FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009

Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

April 2009

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Preamble

There are numerous important matters which arise in the transition from the current workplace relations system to the new system under the *Fair Work Act*.

In general, Ai Group supports the provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, but amendments are proposed in a number of areas, including the following:

- The interaction between State and Territory long service leave laws and enterprise agreements;
- The concept of transitional termination;
- The application of the NES to transitional instruments;
- Take-home pay orders;
- Transfer of business;
- Registered organisations.

Ai Group is one of the largest national industry bodies in Australia representing employers in manufacturing, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, airlines and other industries.

Ai Group has had a strong and continuous involvement in the workplace relations system at the national, state, industry and enterprise level for over 135 years. Ai Group is well qualified to comment on the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.*

This submission is made by Ai Group and on behalf of its affiliated organisation, the Engineering Employers' Association, South Australia (EEASA).

Heather Ridout
CHIEF EXECUTIVE

Schedule 1 – Repeals

This Schedule facilitates the conversion of the *Workplace Relations Act 1996* (“the WR Act”) into a *Fair Work (Registered Organisations) Act 2009.*

Ai Group does not object to a separate Act being created for registered organisations but it is not our preferred approach. Registered organisations are vital elements of the workplace relations system and, in our view, such organisations should be regulated through provisions (say, a separate Part) of the *Fair Work Act* (“the FW Act”). This would reinforce the important rights and responsibilities that registered organisations have under the workplace relations system.

Schedule 2 – Overarching Schedule about transitional matters

Ai Group has not identified any difficulties with the provisions of Schedule 2.

The general rule in Item 11 (which provides that the WR Act continues to apply to conduct that occurred before the WR Act repeal day) is appropriate.

Schedule 3 – Continued existence of awards, workplace agreements and certain other WR Act instruments

This Schedule deals with the continued existence of awards, workplace agreements and various other instruments in force under the WR Act.

Ai Group is generally supportive of the provisions of this Schedule but has concerns about the following aspects:

- The lack of clarity regarding the interaction between transitional instruments and State and Territory laws (eg. long service leave laws);
- The concept of “conditional termination”;
- The application of the NES to transitional instruments;
- Collective agreement-based transitional instruments should not be able to be replaced with an enterprise agreement under the FW Act prior to the nominal expiry date of the agreement; and
- FWA should not have the power to make a determination covering employees bound by a collective agreement-based transitional instrument prior to the nominal expiry date of the transitional instrument.

Our position on the items in Schedule 3 of the Bill is set out in the table below.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Part 2 – Continued existence of WR Act instruments as transitional instruments WR instruments continue in existence as transitional instruments. Transitional instruments are classified as: • Award-based transitional instruments; and • Agreement-based transitional instruments - which are of two types: o Collective agreement-based transitional instruments; and o Individual agreement-based transitional instruments. **[Items 2, 3, 6, 7 and 8]**	**Supported**	These provisions are appropriate.
4 - Transitional instruments continue to be subject to the same instrument content rules	**Supported**	This provision is important and appropriate. Any other approach would not be workable.
5 - Transitional instruments continue to be subject to the same instrument interaction rules	**Amendment needed**	It is unclear to Ai Group whether the term "instrument" in Item 5 would encompass State and Territory laws. It is extremely important that federal awards and agreements which currently override State and Territory laws (eg. long service leave laws), continue to do so when they become transitional instruments. Any other approach would not be workable and would be unfair on employers and employees.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 3 – Variation and termination of transitional instruments		
Transitional instruments can only be varied in very limited circumstances. [**Items 9 to 17, 19, 20 and 21]**	**Supported**	Ai Group has not identified any problems with these provisions. It is very important that agreement-based transitional instruments cannot be terminated unilaterally by any party prior to the nominal expiry date. We are pleased that the option to extend and vary pre-reform certified agreements and preserved collective state agreements (Items 13 and 14) is available beyond 1 July (and up to 31 December). This has been a popular mechanism used by employers, employees and unions to roll-over their existing agreements for an additional period.
18 – Individual agreement-based transitional instruments: termination conditional on enterprise agreement • An employer and an employee can enter into a written agreement prior to the nominal expiry date of an AWA or ITEA for the agreement to be automatically terminated **if** an enterprise agreement comes into operation which covers the employer and employee; and • Either the employer or employee party to an AWA or ITEA can apply to FWA after the nominal expiry date of the agreement, for it to be automatically terminated **if** an enterprise agreement comes into operation.	**Opposed**	In no circumstances should an employee have the right to take industrial action prior to the nominal expiry date of an applicable workplace agreement. Ai Group can see no reason why an employer would agree to the "conditional termination" of any agreement which has not passed its nominal expiry date. If a conditional termination is in place, formal bargaining rights are extended to the employee including the right to take industrial action.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 4 – Transitional instruments and the Australian Fair Pay and Conditions Standard **22 – Same AFPC interaction rules continue to apply**	 **Supported**	 Ai Group has not identified any problems with these provisions.
Part 5 – Transitional instruments and the FW Act **Division 1 – Interaction between transitional instruments and the NES [Items 23 to 27]** **Division 2 – Interaction between transitional instruments and FW Act modern awards, enterprise agreements and workplace determinations** **28 - Modern awards and agreement-based transitional instruments**	 **Opposed** **Supported**	 We oppose the application of the NES to transitional instruments. The Australian Fair Pay and Conditions Standard does not apply to agreements made prior to the introduction of the WorkChoices legislation (except where an agreement does not deal with a particular entitlement in the Standard). A similar approach should be taken in implementing the NES. The No Detriment Rule is very inflexible and requires a line by line approach to compliance with the NES. Many transitional instruments containing flexible hours of work and leave provisions would be disturbed causing operational difficulties for employers. A test which allowed the provisions in the agreement relating to a particular NES entitlement (eg. annual leave) to be considered as a whole would be fairer. Ai Group has not identified any problems with these provisions.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
29 – Modern awards and award-based transitional instruments	**Supported**	Ai Group has not identified any problems with these provisions.
30 – FW Act enterprise agreements and workplace determinations, and agreement-based transitional instruments	**Amendment needed**	Ai Group opposes the approach in Item 30(2). Collective agreement-based transitional instruments should not be able to be replaced with an enterprise agreement under the FW Act prior to the nominal expiry date of the agreement. Item 30(2) would most likely lead to coercion of employers to enter into agreements under the FW Act. The provision may also lead to uncertainty regarding the bargaining rights and obligations of parties in respect of the negotiation of agreements under the FW Act. Also, it is very inappropriate that FWA have the power to make a determination covering employees bound by a collective agreement-based transitional instrument prior to the nominal expiry date of the transitional instrument. In the rare circumstances where the parties to an unexpired collective agreement-based transitional instrument wish to make a new enterprise agreement, the parties should be required to apply to terminate the transitional instrument. This is a relatively straightforward process if all parties agree. Item 30, as drafted, is not necessary or desirable.
31 – FW Act enterprise agreements and workplace determinations, and award-based transitional instruments	**Supported**	Ai Group has not identified any problems with these provisions.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 3 – Other general provisions about how the FW Act applies in relation to transitional instruments [Items 32 to 37]	**Supported**	Ai Group has not identified any problems with Items 32 to 37.
Part 6 – Preservation of redundancy provisions in agreements etc. [Items 38 to 40]	**Supported**	Ai Group has not identified any problems with these provisions.

Schedule 4 – National Employment Standards

This Schedule deals with:

- The continued application of the non-wage elements of the Australian Fair Pay and Conditions Standard and other minimum entitlements under the WR Act, during the bridging period; and
- The treatment of service with an employer before the FW (safety net provisions) commencement day.

Ai Group has not identified any problems with Schedule 4. We support the approach of not counting prior service, for the purposes of NES redundancy entitlements, where the employee did not have a redundancy pay entitlement immediately prior to the FW (safety net provisions) commencement day.

Schedule 5 – Modern awards (other than enterprise awards)

Schedule 5 deals with the continuation of the award modernisation process. Ai Group has not identified any difficulties with this Schedule with the exception of Part 3 – Avoiding Reductions in Take Home Pay (Items 2 to 7) which Ai Group opposes.

The provisions of Part 3 are lopsided and unfair upon employers. They would most likely be used by unions to facilitate a recruitment drive in industries where award modernisation has resulted in a perceived reduction in wages or conditions. The provisions could also influence the AIRC's views in determining modern award provisions and lead to the Commission giving more weight to the importance of not disadvantaging employees than the equally important objective of not increasing costs for employers.

If this Part is to be retained, despite our objections, provisions need to be added to the Bill enabling employers to apply for an order remedying an increase in costs. Employers in some cases are facing a huge increase in costs and/or loss of flexibility as a result of award modernisation which could have negative employment effects.

Provisions should also be added requiring that an application for a take-home pay order be made within a defined period of the modern award coming into operation, say three months. Also, take-home pay orders should not be able to have retrospective operation. As currently drafted, a union could apply for a take-home pay order in, say, 2015, and argue that it is necessary for the take-home pay order to apply from 1 January 2010 in order to address a reduction in take home pay. The cost to the relevant employer could be massive, threatening the viability of the business and the job security of its employees.

If Part 3 is to be retained, paragraph 8(3) is particularly important because it clarifies that the reduction in take home pay needs to relate to the same pattern of work. Any other approach would be unfair and unworkable given frequent changes in work patterns by employees (eg. reductions in overtime due to the current economic environment, changes in shift rosters, etc). Also, Item 10 is important because it clarifies that the order would not have application to any employee who does not actually suffer a reduction in take home pay (eg. an employee employed after the relevant modern award came into effect). Item 10 also ensures that an order will eventually no longer have effect once the employee's wages have increased to cover the shortfall in take home pay.

Schedule 6 – Modern enterprise awards

The content of Schedule 6 bears much similarity to the submissions which Ai Group made to the Government on the approach which should be taken to modernising enterprise awards.

Ai Group can understand why the Government intends to require the parties to existing enterprise awards and enterprise NAPSAs to modernise them. Under the new workplace relations system, the NES is a major part of the safety net and modern awards need to be drafted to reflect this fact.

Ai Group supports the timeframe and process set out in the Schedule 6 but has some concerns and suggestions relating to a few provisions, as set out in the table below.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Part 2 – The enterprise instrument modernisation process **Division 1 – Enterprise instruments** **2 – Enterprise instruments; and 3 – Meaning of *single enterprise* and *part of a single enterprise***	**Supported**	It is appropriate that a broad approach be taken to defining an existing award or NAPSA as an enterprise instrument, and to provide appropriate flexibility in drafting the coverage provisions of modern enterprise awards. Many enterprise instruments are very old and the employers bound by them have often restructured since they were made.
Division 2 – The enterprise instrument modernisation process **4 – The enterprise instrument modernisation process; 5 – Enterprise instruments: termination by FWA; 6 – The modern enterprise awards objective; and 7 – Terms of modern enterprise awards**	**Amendment needed**	Ai Group supports the proposed four year period for the enterprise instrument modernisation process. However, it is important that paragraph (3) be amended to enable applications to be made prior to the FW (safety net provisions) commencement day in exceptional circumstances. Such circumstances would include, for example, where an enterprise instrument applies to some but not all franchisees of the same franchisor and it is more appropriate for a modern enterprise award to apply to all franchisees, rather than the relevant modern industry award. If such enterprises are not able to modernise their enterprise instrument until after 1 January 2010 some of the franchisees will be put in an untenable position in being forced to apply the modern industry award. This would create uncertainty for both the employer and its employees.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The criteria in Item 4 paragraph (5) and Item 6 are balanced and appropriate. A balanced approach is important because some employers strongly oppose the termination of their enterprise instrument, while others support its termination. Some enterprise instruments have conditions which are more favourable for the employer than the relevant industry award and hence provide a competitive advantage, others have conditions which are less favourable for the employer than the industry award and accordingly result in a competitive disadvantage. To cater for the different views and circumstances, any party to an enterprise instrument should have the right to argue for the retention or termination of an enterprise award and to argue for the level of the conditions in the award to be amended upwards or downwards during the modernisation process.
8 – Coverage terms	**Supported**	As set out above, it is appropriate that significant flexibility be provided to enable appropriate coverage provisions of modern enterprise awards to be drafted to cater for the diverse enterprise structures and arrangements which exist.
9 – Variation and termination of certain transitional instruments; and 10 – Notification of the cut-off of the enterprise instrument modernisation process	**Supported**	These provisions are practical and appropriate.
Division 3 – Avoiding reductions in take home pay [Items 11 to 16]	**Opposed**	Ai Group opposes these provisions for the reasons set out above in respect of Part 3 of Schedule 5.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 4 – Application of the FW Act [Item 16]	**Supported**	Ai Group has not identified any problems with these provisions.
Part 3 – Amendments	**Supported**	Ai Group has not identified any problems with these provisions.

Schedule 7 – Enterprise agreements and workplace determinations made under the FW Act

This Schedule primarily deals with enterprise agreements and workplace determinations made during the bridging period.

Ai Group supports Schedule 7, including:

- the approval of agreements by FWA;
- the application of the no-disadvantage test and "reference instruments" during the bridging period;
- the application of the Better Off Overall Test and award-based transitional instruments after the bridging period for employees not covered under a modern award.

Ai Group's position is further clarified in the following table.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 2 – Transitional provisions relating to the application of the no-disadvantage test to enterprise agreements made and varied during the bridging period **[Items 2 to 10]**	**Supported**	Ai Group has not identified any problems with these provisions.
Part 3 – Other requirements and modifications applying to making and varying enterprise agreements during the bridging period		
Division 1 – Requirements relating to approval; and Division 2 – Base rate of pay; and Division 3 – No extensions of time **[Items 11 to 16]**	**Supported**	Ai Group has not identified any problems with these provisions.
Division 4 – State and Territory laws dealing with long service leave **[Item 17]**	**Supported**	Ai Group strongly supports Item 17, but an amendment needs to be made to Schedule 3 of the Bill (as set out above in the relevant section of this submission) to clarify that, similar to agreements made during the bridging period, agreement-based transitional instruments prevail over State and Territory laws dealing with long service leave.
Part 4 – Transitional provisions to apply the better off overall test after end of bridging period if award modernisation not yet completed **[Items 18 to 20]**	**Supported**	Ai Group has not identified any problems with these provisions.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 5 – Transitional provisions relating to workplace determinations made under the FW Act [Items 21 to 26]	**Supported**	Ai Group has not identified any problems with these provisions. Ai Group is particularly pleased that Item 22 has been included in the Bill. If s.263(3) in the FW Act did not include transitional instruments every employer of low paid employees would be exposed to the making of a determination, even if it had maintained a collective agreement for many years.
Part 6 – Interaction with Australian Fair Pay and Conditions Standard during bridging period [Item 27]	**Supported**	Ai Group has not identified any problems with these provisions.

Schedule 8 – Workplace agreements and workplace determinations made under the WR Act

Schedule 8 deals with workplace agreements made before the WR Act repeal day, ITEAs made during the bridging period, and various other matters.

Ai Group's position on the provisions of Schedule 8 is set out in the table below:

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 2 – Transitional provisions relating to workplace agreements **Division 1 – Transitional provisions relating to collective agreements made before the WR Act repeal day**		
3 – General rule – continued application of lodgement provisions, no-disadvantage test and prohibited content rules, etc	**Supported**	Ai Group has not identified any problems with these provisions.
4 – Modification – unlodged collective agreements must be lodged within 14 days	**Supported**	The 14 day cut-off period is reasonable.
5 – Limits on variation of a collective agreement that operates from approval for the purpose of passing the no-disadvantage test	**Supported**	It would be unfair to prevent the parties to an agreement made under the WR Act varying the agreement in circumstances where the Workplace Authority determines that the agreement does not meet the no-disadvantage test. The 30 day period within which variations must be lodged (starting 7 days after the date of issue of the Workplace Authority's notice) is reasonable. There is likely to be a very large number of agreements lodged but not approved by 1 July.
Division 2 – Transitional provisions relating to variations of collective agreements made before the WR Act repeal date **[Items 6, 7, 8 and 9]**	**Supported**	Ai Group has not identified any problems with these provisions.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 3 – Transitional provisions relating to pre-WR Act repeal day terminations of collective agreements [Items 10, 11, 12 and 13]	**Supported**	Ai Group has not identified any problems with these provisions.
Division 4 – Transitional provisions relating to ITEAs made before the WR Act repeal day [Items 14 and 15]	**Supported**	Ai Group has not identified any problems with these provisions.
Division 5 – Transitional provisions relating to variations of ITEAs made before the WR Act repeal day [Items 16 and 17]	**Supported**	Ai Group has not identified any problems with these provisions.
Division 6 – Transitional provisions relating to pre-WR Act repeal day terminations of ITEAs [Items 18, 19 and 20]	**Supported**	Ai Group has not identified any problems with these provisions.
Division 7 – Transitional provisions relating to making ITEAs during the bridging period		
21 – General rule – continued application of Part 8 to making of ITEAs	**Amendment needed**	Paragraphs (3) and (4) are not appropriate. Similar to collective agreements made by 1 July but not lodged (refer Schedule 8, Division 1), ITEAs made up to 31 December 2009 should be able to be lodged within 14 days.
Items 22, 23, 24 and 25	**Supported**	Ai Group has not identified any problems with these provisions.
Division 8 – Applying the no-disadvantage test where there is a transmission or transfer of business	**Supported**	Ai Group has not identified any problems with these provisions.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 9 - Miscellaneous	**Supported**	Ai Group has not identified any problems with these provisions.
Part 3 – Transitional provisions relating to workplace determinations made under the WR Act	**Supported**	Ai Group has not identified any problems with these provisions.

Schedule 9 – Minimum wages

Ai Group has not identified any difficulties with the provisions of Schedule 9.

Schedule 10 – Equal remuneration

Ai Group has not identified any problems with the content of Schedule 10.

Schedule 11 – Transfer of business

As submitted during the Senate inquiry into the *Fair Work Bill*, Ai Group regards the transfer of business provisions of the *Fair Work* legislation as highly problematic and ill-conceived, even with the amendments made by Parliament.

We anticipate that there will be a need to vary the provisions once the full extent of the problems become apparent.

In the meantime, we submit, carefully drafted transitional arrangements need to be implemented to protect companies in the industries where the provisions are set to cause substantial operational difficulties, including ICT, labour hire and contract call centres.

The source of many of the problems is the move away from the notion of a business being "transmitted" to a notion that the new employer becomes bound by the industrial instruments of the old employer in an extremely wide and loosely defined set of circumstances, when the new employer employs a person employed by the old employer to perform substantially the same work.

Consider the situation of a labour hire company which places a temporary employee in a client's workplace. As occurs in a very large number of workplaces every day, after a period of time the client often wants to employ the temp. The FW Act provides that if the employee performs substantially the same work for the old and the new employer, and the new employer, in accordance with *"an arrangement"* with the old employer, has *"the beneficial use of some or all of the assets…..that the old*

employer had the beneficial use of, and that relate to, or are used in connection with, the transferring work", then a *"transfer of business"* occurs. If an *"asset"*, for the purposes of s.311(3) of the FW Act, includes office equipment, furniture, tools etc, this could mean that a client of a labour hire company will become bound by the labour hire company's enterprise agreement when they choose to employ a temp. It is unrealistic and unworkable to expect labour hire companies and/or their clients to apply for an order from Fair Work Australia for what is an everyday occurrence.

Further problems will undoubtedly arise due to the fact that the FW Act does not define the term *"outsource"* in sub-sections 311(4) and (5). This term is commonly understood to mean the transfer of an internal business function or internal operational unit to another organisation (eg. information technology, maintenance, customer service, etc). It is not commonly understood to relate to the transfer of the work carried out by a single employee or a few employees.

Ai Group proposes the following essential changes to the transfer of business transitional provisions in Schedule 11:

- The connections between the old employer and the new employer in s.311 of the FW Act are referred to in several places in Schedule 11 of the transitional and consequential legislation. To clarify the meaning (for the purposes of the transitional legislation and the FW Act):

  - The term *"outsource"* (as used in s.311(4) and (5) of the FW Act) needs to be defined, as set out above;
  - The terms *"arrangement"* and *"beneficial use of some or all of the assets"* (as used in s.311(3) of the FW Act) needs to be clarified to address the problem described above re. temps, and other problems that will result from such vague terminology. The problems would be reduced if there was a requirement that the ownership or use of the assets be transferred as a result of an "express agreement" between the old and the new employer, but this would not address all of the problems.

- Part 3, Division 1, Item 7 addresses the situation where a connection between the old and the new employer, as described in s.311(1)(d), is established on or after the WR Act repeal day and provides that the transfer of business provisions of the FW Act apply regardless of whether the employment of the transferring employee was terminated by the old employer before, on or after the WR Act repeal day; or the new employer employs the transferring employee before, on or after the WR Act repeal day. However, a further provision is needed in Item 7 or elsewhere to expressly state that the transfer of business provisions of the FW Act do not apply if the connection between the old and the new employee, as described in s.311(1)(d), is established before the WR Act repeal day regardless of whether the transferring employee/s are employed after the WR Act repeal day.

- Part 3, Division 1, Sub-item 8(1) needs to be amended to remove award-based transitional instruments. If this is not acceptable, then it needs to be clarified that a transitional instrument does not bind the new employer once the instrument is terminated in accordance with the award modernisation requirements.

Schedule 12 – General protections

Ai Group has not detected any problems with the provisions of this Schedule.

Schedule 13 – Bargaining and industrial action

Ai Group supports the approach in Schedule 13 whereby those involved in collective bargaining generally need to start the bargaining and industrial action processes afresh.

Ai Group's position on the provisions of Schedule 13 is set out in the following table:

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 2 – Bargaining **2 – Employee covered by individual agreement-based transitional instrument is taken not to be an employee who will be, or who is, covered by enterprise agreement in certain circumstances**	**Amendment needed**	Ai Group opposes the extension of industrial action rights to any employee bound by an agreement which has not passed its nominal expiry date. Paragraph 2(2)(b) should be deleted. Also, Ai Group opposes the requirement that an employer must give a notice of employee representational rights to employees covered by individual agreement-based transitional instruments which have not passed their nominal expiry date in circumstances where the employer would have been required to give the notice if the agreement was not in place. Sub-item 2(3) should be deleted.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
3 – Application for bargaining order where certain collective agreement-based transitional instruments have not passed nominal expiry date	**Opposed**	Ai Group opposes Fair Work Australia having the power to impose a bargaining order on a party bound by a collective-agreement based transitional instrument which has not passed its nominal expiry date.
Part 3 – Industrial action		
4 – Industrial action must not be taken before the nominal expiry date of transitional instrument	**Amendment needed**	This provision is very important but Sub-item (2) needs to be deleted. Industrial action rights should not be available to any employee bound by an agreement which has not passed its nominal expiry date.
Items 5, 6 and 7 re. section 496 and 497 orders and injunctions	**Supported**	These provisions are important.
Items 8, 9, 10 and 11 re. suspension and termination orders and notices of industrial action	**Supported**	A balanced approach has been taken in the Bill. Both employers and unions need to start the bargaining and industrial action processes afresh.
Part 4 – Protected action ballots		
Items 12 to 16	**Supported**	These provisions are appropriate.
Item 17	**Amendment needed**	An application for a ballot order should not be able to be made prior to the nominal expiry date of an agreement-based transitional instrument.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 5 – Effect of conduct engaged in while bargaining for WR Act collective agreement [Item 18]	**Supported**	This is a sensible and practical provision which will assist in ensuring fairness for both employers and employees.
Part 6 – Payment relating to periods of industrial action [Items 19 and 20]	**Supported**	Ai Group has not identified any problems with these provisions

Schedule 14 – Right of entry

Ai Group has not detected any problems with the provisions of this Schedule.

Item 6 is particularly important to ensure that conduct that occurred under the WR Act can be considered under s.510 of the FW Act in respect of the revocation or suspension of an entry permit.

Schedule 15 – Stand down

Ai Group opposes Item 3. The former provisions of some awards which required that an employer apply to a third party (eg. the AIRC) for authorisation to stand-down employees are no longer enforceable and should not be reinstated. Employers should have the right to stand-down employees in the circumstances set out in the FW Act.

The AIRC has decided that it is inappropriate to include stand-down provisions in modern awards and that the provisions of the FW Act should apply. It is inconsistent with this decision to impose stand-down restrictions upon employers during the bridging period through award-based transitional instruments.

Schedule 16 – Compliance

Ai Group submits that an amendment needs to be made to Schedule 16. That is, Item 17 needs to be amended to prevent the Federal Court and the Federal Magistrates Court ordering an injunction in relation to, not only the contravention or proposed contravention of a transitional instrument, but also in respect of an employee's entitlement to the benefit of a transitional instrument.

Schedule 17 – Amendments relating to the Fair Work Divisions of the Federal Court and the Federal Magistrates Court

Ai Group has not identified any problems with Schedule 17, with the exception of Item 7. This Item enables Judges to be specifically assigned to the Fair Work Division of the Federal Court and to generally only exercise the powers of the Court in that Division. Ai Group does not support this approach.

The current approach of having a large number of Federal Court Judges dealing with industrial matters has led to much better outcomes for the Australian community than the previous approach of having a small number of Judges dealing with all industrial relations matters via the Industrial Relations Court of Australia. There was widespread concern amongst employers with the structures and outcomes of the Industrial Relations Court of Australia and it would be a retrograde step to allow a similar structure to be implemented whereby a small number of Judges handle all of the industrial relations cases.

Item 7 should be amended with the effect that all Federal Court Judges (existing and future appointments) are taken to not be assigned to a particular Division and are able to hear and determine matters in both Divisions of the Court.

Schedule 18 - Institutions

In submissions to the Federal Government, Ai Group argued in support of the appointment of all existing members of the AIRC to Fair Work Australia and we are pleased that this has been implemented.

The approach in Item 11 is practical and sensible. That is, after the cessation time for a WR Act body or office, the powers, functions and duties are to be exercised by Fair Work Australia or any other body determined by the Minister in writing.

However, the cessation time for the Workplace Authority would appear to be potentially problematic. Under the Bill, the Workplace Authority has the role of approving ITEAs lodged during the bridging period. A cessation time of 31 January 2010 may be a little premature given that a large number of ITEAs are likely to be made during the bridging period. It may be more efficient and less costly to allow the Workplace Authority to operate until, say, the end of February or March 2010 instead of transferring the task of approving the remaining ITEAs to Fair Work Australia. We note that Item 7 allows the Minister to determine that a WR Body ceases to exist on an earlier or later date than that set out in the Bill.

Schedule 19 – Dealing with disputes

Ai Group has not identified any problems with this Schedule.

Schedule 20 – WR Act transitional awards etc

Ai Group has not identified any problems with this Schedule.

Schedule 21 – Clothing Trades Award 1999

Ai Group has not identified any problems with this Schedule.

Schedule 22 – Registered organisations

Ai Group is one of the oldest registered organisations in Australia. We have a continuous history of employer representation since 1873 when we were founded as the Iron Trades Employers' Association. Ai Group holds Registration Certificate No. 1 in the New South Wales State industrial relations system, dated February 1902. Ai Group was registered in the national industrial relation system in 1926.

As set out above, in respect of Schedule 1 of the Bill, Ai Group does not object to a separate Act being created for registered organisations but it is not our preferred approach. Registered organisations are vital elements of the workplace relations system and, in our view, such organisations should be regulated through provisions (say, a separate Part) of the FW Act. This would reinforce the important rights and responsibilities that registered organisations have under the workplace relations system.

There are a number of important issues which Ai Group submits need to be addressed in Schedule 22, as set out below.

Part 1 – Main Amendments

Representation and appearance rights of registered organisations in the Federal Court and Federal Magistrates Court

Ai Group is very concerned that Division 3, Part 20, ss.854 and 855 of the WR Act have not been replicated in the FW Act. We understand that unions share our concerns about this matter.

The right of registered organisations to represent themselves and their members in relevant Courts dates back to 1904 and it is extremely important that this right be preserved. Prior to the WorkChoices amendments, the relevant sections of the WR Act were ss.469 and 470. These provisions became ss.854 and 855 under the WorkChoices legislation. The changes made by WorkChoices were not significant so far as the representation rights of registered organisations were concerned, except that organisations were given rights relating to the Federal Magistrates Court which had been established.

Under the current provisions, registered organisations can represent themselves and their members before the Federal Court and Federal Magistrates Court in all proceedings under the WR Act, the *Building and Construction Industry Improvement Act* and the Registered Organisations Schedule, except appeals and prosecutions, and only with leave in matters dealing with the interpretation of awards and agreements and questions of law. This is an important right of registered organisations.

The only relevant provisions in the FW Act appears to be s.548 (8) and (9) which give a registered organisation a very limited right to appear in small claims matters under the Act.

Ai Group submits that ss.854 and 855 should be legislated in some form. Preferably such provisions would have been included in the FW Act but given that they have been omitted we seek that these provisions be inserted into Schedule 22 and included as provisions in the *Fair Work (Registered Organisations) Act*.

Section 856 of the WR Act, which relates to intervention rights of the Minister, was apparently similarly omitted from the FW Act but such rights will be reinstated through Item 50 of Schedule 22. It is important that a similar approach be taken with the omissions relating to ss.854 and 855 of the WR Act and that appropriate provisions be included in Schedule 22.

Part 2 – State and federal organisations

Autonomy of branches of registered organisations [Item 62]

The Bill cannot grant any form of autonomy to a branch of a registered organisation as a branch does not have any separate identity and no existence apart from the registered organisation of which it is an integral and inseverable part. Its members are merely a section of the total membership of the federal organisation – locally organised for the sake of convenience, but in no respect independent of the federal organisation and in all respects subject to the control of that organisation. A branch of an organisation registered under the WR Act does not enjoy any distinct corporate status or legal personality. Such a "branch" is the aggregation of the members of the organisation allocated to that branch by the rules of the organisation and the branch has no separate legal personality. Accordingly, the Bill cannot grant any form of autonomy to a branch. See *Williams v Hursey* [1959] HCA 51; (1959) 103 CLR at 54-55 and *McJannet Ex Parte Minister for Employment Training & Industrial Relations (Qld.)* [1995] HCA 31; (1995) 184 CLR 620 at paras 18 and 62. Ai Group submits that proposed sections 154A and 154B are invalid.

Unfair treatment of existing federally registered organisations in comparison to State-registered associations [Items 70 and 84]

An association which is registered under a State law is able to apply to become a “recognised State-registered association”. It is essential that associations not have the right to represent their members’ industrial interests outside the State in which they are a State-registered association, nor if they have a federal counterpart. The Bill deals with this issue, as it relates to an application to become a “recognised State-registered association”, in Item 84.

Recognised State-registered associations and transitionally recognised associations can apply for full registration under the Act. The provisions relating to such applications are very important and require tightening to avoid demarcation problems and conflicts between registered organisations. Also, the provisions as currently drafted would operate unfairly for existing federally registered organisations.

The Federal system has always been marked by a delineation of industries and the allocation of such industries among specific registered organisations so as to achieve specialised representation of employers and employees. The State systems have not been marked by such an allocation of industries and have a loose system of identifying industries for purposes of registration.

An example of this is a transitionally registered organisation of employers that is currently applying for full registration under the current federal system. The industry coverage of such organisation under the New South Wales system includes as follows:

> *“employers engaged in or in connection with manufacturing and other producing industries and trade and commerce”*

This coverage is so broad as to potentially cover virtually every employer engaged in commercial activity in the relevant State. It is contrary to the whole current system of registration of federal organisations for such a wide ranging coverage to be incorporated into the federal system. If the current system of allowing recognised state-registered organisations to be almost automatically registered federally with the same industrial coverage as held under the State system, is allowed to continue, the whole basis of federal registration of organisations will be thwarted.

Regulation 4.2 of Chapter 6, Part 3 of the *Workplace Relations Regulations 2006* prevents any objection under s.19(1)(j) of the current Schedule 1 of the WR Act (ie. the "conveniently belong rule") when a transitionally registered association applies for full registration. This is unfair upon existing federally registered organisations which are subject to the conveniently belong rule.

The Bill needs to expressly state that, in circumstances where a recognised State-registered association or transitionally recognised association applies for full federal registration:

- The association is precluded from obtaining eligibility to represent employers or employees outside of the State in which it is a State-registered association; and
- Fair Work Australia can hear objections from existing federally registered organisations and test the industry coverage of recognised State-registered associations and transitionally recognised associations in the same manner as any other association applying for full registration.

Part 3 - Representation orders for workplace groups

As the Senate Committee is aware, Ai Group opposed the provisions of the FW Bill which massively expand union entry rights for the purposes of holding discussions with employees.

We do not believe that the provisions of Part 3 – Representation Orders for Workplace Groups, will be effective in avoiding an outbreak in coverage disputes between different unions, and disputes between employers and unions about entry rights.

Further, the Bill needs to be amended to allow representation orders to be obtained to "avoid" an anticipated dispute about coverage. The example on page 129 of the Explanatory Memorandum involves a situation where an application is made to avoid anticipated conflict over coverage. Such applications would appear to be inconsistent with the current wording of the Bill. The Bill needs to be amended to remove the requirement in Item 89 (Para 137A(1)) that there be a "dispute" in order to obtain a representation order.