WORKPLACE RELATIONS AMENDMENT BILLS

A submission by Australian Industry Group and
Engineering Employers' Association, South Australia
to the Senate Employment, Workplace Relations,
Small Business and Education Committee Inquiry

5 SEPTEMBER 2000

1.0 Introduction

The Australian Industry Group (Ai Group) is the largest national industry body in Australia, representing 11,500 employers, large and small, in every State and Territory. Members provide more than $100 billion in output, employ more than 1 million people and produce exports worth some $25 billion.

Ai Group represents employers in metal and engineering, construction, energy, printing, packaging, information technology, food processing, automotive, rubber, plastic, chemicals, telecommunications, aviation, labour hire, textiles, clothing and footwear and other related industries.

Ai Group has had a strong and continuous involvement in the industrial relations system at the national, industry and enterprise level for over 125 years. Ai Group is well qualified to comment on:

- The Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000;
- The Workplace Relations Amendment (Termination of Employment) Bill 2000;
- The Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000; and
- The Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000;

We welcome the opportunity to contribute to the debate on workplace reform.

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

This submission draws on materials submitted to the Committee in September 1999 in respect of the Inquiry into the impact of the Workplace Relations Act, 1996 and the provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill, 1999. It is not our intention to comment on all aspects of the Bills but rather to outline Ai Group's position on some of the more significant legislative amendments proposed.

R N Herbert
CHIEF EXECUTIVE

2.0 The Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000

The amendments would:

- provide for AWAs to take effect on the day of signing or, if later, the date specified in the AWA as the commencing day, or in the case of a new employee, the date the employment commences;

- require employers to apply within 60 days of signing the AWA to have it approved;

- provide a more streamlined approval process for AWAs for employees paid more than $68,000 per year;

- remove the requirement relating to offering identical AWAs to comparable employees;

- remove the requirement that the Employment Advocate refer AWAs to the Commission, where there is concern that the AWA does not pass the no-disadvantage test . The Employment Advocate would apply the no-disadvantage test in all cases (subject to principles which may be developed by the Commission);

- amend the provisions dealing with the relationship between AWAs and certified agreements and awards made under subsection 170MX(3) of the Act; and

- remove the limited immunity available in respect of industrial action taken in support of a claim for an AWA.

Ai Group has detected an increasing interest in AWAs amongst its membership, particularly in high growth sectors such as call centres and information technology. Ai Group strongly supports AWAs as an important agreement making option for both employers and employees and in the light of experience in the use of AWAs believes that the proposed amendments are necessary and appropriate. The proposed amendments will have the effect of simplifying the approval process to the benefit of both employers and employees.

Paragraphs 170VD(4), (5) and (6) deal with similar subject matter to s.170VQ(6) of the current Act. The existing s.170VQ(6) provides that an AWA prevails over a certified agreement which has not reached its nominal expiry date only where the certified agreement expressly allows for such a situation. Ai Group believes that the existing provision unnecessarily inhibits flexibility for those employers and employees who wish to enter into AWAs in workplaces where certified agreements are in operation. Further, the provisions of s.170VQ(6) have caused difficulty for employers in some situations involving a transmission of business. For example, circumstances have arisen where a public sector enterprise has transmitted a business to the private sector and the new employer has been unable to enter into AWAs to override the provisions of the transmitted public sector certified agreement. Further, the existing s.170LY(1)(b) also prevents the new employer entering into a new certified agreement to override the transmitted certified agreement. Hence, the transmittee is left with no option other than to accept the terms of the transmitted AWA or certified agreement which may be totally inappropriate for the environment where the business is carried out.

The new s170VDD will further assist in overcoming problems which have arisen with the current legislative provisions dealing with transmission of business. The existing legislative provisions provide no mechanism for a transmittee to apply for removal or modification of the transmission provisions as they relate to AWAs or certified agreements. This lack of flexibility in respect of AWAs and certified agreements is inconsistent with the approach taken in s.149 of the Workplace Relations Act in respect of awards. Under s.149, a transmittee can apply to the

AIRC for an order preventing inappropriate award provisions from transmitting. The legislation needs to recognise that there will be circumstances where it will be necessary for new employment arrangements to be established consistent with the environment where the transmitted work is to be performed and that the automatic transmission of AWAs and certified agreements may not be appropriate.

In addition to those set out in the Bill, Ai Group proposes the following amendments:

- Where an employee earning remuneration in excess of $68,000 per year is covered by an AWA, the unfair dismissal provisions of the Act should not apply. In Ai Group's experience this lack of exemption is the most significant disincentive for employers considering entering into AWAs in respect of managerial and professional employees. Companies are very reluctant to enter into an AWA for such employees when the effect is to extend the unfair dismissal laws to such employees.

- In the light of several recent Federal Court cases (eg. *Maritime Union of Australia v Burnie Port Corporation Pty Ltd [2000] FCA 1189 (24 August 2000)*), it needs to be very clear that an employer may offer an AWA to a prospective employee as a condition of employment;

- In the event that the Employment Advocate refuses to approve an AWA, Ai Group strongly believes that there should be an avenue of appeal to the AIRC. The proposed amendments appear to allow no right of appeal if an application for an AWA is rejected. An appeal mechanism is necessary for reasons of fairness and natural justice.

- For the reasons set out above, paragraph 170LY(1)(b) of the Act should not apply to certified agreements which are transmitted. (Note: paragraph 170LY(1)(b) provides that a certified agreement cannot prevail over an earlier certified agreement which has not reached its nominal expiry date).

3.0 The Workplace Relations Amendment (Termination of Employment) Bill 2000

The following table sets out Ai Group's views about the various matters which arise in the Bill.

Proposed Amendment	**Ai Group's Position**	**Basis of Ai Group's Position**
Prevention of forum-shopping **(170CCA)**	Supported	It is appropriate to deal with the question of forum-shopping in the manner proposed in the Bill.
Exclusion of persons engaged under contracts for services and employees demoted who do not suffer a significant reduction in remuneration. **(170CD(1A) and 1(B))**	Supported	The intention of the legislation is that the unfair dismissal laws apply to the termination or proposed termination of an employee's employment. The proposed amendments reflect this intent.
Limiting the ability of the AIRC to find that termination of employment due to the operational requirements of the business is unfair **(170CG(4))**	Supported	The existing provisions impose a heavy burden on an employer which needs to restructure its workforce, by requiring it to justify not only the business case for the restructure, but also its selection of particular individuals for retrenchment (and, by extension, its selection of particular individuals for retention or for new roles).

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
		These are matters pertaining to operational aspects of the business. Where operational grounds can be established, the employer should have the discretion to make and finalise selection decisions without the prospect of reversal by the Australian Industrial Relations Commission.
Clarification of the criteria to apply when the AIRC is assessing applications for an extension of time for lodgement **(170CE(8) and 8A)**	Supported	It is appropriate to deal with the question of extensions of time for lodgement of applications in the manner proposed in the Bill.
Dismissal of an application for want of jurisdiction at any time **(170CEA)**	Supported	It is appropriate to deal with the issue in the manner proposed in the Bill. The facts on which jurisdiction depends are not always apparent at an early stage of proceedings.
Imposing an onus on the AIRC to prevent applications with little chance of success proceeding to arbitration **(170CF and 170CFA)**	The Objective is Supported but the Proposed Mechanism is not Supported	Ai Group wholeheartedly supports the objective of introducing greater rigour into the processing of 'unfair dismissal' applications, however, it believes that the mechanisms proposed in the relevant subsections may frustrate rather than promote these objectives.

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
		The proposals envisage that the conclusions reflected in the certificate given by the Commission are formed on the basis of the matters revealed in the conciliation process. Current practice is that conciliation conferences are relatively informal proceedings, with applicants and respondents making unsworn statements giving a summary of the facts as they know them and an indication of their attitude toward various forms of settlement. In the great majority of cases, such a process is not suitable for testing the veracity of the matters stated by the parties to the extent required to support a finding on the balance of probabilities. The practical result of implementing the proposals is therefore likely to be either: a) an increase in the degree of formality with which such proceedings are conducted, with the potential for increased costs at an early stage of the proceedings; or b) if an informal process is retained, an increased likelihood of a finding in favour of the applicant, due to the limitations of the material available on which to base such a conclusion. A finding in favour of the applicant at this early stage is likely to elevate the status of the application (particularly in the eyes of the applicant) and may lead to higher expectations in relation to financial settlements or may actually increase the incidence of unmeritorious or speculative claims being pursued to arbitration.

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
Introducing a requirement that the AIRC must take into account the size of an employer's business when considering the procedures which should have been followed in effecting termination of employment. **(170CG(3)(d))**	Supported	Small businesses should not be expected to adhere to the same procedural requirements as larger businesses which may have human resource departments, procedure manuals, and so on. The proposed amendment deals only with the procedures followed by employers. The AIRC would retain its ability to assess for all employers, large and small, whether the reasons for dismissal were valid.
Removing the ability of the AIRC and the Federal Court to award compensation for shock, distress etc, caused by termination **(170CH(7A))**	Supported	Non-economic factors such as shock, distress, etc are inherently difficult to quantify and assess in the context of an application which alleges that a dismissal has been harsh, unjust or unreasonable. Such factors have not traditionally been taken into account in unfair dismissal matters and in Ai Group's view appear to be inconsistent with the original intention of the legislation
Requiring the AIRC to ask representatives whether or not their representation is subject to a contingency fee arrangement **(170CIA)**	Supported	While Ai Group supports the change, it is unclear whether this proposal will result in any significant change to the practice of parties' representatives.

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
Empowering the AIRC to dismiss an application if an applicant fails to attend **(170CIB)**	Supported	Non-attendance at conciliation conferences and hearings by applicants is a common problem which employers and the AIRC are forced to endure at present. This is resulting in a significant wastage of public resources and those of industry. The proposed amendments will provide the AIRC with the ability to deal in an appropriate manner with applicants who initiate proceedings then elect not to attend.
Increasing the AIRC's ability to issue costs orders **(170CJ)**	Supported	The 'unfair dismissal' jurisdiction is currently regarded as primarily a 'no costs' jurisdiction, with current provisions limited to penalising obvious abuses of process. If the test for awarding costs is widened as proposed, it is essential that the potential liability for costs be restricted to the party initiating the particular proceeding (as the Bill proposes)
Lodging by applicant of security for costs **(170CJA)**	Supported	This provision is likely to have only limited application in practice, however, it provides a necessary safeguard against unmeritorious or speculative claims.

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
Ensuring advisers do not encourage applicants to pursue unmeritorious or speculative claims **(170HD to 170HI)**	Supported	It is appropriate to deal with the matter in the manner proposed in the Bill. It is noted that the proposals do not affect legal professional privilege.

4.0 The Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000

The proposed amendments provide that:

- prior to taking protected action, a union or employees would be required to apply to the AIRC for an order that a 'protected action ballot' be held;

- the AIRC would be responsible for deciding whether a ballot should be held subject to certain statutory conditions;

- if a union makes an application for a ballot, only union members whose employment would be covered by the proposed agreement would be entitled to vote in the ballot. If employees who are seeking a non-union agreement make the application, all employees whose employment would be covered by the proposed agreement would be entitled to vote in the ballot;

- certain procedural requirements for ballots would be required to be followed, including a requirement that specific information be provided to employees in ballot papers;

Industrial action would be authorised by a ballot if at least 50 per cent of eligible voters participate in the ballot and if more than 50 per cent of the votes cast are in favour of the proposed industrial action;

Ai Group's concern with compulsory secret ballots has been that they tend to polarise the position of parties and may make disputes more difficult to resolve. However, having studied the scheme of secret ballots proposed in the Bill Ai Group believes that a secret ballot process, overseen by the AIRC is an appropriate precondition for the taking or organising of protected industrial action by employees and organisations or employees.

The amendments mean that:

- employees will have an opportunity to vote without fear or favour in a fair and democratic ballot on whether they are prepared to lose wages through protected industrial action in support of enterprise bargaining claims;

- employees will know before voting what the precise claims are and what the nature and duration of the industrial action they are voting on is intended to be;

- no ballot will be ordered and therefore protected action will not be available if the Commission finds that the applicant has not genuinely tried to reach agreement with the employer prior to the application for a ballot;

- an employer will have the opportunity to argue that the claims being pursued by the applicant for a secret ballot are industry pattern bargaining claims (and consequently the party has not genuinely tried to reach agreement at the enterprise level) and therefore the ballot should not proceed.

Given these amendments, Ai Group **supports the legislative scheme with one important exception**, namely that employees eligible to vote in a secret ballot should not be limited to union members. To do so would create hostility and division within the enterprise. Ai Group would propose an alternative to the effect that the following employees be eligible to vote in the secret ballot:

- employees in the relevant enterprise, workplace, section or sections where the proposed agreement will apply; and
- whose industrial interests the organisation or organisations of employees proposing to take the protected industrial action are entitled to represent.

5.0 The Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

The amendments would remove union picnic days and tallies as allowable matters.

Union Picnic Days

In many federal awards, a union picnic day is recognised as a public holiday. However, two distinctly different situations apply:

1. The union picnic day is recognised as an additional public holiday (ie. a 12th holiday) for employees under the relevant federal award in all states.

2. The union picnic day is recognised in New South Wales as the 11th public holiday .

The 11 public holidays recognised under most federal awards are:

1. New Years' Day
2. Australia Day
3. Good Friday
4. Easter Saturday
5. Easter Monday
6. Anzac Day

7. Queens Birthday
8. Labour Day
9. Christmas Day
10. Boxing Day
11. Show Day (QLD); Melbourne Cup Day (VIC); Regatta Day (Southern TAS); Recreation Day (Northern TAS); Adelaide Cup Day (SA); Foundation Day (WA); an additional public holiday (which in a minority of awards is called union picnic day) (NSW).

Union Picnic Day as a 12th Public Holiday for Employees in All States

The Storage Services Steel Distributing Award 1996 is an example of an award where a union picnic day constitutes a 12th public holiday for employees in all states. In such circumstances it can be argued that given that the role of awards is to provide a safety net only, it is inappropriate for awards to provide an additional public holiday beyond those which are generally recognised within the federal award system.

However, care would need to be taken to ensure that the amendments did not simply result in the name of the 12th public holiday in the relevant awards being changed. The applications and hearings associated with such an exercise would require that Ai Group devote significant resources without any practical benefit.

Union Picnic Day as the 11th public holiday in New South Wales

The more common situation is that the union picnic day constitutes the 11th public holiday in New South Wales.

Federal awards and New South Wales state awards typically provide for an additional public holiday which is equivalent to holidays in other states, such as Melbourne Cup Day, Brisbane Show Day, and so on.

The Graphic Arts – General – Interim Award 2000 is an example of an award which provides that Union Picnic Day is to be recognised as the 11th public holiday in New South Wales. The day is observed each year on the Tuesday immediately following Easter Monday. This award can be contrasted with the Metal, Engineering and Associated Industries Award 1998 which provides for a public holiday in New South Wales on this same day but the day is not referred to as "Union Picnic Day". Rather, it is referred to as the "additional public holiday".

As set out above, care would need to be taken to ensure that the exercise of removing union picnic days from awards was not simply one of renaming the holiday. Further, we are concerned about the equity of removing the public holiday for employees covered under the Graphic Arts Award in the above example but not for employees covered under the Metals Award, simply based upon the current name of the public holiday. In many large workplaces both of these awards are in operation and there will be obvious practical difficulties associated with the production employees no longer having an entitlement to a public holiday on the Tuesday following Easter Monday and the maintenance employees continuing to have such entitlement.

Tallies

Ai Group does not have a major involvement in the meat industry and consequently the removal of tallies as an allowable matter will have no practical impact on the overwhelming majority of Ai Group members. Accordingly, the views of the major employer association/s involved in the meat industry are more appropriately taken into account in assessing this issue.

6.0 Conclusion

In Ai Group's view there are many worthwhile and important legislative amendments proposed in the various Bills which deserve the support of all political parties.