AUSTRALIAN INDUSTRY GROUP

FAIR WORK BILL 2008

Standing Committee on Education, Employment and Workplace Relations

January 2009

CONTENTS

Summary of Ai Group's position and the context in which the Bill is being introduced

Unlike the last round of workplace relations legislative reforms, the *Fair Work Bill* is being introduced in an immensely tough and challenging economic environment. The global financial crisis and economic slowdown are yet to be fully felt by Australian companies, and employers are bracing themselves. Businesses need to remain highly flexible and adaptable in order to survive the tough times ahead.

In addition to coping with the bleak economic environment, industry is facing increased costs from Government policy changes. Ai Group's conservative estimates are that the Carbon Pollution Reduction Scheme (CPRS) will add an additional $8 billion to business costs in the 2010-11 fiscal year, rising to around $13 billion in the 2020-21 year. Changes to superannuation laws in July last year have also increased labour costs, in some cases substantially. Further, in some industries modern awards will impose major labour cost increases from January next year.

A key test for the laws will be whether they are suitable for bad times and well as good times. Another key test is whether the new laws will preserve the harmonious workplace relations environment that Australia has enjoyed over the past few years. Already the signs are not good. For the year ended September 2008, the number of industrial disputes was up by around 14% on the previous year and the number of working days lost to industrial disputes more than doubled.

The *Fair Work* legislation is being introduced during a year when more than 5000 enterprise agreements expire, including 1300 in the manufacturing industry. Industry needs clear and rigorous bargaining laws and, while the Government has incorporated important protections, the Bill needs tightening in a number of important areas.

In the current environment, excessive improvements in working conditions and the reckless use of the proposed increase in union power will be at the expense of jobs. Jobs are the priority, together with protecting industry from workplace relations turmoil.

The *Fair Work Bill* is the outcome of an extensive and testing consultation process over many months. Ai Group acknowledges that the Bill puts in place many important protections for industry and addresses a number of the concerns which Ai Group has raised during the consultation process. For example, the Bill ensures that:

- Good faith bargaining will not require employers to make concessions or sign up to an agreement that they do not support;
- Some restrictions will remain on agreement content and bargaining claims;
- Strong laws will remain in place to prevent industrial action in pursuit of pattern bargaining;
- Industrial action will remain unlawful in pursuit of multi-enterprise agreements, including project agreements;
- The compulsory arbitration powers of Fair Work Australia (FWA) will be limited;
- Parties will have immediate access to Courts for injunctions and damages where unlawful action is taken;
- The investigatory and prosecutory function of FWA will be separated and judicial functions will continue to be handled by the courts; and
- Hearings, appeal rights and various exemptions will remain part of the unfair dismissal system.

However, key concerns remain which need to be addressed to preserve a productive and flexible workplace relations system which supports jobs and competitiveness. The Bill needs to be amended to address the following problems:

1. The Bill substantially increases union entry rights, giving each union access to a much wider range of workplaces and giving union officials access to wage records of non-union members. The existing entry rights are appropriate and should not be expanded.

2. A union should not be entitled to be covered by an enterprise agreement if only a minority of the employees are union members. A union should only be entitled to be covered if the agreement specifies that the union is covered by it, and the agreement is made with the union.

3. Unless amended the greenfields agreement provisions will result in substantial delays in the commencement of construction projects and increased construction costs.

4. Ai Group has concerns about the drafting of some of the Bill's provisions relating to enterprise agreement making and the potential for interpretation problems to arise. Important changes are proposed to various provisions including those relating to dispute settling, an employer's obligation to bargain, FWA's powers, and the criteria for majority support determinations and scope orders.

5. The low paid bargaining stream, which would have the effect of reintroducing compulsory arbitration, would undermine Australia's enterprise bargaining system and add a further layer of arbitrated employment conditions above the safety net. It should be scrapped.

6. Preventing enterprise agreements overriding State and Territory long service leave laws, as the Bill does, disadvantages all parties.

7. The transfer of business provisions of the Bill are very problematic and will cause major problems for businesses in the Information and Communications Technology (ICT), contract call centre, cleaning, catering and a wide range of other industries which carry out work outsourced from other industries.

Once the law is passed by Parliament it will need to be tested and settled. It is critical that members of Parliament remain open to future amendments which may be necessary to enhance the Bill's operability.

Unions will need to be responsible in their use of the new laws or risk causing economic damage at the worst time for Australia, when pressures on business and on employment are intense.

The reforms will require a massive education effort for industry. Award modernisation is already imposing huge resource demands upon Ai Group and other representative bodies. The situation would be assisted if the Government worked with representative bodies such as Ai Group in rolling-out a substantial education program for industry. Ai Group maintains close links with industry, and employers rely on Ai Group for advice and leadership. Education programs which are channelled through respected industry bodies such as Ai Group are likely to be more effective than broad-brush approaches.

In this submission it is not our intention to comment on every provision of the *Fair Work Bill* but rather to outline Ai Group's position on the significant legislative amendments proposed. The views expressed are subject to the important qualification that at the time of drafting this submission Ai Group had not seen a draft of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill*, nor the intended Regulations. These instruments will contain many provisions which dovetail with provisions of the *Fair Work Bill.*

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 Bill.*

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

Chapter 1 of the Bill – Introduction

Chapter 1 – Introduction, of the Bill includes:

- Objects of the legislation;
- Definitions; and
- Application of the legislation.

Ai Group's position on the provisions of Chapter 1 is set out in the table below. Ai Group has proposed a few amendments to address some important issues.

One important amendment relates to long service leave. Preventing enterprise agreements overriding State long service leave laws, as the Bill does, disadvantages all parties. It is common for employers operating in more than one State to reach agreement with employees / unions to standardise long service leave provisions. Also, employers need to be able to continue to enter into enterprise agreements to override the construction industry portable long service leave schemes in the States and Territories and provide long service leave to their employees in the traditional way.

Further, an important apparent error in the Explanatory Memorandum needs to be corrected regarding the definition of "full rate of pay".

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 1-1, CHAPTER 1 **s.3 – Object of this Act**	**Supported with amendment to (c)**	Objective 3(c) reads like a political statement rather than a provision of a major piece of legislation and should be deleted. 3(c) is not needed - 3(f) emphasises collective bargaining. Also, 3(c) gives the impression that individual agreement making is not encouraged when individual flexibility agreements made under awards and enterprise agreements are a key part of the new system, as are common law individual agreements. 3(c) should be replaced with the following important objectives from the existing Act: • "ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level"; and • "enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances." In 3(f), the terminology *"…emphasis on **single-**enterprise level bargaining….."* should be used, for clarity purposes.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 1-2, CHAPTER 1 **s.12 – The Dictionary**	**Most definitions are supported (exceptions below)**	
Definitions of *"industrial association"*, *"office"*, *"officer"* and *"official"*	**Opposed**	The WR Act and its predecessors recognise registered unions and employer associations for the purposes of the Act. Registration attracts rights but also relatively onerous responsibilities and reporting requirements. An organisation that wishes to be recognised as an "industrial association" under the Act should seek registration and be required to comply with the "Registration and Accountability of Organisations" provisions which are currently found in Schedule 1 to the WR Act.
Definitions of *"organisation"* and *"registered employee association"*	**Opposed**	These definitions refer back to the WR Act. The rights and responsibilities of registered organisations are central elements of the WR system and should be dealt with in a Chapter of the *Fair Work Bill* with similar content to Schedule 1 - "Registration and Accountability of Organisations" of the WR Act.
Definition of *"relevant employee organisation"*	**Opposed**	Ai Group regards the greenfields agreement provisions of the Bill as unworkable and this is a key definition for the purposes of those provisions. This issue is discussed in the Enterprise Agreements section of this submission.
ss.13 to 15 – Definitions of *"employee"*, *"employer"* etc	**Supported**	These definitions are largely consistent with the WR Act. It is important that the coverage of the Bill relate to "employees". It would not be appropriate to cover independent contractors whose contracts are regulated through commercial law.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
ss. 16 and 17 – Meaning of *"base rate of pay"* and *"child"*	**Supported**	Importantly, the definition of "base rate of pay" excludes overtime and penalty rates, which should not be payable where the additional time is not worked, eg. when an employee is on paid leave.
s.18 – Meaning of *"full rate of pay"*	**Apparent error in Explanatory Memorandum**	In para 81 (p.13) and para 237 (p.39) of the Explanatory Memorandum there is an apparent error which needs to be corrected. The comment is made that an employee's "full-rate of pay", as defined in clause 18, is the rate payable for the employee's "**ordinary hours of work**" including…overtime…". Unlike s.16 - Meaning of Base Rate of Pay, s.18 - Meaning of Full Rate of Pay, does not refer to "ordinary hours of work" and it would be highly inappropriate to do so. Deeming any overtime to be part of "ordinary hours of work" would create major interpretation problems within the Bill and could disturb the very widely understood meaning of the term "ordinary hours of work" within the industrial relations system, including within awards. Requiring employers to pay the "full rate of pay" for notice of termination and when transferred to a safe job, as the Bill does, is not supported by Ai Group. However, deeming overtime to be part of "ordinary hours of work" has much wider implications and is strongly opposed by Ai Group. In the AIRC's *Reasonable Hours Case*, the ACTU endeavoured to overturn the widely accepted meaning of "ordinary time" "and "ordinary hours of work" and include regularly worked overtime. This was rejected by the Commission. In its decision[1], the five member Full Bench (including the President and two Vice Presidents) said:

[1] PR072002

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		"[49] The expression "ordinary time hours of work" in s.89A(2)(b) is a conflation of two well-established expressions in the industrial relations vocabulary - "ordinary hours of work" and "ordinary time." It is to be inferred that the composite term refers to hours which may be worked without the payment of overtime and to the regulation of those hours. The ACTU submitted that the expression should be construed to mean "regular, normal, customary or usual hours". We doubt that this is so. The distinction between ordinary hours and overtime is one which is deeply embedded in the Commission's awards and agreements."
s.19 – Meaning of *"industrial action"*	**Supported**	Importantly, the definition of "industrial action" continues to define employer industrial action as lock-out action, which will prevent unions seeking stop orders to stifle the introduction of workplace changes or the termination of an employee.
s.20 – Meaning of *"ordinary hours of work"* for award/agreement free employees	**Supported**	This is an appropriate and important definition to clarify that the ordinary hours of work for a full-time award/agreement free employee are 38 unless agreement is reached on a different number of ordinary hours. Paragraph 100 on page 15 of the Explanatory Memorandum is also important to clarify that the ordinary hours of work for award and agreement covered employees are those set out in the relevant award or agreement.
s.22 – Meaning of *"service"* and *"continuous service"*		
• **Paras (1) to (4)**	**Supported**	These provisions are appropriate.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
• **Paras (5) to (8) re. Transfer of employment**	**Supported with qualification**	Ai Group has substantial concerns about the transfer of business provisions in Chapter 2, Part 2-8, of the Bill, which are linked with s.22 of the Bill, as set out later in this submission. Ai Group supports ss.91(1) and 122(1) (which are referred to in the note under s.22(5)). These sections enable the second employer to decide not to recognise an employee's service with the first employer for the purposes of annual leave and redundancy pay, when employment transfers.
Meaning of "small business employer"	**Amendment needed**	This definition is important for the small business redundancy pay exclusion in s.121. Ai Group does not support the extension of unfair dismissal laws to small businesses.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 1-3, CHAPTER 1		
s.26 – Act excludes State or Territory industrial laws	**Supported**	These exclusions are largely consistent with the existing Act.
s.27 – State and Territory laws that are not excluded by section 26		
• **Para (2)(c) – child labour**	**Amendment needed**	Various State Governments have enacted legislation requiring companies to provide conditions of employment to workers under the age of 18 which are at least equal to the conditions in the comparable state award and state legislation. These laws are creating huge problems for companies and need to be ousted by the Fair Work legislation. The exclusion in s.27 should be narrower, along the lines of the following: *"(c) the following matters relating to child labour:* *(i) Minimum age of employment; and* *(ii) Prohibited types of child employment."*
• **Para (2)(o) - Claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies**	**Opposed**	Ai Group is unconvinced of the need to preserve these laws. Pleasingly, the Explanatory Memorandum clarifies that laws relating to the variation or setting aside of unfair contracts are not saved. Until relatively recently excluded by the WR Act, the NSW unfair contracts laws caused major problems for industry and became a *de facto* unfair dismissal jurisdiction for senior managers.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.29 – Interaction of modern awards and enterprise agreements with State and Territory laws	**Amendment needed**	Ai Group is concerned about s.29 of the Bill as it is currently drafted. Currently, the WR Act (s.17) and Regulations enable federal awards and workplace agreements to override State and Territory laws, with a small number of exclusions, namely laws dealing with OHS, workers' compensation, training arrangements, child labour, discrimination and EEO. In contrast, para 29(2)(c) of the *Fair Work Bill* prevents federal awards and enterprise agreements overriding State and Territory laws dealing with all "non-excluded matters", including long service leave. Preventing enterprise agreements overriding State long service leave laws disadvantages all parties. It is common for employers operating in more than one State to reach agreement with employees / unions to standardise long service leave provisions. The provisions vary substantially from State to State. Also, employers need to be able to continue to enter into enterprise agreements to override the construction industry portable long service leave schemes in the States and Territories and provide long service leave to their employees in the traditional way. For example, the CoINVEST portable long service leave scheme in Victoria has crept far beyond the construction industry and employers in other industries are using enterprise agreements to protect themselves from CoINVEST claims. It is unreasonable for companies outside of the construction industry to be forced to contribute to construction industry portable long service leave schemes for employees who are not engaged in construction work.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.30 – Act may exclude State and Territory laws etc in other cases	**Supported**	It is essential that: • The *Fair Work Bill* is amended to enable new enterprise agreements to override State and Territory long service leave laws, subject to the better off overall test; • Section 113 of the Bill is amended to permit new enterprise agreements to override the award-derived long service leave terms in the National Employment Standards; and • The *Fair Work (Transitional and Consequential Amendments) Bill 2009* provides that enterprise agreements in operation (or filed with the Workplace Authority) prior to 1 July 2009 override State and Territory long service laws indefinitely (not just until 1 January 2010 when the NES applies to all agreements). This is an important provision for clarity purposes.

Chapter 2 of the Bill – Terms and Conditions of Employment

This chapter is, far and away, the lengthiest in the Bill. It deals with the key topics of:

- Interaction between the National Employment Standards, modern awards and enterprise agreements;
- National Employment Standards;
- Modern awards;
- Enterprise agreements;
- Workplace determinations;
- Minimum wages;
- Equal remuneration;
- Transfer of business;
- Payment of wages; and
- Guarantee of annual earnings.

Each of these areas is dealt with separately below.

Interaction between the NES, modern awards and enterprise agreements

Ai Group's position on the key provisions of Chapter 2, Part 2-1, of the Bill is set out in the following table.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 2-1, CHAPTER 2		
s.44 – Contravening the National Employment Standards	**Supported**	This section implements the Government's public commitment to not expose employers to orders where they refuse a request for flexible work arrangements or an application to extend unpaid parental leave on reasonable business grounds.
ss.45 to 48 re. coverage and application of modern awards plus ss.50 to 53 re. coverage and application of enterprise agreements	**Amendment needed**	Ai Group has reservations about the concept of "covers" vs "applies" on the basis that this may cause confusion. In respect of industrial instruments, employers and employees typically use the term "covers" and "applies" interchangeably. Ai Group would prefer that entitlements and obligations relate to instruments which "apply". In circumstances where the term "apply" is not appropriate (eg. to describe a future entitlement) a different, appropriate term could be used eg. "will apply" or "would but for the enterprise agreement apply". Awards should not "cover" or "apply" to high income employees.
s.49 – When a modern award is in operation	**Supported**	The content of this section is practical and beneficial. The section recognises the importance of new obligations usually commencing at the start of a financial year and from the start of a pay period. Also, the importance of avoiding retrospectivity is recognised.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.54 – When an enterprise agreement is in operation	**Supported**	The existing 7 day rule is preserved.
ss.55 and 56 – Interaction between the NES and a modern award or enterprise agreement	**Amendment needed**	To enhance flexibility, employers and employees should have the ability to agree on arrangements which deviate from the entitlements in a particular Division of the NES (eg. Annual Leave) provided that the employee is better off overall. This is particularly important because the Government has announced that the *Fair Work (Transitional and Consequential Amendments) Bill 2009* will extend the operation of the NES to all existing agreements from 1 January 2010. Many existing agreements contain provisions which are inconsistent with the NES (particularly when compared on a line by line basis) but are equally or more generous to employees when considered as a whole. As set out in the last Chapter of this submission, it is important that enterprise agreements be able to override State and Territory long service leave laws and Division 9 – Long Service Leave, of the NES, provided the employee is better off overall. Preventing this will disadvantage both employers and employees.
s.57 – Interaction between modern awards and enterprise agreements	**Supported**	The effect of this provision is largely similar to the WR Act.
s.58 – Only one enterprise agreement can apply to an employee	**Supported**	The effect of paras (1) and (2) of this provision is largely similar to the WR Act. Ai Group strongly supports para (3). It is essential that the Fair Work legislation give primacy to single-enterprise agreements and that such agreements oust any multi-enterprise agreement in place.

The National Employment Standards

An Exposure Draft of the National Employment Standards (NES) was released in early 2008 and Ai Group made a detailed submission proposing various amendments, some of which were adopted by the Government.

A subsequent version of the NES was released to assist the Australian Industrial Relations Commission (AIRC) in modernising awards. This version is largely similar to Chapter 2, Part 2-2 of the Bill, but not identical.

The table below sets out Ai Group's views on the sections of the Bill relating to the NES. Ai Group has proposed some amendments, including to:

- Ensure that the "transfer to a safe job" provisions are fair for both employers and employees;
- Enable award-covered employees to cash-out annual leave via a written agreement with their employer, given the AIRC's decision not to include cashing-out provisions in modern awards;
- Allow enterprise agreements to override the long service leave provisions of the NES, together with State and Territory long service leave laws, subject to the employee being better off overall;
- Remove additional red tape for business associated with the termination of employment provisions and the Fair Work Information Statement; and
- Clarify that employees are not entitled to accrue leave under the NES when on workers' compensation.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 2.2, CHAPTER 2		
Overview	**Apparent error in Explanatory Memorandum**	In paragraphs 237 on page 39 of the Explanatory Memorandum there is an apparent error which needs to be addressed. The comment is made that an employee's "full-rate of pay", as defined in s.18, is the rate payable for the employee's "ordinary hours of work", including…..overtime…". This issue is discussed above in the section of this submission dealing with s.18 of the Bill.
Division 3 – Maximum weekly hours (ss.62 to 64)	**Supported**	The Bill addresses several of Ai Group's concerns about the maximum weekly hours provisions of the exposure draft of the NES. The 12 months' service requirement, as sought by Ai Group, is very important.
Division 4 – Requests for flexible work arrangements		
s.65 – Requests for flexible work arrangements	**Supported**	Ai Group strongly supports s.44(2) which implements the Government's public commitment to not expose employers to orders where they refuse a request for flexible work arrangements on reasonable business grounds.
s.66 – State and Territory laws that are not excluded	**Opposed**	Employers should only be required to comply with one "right to request" scheme. Section 66 will encourage State and Territory Governments to develop legislation which is more onerous upon employers. Section 66 is not needed to preserve State EEO laws as this is dealt with in s.27(1)(a) of the Bill.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 5 – Parental leave and related entitlements (ss.67 to 85)	**Amendment needed**	Ai Group acknowledges that the Bill addresses a number of concerns which Ai Group had regarding the parental leave provisions of the exposure draft. However, amendments need to be made to the "transfer to a safe job" provisions of the Bill. Ai Group opposed the WorkChoices "transfer to a safe job" provisions (which are now reflected in the WR Act) during the Senate inquiry into the legislation, on the basis that they significantly altered the longstanding award provisions and were unfair upon employers. Ai Group is equally opposed to the NES provisions which are even more unfair upon employers. The award test case "transfer to a safe job" provisions should be adopted in lieu of the provisions in the draft NES. The federal award test case standard for parental leave requires that where an employee is pregnant and where, in the opinion of a registered medical practitioner, illness or risks arising from the pregnancy or hazards connected with the work make it inadvisable for the employee to continue in her present job, the employee is to be transferred to a safe job if the employer deems it practicable. If transferring the employee to a safe job is not deemed practicable by the employer, the standard award clause enables the employee to elect, or the employer to require, the employee to commence **unpaid** parental leave. The "transfer to a safe job" provisions of the Bill are very unfair upon employers in the lead, chemical, manufacturing, aviation, construction, mining and other industries where the nature of the work may not, in all circumstances, be safe for pregnant employees. The "transfer to a safe job" entitlements provide a significant disincentive for employers in hazardous industries to employ females of child-bearing age.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		If the "transfer to a safe job" provisions are retained, despite Ai Group's objections, it is not appropriate for an employee transferred to a safe job to be paid for any overtime that she would or may have worked in her regular job. This may not be the Government's intent because para 81(5) of the Bill refers to payment being required for "the hours that she works in the risk period", but the requirement to pay the "full rate of pay" indicates otherwise. Given the inclusion of overtime within the definition of "full rate of pay", this rate is not appropriate for the "transfer to a safe job" provisions. The existing WR Act requires that when an employee is transferred to a safe job the employer must ensure that there is "no other change to the employee's terms and conditions of employment". Where an employee's terms and conditions of employment only require overtime rates to be paid when overtime is worked, an employee would not be entitled to be paid for any overtime not worked.
Division 6 – Annual leave (ss.86 to 94)	**Amendment needed**	Ai Group proposes the following amendments to Division 6: • ***s.89(2) re. interaction between annual leave and personal/carer's leave*** It has been a very longstanding industrial principle that employees are not entitled to claim sick leave during periods of annual leave, unless an award or agreement provides otherwise. Very few private sector awards have provided this entitlement. Para 89(2) of the Bill should be amended to exclude personal/carer's leave from the categories of leave which take priority over annual leave. The provision as currently drafted will increase absenteeism costs for employers.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 7 – Personal/carer's leave and compassionate leave (ss.95 to 107)	**Supported with qualification**	• ***ss.92 to 94 re. cashing out of annual leave*** Despite the NES allowing modern awards to contain cashing-out provisions, the AIRC has to date refused to insert such provisions in modern awards. Given this development, cashing out should be available to all employees, award covered and award-free, subject to the safeguards in s.94 – including the requirement that there be an agreement in writing between the employer and the employee. Ai Group notes the important wording in the Explanatory Memorandum which makes it clear that the 10 day personal / carer's leave entitlement accrues progressively according to the number of ordinary hours that an employee works. This apparently means that an employee who works 38 hours over 4 days, would accrue 76 hours of leave in a year – the same as an employee who works 38 hours over 5 days. Ai Group has been concerned that the expression of the entitlement in terms of days rather than hours could be interpreted as entitling an employee who works 12 hour shifts to 10 x 12hr days of personal/carer's leave (ie. 120 hours of leave rather than 76 hours). As Ai Group reads the Explanatory Memorandum, it is the Government's intent that an employee who works an average of 38 ordinary working hours per week, on the basis of a 12 hour shift roster, would be entitled to 76 hours of personal/carer's leave per year. If this is not the case then the Bill needs to be amended.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 8 – Community service leave (ss.108 to 112)	**Supported**	The 10 day cap on payment for jury service was inserted in response to Ai Group's concerns about the open-ended entitlement in the exposure draft. With regard to leave for voluntary emergency management activities, Ai Group is pleased that the following provisions, which are similar to those in the WR Act, have been incorporated within the Bill: • The requirement that the "absence is reasonable in all the circumstances"; and • The definitions of "voluntary emergency management activity" and "recognised emergency management body".
Division 9 – Long service leave (s.113)	**Amendment needed**	Preserving the effect of award long service leave provisions, as Division 9 does, is very important for companies in the metal, food, vehicle and printing industries where longstanding federal award provisions currently apply. However, s.113 needs to be amended to permit new enterprise agreements to override award-derived long service leave terms. Also, as set out in Chapter 1 of this submission, it is essential that: • The *Fair Work Bill* is amended to enable new enterprise agreements to override State and Territory long service leave laws, subject to the better off overall test; and • The *Fair Work (Transitional and Consequential Amendments) Bill 2009* provide that enterprise agreements in operation (or filed with the Workplace Authority) prior to 1 July 2009 override State and Territory long service laws indefinitely (not just until 1 January 2010 when the NES applies to all agreements).

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 10 – Public holidays (ss.114 to 116)	**Supported**	The Bill addresses various concerns which Ai Group raised regarding the public holidays provisions of the exposure draft of the NES.
Division 11 – Notice of termination and redundancy pay		
Notice of termination (ss.117 and 118)	**Amendment needed**	Ai Group opposes the requirement in para 117(1) that an "employer must not terminate an employee's employment unless the employer has given the employee **written** notice of the day of the termination". This is not an existing requirement of the legislation or awards and its introduction would: • Increase red tape for employers; and • Increase small and large employers' risks regarding unfair dismissal claims. Ai Group also opposes the requirement in para 117(2)(b) that payment in lieu of notice be paid at the "full rate of pay" for the hours the employee would have worked during the notice period. The full rate of pay is defined in s.18 and includes overtime and penalty rates among other things. Ai Group supports the existing payment rule in paras 661(4) and (5) of the WR Act. Payment in lieu should not entitle employees to be paid for overtime not worked.
Redundancy pay (ss.119 to 122)	**Supported**	The Bill addresses various concerns which Ai Group raised regarding the redundancy provisions of the exposure draft of the NES. The transfer of employment provisions in paras (3) and (4) of s.122 are particularly important and largely consistent with the provisions agreed upon between Ai Group and the ACTU in the *Redundancy Case* and endorsed by the AIRC.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Limits on the scope of the Division (s.123)	**Supported**	The exclusions are appropriate.
Division 12 – Fair Work Information Statement (s.124 and 125)	**Opposed**	Ai Group regards the requirement for employers to issue a Fair Work Information Statement to new employees as further unnecessary "red tape" upon employers. If the Government proceeds with the requirement, the Statement should be developed in consultation with major industry representative bodies, including Ai Group. Also, it is important that flexibility be provided for employers to issue the Statement in a variety of ways in keeping with contemporary business practices. This could be achieved through a similar Regulation to the one which existed when employers were required to issue the former *Workplace Relations Fact Sheet*. It appears that the maximum penalty for non-compliance with the NES (including Division 12) is $33,000 per offence. (Refer to ss.44, 539 and 546(2) of the Bill).The focus of any Fair Work Information Statement should be on education and therefore it is inappropriate for the legislation to impose a penalty upon small and large employers for failure to issue the Statement. If, notwithstanding Ai Group's view, the Government decides to include a penalty it should be no more than the $110 maximum penalty which existed for failure to distribute the *Workplace Relations Fact Sheet*. A penalty of $33,000 for every offence is extremely excessive. Potentially a separate offence would be committed for every employee not issued with the Statement. A similar maximum penalty should apply for failure to give an employee written notice of the day of termination in accordance with Division 11 of the NES (if the Government proceeds with this requirement despite Ai Group's opposition).

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 13 – Miscellaneous (ss.126 to 131)	**Amendment needed**	Para 130(1) operates subject to para 130(2). Ai Group is concerned about the interpretation which could be placed on "permitted" in para 130(2). Compensation laws do not typically deal with the issue of leave accruals and hence do not prohibit the accrual of leave when on workers' compensation. Section 130 should be amended to ensure that it is very clear that employees do not accrue leave during periods of workers' compensation.

Modern awards

Awards will continue to play an important role under the *Fair Work Bill*.

Generally, the Bill recognises that modern awards should deal with a limited number of issues and operate in a stable manner over time.

The Bill also recognises the need for awards to promote flexible work practices and productivity improvement, and to not increase the regulatory burden on industry.

Despite these positive aspects, Ai Group has recommended a number of important amendments to address the following issues:

- Award variations between 4 yearly wage reviews should only be permitted in exceptional circumstances and if essential in order to meet the "modern awards objective";
- Variations to award rates should be dealt with during annual wage reviews and not via 4 yearly award reviews;
- The creation of a separate process for varying wage rates through "work value adjustments" will lead to confusion and potential "double-dipping"; and
- The need for greater clarity in the Bill and/or Explanatory Memorandum to ensure that FWA will only be permitted to arbitrate disputes which arise under modern awards where all parties agree.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 2-3		
Division 1 – Introduction (ss.132 and 133)	**Supported**	These provisions are appropriate
Division 2 – Overarching provisions		
s.134 – The modern award objective	**Amendment needed**	This section sets out the overarching principles guiding FWA's modern award powers. Generally, these principles are appropriate. However, there are a number of differences between the modern award objective and the equivalent current provisions in the ss.576A and 576B of the WR Act. The majority of the concepts in the current provisions are reflected in s.134 but the following concepts are missing and should be included: *"(i) protecting the position in the labour market of young people, employees with a disability and employees to whom training arrangements apply;* *(j) the representation rights of organisations"*
s.135 – Special provisions relating to modern award minimum wages	**Opposed**	Variations to award wages are appropriately dealt with via the process in Chapter 2, Part 2-6 – Minimum Wages, of the Bill. Matters of "work value" are able to be raised at the time of the annual wage reviews. The creation of a separate process for varying wage rates in awards via "work value adjustments" carried out at the time of 4 yearly reviews or between 4 yearly reviews is a recipe for confusion and will potentially lead to "double-dipping".

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The definition of "work value" in the Bill is very broad and does not contain all of the protections and qualifications included within Principle 6 – Work Value Changes, of the AIRC's Statement of Principles for national wage adjustments, as highlighted by the following extracts: • *"Changes in work value by themselves may not lead to changes in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification";* • *"A party making a work value application will need to justify any change to wage relativities that might result not only from within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in a relative position";* • *"Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole."*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 3 – Terms of modern awards		
Subdivision A – Preliminary (ss.136 to 138)	**Supported**	These provisions are appropriate.
Subdivision B – Terms that may be included in modern awards		
s.139 – Terms that may be included in modern awards - general	**Supported**	The "allowable matters" set out in this section are similar to those in the WR Act and are appropriate. It is essential that the list of allowable matters be clear and stable and that there be no scope for additional or "exceptional matters" to be included. Allowing extra matters to be included in awards would lead to excessive detail and unnecessary provisions creeping back into awards over time.
s.140 – Outworker terms	**Supported**	This provision is similar in effect to the equivalent provision in the WR Act.
s.141 – Industry-specific redundancy schemes	**Supported**	This is an important provision to prevent industry specific redundancy schemes creeping beyond their existing coverage. Industry specific redundancy schemes operate in the construction industry and the Cole Royal Commission was very critical of nearly all of the schemes as highlighted by the following extracts from the Final Report:

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		"Issue *Redundancy funds were set up for the benefit of employees to ensure payment of entitlements in the event of redundancy. They should operate solely for the benefit of employees. With the exception of the Australian Construction Industry Redundancy Trust (ACIRT), they instead provide significant income streams for others. Other funds distribute surpluses for training, or to sponsors or their nominees.* *At present, surpluses from ACIRT are distributed annually as additional income to employee members irrespective of redundancy. Surpluses should either be credited to member employees' accounts to be applied towards meeting redundancy entitlements and payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required.* ***Recommendation 168*** *(a) Surpluses in redundancy funds either be credited to the employee members' accounts to be payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required.* *(b) The distribution of surpluses in accordance with this recommendation should be a prerequisite for a redundancy fund being prescribed as a fund exempt from fringe benefits tax.*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Issue *Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management yet they function without any prudential control. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunity for any of these events to occur is manifest.* ***Recommendation 169*** *Legislation be enacted to implement a uniform system of financial reporting, external auditing, actuarial assessment and annual reporting to a prudential authority for redundancy funds. The systems presently applying for superannuation and long service leave funds should be points of reference. Documents produced, in compliance with the legislation, be public documents."*
s.142 – Incidental and machinery terms	**Supported**	This provision is similar in effect to the equivalent provision in the WR Act.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division C – Terms that must be included in modern awards		
s.143 Coverage terms	**Amendment needed**	Paras 114(1) to (6) are appropriate. Para (7) is important but the Bill needs to be amended to: • Prevent awards "applying" to or "covering" high income employees; • Require that FWA insert a term in all awards specifying that the award does not apply to or cover a "high income employee" (as defined in s.329). High income earners are able to negotiate their terms and conditions with their employer (subject to the NES) and modern awards should not apply to or cover them.
ss.144 and 145 – Flexibility terms	**Amendment needed**	Individual flexibility arrangements need to be able to be offered to employees as a condition of employment. Prohibiting this would prevent employers utilising individual flexibility arrangements as a mainstream employee relations approach and would inhibit business planning. Also, individual flexibility arrangements should not be able to be terminated with 28 days notice. Agreements have been reached under award facilitative provisions for over 15 years without such an impediment applying and there is no evidence of any difficulties arising. The termination provision in the Bill would, once again, prevent employers utilising individual flexibility arrangements as a mainstream employee relations approach and inhibit business planning.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.146 – Terms about settling disputes	**Amendment needed**	Ai Group is concerned with the use of the term "settle disputes" in s.146. Whilst sections 738 to 740 clarify that FWA and others cannot deal with a dispute about whether an employer has "reasonable business grounds" under ss.65(5) or 76(4) and cannot arbitrate disputes unless all parties have agreed, Ai Group is very concerned about the statement made in para 2728 of the Explanatory Memorandum relating to s.737 – Model Term about Dealing with Disputes, as follows: *"Consistent with the requirements of the Bill for dispute settlement terms (see subclause 186(6), the model term will provide for the binding resolution of disputes".* The above statement in the Explanatory Memorandum needs to be amended to avoid it being interpreted to totally negate the effect of sections 739(4) and 740(3) of the Bill with regard to both awards and enterprise agreements. Sections 146 and 186 contain similar references to dispute **settlement**. It is extremely important that parties negotiating enterprise agreements be permitted to agree on dispute settlement clauses which do not give arbitration powers to FWA or any other party. It is also extremely important that the terms "dispute settlement" in s.146 is not interpreted as requiring that award disputes procedures give compulsory arbitration powers to FWA. The term "settling disputes" in s.146 should be replaced with the term "dealing with disputes".
s.147 to 149 – ordinary hours of work, pieceworkers and allowances	**Supported**	These provisions are appropriate.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Subdivision D – Terms that must not be included in modern awards		
s.150 – Objectionable terms	**Supported**	Ai Group supports this provision, together with the definition of "objectionable term" in s.12.
ss.151 to 153 – payments and deductions for the benefit of the employer, right of entry and discriminatory terms	**Supported**	These provisions are appropriate.
s.154 – Terms that contain State-based differences	**Supported with qualification**	While as a general principle there is merit in removing state-based differences, this provision could lead to large cost increases for employers in some industries as a result of award modernisation. It is important that Parliament remain open to amending the five year timeframe and/or related requirements if the award modernisation objective of not increasing costs for employers is not being achieved.
s.155 – Terms dealing with long service leave	**Supported with qualification**	Ai Group only supports s.155 if the Bill is amended to allow enterprise agreements to override State and Territory long service leave laws plus Division 9 – Long Service Leave, of the NES. The importance of this is explained in earlier sections of this submission.
Division 4 – 4 yearly reviews of modern awards (s.156)	**Amendment needed**	Ai Group supports the proposed 4 yearly reviews of modern awards, commencing 4 years after the legislation comes into operation. However, it is essential that the ability to vary awards between 4 yearly reviews be extremely limited. This is not the case under the Bill, as currently drafted, which gives FWA relatively wide powers to vary awards at any time (see below).

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Ai Group does not support the adjustment of award wage rates for "work value reasons" during 4 yearly reviews. Any adjustment to wage rates should be dealt with through the processes in Chapter 2, Part 2-6 – Minimum Wages, of the Bill.
Division 5 – Exercising modern award powers outside 4 yearly reviews and annual wage reviews **Subdivision A – Exercise of powers if necessary to achieve award modern awards objective**		
s.157 – FWA may vary etc modern awards if necessary to achieve modern awards objective	**Amendment needed**	FWA's modern award powers outside the 4 yearly reviews and annual wage reviews are too broad, especially given the subjective nature of concepts identified in the modern award objective. Para 157(1) should be reworded along the following lines: *(1) FWA may:* *(a) …* *(b) …* *(c) …* *if **exceptional circumstances** **exist** and FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews is **essential** to achieve the modern awards objective.* Para 157(2) should be deleted. Any adjustment to wage rates should be dealt with through the processes in Chapter 2, Part 2-6 – Minimum Wages, of the Bill.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.158 – Applications to vary, revoke or make modern award	**Supported**	This provision is appropriate.
Subdivision B – other situations (ss.159 to 161)	**Supported**	These provisions are appropriate.
Division 6 – General provisions relating to modern award powers		
ss.163 and 164 - Special criteria relating to changing coverage and revoking modern awards	**Amendment needed**	Ai Group can see no reason why the restrictions in s.163(1) and s.164 are necessary. FWA should have discretion to decide whether a reduction in coverage of a modern award is appropriate, or whether it should be revoked. There may be circumstances where it is appropriate for the miscellaneous modern award to cover employers and/or employees previously covered under another modern award.
s.165 – When variation determinations come into operation	**Supported**	This provision is essential. It addresses the important principles of avoiding retrospectivity and the "first full pay period".
s.166 – When variation determinations setting, varying or revoking modern award minimum wages come into operation	**Opposed**	As set out above, any adjustment to wage rates should be dealt with through the processes in Chapter 2, Part 2-6 – Minimum Wages, of the Bill.
s.167 – special rules relating to retrospective variation of awards	**Supported**	This provision is appropriate.
s.168 – Varied award must be published	**Supported**	This provision is appropriate.

Enterprise agreements

Ai Group has been deeply involved in the public debate and the Government's consultation process regarding the *Fair Work Bill*, particularly the enterprise agreement making provisions.

Ai Group acknowledges that the Bill puts in place a number of important protections for industry and addresses various concerns which Ai Group has raised during the consultation process, but Ai Group remains very concerned about several provisions of Chapter 2, Part 2-4 of the Bill.

The *Fair Work* legislation is being introduced during a year when more than 5000 enterprise agreements expire, including 1300 in the manufacturing industry. Industry needs clear and rigorous bargaining laws and the Bill needs tightening in a number of important areas.

In the current environment, excessive improvements in working conditions and the reckless use of the proposed increase in union power will be at the expense of jobs. Jobs are the priority, together with protecting industry from workplace relations turmoil.

The Bill needs to be amended to address the following problems:

- A union should not be entitled to be covered by an enterprise agreement if only a minority of the employees are union members. A union should only be entitled to be covered if the agreement specifies that the union is covered by it, and the agreement is made with the union.

- Unless amended the greenfields agreement provisions will result in substantial delays in the commencement of construction projects and increased construction costs.

- Ai Group has concerns about the drafting of some of the Bill's provisions relating to enterprise agreement making and the potential for interpretation problems to arise. Important changes are proposed to various provisions including those relating to dispute settlement, an employer's obligation to bargain, FWA's powers, and the criteria for majority support determinations and scope orders.

- The low paid bargaining stream, which would have the effect of reintroducing compulsory arbitration, would undermine Australia's enterprise bargaining system and add a further layer of arbitrated employment conditions above the safety net. It should be scrapped.

- Preventing enterprise agreements overriding State and Territory long service leave laws, as the Bill does, disadvantages all parties.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
PART 2-4, CHAPTER 2 **Division 1 – Introduction**		
s.171 – Objects of this Part	**Amendment needed**	In para 171(a), the terminology *"..particularly at the **single-enterprise level…"*** should be used, for clarity purposes.
Division 2 – Employers and employees may make enterprise agreements		
s.172 – Making an enterprise agreement		
Para (1) – Enterprise agreements may be about permitted matters	**Amendment needed**	Ai Group acknowledges that s.172 represents a compromise between positions vigorously argued by Ai Group and the trade union movement. Notwithstanding this, Ai Group supports the retention of the existing "matters pertaining" test which is similar to para 172(1)(a). Para 172(1)(b) will enable protected industrial action to be taken to support claims for provisions beneficial to unions which do not pertain to the relationship between the employer and its employees. The concept that industrial action can be taken resulting in serious financial loss to employers and employees to support claims that will only benefit unions is contrary to modern standards of employment relations. If this provision remains in the legislation it should only have application in respect of the inclusion of clauses in an enterprise agreement and there should be no right to take industrial action in pursuit of such union claims.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Para (2) – Single-enterprise agreement	**Amendment needed**	It is essential that there be a clear differentiation between agreements which apply to a single enterprise and those which apply to more than one enterprise. Para 172(2) achieves this, with the exception that "single interest employers" are included ("Single interest employers" are dealt with below). There is a problem with the terminology used in para 172(2)(b)(ii) regarding greenfields agreements. This para identifies the circumstances under which an employer can seek to make a single-enterprise greenfields agreement. It is a requirement that employer/s *"have not employed any of the persons who will be necessary for the normal conduct of the enterprise".* This language is far too broad and would potentially prevent a greenfields agreement where a General Manager had been hired even though they will not be covered by the agreement. Para 172(2)(ii) should be reworded along the lines of: *"(ii) the employer or employers have not employed any of the employees who will be covered by the agreement."*
Para (3) – Multi-enterprise agreements	**Amendment needed**	Ai Group recognises that the Government has inserted important protections in the Bill relating to multi-enterprise agreements, including: not permitting industrial action and outlawing coercion in pursuit of multi-enterprise agreements. However, Ai Group is concerned that allowing multi-enterprise agreements to be made without restrictions will lead to the loss of genuine enterprise bargaining in many industry sectors.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Similar to s.332 of the WR Act, multi-enterprise agreements should only be permitted if FWA grants authorisation, including being satisfied that the matters dealt with in the agreement could not be more appropriately dealt with in a single-enterprise agreement
Para (4) – Greenfields agreements	**Amendment needed**	It is vital that the Bill include greenfields agreement provisions but Ai Group submits that the provisions, as currently drafted, are unworkable. Our concerns are set out above and below relating to ss.172(2), 175 and 177, plus the definition of *"relevant employee organisation"* in s.12.
Para (5) – Single interest employers	**Amendment needed**	The inclusion of joint ventures, common enterprises and related bodies corporate is similar to the approach within s.322 of the existing WR Act. However, Ai Group opposes the single interest employer stream (see later section of this submission).
Division 3 – Bargaining and representation during bargaining		
s.173 – Notice of employee representational rights	**Supported with qualification**	The concept of employers being required to give employees a notice during bargaining is not a new one in the federal workplace relations legislation. However, para 173(2) is linked to the provisions of the Bill relating to employee representational rights, majority support determinations, scope orders and low-paid authorisations – all of which Ai Group proposes important amendments to.
s.174 – Content of notice of employee representational rights	**Amendment needed**	Ai Group does not support the "default bargaining representative" provisions in s.176 which are required to be explained in the notice (see paras 174(3) and (4)).

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.175 – Relevant employee organisations to be given notice of employer's intention to make greenfields agreement etc	**Opposed**	Section 175 and related greenfields agreement provisions of the Bill are unworkable and would lead to major delays in finalising agreements and commencing construction projects. Section 175 needs to be read in conjunction with the definition of "relevant employee organisation" in s.12. An employer would be required to notify every union which is eligible to represent even one employee who will be covered by the agreement. Every union would then be deemed to be a bargaining representative for the agreement (s.177). The employer would then have an obligation to bargain in good faith with every union (s.179). Even on a small project many unions would be required to be notified and bargained with and on a major project a very large number of unions would need to be notified and bargained with. Any union would have the ability to apply for a good faith bargaining order and substantially delay the commencement of construction work until its demands were met. The greenfields agreement provisions are a recipe for demarcation disputes, substantially increased union power, and increased construction costs (including for Governments). Delays in commencing projects caused by the ill-conceived greenfields agreement provisions would be very costly. Under the Bill, greenfields agreements will only be permitted between employer/s and union/s. Agreements will need to comply with all legislative requirements. Accordingly, a notification requirement is not necessary or desirable. Section 175 should be removed from the Bill.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.176 – Bargaining representatives for proposed enterprise agreements that are not greenfields agreements	**Amendment needed**	Paras 176(1)(b) and (2) need to be deleted. The approach in para (1)(c) should apply to unions. There should be no default bargaining representative provisions. A union should only be deemed to be a bargaining representative if appointed in writing by the employees. Unlike the voluntary bargaining system that has been in place in Australia since 1994, the bargaining system in the Bill gives unions substantial new rights. Ai Group's proposed amendment is appropriate in this context.
s.177 – Bargaining representatives for proposed greenfields agreements	**Amendment needed**	As set out above, the greenfields agreement provisions in the Bill are unworkable, including s.177. This section should be amended to provide that an employee organisation is a bargaining representative for an agreement if the employer agrees to bargain or initiates bargaining for a greenfields agreement with the employee organisation.
s.178 – Bargaining representatives – other matters	**Supported**	This provision is appropriate.
s.179 – Employer etc must not refuse to recognise or bargain with other bargaining representatives	**Amendment needed**	A very important amendment needs to be made to this section. A paragraph along the lines of the following needs to be added to ensure that bargaining is not held to require that employers make any concessions: *"(3) Subsection (1) does not require:* *(a) a bargaining representative to make concessions during bargaining for the agreement; and* *(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement"* Whilst this issue is dealt with in s.228, regarding FWA's role in facilitating bargaining, s.179 is separate provision and a civil remedy provision.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The need for the above paragraph is increased because para 728 of the Explanatory Memorandum states that the obligation in s.180 "on the employer or its bargaining representative is in addition to any good faith bargaining requirements that they are required to meet" under 228(1).
Division 4 – Approval of enterprise agreements **Subdivision A – Pre-approval steps and applications for FWA approval**		
s.180 – Employees must be given a copy of a proposed enterprise agreement	**Supported**	This provision is appropriate.
s.181 – Employers may request employees to approve a proposed enterprise agreement	**Amendment required**	A note should be inserted in s.181 referring to s.255, and s.255 needs to be amended to clarify that: 1. FWA is not empowered to make an order that **prevents or has the effect of preventing** an employer requesting under subsection 181(1) that employees approve a proposed enterprise agreement; and 2. FWA is not empowered to make an order that **prevents or has the effect of preventing** an employee approving a proposed enterprise agreement. The above amendment to s.255 is vital to ensure that unions are not able to apply for bargaining orders or scope orders to delay or prevent a vote by employees to approve an agreement. Such a tactic is predictable in circumstances, say, where only a minority of employees are union members and the union does not support all of the content of the agreement.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.182 – When an enterprise agreement is made	**Supported**	This provision is acceptable.
s.183 – Entitlement of an employee organisation to have an enterprise agreement cover it	**Opposed**	It is unacceptable and unfair to employers and non-union members for a union to be given the right to be deemed covered by an enterprise agreement if it has even one member. Given the default bargaining representative provisions of the Bill, s.183 would enable: • A union to be covered by an agreement where it has only one member out of 1000 employees at an enterprise; • A union to be covered by a multi-enterprise agreement where it has only one member at only one of the enterprises; and • A union to be bound by a multi-enterprise agreement, where a low-paid authorisation is in operation, even if it does not have any members at any of the enterprises. Section 183 should be deleted. A union should only be covered by an agreement if: • The agreement specifies that the union is covered by the agreement; and • The agreement is made with the union.
s.185 – Bargaining representative must apply for FWA approval of an enterprise agreement	**Supported**	This provision is acceptable.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Subdivision B – Approval of enterprise agreements by FWA **s.186 – When FWA must approve an enterprise agreement – general requirements**	**Amendment needed**	Importantly, before approving a multi-enterprise agreement FWA must be satisfied that each of the employers was not coerced and has genuinely agreed to the agreement. However, para 186(4) should be amended to require that FWA be satisfied that an agreement does not include any matters which are not "permitted matters", as well as not including any unlawful terms. With regard to dispute settlement procedures in agreements, as referred to in para 186(6), sections 738 to 740 clarify that FWA cannot arbitrate unless all parties have agreed. However, Ai Group is very concerned about the statement made in para 2728 of the Explanatory Memorandum relating to s.737 – Model Term about Dealing with Disputes, as follows: *"Consistent with the requirements of the Bill for dispute settlement terms (see subclause 186(6), the model term will provide for the binding resolution of disputes".* The above statement in the Explanatory Memorandum needs to be amended to avoid it being interpreted to totally negate the effect of sections 739(4) and 740(3) of the Bill. It is extremely important that parties negotiating enterprise agreements be permitted to agree on dispute settlement clauses which do not give arbitration powers to FWA or any other party. The term "settle disputes" in para 186(6) should be replaced with the term "deal with disputes".

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
s.187 – When FWA must approve an enterprise agreement – additional requirements	**Amendment needed**	Para 187(2) is unnecessary because para 186(3) requires that FWA be satisfied that the group of employees covered by the agreement be fairly chosen. Para 187(2) is likely to be used by unions to prevent an agreement being approved which has a different scope to any scope order issued as highlighted in the following example: ***Example*** A union applies for and obtains a scope order requiring a manufacturing company with 500 employees to bargain for a collective agreement covering all of its employees. However, the company is not prepared to enter into a collective agreement for its 50 managerial, professional, clerical and sales employees who are not union members. Eventually the company and its 450 blue-collar employees reach agreement on the terms of an agreement and seek approval. Despite the wishes of the employees, the union would be able to frustrate the approval of the agreement by arguing that the agreement breaches para 187(2) because of its scope. Para 786 of the Explanatory Memorandum makes it clear that such a circumstance would most likely breach para 187(2) and FWA would be unable to approve the agreement.
s.188 – When FWA must approve an enterprise agreement – additional requirements	**Supported**	This provision is appropriate.
s.189 – FWA may approve an enterprise agreement that does not pass better off overall test – public interest test	**Supported**	This provision is appropriate.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
ss.190 and 191– Approval of an enterprise agreement with undertakings	**Supported**	These provisions are appropriate.
s.192 – When FWA may refuse to approve an enterprise agreement	**Supported**	This provision is welcome and will assist in preventing agreements being approved which, for example, contain provisions that breach the *Trade Practices Act*.
Subdivision C – Better off overall test (s.193)	**Amendment needed**	With a collective agreement, it is not practicable for FWA to be required to satisfy itself that *each* employee be better off overall than if the relevant modern award applied. The test should be whether the approval of the agreement would result in the *group* of employees covered by the agreement being better off overall if the agreement applied to them than if the relevant modern award/s applied. Whilst employers can gain some comfort from para 818 of the Explanatory Memorandum, Ai Group prefers that s.193 be amended. As set out in an earlier section of this submission, enterprise agreements need to be able to override State and Territory long service leave laws (as they currently can). In applying the better off overall test, FWA should be required to consider the terms of State and Territory long service leave laws as well as modern awards.
Subdivision D – Unlawful terms		
s.194 – Meaning of unlawful term	**Amendment needed**	All of the unlawful terms set out in paragraphs (a) to (g) are vital. However, the unlawful terms relating to unfair dismissal and right of entry (paras (c),(d) and (f)) should be broadened and worded as currently appears in the prohibited content provisions of the WR Regulations. The Bill includes a detailed statutory scheme for unfair dismissal and right of entry which should not be undermined by bargaining.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Also, the following additional unlawful terms need to be added which are identical to existing prohibited content matters under the WR Regulations: *(h) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;* *(i) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency.* The above proposed unlawful terms will prevent unions impeding the ability of employers to effectively manage their businesses and prevent interference with legitimate commercial arrangements between clients, contractors and labour hire firms. Importantly, the Bill deems an "objectionable term" to be an unlawful term. The definition of "objectionable term" in s.12 is appropriate and includes a term which requires the payment of a "bargaining services fee" which is defined in s.353 of the Bill in similar terms to the WR Act. The exemption for fees payable under a contract is important to enable employer associations to charge companies for enterprise bargaining services (which is a significant proportion of many associations' revenue).
s.195 – Meaning of discriminatory term	**Supported**	This definition is appropriate.
Subdivision E – Approval requirements relating to particular kinds of employees (ss.196 to 200)	**Supported**	These provisions are workable.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Subdivision F – Other matters **s.201 Approval decision to note certain matters**	**Amendment needed**	Paras (1) and (3) are appropriate. Ai Group opposes para (2) and submits that it should be deleted. As set out above re. s.183, a union should only be covered by an agreement if: • The agreement specifies that the union is covered by the agreement; and • The agreement is made with the union. s.601(4) requires that FWA publish an enterprise agreement that has been approved as soon as practicable after the decision is made to approve the agreement. It is essential that the Explanatory Memorandum clarify that the there is no requirement to publish supporting materials, such as wage rate information that does not form part of the agreement. Significant problems have arisen in the past with some AIRC members who have required that companies provide wage rate information to the Commission to enable them to be assured that the agreement passes the no disadvantage test, and then have made the information available publicly. Only a minority of AIRC members have adopted this approach but the problem could easily arise again unless it is clarified in the Bill or Explanatory Memorandum. Many agreements include wage increases but do not include actual wage rates. Companies typically do not want their competitors knowing the wage rates which they pay. Also, where a company pays employees different amounts on a merit basis, the company will not want employees knowing what others are paid.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 5 – Mandatory terms of enterprise agreements		
s.202 – Enterprise agreements to include a flexibility term etc	**Supported with qualification**	The terms of the model flexibility term, to be prescribed in the Regulations, are very important, and Ai Group has not yet seen such Regulations.
ss.203 and 204 – Flexibility terms	**Supported**	Para 203(5) is particularly important to prevent unions insisting that flexibility terms in agreements require that individual flexibility arrangements be approved by the union and/or the majority of employees.
s.205 – Enterprise agreements to include a consultation term	**Amendment needed**	Similar to the approach adopted in s.203, the Bill should ensure that the requirement to include a consultation term is not used by unions to frustrate the Government's policy intent. As set out in s.171 of the Bill, it is an objective of Chapter 2, Part 2-4- Enterprise Agreements, of the Bill that enterprise agreements deliver productivity benefits. Unions have a long history of insisting that consultation terms in enterprise agreements require that agreement be reached with union/s and/or the majority of employees before workplace changes are introduced. Few companies have been prepared to agree to this common demand but the requirement to include a consultation term increases union power in this respect. Similar to 203(5) of the Bill, a para along the lines of the following should be inserted into s.205 of the Bill: *"The consultation term must not require that the agreement or consent of any other person be obtained before workplace changes are introduced".*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 6 – Base rate of pay under enterprise agreements (s.206)	**Supported**	This provision is generally appropriate but Ai Group is aware that employers in some industry sectors are facing very substantial cost increases due to the AIRC's decision to level-up rates of pay in modern awards. This issue needs to be addressed either in the AIRC or via legislation.
Division 7 – Variation and termination of enterprise agreements		
Subdivision A – Variation and termination of enterprise agreements (ss.207 to 216)	**Supported**	These provisions are appropriate.
Subdivision B – Variations of enterprise agreements where there is ambiguity, uncertainty or discrimination (ss. 217 and 218)	**Supported**	These provisions are appropriate.
Subdivision C – Termination of enterprise agreements by employers and employees (ss.219 to 224)	**Supported**	These provisions are appropriate.
Subdivision D – Termination of enterprise agreements after nominal expiry date (ss.225 to 227)	**Supported**	These provisions are appropriate.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 8 – FWA's general role in facilitating bargaining **Subdivision A – Bargaining orders**		
s.228 – Bargaining representatives must meet the good faith bargaining requirements	**Amendment needed**	Para 228(2) is extremely important. This para needs to be repeated in s.179 which is a civil remedy provision. The requirements of paras 228(1)(a), (b), (c) and (d) are reasonable and acceptable procedural provisions. In contrast para 228(e) is vague and uncertain. This provision will almost certainly lead to litigation to try to assign a meaning to the vague expressions used such as "undermining collective bargaining". The terms of a statute should have clear meaning and effect. Capricious and unfair conduct in the workplace is comprehensively dealt with through the General Protections and Unfair Dismissal provisions of the Bill. Ai Group proposes that para (e) be deleted.
ss.229 to 233 – Bargaining orders	**Amendment needed**	Para 229(2) is very important. It is essential that bargaining orders not be available for multi-employer agreements. Para 229(3) needs to be amended. Bargaining orders should not be able to be sought before the nominal expiry date of an agreement. The 90 day period implies that a party is required to meet the good faith bargaining requirements at that date and hence start bargaining well before that date if another bargaining party wants to. It is unusual for parties to start bargaining more than three months before the expiry of an agreement and often bargaining commences much later in unionised and non-unionised workplaces. Bargaining is a resource intensive and disruptive process and parties should not be forced to bargain prematurely.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Para 229(5) should be deleted. In all cases, a bargaining representative should not be permitted to apply for a bargaining order unless paras 4(b) and (c) have been complied with. Section 231 should be modified to delete paras (1)(b), (1)(c), (2) and (3), in accordance with Ai Group's proposal that para 228(e) should be deleted. It is unnecessary to deal with termination of employment issues through the good faith bargaining process – such issues are appropriately dealt with via the unfair dismissal or unlawful termination laws. Section 232 specifies that bargaining orders can be revoked. This is very important. Circumstances will no doubt arise where agreement is not reached after parties have bargained in good faith. Ai Group notes that s.603 of the Bill enables a bargaining representative or other affected person to apply to revoke a bargaining order.
Subdivision B – Serious breach declarations (s.234 and 235)	**Opposed**	The penalty for breaching a bargaining order is a maximum of $33,000 per offence (see ss.233, 539 and 546). This is a substantial penalty which will promote compliance with bargaining orders. The fact that good faith bargaining obligations are intended to be procedural in nature and will not require concessions will also minimise the number of breaches. Giving FWA the power to making a bargaining related workplace determination because a bargaining order is breached is not logical or appropriate.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Subdivision C – Majority support determinations and scope orders **ss.236 and 237 – Majority support determinations**	**Amendment needed**	There is a problem with the criterion in para 237(2)(c) in that it appears that this provision could be interpreted as automatically deeming that an agreement which covers *"all the employees of the employer or employers"* covers a group that is fairly chosen. Usually, such a scope is inappropriate because in most circumstances it is not appropriate for a collective agreement applying to blue-collar workers to also cover managerial, professional, administrative and sales staff who are typically engaged on staff contracts. Para 237(2)(c) should be reworded as follows: *"(c) the group was fairly chosen"* A separate para should also be inserted as follows: *"In deciding whether the group is fairly chosen, FWA must consider whether the group of employees that will be covered is geographically, operationally or organisationally distinct".* If the above amendment is not made, employers could be exposed to significant risks and disputation associated with union claims to cover managerial, professional, administrative or sales staff under collective agreements applying to blue collar employees.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
		Paras 775 to 778 of the Explanatory Memorandum (relating to s.186 of the Bill) supports the amendment to s.237 sought by Ai Group because these paras make it clear that "there is no requirement for an agreement to cover all of the employees", and that "where an agreement covers a group of employees that do not work in a geographically, operationally or organisationally distinct part of an employer's enterprise", the group should be "fairly chosen". The relevant extract from the Explanatory Memorandum is repeated below: *"775 Subclause 186(3) provides that if the agreement does not cover all employees, the group of employees covered by the agreement must be fairly chosen. There is no requirement that an agreement should cover all the employees of an employer.* *776 The effect of paragraph 186(3) is that where an agreement covers a group of employees that do not work in a geographically, operationally or organisationally distinct part of an employer's enterprise, FWA is required to assess whether the group covered by the agreement was fairly chosen.* *777 It is intended that in assessing whether the group of employees covered by the agreement is fairly chosen, FWA might have regard to matters such as:* • *The way in which the employer has chosen to organise its enterprise; and*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
ss.238 and 239 – Scope orders	**Amendment needed**	• *Whether it is reasonable for the excluded employees to be covered by the agreement having regard to the nature of the work they perform and the organisational and operational relationship between them and the employees who will be covered by the agreement.* *778 This subclause allows and agreement to cover a group of employees that is constituted in any fair and appropriate way (eg. all the electricians employed by the employer or employers)."* Also, para 237(3) should be amended to require that a secret ballot be used to determine whether a majority of employees want to bargain, unless the employer accepts that the majority do. This approach is consistent with the UK and USA laws. Similar to s.232 (re. bargaining orders) and s.239 (re. scope orders), wording should be inserted into para 237(4), to clarify that a majority support determination can be revoked and ceases to operate "from the time specified in the instrument of revocation". Further, there should be a requirement for any application under s.237 to be notified to the relevant employer/s. Importantly, paras 238(1) and (5) clarify that scope orders are only available when bargaining for a single-enterprise agreement, not a multi-enterprise agreement.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Section 238 needs to be amended to clarify that an application for a scope order cannot be made unless an employer has initiated or agreed to bargain, or a majority support determination has been issued. Otherwise the Bill could be interpreted as allowing a union to apply for a scope order when only a small percentage of the employees covered by the proposed agreement wish to bargain collectively. Also, similar to para 237(c), there is a problem with the criterion in para 238(4)(c) in that it appears that this provision could be interpreted as automatically deeming that an agreement which covers *"all the employees of the employer or employers"* covers a group which is fairly chosen. Usually, such a scope is inappropriate because in most circumstances it is not appropriate for a collective agreement applying to blue-collar workers to also cover managerial, professional, administrative and sales staff who are typically engaged on staff contracts. Para 238(4)(c) should be reworded as follows: *"(c) the group was fairly chosen"* A separate para should also be inserted as follows: *"In deciding whether the group is fairly chosen:* • *FWA must consider whether the group of employees that will be covered is geographically, operationally or organisationally distinct; and*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		• *If the scope proposed by the applicant extends beyond a single workplace – FWA must be satisfied that the matters dealt with in the agreement could not be more appropriately dealt with in a single-enterprise agreement which does not extend beyond one workplace.* As set out above re. majority support determinations, paras 775 to 778 of the Explanatory Memorandum (relating to s.186 of the Bill) supports the amendment sought by Ai Group because these paras make it clear that "there is no requirement for an agreement to cover all of the employees", and that "where an agreement covers a group of employees that do not work in a geographically, operationally or organisationally distinct part of an employer's enterprise", the group should be "fairly chosen". The second dot point above will restrain unions in seeking to inappropriately use scope orders to force a large corporation to bargain over a single agreement covering all workplaces within the corporation. In the past, such agreements have often been sought by unions but almost universally rejected by employers because of the negative impact upon productivity and workplace relations. Ai Group strongly opposes para 238(6)(b). It is highly inappropriate for a scope order to relate to more than one proposed single-enterprise agreement. As set out above re. s.187(2), it is important that an agreement be able to be approved if it has a different scope to a scope order issued, provided that at the time of approval FWA is satisfied that the group was fairly chosen.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Subdivision D – FWA may deal with a bargaining dispute on request (s.240)	**Supported**	Importantly, this section only allows FWA to arbitrate if all of the bargaining representatives have agreed.
Division 9 – Low-paid bargaining (ss.241 to 246)	**Opposed**	Ai Group opposes the low-paid bargaining stream for the following reasons: • The provisions in the other Divisions of Chapter 2, Part 2-4 of the Bill give unions and employees many new rights and give FWA many new powers to promote collective bargaining in all sectors – high-paid and low-paid. Accordingly, a low-paid bargaining stream is not necessary or desirable; • "Low-paid employees" are not defined and the provisions could be used by unions to pursue claims against employers paying award rates in any industry; • The stream promotes multi-enterprise agreements over single-enterprise agreements which is inconsistent with the objects of the Act and sound workplace relations; • If agreement is not reached, FWA has the power to make a workplace determination imposing a multi-enterprise outcome. This approach is inconsistent with the objects of the Act and sound workplace relations; • The low-paid provisions add a further layer of arbitrated compulsory conditions over and above the minimum safety net on which the Bill is predicated. Section 284(1) of the Bill sets out the objective of the fixing of a minimum wage by FWA and this includes taking into account relative living standards and the needs of the low-paid, as well as other equitable considerations;

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Division 10 – Single interest employer authorisations (ss.247 to 252)	**Opposed**	• Para 263(3) requires FWA to ensure that no employer covered by a low-paid workplace determination has been covered by an enterprise agreement or other workplace determination. It does not make reference to any form of enterprise agreement that may have been entered into by the employer under the provisions of legislation which preceded the Bill. Simply showing that the employer has not negotiated an agreement since the commencement of the Fair Work legislation does not demonstrate that the employer has evaded bargaining; • Para 242(1)(b) authorises a union with coverage to seek a low-paid authorisation even if it does not have any members within the scope of the proposed agreement. This is a grant of rights to act for an employee contrary to any wishes of that employee. These provisions promote union recruitment and are contrary to the right for an employee to freely decide to be represented by a union or not to be represented. It is particularly inappropriate that if agreement is not reached, the outcome is a multi-enterprise determination by FWA, rather than a separate determination for each single-enterprise. A multi-enterprise outcome is not logical if the intent is to encourage genuine enterprise bargaining. Ai Group cannot see any need for a single interest bargaining stream and we do not support this Division of the Bill. Other provisions of the Bill provide for multi-enterprise agreements which enable employers with common interests to bargain together. Permitting industrial action to be taken across more than one enterprise (as the single interest employer stream does) is a retrograde step.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*

		Notwithstanding Ai Group's opposition, several important protections are contained within the Bill which reduce the risk of the stream being used by unions to target companies in private sector industries where there is a high degree of co-ordination required between enterprises, including the following:
		
		• Access to the stream (other than for franchisees) requires:
		  ○ A Ministerial Declaration;
		  ○ An application to be made to FWA for a single interest employer authorisation;
		• The criteria which the Minister is required to consider includes such vital aspects as:
		  ○ Whether it would be more appropriate for each relevant employer to make a separate enterprise agreement with its employees;
		  ○ The extent to which the relevant employers operate collaboratively rather than competitively;
		  ○ Whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory;
		• Before issuing a single interest employer authorisation, FWA is required to be satisfied that the employers have agreed to bargain together, and no person coerced, or threatened to coerce, any of the employers;
		• The employers who wish to access the stream are the only parties who can apply for a Ministerial Declaration and a single interest employer authorisation;
		• Scope orders are not available.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Ai Group can see no reason why any rational employer would apply for access to the single interest employer stream and hence expose itself to protected industrial action, when the same agreement making outcome could be achieved using the multi-enterprise agreement provisions. However, there is the risk that an employer may unwittingly agree to be listed in an application for a Ministerial Declaration or a single interest employer authorisation, along with a large number of other employers, without knowing the full implications. If the stream is to be retained, despite Ai Group's opposition, the following additional protections are needed: • Applications for Ministerial Declarations should be required to be notified to industry representative bodies such as Ai Group before any application is considered by the Minister, to enable industry's views to be taken into account; • Section 254 should be amended to require that applications for Ministerial Declarations, single interest employer authorisations and variations to add employers should be required to be signed by each individual employer; • Section 251 should be amended to enable an employer to withdraw from the single interest bargaining stream, without restrictions, by simply giving written notice to the other bargaining representatives and FWA; • Along with the prohibition on scope orders which is already in the Bill, majority support determinations and bargaining orders should not be available; and

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		• Workplace determinations should not be available. As drafted, the Bill would apparently allow a union to apply for a determination if protracted industrial action is taken in respect of any one of the employers (eg. one out of 100 employers), and significant harm is being caused (or threatened) to any one of the employers and any individual employee of any of the employers.
Division 11 – Other matters		
s.253 – Terms of an enterprise agreement that are of no effect	**Amendment needed**	This is a very important provision. It is essential that terms of agreements which are not "permitted matters" or are "unlawful terms" have no effect. However, as set out earlier in this submission, Ai Group proposes amendments to the definitions of "permitted matter" and "unlawful term", and proposes that FWA be required to be satisfied that an agreement does not include any matters which are not "permitted matters" or are "unlawful terms" before approving the agreement.
s.254 – Applications by bargaining representatives	**Opposed**	It is risky and inappropriate to allow a bargaining representative of one employer to make application on behalf of other employers. With all agreements applying to more than one employer, the Bill should require that every employer sign every application.
s.255 – Part does not empower FWA to make certain orders	**Amendment required**	This is a beneficial and important provision but s.255 needs to be amended to clarify that:

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		1. FWA is not empowered to make an order that **requires or has the effect of requiring** particular content to be included or not included in a proposed enterprise agreement *(This aspect is covered in para 255(1)(a) of the Bill);* 2. FWA is not empowered to make an order that **requires or has the effect of requiring** an employer to request under subsection 181(1) that employees approve a proposed enterprise agreement *(This aspect is covered in para 255(1)(b) of the Bill);* 3. FWA is not empowered to make an order that **prevents or has the effect of preventing** an employer requesting under subsection 181(1) that employees approve a proposed enterprise agreement *(This aspect is not adequately covered in the Bill);* 4. FWA is not empowered to make an order that **requires or has the effect of requiring** an employee to approve, or not approve, a proposed enterprise agreement *(This aspect is covered in para 255(1)(c) of the Bill);* 5. FWA is not empowered to make an order that **prevents or has the effect of preventing** an employee approving a proposed enterprise agreement *(This aspect is not adequately covered in the Bill).*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The issues dealt with in points 3. and 5. above are vital to ensure that unions are not able to apply for bargaining orders or scope orders to delay or prevent a vote by employees to approve an agreement. Such a tactic is predictable in circumstances, say, where only a minority of employees are union members and the union does not support all of the content of the agreement.
ss.256 and 257 – Prospective employers and employees	**Supported**	Ai Group has not identified any problem with this provision.
s.257 – Enterprise agreements may incorporate material in force from time to time	**Supported**	This provision is appropriate.

Workplace determinations

The Bill provides for the following types of workplace determinations:

1. ***Low-paid workplace determinations*** – which can be applied for if a low-paid authorisation has been issued and bargaining representatives have been unable to reach agreement on the terms of a multi-enterprise agreement.

2. ***Industrial action related workplace determinations*** – which FWA must make if the right to take industrial action is terminated in one of the following circumstances and the bargaining representatives have been unable to reach agreement at the end of the post-declaration negotiating period:[2]

    a. Where industrial action is causing, or is threatening to cause, significant economic harm to the employer/s and any of the employees covered by the agreement; or

    b. Where industrial action is threatening to endanger the life, personal safety, health or welfare of the population or part of it; or

    c. Where industrial action is threatening to cause significant damage to the Australian economy or an important part of it;

[2] Generally 21 days after the date that the termination instrument is made.

d. Where the Minister has made a declaration terminating industrial action in similar circumstances to those mentioned in a. and b.

3. ***Bargaining related workplace determinations*** – which FWA must issue if a serious breach declaration is made and the bargaining representatives have been unable to reach agreement at the end of the post-declaration negotiating period.[3]

It is essential that bargaining outcomes are only imposed upon parties in extremely limited circumstances and only when the interests of the community outweigh the interests of the parties. Of the circumstances set out above, the only ones which meet this criteria are:

- Where industrial action is threatening to endanger the life, personal safety, health or welfare of the population or part of it; or
- Where industrial action is threatening to cause significant damage to the Australian economy or an important part of it.

Giving FWA and the Minister the power to terminate industrial action and make a determination in these two circumstances is essential and consistent with existing provisions of the *Workplace Relations Act*.

However, the same cannot be said about the other circumstances referred to above.

[3] Generally 21 days after the serious breach declaration is made.

The reasons for our opposition to low-paid workplace determinations and bargaining related workplace determinations are set out in the section of this submission which deals with Enterprise Agreements. A low-paid workplace determination is anything but a "workplace" determination – the result is a multi-enterprise outcome which is particularly inappropriate and illogical if the intent is to encourage enterprise bargaining.

The reasons for our opposition to an industrial action related workplace determination being made where industrial action is causing, or is threatening to cause, significant economic harm to the employer/s and any of the employees covered by the agreement are set out below:

- 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.

- Determining a bargaining outcome against the will of the parties is totally inconsistent with an enterprise bargaining system. Once an outcome is determined it is, of course, no longer "an agreement".

- Fact Sheet 10 – *Clear, tough rules for industrial action,* which the Government released on 17 September 2008, states that:

*"Where protected industrial action is protracted and causing significant harm to the relevant employer **and employees**, Fair Work Australia may similarly act to end the industrial action and determine a settlement for the bargaining participants".*

Contrary to the Fact Sheet, s.423 provides that if the industrial action is threatening harm to the employer and **any employee** then the industrial action can be terminated and a determination made. This is too loose.

- Ai Group is concerned that this provision could lead to a return to the old days of arbitration around ambit claims. There is the risk that arbitrated outcomes, particularly those favourable to unions, would flow-on across industries. This could occur as a result of unions pressing other employers to accept the arbitrated outcome and also through other similar outcomes being arbitrated by FWA and the doctrine of precedent.

Minimum wages

Ai Group supports the minimum wage processes in the Bill. It is hoped that the Bill will lead to the best elements of the previous AIRC and Australian Fair Pay Commission (AFPC) processes being implemented.

The following very worthwhile elements of the AFPC minimum wage reviews will hopefully be preserved under the new system:

- A greater degree of informality than previous AIRC safety net review proceedings;
- Proceedings which are inquisitorial in nature rather than adversarial;
- The commissioning of research.

Over the past few years the AFPC has commissioned a substantial amount of research, which has made a major contribution to the community's understanding of the impact of minimum wage increases and the attributes of the low paid.

As set out in the Awards section of this submission, Ai Group believes that award wages should only be able to be varied through the Minimum Wage processes in the Bill, rather than through "work value" cases and 4 yearly award reviews. The Minimum Wage provisions of the Bill are flexible and the Minimum Wage Panel is not required to award the same wage increase to employees under each award. Any matters of work value etc should be raised with the Minimum Wage Panel at the time of the annual wage review.

In accordance with s.620 of the Bill, the Minimum Wage Panel consists of seven members including at least three "Minimum Wage Panel Members" who hold office on a part time basis. The Minimum Wage Panel Members should include at least one representative from industry. The Bill logically provides in s.629(4) that the Minimum Wage Panel Members hold office for the period of their appointment which must not exceed 5 years.

Ai Group proposes a few changes to the minimum wage objective in s.284 as follows.

The need for competitiveness in the labour market is an important issue in respect of junior wages. Therefore Ai Group proposes that the following objective from the current *Workplace Relations Act* should replace s.284(1)(e) in the Bill:

> *"(e) Providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market."*

Section 284 should also be amended to require the Minimum Wage Panel of FWA to take into account:

> *"(f) The capacity for the unemployed and low paid to obtain and remain in employment; and*
>
> *(g) Other elements of the social safety net, in particular income tax and income support arrangements."*

These two vital issues have been focussed upon by the AFPC and it is important that the Minimum Wage Panel give sufficient focus to them.

Equal remuneration

Ai Group supports the principle of equal remuneration for work of equal value.

The existing provisions in Part 12, Division 3 of the *Workplace Relations Act* are balanced and Ai Group does not see any need for major changes. The provisions of the Bill are very general and imprecise.

The Bill should preserve the existing arrangements whereby:

- The principle underpinning the equal remuneration provisions should relate to work of "equal value" – not work of "equal or comparable value"; (As set out in the Explanatory Memorandum, "comparable value" is a broader concept and could involve comparisons between quite different work and jobs); and
- The applicant should be required to demonstrate as a threshold issue that there has been some kind of discrimination involved in the setting of remuneration.[4]

[4] Refer to para 1192 on p.189 of the Explanatory Memorandum.

Transfer of business

The Transfer of Business provisions of the Bill are inappropriate and problematic. The provisions will cause problems for employers in the Information and Communications Technology (ICT), contract call centre, cleaning, catering and a wide range of other industries which carry out work outsourced from other industries.

The transmission of business provisions of the *Workplace Relations Act* have been the subject of exhaustive debate, legislative development and litigation in the Federal Court and High Court over the past decade. The provisions are finally working effectively and should be retained in their current form.

The key issue over time has been whether "transmission of business" involves the concept of the "the work" transferring, or alternatively "the business" transferring. This issue was considered at length by the High Court in *PP Consultants Pty Ltd v FSU [2000] HCA 59* and by the Full Federal Court in *Stellar Call Centres P/L v CPSU [2001] 103 IR 220*.

The High Court in *PP Consultants* reversed a decision of the Full Federal Court and devised a "character of the business test" to determine whether a transmission of business under the Act has occurred. The High Court said that it is necessary to characterise the business, or relevant part of the business, of the outgoing employer, and to then identify the character of the business as carried on by the new employer. Only if the two are the same is there a transmission of business.

In *Stellar Call Centres P/L v CPSU [2001] 103 IR 220*, a Full Court of the Federal Court had to decide whether a group of call centres that were outsourced by Telstra were subject to Telstra's certified agreements by virtue of the transmission provisions of the *Workplace Relations Act*. The Court found that Telstra's business was providing telecommunications services to its customers while the business of Stellar was the provision of telephone answering services. This meant that the businesses were not the same and the certified agreements did not transmit. The Full Bench pointed out that if a restaurant outsourced its cleaning operations this would not be a transmission because cleaning was not a part of the business of a restaurant, although it was a necessary aspect of such a business.

The High Court's decision in *Gribbles Radiation Pty Ltd v HSU [2005] HCA 9* set out some further principles which apply when a business is transmitted, including the requirement that tangible or intangible assets need to transfer from the old employer to the new employer for the transmission of business provisions to apply.

The Bill extinguishes the High Court's "character of the business test" and, even though a test based upon the *Gribbles* case has been included in the Bill, inexplicably and illogically the test does not apply to outsourcing and in-sourcing scenarios.

The Bill adopts the "transfer of work" approach which was pursued by unions and ultimately rejected by the High Court and Full Federal Court in the *PP Consultants*, *Stellar* and *Gribbles* cases.

The Bill gives no weight to whether a business which takes over outsourced work has the same character as the one which outsources the work, nor whether any tangible or intangible assets transfer from the old employer to a new employer.

The Bill imposes a substantial disincentive on the new employer offering any of the employees of the old employer a job, because if the new employer does so:

- Any enterprise agreement, workplace determination or named employer award ("transferable instrument") applicable to the old employer will apply to the transferring employees in their employment with the new employer;
- Any new employee employed by the new employer to do similar work as the transferring employees after the transfer of business will be covered by the transferable instrument, if the new employer is not covered by another enterprise agreement or modern award (s.314); and
- FWA has the power to make an order requiring the new employer to apply the transferable instrument to all of its existing and new employees carrying out similar work as the transferring employees (s.319).

Imposing such a major disincentive in respect of the employment of any of the old employer's workers is not sensible. The Bill should encourage employment, not discourage it. At this time of rising unemployment, it is imperative that the Bill be amended.

The shift in the balance of the transfer of business provisions proposed in the Bill is further exacerbated by the removal of the existing "sole and dominant" reason test (s.792(4) of the *Workplace Relations Act*) in the General Protections part of the Bill. Prior to the Act being amended to insert this test, unions were able to stymie outsourcing plans with applications for an injunction on the basis that employees were being dismissed due to their entitlement to the benefits of an industrial instrument.

As set out above, Ai Group proposes that Part 2-8 of the Bill be redrafted and the transmission of business provisions in the *Workplace Relations Act* be retained. If this is not acceptable, then the following changes to the Bill are critical:

- In section 311 of the Bill, it is inappropriate that paragraph 311(3) is not a requirement for the outsourcing and in-sourcing scenarios in s.311(4) and (5), in order for a "transfer of business" to occur. Companies in the ICT, contract call centre, catering, cleaning, contract maintenance, labour hire etc industries take over work previously carried out by companies in other industries on a daily basis – this is the nature of their business. These companies would find it difficult and disruptive to run their businesses efficiently if the industrial instruments of their clients became binding upon them in respect of transferring employees and potentially other employees if they employ any of the old employer's workers.

  It is unfair and unworkable to force these companies to go to FWA for an order every time they gain a new client and any employee is transferred. Often with a major contract it is essential for the company which wins the contract to employ some of the client's former staff given the knowledge that such staff have of the client's products, services, systems or customers.

- Subsection 311(3) of the Bill describes the High Court's *Gribbles* test. A provision should also be drafted and included in s.311 describing the High Court's *PP Consultants* "character of the business test". For a transfer of business to occur (including in outsourcing and in-sourcing scenarios) the two tests should be required to be met. That is:

- There must be a transfer of assets from the old employer to the new employer; and
- The new employer's business must be of the same character as the old employer's business.

- Section 314 (New non-transferring employees of new employer may be covered by transferable instrument) should be deleted.

- Section 319 of the Bill should be amended to remove the power for FWA to issue an order making a transferable instrument binding upon the new employer in respect of non-transferring employees.

Payment of wages

Ai Group has not identified any problems with the Payment of Wages provisions of the Bill. The provisions require that payment be made at least monthly and, importantly, enable the use of electronic funds transfer.

Section 326 provides that a term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits or requires a deduction or payment if the deduction or payment is:

- Directly or indirectly for the benefit of the employer; and
- Unreasonable in the circumstances.

The Bill enables Regulations to be made prescribing circumstances in which a deduction or payment is reasonable or unreasonable.

The Regulations should specify that reasonable deductions include (but are not limited to):

- Recovery of overpayments arising from payroll or financial institution errors;
- Withholding monies on termination for: notice not given by an employee; annual leave, personal/carer's leave or rostered days off granted in advance; or amounts loaned to the employee by the employer.

Guarantee of annual earnings

The process in Chapter 2, Part 2-9, Division 3 of the Bill has application where a modern award covers a "high income employee". In such circumstances the employer is able to undertake in writing to pay the employee an amount of earnings above the "high income threshold" for a period of 12 months or more and if the employee accepts the undertaking (and subject to various other conditions) the award no longer "applies" to the employee (but still "covers" him or her).

Whilst the process in the Bill appears to be workable and, importantly, allows an employer to offer an undertaking as a condition of employment when making a job offer to an employee, Ai Group has the following concerns:

- Ai Group does not support the exclusion of Statutory superannuation contributions from the earnings that are assessed when determining whether an employee is a high income employee. Employer superannuation contributions currently fall within the definition of "remuneration" for an employee for the purpose of assessing an employee's ability to bring an unfair dismissal claim under the *Workplace Relations Act*. This was also the case with the pre-Workchoices provisions of the Act.

- As set out earlier in this submission, Ai Group has reservations about the concept of "covers" vs "applies" on the basis that this may cause confusion. In respect of industrial instruments, employers and employees typically use the term "covers" and "applies" interchangeably. Ai Group would prefer that entitlements and obligations relate to instruments which "apply".

- As set out in the Awards section of this submission, Ai Group proposes that the Bill be amended to:

    - Prevent awards “applying” to or “covering” high income employees;
    - Require that FWA insert a term in all modern awards specifying that the award does not apply to or cover a “high income employee”.

High income earners are able to negotiate their terms and conditions with their employer (subject to the NES) and modern awards should not “apply to” or “cover” them.

Chapter 3 of the Bill – Rights and Responsibilities of Employees, Employers and Organisations

Chapter 3 of the Bill deals with:

- General protections;
- Unfair dismissal;
- Industrial action;
- Right of entry;
- Stand down; and
- Other rights and responsibilities.

Each of these areas is dealt with separately below.

General protections

Chapter 3, Part 3-1 – General Protections, of the Bill deals with matters presently covered by Part 16 "Freedom of Association" in the *Workplace Relations Act* but is significantly broader.

Ai Group makes the following submissions about this part of the Bill:

- S.345 deals with false and misleading statements about the workplace rights of another person or the exercise of such rights by another person. In the manner in which this provision is drafted, it only applies to representations made to a person about the workplace rights of the person to whom the statement is addressed. It is difficult to see why this provision is limited in this manner when it should also cover misrepresentations about the rights of the person making the representation. Logically it should apply to misrepresentations about the rights of the person making the statement, as well as rights of the person addressed. The qualifications that the statements must be made knowingly or recklessly, and that they must be expected to be relied upon, give adequate protection to prevent use of these provisions in all but extreme cases. The Explanatory Memorandum states that this provision is meant to broadly cover existing s.401 which deals with false or misleading statements about agreements. S.401 is broader in effect as it covers any statement by the person making the misrepresentation. S.345 should be amended so as to cover any statement made by the person making the misrepresentation.

- Section 351 – Discrimination, substantially duplicates existing protections in Commonwealth, State and Territory anti-discrimination laws and, accordingly, is unnecessary. Such claims are more appropriately pursued under anti-discrimination laws which establish appropriate mechanisms for making and dealing with complaints and which are the established means for dealing with such matters. The protections are far wider than any existing discrimination protections in the *Workplace Relations Act*. The provision is contrary to the Government's commitment to harmonise existing anti-discrimination laws and would add additional complexity and increase the regulatory burden on business.

  Also s.351 specifically prohibits an employer from taking adverse action against employees or prospective employees based on discriminatory grounds. "Adverse action" is defined in a manner that is not confined to action taken by employers only. (See for example s.342, items 5, 6 and 7). If s.351 is to be retained it should apply to any person taking adverse action, so as to prevent employees or unions from taking adverse action based on discriminatory grounds. There is no basis for confining this offence to employers only.

- Ai Group strongly supports s.353 of the Bill which outlaws "bargaining services fees", which are defined in similar terms to the *Workplace Relations Act*. The exemption for fees payable under a contract is important to enable employer associations to charge companies for enterprise bargaining services (which is a significant proportion of many associations' revenue).

- Section 355 is an important provision. It is unfair and inappropriate for employers to be forced to employ full-time union delegates and OHS Officers nominated by unions. OHS is a vital issue and it is essential that the most qualified person is appointed, not the person forced upon the employer by a union. In the construction industry it was common in Victoria and Western Australia for employers to be forced to employ highly militant individuals as full-time union delegates and OHS officers before the relevant union would sign a project agreement.

- Ai Group supports s.356 of the Bill, including the definition of “objectionable provision” in s.12.

- Section 723 of the Bill states that a person must not make an unlawful termination application in relation to conduct if the person is entitled to make a General Protections court application in relation to the conduct. Accordingly, most unlawful termination claims will now be dealt with under the General Protections provisions. It is essential that the Bill be amended to preserve the existing six month limit on compensation where a claim is pursued on the basis of a prohibited reason.

Unfair dismissal

The unfair dismissal provisions of the Bill are simpler than the existing provisions and simplicity is worthwhile so long as fairness and justice is not compromised.

Ai Group makes the following submissions about Part 3-2 of the Bill:

- Ai Group opposes the removal of the existing exemption for small businesses. However, given the Government's decision to remove the exemption, Ai Group supports the Small Business Fair Dismissal Code and subsection 385(c) of the Bill which provides that a dismissal which is consistent with the Code is not an unfair dismissal.

- Ai Group opposes the removal of the "genuine operational reasons" exemption and its replacement with an exemption for "genuine redundancy" and opposes the narrowing of various other unfair dismissal exemptions.

- Section 386(2)(a) needs to be amended to address the reality that a season does not have a defined start date where all seasonal workers are employed and a defined end date where all employees are terminated. Work ramps up at the start of a season and winds down towards the end of a season and employees are employed and terminated progressively. Seasonal workers should not be able to pursue an unfair dismissal claim if terminated "during or at the end of a season".

- Section 397 requires FWA to conduct a conference or hold a hearing if an application for unfair dismissal remedies involves contested facts. This appears to give discretion to FWA as to which process to adopt, although the provisions of s.399 (1) impose a presumption that hearings will not take place unless FWA considers it appropriate taking into account certain criteria.

  These provisions can be contrasted with the existing provisions of the *Workplace Relations Act* which provide for certain matters to be decided as threshold matters and which allow for some matters to be decided without a hearing (see s.645). The provisions of the *Workplace Relations Act* are narrowly limited as to the making of decisions without a hearing, whereas the provisions of the *Fair Work Bill* would enable FWA to decide not to hold a hearing in any matter coming before it.

  It is submitted that a party to proceedings for relief against unfair dismissal should have the right to require a full hearing to be held in the event of there being a contest as to facts. It is only in a hearing, that a party would be required to give evidence on oath and be cross-examined. During a conference a party may make unsworn statements that cannot be tested and this can result in a situation where FWA would be making a decision based on untested information. This is a position that should not be allowed to prevail notwithstanding the Government's desire to introduce a simple system for dealing with unfair dismissal claims. The fact that hearings can only take place at the option of FWA has the potential to lead to miscarriages of justice and for parties to benefit who have misrepresented information to FWA. This cannot be justified on the basis of expediency. Either party to proceedings relating to unfair dismissal should have the right to require a hearing to take place.

- Section 400 provides no time limit for the instituting of an appeal. The Explanatory Memorandum at paragraph 1588 states:

  "Flexibility in the timing of an appeal is possible because a decision regarding initial matters is an appealable decision and clauses 400 and 604 do not require that appeals be lodged within specified timeframes."

  The current rules of the AIRC require that appeals are lodged within 21 days of the date of the decision appealed against (13(2)). It is important that a similar provision is retained to ensure that an appeal could not be commenced months or years after a matter has been determined by FWA.

- The grounds for seeking costs orders under section 611 of the Bill are too limited and omit important grounds for costs orders contained in the unfair dismissal provisions of the *Workplace Relations Act.* These additional grounds are found at ss.658(2) and 658(3) of the Act and relate to unreasonable refusal by a party to settle the proceedings and unreasonable acts or omissions by a party respectively. These provisions should be incorporated within the Bill for unfair dismissal matters.

Industrial action

The industrial action provisions in Part 3-3 are closely intertwined with the Enterprise Agreements and Workplace Determinations provisions of the Bill:

Ai Group has the following comments to make about Part 3-3 of the Bill.

Employee claim action

Para 409(1)(a) defines employee claim action for a proposed enterprise agreement as, amongst other aspects, *"industrial action that …is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are about, or reasonably believed to be about, permitted matters".*

As set out in the Enterprise Agreements section of this submission, Ai Group submits that permitted matters should be defined to only include matters which pertain to the relationship between an employer and its employees.

Further, the Bill needs to include a process to reinforce the requirement in Para 409(1)(a) that industrial action must only be taken in support of permitted matters, when a ballot order is applied for, as set out below in the section dealing with protected action ballots.

Prohibition on industrial action in pursuit of pattern bargaining and injunctions

It is vital that the Bill continue to outlaw industrial action in pursuit of pattern bargaining and Ai Group is of the view that the definition of "pattern bargaining" in s.412 of the Bill is workable and appropriate. The related provisions in s.409(4) and s.422 are also appropriate and essential.

Prohibition on industrial action in pursuit of greenfields or multi-employer agreements

Subsection 413(2) is another vital provision. It outlaws industrial action in pursuit of greenfields agreements and multi-employer agreements.

Common requirements for industrial action to be protected

Ai Group supports the provisions of ss.413 and 414 of the Bill.

Prohibition on industrial action before an enterprise agreement passes its nominal expiry date

Section 417 continues the existing approach in the *Workplace Relations Act* and this is very important.

The reference to "applies" in two places in 417(2) appears to be inconsistent with the Enterprise Agreements and Workplace Determinations sections of the Bill. The correct terminology would appear to be "covers".

FWA Orders stopping industrial action

The provisions of ss.418 to 421 are essential.

Suspension or termination of industrial action by FWA

Ai Group opposes s.423 (FWA may suspend or terminate protected industrial action – significant economic harm) of the Bill, for the reasons set out in the Workplace Determinations section of this submission. This section enables FWA to terminate a bargaining period based upon harm or threatened harm to the bargaining parties themselves.

However, Ai Group strongly supports ss.424 to 434 of the Bill which enables industrial action to be suspended or terminated:

- If the action is threatening to endanger the life, personal safety, health or welfare of the population or part of it;
- If the action is threatening to cause significant damage to the Australian economy or an important part of it;
- To allow for cooling-off;
- If the action is threatening to cause significant harm to a third party.

Ai Group is concerned about the comment in para 1728 of the Explanatory Memorandum that the "significant harm to third party" provision in s.426 would only be applicable "in very rare cases". It is inappropriate that the Explanatory Memorandum interpret the wording of the provision in such a narrow manner and place such a high hurdle on the use of the provision.

Protected action ballots

A number changes have been made to the existing secret ballot provisions which are of concern to Ai Group including the following:

- Applications for secret ballot orders should not be permitted before the nominal expiry date of an agreement (Ref. s.438);

- A vital element of the existing secret ballot provisions is the requirement that the AIRC be satisfied that the unions / employees are not pattern bargaining before a ballot order is granted. This requirement needs to be retained through the addition of, say, a paragraph (c) in section 443(1), as follows:

  "(c) FWA is satisfied that each applicant is not engaged in pattern bargaining"

  Ai Group notes the commentary in paras 1772 and 1773 of the Explanatory Memorandum but is of the view that a specific reference to pattern bargaining is needed in s.443, rather than reliance on the requirement that the applicant be "genuinely trying to reach agreement". AIRC scrutiny of whether pattern bargaining is occurring before a ballot order is issued is one of the most vital elements of the existing pattern bargaining laws and needs to be retained.

- A further vital element of the existing secret ballot laws (as set out in WR Regulation 9.7 of Chapter 2, Subdivision B) is the commitment that unions are required to give when applying for a ballot order that they are not pursuing claims which extend beyond matters pertaining to the employment relationship. Consistent with the current legislation, the union / employees should be required to satisfy FWA, before a ballot order is issued, that claims are not being pursued for matters which are not "permitted matters". Unions should be required to expressly withdraw any claims for matters which are not "permitted matters" before industrial action is taken. If not, how will the employer know that the industrial action is not being taken over matters which are not "permitted matters" when claims for both permitted and non-permitted matters have been pursued before the industrial action is taken? The resolution of these issues will be partially addressed through the addition of, say, a paragraph (d) in s.443(1), as follows:

  > *"(d) FWA is satisfied that each applicant is not engaged in industrial action wholly or partially in pursuit of a matter which is not a permitted matter."*

  Further, consistent with the existing *Workplace Relations Regulations*, unions should be required to give a commitment that they are not pursuing any matters which are not "permitted matters" before a protected action ballot order is issued.

Payments relating to periods of industrial action

Ai Group supports ss.470 to 476 of the Bill.

Right of entry

Ai Group is very concerned about the right of entry provisions in Chapter 3, Part 3-4 of the Bill.

Prior to the Federal Election the Government gave a commitment to the Australian community that entry rights for unions would not be expanded and it is essential that this commitment is honored. The Bill substantially extends union rights of entry.

The right of entry provisions of the Bill as currently drafted would:

- Operate unfairly for non-union members by allowing union officials to access their wage records;
- Allow a sweeping expansion in the right of unions to enter workplaces to hold discussions with employees;
- Lead to disputation in workplaces between employers and unions over entry rights when this is virtually non-existent at present; and
- Lead to coverage disputes between unions.

All of these problems can be readily avoided if the Government makes some relatively simple and sensible amendments to the Bill (as set out below).

Entry to investigate suspected contraventions

Subsection 748(4) of the current *Workplace Relations Act* is worded as follows:

> *"Inspection of records while on premises*
>
> *(4) While on premises, the permit holder may, for the purpose of investigating the suspected breach, require an affected employer to allow the permit holder, during working hours, to inspect and make copies of, any records relevant to the suspected breach* ***(other than non-member records)*** *that:*
>
> *(a) are kept on the premises by the employer; or*
> *(b) are accessible from a computer that is kept on the premises by the employer".*

Subsection 482(1) of the Bill outlines the rights that a permit holder may exercise while on premises including:

> *"(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record relevant to the suspected contravention that:*
>
> *(i) is kept on the premises; or*
> *(ii) is accessible from a computer that is kept on the premises."*

It can be seen that the wording in the Bill is very similar to the wording in the existing Act except that the wording in brackets - "(other than non-member records)" - has been removed.

Consistent with the pre-election promise given by the Government, subsection 482(i)(c) of the Bill should be reworded as follows:

> *"(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record relevant to the suspected contravention* ***(other than non-member records)*** *that:*
>
> *(b) is kept on the premises; or*
> *(b) is accessible from a computer that is kept on the premises."*

In past years much reliance had been placed on unions to police compliance with the Act and industrial instruments. This was at a time when public resources made available for compliance were minimal. Modern developments mean that there is a well-resourced, independent Workplace Ombudsman (soon to be replaced with the Fair Work Ombudsman) with significant staff charged with enforcing compliance. In these circumstances it is no longer appropriate that unions be relied on as a major source of enforcement for employees generally. While unions should have the right to protect their members from breaches of the Act and industrial instruments, their right to refer matters to the Fair Work Ombudsman is adequate to achieve enforcement in respect of non-members and rights of entry should be limited accordingly, so as to take into account privacy considerations relating to non-member information.

Entry to hold discussions with employees where a collective agreement covers the employees

Under s.760 of the *Workplace Relations Act*, a union official is entitled to enter premises where a collective agreement covers employees, to hold discussions with the employees if:

- The union is covered by the collective agreement;
- The employees are members of the union or eligible to be members;
- The employees wish to participate in the discussions.

Section 484 of the Bill enables union officials to enter premises where a collective agreement covers employees, to hold discussions with the employees if:

- The employees are members of the union or eligible to be members;
- The employees wish to participate in the discussions.

Accordingly, the existing requirement that the union be covered by the collective agreement has been removed and this requirement should be inserted into the Bill.

The Government's rationale for removing the existing link between rights of entry and coverage of industrial instruments appears to revolve around the fact that the AIRC has decided not to make modern industry and occupational awards binding upon unions. This argument is irrelevant to the issue of what entry rights are appropriate in workplaces where collective agreements cover the employees.

Entry to hold discussions with employees where an enterprise award covers the employees

Under s.760 of the *Workplace Relations Act*, a union official is entitled to enter premises where an enterprise award covers employees, to hold discussions with the employees if:

- The union is covered by the enterprise award;
- The employees are members of the union or eligible to be members;
- The employees wish to participate in the discussions.

Section 484 of the Bill enables union officials to enter premises where an enterprise award covers employees, to hold discussions with the employees if:

- The employees are members of the union or eligible to be members;
- The employees wish to participate in the discussions.

Accordingly, the existing requirement that the union be covered by the enterprise award has been removed.

The fact that the AIRC has decided not to make modern industry and occupational awards binding upon unions is irrelevant to the issue of what entry rights should be in workplaces where enterprise awards cover the employees.

Existing federal enterprise awards and enterprise NAPSAs specify the union/s which are bound (often a single union). It is very likely that the company and union parties to enterprise awards and enterprise NAPSAs will not wish to change the parties bound when they modernise their awards. Subsection 143(3) of the Bill enables modern awards to be expressed to cover unions.

The existing requirement that a union be covered by an enterprise award if it wishes to enter premises to hold discussions with employees should be included in the Bill.

Entry to hold discussions with award-free and agreement-free employees

Union officials are not currently entitled to enter workplaces to hold discussions with employees who are award-free and agreement-free. Consistent with the Government's pre-election promise not to expand entry rights, the Bill should not give unions entry rights with regard to these employees.

The fact that the AIRC has decided not to make modern industry and occupational awards binding upon unions is irrelevant to the issue of what the entry rights should be in respect of award-free and agreement-free employees.

Entry to hold discussions with employees where a modern award covers the employees

Under s.760 of the *Workplace Relations Act*, a union official is entitled to enter premises where an award covers employees, to hold discussions with the employees if:

- The union is covered by the award;
- The employees are members of the union or eligible to be members;
- The employees wish to participate in the discussions.

Section 484 of the Bill enables union officials to enter premises where a modern award covers employees to hold discussions with the employees if:

- The employees are members of the union or eligible to be members;
- The employees wish to participate in the discussions.

Unlike the other three scenarios outlined above (ie. (1) agreement-covered, (2) enterprise award-covered, and (3) award-free and agreement-free), the fact that the AIRC has decided not to make modern industry and occupational awards binding upon unions is relevant for employees covered under modern awards.

Ai Group proposes that for this category, a new form of “representation order” be created. These orders should be available to unions in circumstances where an employer is not prepared to grant entry to a union to hold discussions with employees eligible to members who are covered under a modern award. In making a representation order, FWA should be required to ensure that a union is not granted entry rights which extend beyond those which it had under award/s which applied in the relevant workplace before the modern award came into operation.

Stand down

Stand down rights are rarely accessed but essential.

Ai Group strongly supports the need for stand down provisions to be included in the legislation. This is particularly important because the AIRC has decided not to include stand down clauses in modern awards.

Section 524(1) of the Bill allows an employer to stand down an employee without pay in circumstances which for the most part are the same as the *Workplace Relations Act*. However, the ability to stand down an employee due to a breakdown of machinery or equipment is subject to the qualification that the right only applies if *"the employer cannot reasonably be held responsible for the breakdown*". The qualification placed upon breakdowns is inappropriate and is likely to lead to disputes about the level of preventative maintenance carried out on a company's machinery whenever an employer seeks to stand down employees because of a breakdown. The qualification is a departure from wording which has been in common usage in the industrial relations system for many decades (eg. in the stand down provisions in the Metal Industry Award).

Section 526 enables FWA to deal with disputes about the operation of the stand down provisions. Dispute resolution options should include mediation and conciliation but, consistent with most other provisions of the Bill, FWA should only have the power to arbitrate if all parties agree.

Other rights and responsibilities

Part 3-6 – Other Rights and Responsibilities, of the Bill deals with:

- Employer obligations to notify Centrelink and relevant unions, if an employer decides to terminate the employment of 15 or more employees for reasons of redundancy. (A union is only required to be notified if any of the employees was a member); and
- Employer obligations to make and keep employee records and to give pay slips to employees.

The employer obligations to notify Centrelink and relevant unions are largely consistent with existing provisions of the *Workplace Relations Act*.

With regard to ss.535 and 536 of the Bill concerning employee records and pay slips, Ai Group opposes the $16,500 per offence maximum penalty for failure to keep pay records in the form provided by the Regulations or failure to provide a pay slip within one working day of paying an employee (Ref. ss.535, 536, 539 and 546(2)). This level of penalty is excessive. Presently, these requirements are contained within the *Workplace Relations Regulations* and the maximum penalty is $5,500 per offence. With this type of offence an employer potentially commits a separate offence for every employee, for every pay period. Accordingly, the penalty needs to be fair and reasonable.

Also, s.536 of the Bill should be amended to clarify that pay slips can be issued *"in electronic form or as a hard copy"* as provided for in existing Regulation 19.20.

Chapter 4 of the Bill – Compliance and Enforcement

Ai Group submits that the following problems needs to be addressed in Part 4.1 – Civil Remedies, of the Bill:

- The maximum penalty for non-compliance with the NES is $33,000 per offence, as provided for in ss.44, 539 and 546(2) of the Bill. This penalty is not appropriate in respect of the NES requirement to issue a Fair Work Information Statement and to give an employee written notice of termination. The focus of any Fair Work Information Statement should be on education and therefore it is inappropriate for the legislation to impose a penalty upon small and large employers for failure to issue the Statement. If, notwithstanding Ai Group's view, the Government decides to include a penalty it should be no more than the $110 maximum penalty which existed for failure to distribute the former *Workplace Relations Fact Sheet*. A penalty of $33,000 for every offence is extremely excessive. Potentially a separate offence would be committed for every employee not issued with the Statement. A similar $110 maximum penalty should apply for failure to give an employee written notice of the day of termination in accordance with Division 11 of the NES (if the Government proceeds with this requirement despite Ai Group's opposition). Once again, a maximum penalty of $33,000 for small and large employers who fail to give the written notice is manifestly excessive.

- The maximum penalty for non-compliance with a Compliance Notice issued by a Fair Work Inspector is $16,500 (Ref. ss.716, 539 and 546(2)). Ai Group submits that the proposed Compliance Notice system is unfair and it should be removed from the Bill. This issue is covered in Chapter 5 below.

- As set out in Chapter 3, Ai Group opposes the $16,500 per offence maximum penalty for failure to keep pay records in the form provided by the Regulations or failure to provide a pay slip within one working day of paying an employee. (Ref. Ss535, 536, 539 and 546(2)). This level of penalty is excessive.

- Section 558 of the Bill enables the Regulations to provide for an infringement notice system. Ai Group opposes any extension of the existing infringement notice system in the *Workplace Relations Regulations* or any increase in penalties for employers.

Part 4-2 – Jurisdiction and Powers of Courts, of the Bill confers jurisdiction on the Federal Court and Federal Magistrates Court. This jurisdiction in generally required to be exercised in the Fair Work Division of these courts. As set out below, Ai Group supports the Bill's approach of separating the judicial functions carried out by the Courts from FWA.

Chapter 5 of the Bill – Administration

Chapter 5 – Administration, of the Bill deals with the administrative structure of:

- Fair Work Australia (FWA); and
- The Office of the Fair Work Ombudsman (FWO).

Ai Group strongly supports the separation of the functions of FWA, the FWO and the Courts, as is provided for under the Bill.

In the development of the Bill Ai Group advocated that justice requires that the following three functions remain separate and this has been reflected in the Bill:

1. ***AIRC / AFPC / Workplace Authority*** – dispute settlement, awards, minimum wages, enterprise agreements and unfair dismissal;
2. ***Workplace Ombudsman*** – investigation and prosecution;
3. ***Federal Court and Federal Magistrates Court*** – judicial determination.

Ai Group is supportive of Chapter 5, Part 5-1 – Fair Work Australia, of the Bill but wishes to highlight the following matters and proposes the following amendments:

- Section 595 – FWA's Power to Deal with Disputes, is a very important provision. It is essential that FWA only have the power to deal with disputes by arbitration if all parties agree.

- It is important that where FWA has the power to arbitrate / determine a matter (eg. where a bargaining dispute is damaging the economy) parties have the right to object to a FWA Member determining a matter where that Member has conciliated or mediated. Parties will be reluctant to participate fully and openly at the conciliation / mediation stage if the same Member is going to finally determine the matter. This is a very longstanding and important principle of Australia's industrial relations system which should continue to be dealt with through a specific provision of the legislation.

- Subsection 601(4) requires that FWA publish an enterprise agreement that has been approved as soon as practicable after the decision is made to approve the agreement. It is essential that the Explanatory Memorandum clarify that there is no requirement to publish supporting materials, such as wage rate information that does not form part of the agreement. The importance of this is explained in the Enterprise Agreements section of this submission.

- Subsection 606(3) should be deleted. Industrial action can be extremely costly and damaging to employers, employees and the community. FWA should have the power to issue a stay order in respect of decisions to make a protected action ballot order.

- A provision similar to s.117 of the *Workplace Relations Act* needs to be included in the Bill. This is an important provision which enables a Full Bench of the AIRC to issue an order restraining a State industrial authority from dealing with a matter that is the subject of a proceeding before the AIRC. The provision has not been commonly used but, on occasions, it has been extremely important (eg. See *Boeing Australia Ltd and AWU*, Giudice J, Lawler VP and Larkin C, 23 February 2006, PR968945). FWA should have a similar power.

- Inexplicably the qualification requirements for President of FWA in s.627 are less onerous than the qualification requirements for a Deputy President. Under the current *Workplace Relations Act*, the President is required to have been a Judge or enrolled as a legal practitioner of the High Court or a Supreme Court for at least five years, plus in all cases he or she is required to have skills and experience in the field of industrial relations. The Bill simply requires that for a person to be qualified for appointment as President the person must have *"knowledge of, or experience in, one or more of the following fields: (i) workplace relations; (ii) law; (iii) business, industry or commerce."* Whilst legal and industry experience are worthwhile and relevant and should be reflected in the Bill, Ai Group does not believe that it is desirable or practicable for the President of FWA not to have high level skills and experience in workplace relations and this requirement should be reflected in the Bill.

- Ai Group supports s.627 of the Bill which provides that the three Minimum Wage Panel Members who are appointed on a part-time basis to serve on Minimum Wage Panels must have knowledge of, or experience in, one or more of the following fields: (a) workplace relations, (b) economics, (c) social policy, or (d) business, industry or commerce. The three Minimum Wage Panel Members should include at least one representative from industry.

- Ai Group is pleased that the middle rank for Members of FWA is entitled “Deputy President”, rather than the earlier announced title of “Senior Member”. This is consistent with Ai Group’s submissions during the development of the Bill.

- Ai Group welcomed the Government’s confirmation in October last year that all current members of the AIRC will be offered positions with FWA. Ai Group supported this in its submissions to Government and believes that this will provide certainty for all involved and will help to protect the independence of AIRC and FWA Members. Ai Group also supports the more rigorous and open process which the Government has announced for the appointment of future members of FWA.

Ai Group supports the creation of a separate statutory Office of the Fair Work Ombudsman as provided for in Chapter 5, Part 5-2 – Office of the Fair Work Ombudsman, of the Bill. As set out above, the separation between FWA and the FWO is essential.

However, Ai Group opposes the power given to Fair Work Inspectors under s.716 of the Bill to issue Compliance Notices if an inspector believes that an employer or other person has contravened a provision of the NES, a modern award, an enterprise agreement, a workplace determination, a national minimum wage order or an equal remuneration order. The maximum penalty for failing to comply with a Compliance Notice is $16,500 (ref ss.539 and 546) and the employer would need to apply to the Federal Court, Federal Magistrates Court or other relevant Court if the alleged breach was not correct. This is unfair.

Fair Work Inspectors should have the power to enter premises, inspect records and discuss alleged breaches with employers. In the event that an employer does not agree with a claim by a Fair Work Inspector that the law has been breached, then the Fair Work Ombudsman should have the power to pursue the matter in Court. Hefty penalties apply under the Bill for breaches of the NES, awards, agreements and orders. This will be a sufficient deterrent against unlawful behaviour. Sections 716 and 717 should be removed from the Bill

Chapter 6 of the Bill – Miscellaneous

Part 6-1 – Multiple Actions, of the Bill prevents employees pursuing more than one remedy for the same conduct or circumstances. Ai Group supports these provisions.

Part 6-2 – Dealing with Disputes, of the Bill contains vital provisions which clarify that FWA and other parties referred to in dispute settlement clauses in awards, enterprise agreements or contracts of employment do not have the power to arbitrate without the agreement of the parties, nor do they have the power to deal with disputes about whether an employer had "reasonable business grounds" under s.65(5) or s.76(4) of the Bill. Ai Group strongly supports these provisions. However, Ai Group is very concerned about the statement made in para 2728 of the Explanatory Memorandum relating to s.737 – Model Term about Dealing with Disputes, as follows:

> *"Consistent with the requirements of the Bill for dispute settlement terms (see subclause 186(6)), the model term will provide for the binding resolution of disputes".*

The above statement in the Explanatory Memorandum needs to be amended to avoid it being interpreted to negate the effect of sections 739(4) and 740(3) of the Bill. It is extremely important that parties negotiating enterprise agreements be permitted to agree on dispute settlement clauses which do not give arbitration powers to FWA or any other party. This statement is also problematic with regard to s.146 of the Bill concerning "dispute settling" clauses in awards. In s.186(6) and s.146, the term "settle disputes" should be replaced with the term "deal with disputes".

It is inappropriate for the model enterprise agreement term referred to in s.737 to give FWA or any other party the power to arbitrate a dispute unless the parties agree to arbitration at the time when the dispute arises.

Part 6-3 – Extension of National Employment Standards Entitlements, of the Bill extends NES unpaid parental leave and notice of termination entitlements to "non-national system employers" and "non-national system employees" in reliance on relevant ILO Conventions and Recommendations and the External Affairs Power of the Constitution. Ai Group supports these provisions.

Part 6-4 – Additional Provisions Relating to Termination of Employment, of the Bill contains provisions dealing with:

- Termination of employment for prohibited reasons;
- A requirement to notify Centrelink and relevant unions, if an employer decides to terminate the employment of 15 or more employees for reasons of redundancy. (A union is only required to be notified if any of the employees was a member).

The provisions of Part 6-4 are largely consistent with existing provisions of the *Workplace Relations Act*.

Ai Group notes s.723 of the Bill which provides that "a person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct".

Ai Group also notes para 2702 of the Explanatory Memorandum which clarifies that the unlawful termination provisions in Part 6-4 are only intended to cover employees who are not covered by the general protections provisions of the Bill (ie. they are "non-national system employees").

Part 6-5 – Miscellaneous, of the Bill addresses the important matter of the Regulations. Numerous sections of the Bill refer to the Regulations which at the time of drafting this submission Ai Group had not seen. It is vital that draft Regulations be made available to Ai Group and other representative bodies for comment before they are made.

The Bill enables infringement notices to be issued for offences under the Regulations and doubles the current maximum penalties for contravention of the Regulations. Ai Group opposes any extension of the existing infringement notice system in the *Workplace Relations Regulations* or any increase in penalties for employers.

Transitional provisions and consequential amendments

As set out in the Summary at the start of this submission, the views expressed are subject to the important qualification that at the time of drafting this submission Ai Group had not seen a draft of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill*. This legislation will contain many provisions which dovetail with provisions of the *Fair Work Bill.*

Late last year the Government announced that the *Transitional Provisions and Consequential Amendments Bill* will:

- Provide for existing collective agreements and AWAs to apply indefinitely until terminated or replaced by a new agreement made under the Fair Work legislation;
- Require that the NES and minimum wage provisions will apply to all employees from 1 January 2010, including those covered by existing collective agreements and AWAs;
- Ensure that an employee's take home pay is not reduced as a result of the employee's transition on to a modern award by allowing for FWA to make orders to deal with this matter; and
- Allow parties to modernise federal enterprise awards so that they can continue to operate in the new system and treat NAPSAs in the same way.

There are numerous matters which Ai Group will express a view on when a draft of the *Transitional Provisions and Consequential Amendments Bill* becomes available.

For example, Ai Group strongly supports the indefinite continuation of existing collective agreements and AWAs until terminated or replaced, and the ability for parties to modernise federal enterprise awards and NAPSAs. These matters were pressed by Ai Group in submissions to the Government before the announcements were made late last year.

However, Ai Group opposes the requirement that the NES apply to existing collective agreements and AWAs from 1 January 2010. Many existing agreements contain provisions which are inconsistent with the NES (particularly when compared on a line by line basis) but are equally or more generous to employees when considered as a whole.

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