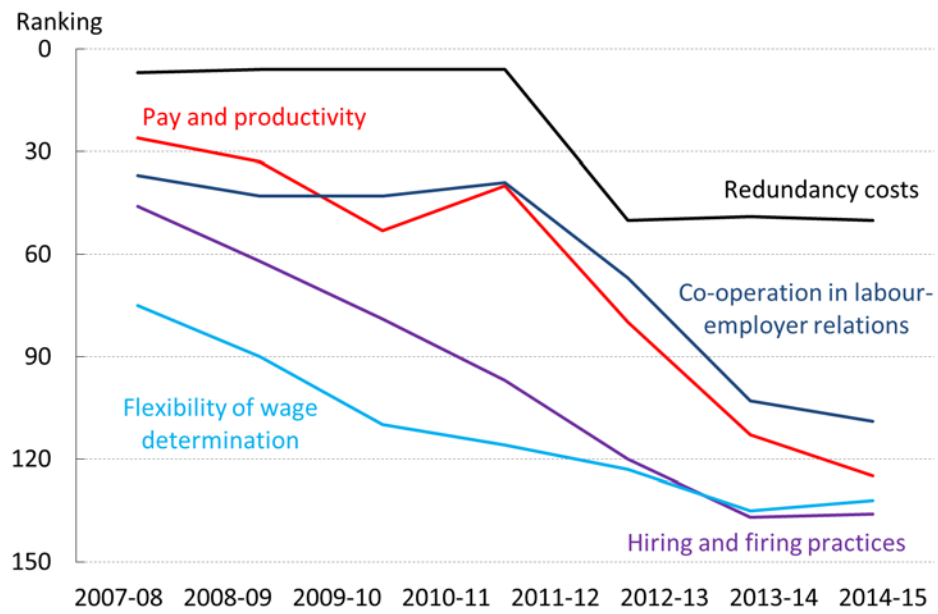
Table 1: WEF selected 'labour market' indicators: index scores & rankings*, Australia

Index	Labour market (all indicators combined)	Flexibility of wage determination	Pay & productivity	Cooperation in labor-employer relations	Hiring & firing practices	Redundancy costs
2008-09	5.0	5.1	4.8	4.8	4.1	4
2009-10	5.1	4.8	4.5	4.7	4.0	4
2010-11	5.2	4.4	4.2	4.7	3.8	4
2011-12	5.1	4.3	4.3	4.8	3.5	4
2012-13	5.0	4.1	3.8	4.3	3.2	12
2013-14	4.6	3.7	3.5	4.0	2.8	11.3
2014-15	4.5	3.7	3.2	3.9	2.7	11.7
Ranking						
2008-09	13	75	26	37	46	7
2009-10	9	90	33	43	62	6
2010-11	9	110	53	43	79	6
2011-12	11	116	40	39	97	6
2012-13	13	123	80	67	120	50
2013-14	42	135	113	103	137	49
2014-15	54	132	125	109	136	50

* Index: high score = best, except on 'redundancy costs'. Ranking: high score = worst.

Figure 1: WEF selected 'labour market' indicators: annual rankings, Australia

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The data sources and detail for the full set of 10 WEF 'labour market' indicators are:

1 Cooperation in labor-employer relations

In your country, how would you characterize labor-employer relations? [1 = generally confrontational; 7 = generally cooperative] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

2 Flexibility of wage determination

In your country, how are wages generally set? [1 = by a centralized bargaining process; 7 = by each individual company] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*

3 Hiring and firing practices

In your country, how would you characterize the hiring and firing of workers? [1 = heavily impeded by regulations; 7 = extremely flexible] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

4 Redundancy costs

Redundancy costs in weeks of salary | This indicator estimates the cost of advance notice requirements, severance payments, and penalties due when terminating a redundant worker, expressed in weekly wages. Sources: World Bank/International Finance Corporation, *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises*; World Economic Forum's calculations.

5 Effect of taxation on incentives to work

In your country, to what extent do taxes reduce the incentive to work? [1 = significantly reduce the incentive to work; 7 = do not reduce incentive to work at all] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

6 Pay and productivity

In your country, to what extent is pay related to worker productivity? [1 = not related to worker productivity; 7 = strongly related to worker productivity] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

7 Reliance on professional management

In your country, who holds senior management positions? [1 = usually relatives or friends without regard to merit; 7 = mostly professional managers chosen for merit and qualifications] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

8 Country capacity to retain talent

Does your country retain talented people? [1 = the best and brightest leave to pursue opportunities in other countries; 7 = the best and brightest stay and pursue opportunities in the country] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

9 Country capacity to attract talent

Does your country attract talented people from abroad? [1 = not at all; 7 = attracts the best and brightest from around the world] | weighted average. Source: World Economic Forum, *Executive Opinion Survey*.

10 Female participation in the labor force

Ratio of women to men in the labor force | This measure is the percentage of women aged 15–64 participating in the labor force divided by the percentage of men aged 15–64 participating in the labor force. Sources: International Labour Organization, *Key Indicators of the Labour Markets*; national sources.



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