



Fair Work Amendment Bill

NOVEMBER 2012

SUBMISSION TO SENATE COMMITTEE RE: FAIR WORK AMENDMENT BILL

AUSTRALIAN INDUSTRY GROUP

Summary of Ai Group's position

The Australian Industry Group (**Ai Group**) welcomes the opportunity to express its views to the Senate Education, Employment and Workplace Relations Legislation Committee regarding the *Fair Work Amendment Bill 2012*.

The Bill deals with:

- Default superannuation funds in modern awards;
- A first tranche of legislative amendments recommended by the Fair Work Act Review;
- Some changes to the structure and operations of Fair Work Australia (FWA), including renaming it as the Fair Work Commission; and
- A few other technical amendments.

Ai Group is very well qualified to comment upon the Bill given our extensive involvement in the Fair Work Act Review and the Productivity Commission inquiry into *Default Funds in Modern Awards.*

When the Final Report of the Fair Work Act Review was released Ai Group described it as "a lost opportunity to make changes to deliver sustained, higher rates of productivity growth" and stated that "in virtually all key areas, its recommendations fall short."

Workplace relations is of course not the only area which contributes to productivity performance but it is a very important factor. The full potential of other drivers of productivity, including product and process innovation, technological change, management skills, workplace training and active supply chain management for instance, depend upon flexible workplaces and good workplace relations.

During the Review, the necessary changes to the *Fair Work Act 2009* (FW Act) were widely identified by Ai Group and other major industry representatives. They included more tightly defining the issues which can be included in enterprise agreements, stopping unions holding employers to ransom over greenfields agreements for new projects, implementing a more effective framework for Individual Flexibility Arrangements, and fixing the poorly drafted general protections and transfer of business laws.

While the Fair Work Act Review Panel proposed some worthwhile changes, they are inadequate to address the big problems which are stifling business investment.

Despite the lack of ambition in the Fair Work Act Review Final Report, Ai Group hoped that the Australian Government would introduce a Bill to address the major problems in the Act. Unfortunately, the Bill does not do so.

The *Fair Work Amendment Bill 2012* contains some useful amendments but does not address the most important issues. Ai Group urges the Committee to recommend that the Bill be passed without delay, with the amendments proposed in this submission. This will enable the significant problems in the FW Act to be focussed upon.

Schedule 1 – Default superannuation

Ai Group was extensively involved in the Productivity Commission inquiry into *Default Funds in Modern Awards*. We made two detailed submissions, we met with the Commissioners and we appeared at the public hearing in Melbourne.

We generally concur with the Australian Government's response to the Inquiry Report and Recommendations, as reflected in Schedule 1 of the Bill, with one important qualification as outlined below.

The provisions of the Bill will generally ensure that:

- The primary principle governing default superannuation arrangements for modern awards will be the promotion of the best interests of employees;
- The selection of default funds will be merit based;
- The selection process will encourage competition and higher levels of performance amongst funds;
- The selection process will promote contestability and transparency;
- Fair processes, procedures and criteria will apply to the selection and review of default funds.

However, there is a critical amendment that needs to be made to the Bill relating to 'corporate MySuper products'.

As Ai Group stated in its August 2012 submission to the Productivity Commission inquiry into *Default Funds in Modern Awards*:

> *"Ai Group opposes the abolition of grandfathering arrangements, as recommended by the Commission. Such arrangements have been common in awards since the late 1980s. For example, an employer who was using a particular complying superannuation fund prior to the making of the Metal Industry (Superannuation) Award in 1989 was entitled to continue to use that fund after the award was made. The employer is still entitled to use that fund as a default fund because the pre-modern award exemptions have been preserved through the grandfathering provision in modern awards.*
>
> *In Ai Group's view, in these long-standing arrangements, the MySuper requirements are likely to offer adequate protections to members. For example, the Manufacturing and Associated Industries and Occupations Award 2010 includes the following in the list of default funds in subclause 35.4:*
>
> > *(k) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, providing that the superannuation fund is an eligible choice fund.*
>
> *Grandfathering arrangements like the above need to remain in awards. Such arrangements will operate on the basis that only funds which offer MySuper products will be eligible to accept default contributions."*

Ideally, the Bill will be amended to require FWA to insert a grandfathering arrangement in each modern award for corporate funds with MySuper products, such as the following:

> *(x) Any superannuation fund <u>that offers a MySuper product</u> to which the employee was making superannuation contributions for the benefit of its employees before 12 September 2008, providing that the superannuation fund is an eligible choice fund.*

If this is not acceptable, the Bill should give FWA the discretion to include such a grandfathering arrangement.

Schedule 2 – Expert Panel

Ai Group supports Schedule 2 of the Bill.

The establishment of an Expert Panel to exercise functions in relation to the assessment of default superannuation funds in modern awards and in conducting Annual Wage Reviews is sensible and practical. The Bill will enable FWA's resources to be used more effectively than if two completely separate Panels were maintained.

Items 43 and 57 of the Bill are important. These provisions will ensure that the Expert Panel Members involved in assessing default superannuation funds are appropriately qualified. Similarly, the provisions will ensure that the Expert Panel Members involved in conducting Annual Wage Reviews are appropriately qualified.

Schedules 3 to 11

The amendments in Schedules 3 to 11 include:

1. Some of the less controversial recommendations made by the Fair Work Act Review Panel;
2. A few other technical amendments;
3. Some changes to the structure and operations of FWA, including renaming it as the Fair Work Commission.

Ai Group's position on the items in these Schedules is set out in the following table.

Provisions of the Bill	*Ai Group's position*	*Comments*
Schedule 3 – Modern Awards		
Item 1 – s.160 – Variation to modern award to remove ambiguity or uncertainty or correct error	Supported	This is an important amendment which addresses a significant drafting problem with the FW Act which has caused widespread concern to registered organisations of employers and employees since the decision of Senior Deputy President Acton of FWA in decision [2012] FWA 2556. This case involved an application by Ai Group to vary the *Manufacturing and Associated Industries and Occupations Award 2010* under s.160 of the FW Act. The Senior Deputy President held that registered organisations have no ability to apply to vary modern awards under s.160. When s.160 was drafted it was clearly envisaged that modern awards would include a list of registered organisations covered by the modern award but this did not eventuate.
Item 2 – s.158 – Applications to vary, revoke or make modern award. Add Note at the end of s.158(1).	Supported	This amendment responds to Recommendation 14 of the Fair Work Act Review.
Schedule 4 – Enterprise agreements		
Item 1 – s. 172 – Making an enterprise agreement Add a new paragraph 176(6).	Not supported	Since enterprise bargaining was introduced into the *Industrial Relations Act 1988* in 1994, enterprise agreements have been able to be made between an employer and an individual employee.
Section 176 – Bargaining representatives for proposed enterprise agreements that are not greenfields agreements Item 2 – Repeal s.176(3) and replace with new paragraph. Item 3 – Amend s.176(4)	Supported	This is a worthwhile amendment and is consistent with the decision of a Full Bench of FWA in *Technip Ocean Pty Ltd v Tracey* [2011] FWAFB 6551. Individual union officials should not be permitted to be a bargaining representative for employees for whom the official's union does not have coverage.

Provisions of the Bill	***Ai Group's position***	***Comments***
Item 4 – s.194 – Meaning of *unlawful term* Add a new paragraph 194(ba) (insert)	Not supported	Ai Group is of the view that appropriately drafted, opt out clauses can be a legitimate form of flexibility for employers and individual employees, despite the views expressed by a five member Full Bench of FWA in *CFMEU v Queensland Bulk Handling* [2012] FWAFB 7551. Rather than Item 4, the Bill should be amended to add the following paragraphs to s.194: • s.194(h) A term which imposes restrictions on the engagement of, or conditions for, independent contractors or on-hire employees; • s.194(i) A term which is not a "permitted matter"; The most important change that needs to be made to the agreement making laws is to implement tighter limits on bargaining content. Nearly all the high profile bargaining disputes since the FW Act was implemented have not revolved around wage outcomes, but around attempts by unions to impose restrictions on businesses.
Section 238 – Scope orders Item 5 – s.238(3) (heading) Item 6 – Repeal s.238(3)(a) and replace with new paragraph.	Supported	This is a sensible amendment. Ai Group agrees with the findings of the Panel that the requirement upon an applicant for a scope order to notify all bargaining representatives of its concerns may in some cases be impossible to meet (see page 139 of the Final Report of the Fair Work Act Review and Recommendation 16.).
Section 174 – Content of notice of employee representational rights Item 7 – s. 174 (heading) Item 8 – Add new paragraphs s.174(1A) and (1B) Item 9 – Repeal s.174(6)	Not supported	This amendment is aimed at the decision of a Full Bench of FWA in *Galintel Mills Pty Ltd t/a The Graham Group* [2011] FWAFB 6772. Ai Group represented The Graham Group in this appeal and the Full Bench upheld Ai Group's arguments. This decision and a number of other Full Bench and single Member FWA decisions have held that substantial compliance with the prescribed Notice of Employee Representation Rights is all that is required.

Provisions of the Bill	*Ai Group's position*	*Comments*
Schedule 5 – General protections		
Part 1 – Time limits for making applications Item 1 Paragraph 366(1)(a)	Supported	Reducing the time limit for making dismissal related general protections claims from two months to 21 days is a very important amendment.
Section 336 – Objects of this Part Item 2 and 3 – Number the existing section as s.336(1) and insert a new s.336(2).	Supported, but a further important amendment is proposed	This amendment no doubt is designed to address the problematic decision of the Full Federal Court in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 ('ADJ Contracting Case'). In this case the Court questioned whether employers have workplace rights protected by general protections. In addition to the amendment to s.336 (which relates to the broad Objects of Part 3-1 of the Act), it is important that an additional amendment be made to s.341 which defines a 'workplace right'. We propose that the following paragraph s.341(6) be added: *"(6) An employee, employer, independent contractor or industrial association may have a workplace right."*
Schedule 6 – Unfair dismissal		
Section 366 – Time limits for making applications Item 1 – Amend s.394(2)(a)	Not supported	The *Fair Work Bill 2008* contained a 7 day deadline for lodging unfair dismissal claims. This was extended to 14 days during the Parliamentary process. A further extension to 21 days is not warranted.
Item 2 – Insert new s.399A – Dismissing applications Item 3 – s.587(1) (insert note)	Supported	This is an important amendment to give FWA the discretionary power to dismiss applications where the parties have concluded a settlement agreement, or where an applicant fails to attend a proceeding relating to the application, or where the applicant fails to comply with FWA directions or orders relating to the application. This Item reflects Recommendation 42 of the Fair Work Act Review.

Provisions of the Bill	*Ai Group's position*	*Comments*
Item 4 – Insert new s.400A Item 5, 6, 7 and 8 (consequential amendments)	Supported	This is an important amendment which was recommended to the Fair Work Act Review Panel by Ai Group and adopted as Recommendation 45. This item would give FWA a discretionary power to make a costs order against a party in an unfair dismissal matter if the party has caused costs to be incurred by another party through an unreasonable act or omission.
Section 401 – Costs orders against lawyers and paid agents Item 9 – Repeal s.401(1) and replace with new s.401(1) and (1A)	Supported	This is an important amendment that would give FWA expanded powers to make an order for costs against a lawyer or paid agent in certain circumstances where the person has acted unreasonably, including where the person has encouraged a party to pursue a speculative unfair dismissal claim. This Item addresses Recommendation 46 of the Fair Work Act Review.
Schedule 7 – Industrial action		
Items 1 to 12 – Electronic voting in protected action ballots	Not opposed	While Ai Group has not detected any problems with the existing provisions, we do not oppose the conduct of secret ballots by electronic means.
Protected action ballots Item 13 – s.437(5)(b) Item 14 – s.453(b) Item 15 – s.433(3A) Item 16 – s.449(2)	Not supported	Ai Group is not convinced that these amendments are necessary or desirable. These amendments address paragraphs (b), (c) and (d) of Recommendation 32 of the Fair Work Act Review. We are pleased that the Government has not proceeded to implement paragraph (e) of Recommendation 32 which Ai Group strongly opposes. This would allow employees covered by an unexpired enterprise agreement to take protected industrial action.

Provisions of the Bill	*Ai Group's position*	*Comments*
Schedule 8 – The Fair Work Commission		
Item 1 – Stay orders	Supported	This is a sensible amendment.
Items 2, 3, 4 and 5 – Conflicts of interest	Supported	This is a sensible amendment. A similar provision should be inserted into the *Road Safety Remuneration Act 2012.*
Items 6, 7, 8 and 9 – Referral of matters to Full Bench etc.	Supported	This is a sensible amendment.
Items 8, 9, 10 and 11 – Appointing acting Commissioners	Supported	This is a sensible amendment.
Items 12, 13 and 14 – Appointing the General Manager	Amendment proposed	The General Manager of FWA has a very important role in relation to the regulation of registered organisations, in addition to a role which has much in common with the Registrar of a Court. Ai Group proposes that the General Manager be appointed by the Minister following consultation with the President of FWA.
Items 15 to 56 – Vice Presidents	Not opposed provided that the appointments are made on merit	The position of Vice President was introduced into the Australian Industrial Relations Commission in 1991 and has proved to be a worthwhile feature of the federal workplace relations system. There has been a lot of speculation about the Government's intentions regarding the FWA Vice President positions provided for in the Bill. It is essential that any appointments are made on merit. The Tribunal has a long and proud history and occupies an important and respected place in Australian society. This will be threatened if appointments to FWA are not made on merit.

Provisions of the Bill	*Ai Group's position*	*Comments*
Items 57 to 65 – Handling complaints	Supported	This is a sensible amendment. Ai Group supports the development of a code of conduct for Fair Work Commission Members.
Items 66 to 81 – Engaging in outside work	Supported	This is a sensible amendment to both the FW Act and the *Road Safety Remuneration Act 2012*. We strongly support the proposed definition of *paid work* to encompass all worked performed, whether it be as an employee or as a self-employed person, for example as a consultant.
Schedule 9 – Changing the name of Fair Work Australia		
Items 1 to 1389 – Changing the name of Fair Work Australia to the Fair Work Commission	Amendment proposed	Ai Group agrees that it is desirable to change the name of Fair Work Australia. The name, Fair Work Australia, and its abbreviation FWA, continue to create confusion about the roles of the Tribunal, the General Manager of Fair Work Australia, the Fair Work Division of the Federal Court, the Fair Work Division of the Federal Magistrates Court, the Fair Work Ombudsman and Fair Work Building and Construction. In addition FWA is commonly used as an abbreviation for Fair Work Australia and the *Fair Work Act,* creating further confusion. While a change from Fair Work Australia to the Fair Work Commission will no doubt assist in reducing the confusion, Ai Group would prefer that the name of the Tribunal be changed to the Australian Workplace Relations Commission.

Provisions of the Bill	*Ai Group's position*	*Comments*
Schedule 10 – Other amendments		
Item 1 – s.570(1) – Costs orders in court proceedings	Supported	This is a very important amendment to address the negative implications of the May 2012 decision of the Full Federal Court in *Construction, Forestry, Mining and Energy Union v CSBP Limited (No 2)* [2012] FCAFC 64. In this decision, the Full Federal Court held that: • Appeals against decisions of single Judges of the Federal Court do not fall within the jurisdiction of the Fair Work Division of the Federal Court, but rather fall within the appellate jurisdiction under s 24(1)(a) of the *Federal Court Act*; and • Section 570 only applies to proceedings where a Court is exercising jurisdiction under the FW Act. Unless addressed, the Full Federal Court's decision will have significant negative impacts on registered organisations of employers and employees as well as peak bodies. The decision will also have negative impacts on the community through reducing the likelihood of erroneous decisions of single Judges of the Federal Court being appealed to the Full Federal Court and reducing the likelihood of erroneous decisions of the Full Federal Court being appealed to the High Court of Australia, because of the risk of financially crippling costs orders. It is a longstanding principle of Australia's workplace relations system that costs will only be awarded where court proceedings are instituted vexatiously etc.
Item 2 – s.84A(b)(ii)	Supported	This amendment corrects an error.
Schedule 11 – Application, transitional and saving provisions		
Items 1 to 32 – Application, transitional and savings provisions	Supported	Ai Group has not identified any problems with the provisions of Schedule 11. Item 3 is a very important provision which ensures the validity of a large number of amendments made to modern awards under s.160 of the FW Act.

SYDNEY
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Tel: 02 9466 5566
Fax: 02 9466 5599

MELBOURNE
20 Queens Road
Melbourne VIC 3004
PO Box 7622
Melbourne VIC 8004
Tel: 03 9867 0111
Fax: 03 9867 0199

BRISBANE
202 Boundary Street
Spring Hill QLD 4004
PO Box 128
Spring Hill QLD 4004
Tel: 07 3244 1777
Fax: 07 3244 1799

CANBERRA
L2, 44 Sydney Avenue
Forrest ACT 2603
PO Box 4986
Kingston ACT 2604
Tel: 02 6233 0700
Fax: 02 6233 0799

ADELAIDE
L1, 45 Greenhill Road
Wayville SA 5034
Tel: 08 8394 0000
Fax: 08 8394 0099

ALBURY/WODONGA
560 David Street
Albury NSW 2640
PO Box 1183
Albury NSW 2640
Tel: 02 6041 0600
Fax: 02 6021 5117

BALLARAT
1021 Sturt Street
Ballarat VIC 3350
PO Box 640
Ballarat VIC 3353
Tel: 03 5331 7688
Fax: 03 5332 3858

BENDIGO
87 Wills Street
Bendigo VIC 3550
Tel: 03 5440 3900
Fax: 03 5444 5940

NEWCASTLE
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300
PO Box 811
Newcastle NSW 2300
Tel: 02 4925 8300
Fax: 02 4929 3429

WOLLONGONG
L1, 166 Keira Street
Wollongong NSW 2500
PO Box 891
Wollongong East NSW 2520
Tel: 02 4228 7266
Fax: 02 4228 1898

AFFILIATE PERTH
Chamber of Commerce
& Industry
Western Australia
180 Hay Street
East Perth WA 6004
PO Box 6209
East Perth WA 6892
Tel: 08 9365 7555
Fax: 08 9365 7550

www.aigroup.com.au

AUSTRALIAN INDUSTRY GROUP

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