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Small Business Employment
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IINQUIRY INTO SMALL BUSINESS EMPLOYMENT

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

June 2002

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1.0 Introduction

The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia, representing approximately 10,000 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 manufacturing, construction, information technology, telecommunications, and other industries.

Ai Group has a large number of small businesses in its membership, including 6500 companies with 50 or fewer employees and 5200 companies with 25 or fewer employees**.**

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

This submission principally principally consolidates and draws on materials submitted to other Inquiries and bodies in relation to matters that are relevant to the terms of reference of this Inquiry. Therefore we would refer the Committee to Ai Group's submission to the Senate Employment, Workplace Relations, and Education Legislation Committee in April 2002 (Attachment 1), being in relation to the following Workplace Relations Amendment bills:

- Workplace Relations Amendment (Fair Termination) Bill 2002
- Workplace Relations Amendment (Fair Dismissal) Bill 2002
- Workplace Relations Amendment (Genuine Bargaining) Bill 2002
- Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002
- Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002

It also draws on a recent submissions and statements made by Ai Group to the Australian Industrial Relations Commission in the 2002 Safety Net Adjustment case (Attachment 2), Superannuation Review (Attachment 3) and the Royal Commission into the Building and Construction Industry (Attachment 4).

Australian Industry Group
June 2002

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2.0 Comment on Terms of Reference

2.1 The effect of government regulation on employment in small business, specifically including the areas of workplace relations, taxation, superannuation, occupational health and safety, local government, planning and tenancy laws.

Although particular individual forms of regulation may not, of themselves, actually discourage the activity of employment, the combined effect of a range of regulation may have that effect, and in the case of small business, in our submission, does. That combined effect may be a product of the complexity of regulation, volume of regulation or contradiction between different laws. Those effects may, in turn be real or perceived. Either way, taking the regulation of an activity as a whole, rather than as individual laws, throws a different light on actual the effect of regulation.

From the point of view of small business, their ability to absorb and apply the requirements of regulation will have a significant effect on their decision to undertake the activity subject to regulation. The capacity to comprehensively digest and apply regulatory obligations with respect to employment is different and more limited than that of larger companies. Faced with regulatory requirements that appear vast, complicated, expensive to comply with and, most

importantly, often uncertain and ambiguous, they can be reluctant to commit to engaging more employees. Other options appear more attractive, including increased overtime, outsourcing, supplementary labour and labour saving solutions.

Employees are the key asset of most businesses. Yet aside from engaging immediate family members, the act of engaging an employee can be risky. Will the person be productive? Do they have pre-existing or latent physical, emotional or psychological conditions that make them unsuitable for the work? Are they trustworthy? Will their personality attract or alienate colleagues or customers? Do they deal with the pressures of life, whether caused by work or personal circumstances, with grace and good humour or with the attitude of a victim?

Having to deal with such issues is among the most difficult of management tasks. Larger companies have the scale to invest in internal or external resources to assist them to manage employment relationships, including meeting complex regulatory requirements. Small business often do not.

Unfortunately regulation is often written on the assumption that the management capacity exists, not only to absorb any particular piece of regulation, but to absorb the cumulative effect of all relevant regulation.

In attempting to comply with regulation, then, small business is often subject to a far higher relative compliance cost burden.

2.2 The special needs and circumstances of small business, and the key factors that have an effect on the capacity of small business to employ more people.

For the purposes of the regulation subject to this Inquiry, the special needs and circumstances of small business can be summarised under the following categories

- The overwhelming concentration of management resources in small business on activities that will generate demand for the output of the business;

  Ai Group surveys of members consistently record that their principal concentration is on finding paying customers for their business. In a small business the same manager whom is responsible for the activities that will achieve this- market research, marketing, sales, customer relations, account management, credit management – is also usually responsible staff issues. However given that the business will not exist without customers, it is logical and sensible for the emphasis to be on the management of demand issues.

- The limited level of management resources and expertise available to become aware of, to understand and to apply the terms of regulation to their operations;

I Without a broadly skilled management team, small business is not typically equipped to engage with regulatory systems in the same way as larger companies. Small business does not usually have the management structure, in terms of level of resources or expertise, to research and apply regulation that is complex, ambiguous or voluminous.

- The nature of relationships between ownership/management and staff in small business;

  In many small businesses, the owner is the manager. As such the relationship they have with their staff can be different to larger companies where a professional management level exists independent of ownership. Owner-managers can take a different attitude to employee behaviour, both in terms of what they will tolerate and how flexibly they can reward or compensate employees. They may also see the employment relationship as being between individuals (they as the owner and the employee) rather than between a corporation and an individual. This applies whether the company is incorporated or not. Quite legitimately they do not necessarily see a difference between themselves and the company. This phenomenon should not necessarily be decried, as it can be the foundation of the success of the business as a wealth generating entity.

  Small business is more likely to employ people in conditions where this reality is acknowledged – by the employees and hopefully by the system of employment regulation.

- The need for small business to be flexible in order to compete.

Faced with more competitive domestic markets and in many cases global competition, business in many sectors is changing rapidly. For example, companies in the manufacturing sector are increasingly deriving value from pre-manufacturing processes (supply chain management, product innovation) and post manufacturing service activities (marketing, distribution and servicing).

The emergence of e-commerce as a key business issue, the level of technological change and the ability of emerging economies to quickly gear up to compete with industry in established industrial economies all mean that businesses increasingly need to evaluate what they do and how they do it. Perhaps the most important factor is the expectations of customers for instant service, customer focus, choice, 24/7 access, etc. This means that the employment relationships in companies have to be flexible. Not just in terms of hours of work, but also in terms of employees skills and attitudes.

Regulation therefore should recognise these trends. It should be based on the assumption that flexibility and change is the norm, not an aberration to be controlled or regulated. Many regulatory instruments, by their nature or their objectives work, against this. The system of industrial awards for example, is based on notions of clear divisions between industries and occupations that are fast disappearing or becoming integrated. The smaller a company, the more flexible it is likely to need to be.

- <u>The reality that small businesses are relatively powerless compared to organised national unions.</u>

Much employment and industrial relations regulation is predicated on the assumption that there is an imbalance between the relative bargaining strengths of employee and employers. Whether that is the case or not generally, in industries where there is a high level of union membership or union influence, it is not safe to assume that an individual employer is in a position of equal or better bargaining strength than a union. In the construction and engineering maintenance sectors for example, individual employers can be subject to great industrial pressure from national unions. Further, once committed to a contract, a company is very poorly placed to negotiate on wages and conditions, nor withstand industrial action. For small employers, who may rely on one or two contracts at any one time, the commercial pressure that can be brought to bear when required to deal with a national union can be significant.

The effects of this reality are dealt with in Ai Group's submission to the Cole Royal Commission into the Building and Construction Industry, at Attachment 2.

- Small business face cost pressures.

Many small businesses are new and emerging businesses, whose success and growth needs to be encouraged for economic health of the nation. They often are running innovative businesses models, where the sustainable income and cost levels have yet to be established. Statistics suggest the majority of businesses fail within the first 5 years. Therefore they need encouragement to survive this period. Regulation can add costs directly, like award minimum conditions, or indirectly, through compliance burden.

2.3 The extent to which the complexity and duplication of regulation by Commonwealth, state and territory governments inhibits growth or performance in the small business sector.

A schedule detailing the range of legislation and regulation covering the employment field is set out in Attachment 5.

The fact that such a complex array of regulation applies to companies once they engage an employee means that:

> Small business feel they are entering into a different game once they commit to taking on employees;
>
> There is feeling that obscure regulatory provisions lie in waiting to trap inexperienced employers. For example, what may on the surface appear to be the "right" law to be complying with turns out not to be the case due to jurisdictional issues that can only be properly assessed by an experienced legal practitioner. The complex industrial award system is a good example of this.

There is also confusion when efforts to comply with one area of regulation create a problem in another. For example, ensuring a healthy and safe workplace by excluding from the workplace employees suspected of being affected by drugs or alcohol, may give rise to an offence under privacy or harassment or equal opportunity laws.

2.4 Measures that would enhance the capacity of small business to employ more people.

We refer to our submission made in April 2002 in relation to the Workplace Relations Amendment Bills (Attachment 1) for initiatives on unfair dismissal law reform for small businesses.

We would refer to our submission to the Royal Commission into the Building and Construction Industry (Attachment 2), particularly sections 2 (National task Force),3 (Legislative Framework) and 5 (Project Agreements) for initiatives that would address the imbalance of power between small business, in particularly, and unionised labour in relation to the construction sector, where the imbalance of bargaining power is most evident.

We would refer to our submission to the Safety net Adjustment case 2002 and to the Superannuation Inquiry for initiatives that go to alleviating the cost burden on small businesses through a more efficient wage/tax treatment for lower income families and addressing the need for substantially higher superannuation savings to ensure viable post retirement incomes.

Finally we would add that a regulatory impact monitoring process that concentrated on the perspective of small business would be very useful in addressing some of the issues outlined above.

ATTACHMENT 1

Extract from Ai Group Submission to Senate Employment, Workplace Relations and Education Legislation Committee April 2002

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2.0 Workplace Relations Amendment (Fair Termination) Bill 2002

Under the existing s.170CC of the *Workplace Relations Act* ("the Act"), power is provided for a regulation to be made exempting *"employees engaged on a casual basis for a short period"* from the operation of the termination of employment provisions of the Act.

Until recently, Regulation 30B(3) defined a casual employee as being engaged for a *"short period"* unless:

X the employee was engaged by a particular employer on a regular and systematic basis for at least 12 months; and

X the employee had a reasonable expectation of continuing employment.

In a decision of 16 November 2001, the Full Court of the Federal Court ruled that Regulation 30B(3) was invalid because it extended beyond the powers prescribed in the Act for the making of regulations (*Hamzy v Tricon International Restaurants trading as KFC & Ors*, [2001] FCA 1589). It appears that, given the Court's decision, it is now impossible to draft a regulation which fully preserves the intent of the previous arrangements without amending the Act.

On 7 December 2001, a new regulation came into operation which defined "short period" in the following manner: *"a casual employee is engaged by a particular employer for a short period if the occasions on which the employee works for that employer under that engagement occur within a period of less than 12 months"*.

While the new regulation has addressed some of the problems caused by the *Hamzy* decision, the concepts of "regular and systematic" employment and "reasonable expectation of continuing employment" are no longer contained within the exemption. These concepts are essential inclusions and are fair to both employers and employees. It is not uncommon for a company to have a list of persons who may be available to carry out casual work and for the company to use that list from time to time when it needs casual labour. If a casual on the list works for a company irregularly and there is no reasonable expectation of continuing employment then it is unfair for an employer to be exposed to an unfair dismissal claim from such a casual - regardless of whether or not the casual has been on the list and worked for the company on several occasions over a period of more than 12 months.

The concepts of "regular and systematic" employment and "reasonable expectation of continuing employment" have been the subject of a significant amount of case law within the AIRC unfair dismissal jurisdiction. The meaning of such terms is now relatively settled. They were adopted by a Full Bench of the AIRC in the recent *Parental Leave for Casuals Test Case* (PR 904631).

The *Hamzy* decision has caused uncertainty and concern amongst employers about the nature and scope of the casual employment exemption under the unfair dismissal laws. This uncertainty is not in the interests of employers or employees. Employers have lost some of the flexibility which they had available with regard to the use of different forms of employment. Further, employees who work on an irregular basis (often voluntarily due to their lifestyle choices or family responsibilities) may find that they have fewer employment opportunities because of an increased use of contractors at the expense of casual labour as a result of the *Hamzy* decision. There is an urgent need for the Act to be amended to restore the intent of the original regulation.

Table 2.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Fair Termination) Bill 2002*

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
To relocate the provisions which exempt certain classes of employees from the termination of employment provisions of the Act (including both the unfair dismissal provisions and the unlawful termination provisions), from the Regulations to the Act. The provisions to be relocated are those which existed prior to the *Hamzy* decision. **(170CBA)**	Supported	Incorporating the exemptions within the Act, rather than the Regulations, would address the uncertainty caused by the *Hamzy* decision and reinstate the arrangements that had operated effectively for several years. This approach would also result in provisions which are easier for employers and employees to understand and comply with because the key provisions would be located in one place.

To remove the words *"or a qualifying period of employment"* which appear in Regulation 30B(1)(c) **(170CBA(1)(c))**	Supported	In August 2001, the Act was amended to provide that an employee is unable to pursue an unfair dismissal claim if he or she is given notice of termination or is terminated prior to the completion of a *"qualifying period of employment"* which is defined as: • three (3) months; or • a shorter period (which could include no period) determined by written agreement between the employee and employer before the commencement of the employment; or • a longer period determined by written agreement between the employee and employer before the commencement of the employment, being a reasonable period having regard to the nature and circumstances of employment. The August 2001 amendments to the Act were worthwhile. However, they have created some confusion about the interplay between the impact of these relatively new provisions in the Act and the longstanding exemption for employees serving a period of probation. Probationary employees are exempt from both the unfair dismissal and the unlawful termination provisions. In contrast, the new provisions of the Act relating to a *"qualifying period of employment"* apply only to the unfair dismissal laws.

		Ai Group's preferred approach would be for the confusion to be remedied by amending the Act to exempt those serving a *"qualifying period of employment"* from all of the termination of employment laws previously referred to in Regulation 30B(1) (ie. both the unfair dismissal laws and the unlawful termination laws). This would mean that the existing Regulation 30B(1)(c) (re. probationary employment) and the proposed new s.170CBA(1)(c) would no longer be required. If such approach is not achievable then the removal of the words "or a qualifying period of employment", as proposed in the Bill, would reduce some of the confusion.
To preserve the rights, liabilities and obligations of employers and employees despite Regulations 30B(1)(d) and 30B(3) being declared invalid in the *Hamzy* decision. **(170CCA)**	Supported	The provisions preserve the status quo which existed prior to the *Hamzy* decision with the exception that the rights and liabilities of parties to proceedings which have been finally determined by a court or by the Commission before the commencement of the proposed new s.170CCA would not be affected. Such an approach is fair to both employers and employees.

To relocate the provisions which require a fee to be paid when termination of employment applications are lodged, from the Regulations to the Act and to providing for this fee to be indexed annually in line with movements in the Consumer Price Index **(170CEAA)**	Supported	A fee of $50 already applies when unfair dismissal applications are filed with the Registry. Such fee can be waived by the Registrar where a person would suffer significant hardship. It is essential that a fee continue to apply when unfair dismissal applications are lodged. The magnitude of the fee is not excessive but it acts as some deterrent to those who might otherwise lodge speculative claims which are without merit. Such claims are costly for the employer and waste the AIRC's resources. Given the need for an ongoing filing fee, it is appropriate that the provisions relating to the fee apply permanently and be relocated from the Regulations to the Act. The approach of increasing the fee in line with CPI is a sensible and practical one. Such approach is consistent with the manner in which various other amounts referred to in the termination of employment laws are indexed (eg. The cut-off rate for award free employees in s.170CC(3) and Regulation 30BB; and the maximum amount of compensation which can be awarded to award free employees under s.170CH(9)).

3.0 Workplace Relations Amendment (Fair Dismissal) Bill 2002

This Bill incorporates a provision excluding employers with less than 20 employees from the operation of the unfair dismissal laws. There is strong support from small business for this approach. Small business members consistently express the view to Ai Group that the existing unfair dismissal laws operate as a disincentive for them to employ new staff.

If an exemption is not achievable then Ai Group proposes that the Act be amended in the manner set out below.

- **Employees of small businesses should be excluded from pursuing an unfair dismissal claim for the first 12 months of their employment.**

  A 12 month exemption period for small businesses would reduce the disincentive for them to employ new staff, while at the same time preserving the rights of longer serving employees.

  It is noteworthy that in the United Kingdom, employees of all businesses are excluded from pursuing an unfair dismissal case until they have 12 months of continuous employment (subject to certain exemptions, such as termination due to trade union membership).

- **Some of the major constraints of procedural fairness under the Act should be removed for small businesses.**

  At the present time, under the unfair dismissal laws, an employee of any business (large or small) needs to prove that his or her dismissal was *"harsh, unjust or unreasonable"*. That is, the same general standard applies to businesses of all sizes.

  The Act was amended in August 2001 to require the Australian Industrial Relations Commission (AIRC) to take into account the differing capacities of businesses of different sizes to comply with dismissal policies and procedures. However, such amendment, while worthwhile, still requires a small business employer to demonstrate that procedural fairness has been afforded to a dismissed employee, including proving that the employee was warned about unsatisfactory conduct or performance. Without written policies and procedures, proving that procedural fairness has been extended to a dismissed employee several months after a termination can be very difficult for small businesses.

  In addition, the cost of defending and/or settling an unfair dismissal case impacts more heavily on smaller businesses given their fewer financial resources and the fact that they typically do not employ specialist human resource staff.

  Under the Act, all employers must have a valid reason for terminating the employment of any employee but Ai Group proposes that where such valid reason exists, small businesses employers should only be required to demonstrate that they have:

  - Notified the employee of the reason for the dismissal; and

- Given the employee an opportunity to respond to any reason related to his or her capacity or conduct before terminating their employment.

Such an approach meets the standard of procedural fairness prescribed by Article 7 of the *ILO Convention Concerning Termination of Employment at the Initiative of the Employer* (Schedule 10 of the Act). The Act incorporates a higher standard, for example, by requiring in s.170CG(3) that warnings be given. The application of this higher standard to small businesses is not in the national interest.

Both the *Workplace Relations Amendment (Fair Dismissal) Bill 2002,* as drafted, and Ai Group's alternative approach propose special arrangements for small businesses only in respect of the unfair dismissal laws (Subdivision B of Division 3 of Part VIA) – not the unlawful termination laws (Subdivision C). Therefore, it would continue to be unlawful for a business of any size to terminate an employee for reasons such as their membership of a trade union or their temporary absence from work because of illness or injury.

Note: Ai Group's proposals relating to the small business exemption under the *Workplace Relations Amendment (Fair Dismissals) Bill 2002* need to be considered in conjunction with our proposals relating to the *Workplace Relations Amendment (Fair Termination) Bill 2002.* When taken together, Ai Group proposes the following approach:

- all businesses to be exempt from the unfair dismissal laws and the unlawful termination laws for a "qualifying period of employment" of three months (or a longer reasonable period by agreement);
- small businesses to be exempt from the unfair dismissal laws (but not the unlawful termination laws) from the conclusion of the "qualifying period of employment" until 12 months.

Amending the Act in accordance with Ai Group's proposals would result in an appropriate balance being struck between maximising employment and protecting Australian workers.

Table 3.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Fair Dismissal) Bill 2002*

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
To prevent unfair dismissal claims by employees if their employer has less than 20 employees **(170CE (5C),(5D) &(5E))**	Supported, but if a blanket exemption is not achievable then Ai Group proposes an alternative approach	There is strong support from small business for a blanket exemption from the unfair dismissal laws. Small business members consistently express the view to Ai Group that the existing unfair dismissal laws operate as a disincentive for them to employ new staff. If an exemption is not achievable then Ai Group proposes that the Act be amended to: • Prevent employees of small businesses pursuing an unfair dismissal claim during the first 12 months of their employment; and • Remove some of the major constraints of procedural fairness for small businesses. (See details above).

		Note: Ai Group's proposals relating to the small business exemption under the *Workplace Relations Amendment (Fair Dismissals) Bill 2002* impact upon our proposals with regard to the *Workplace Relations Amendment (Fair Termination) Bill 2002*. When taken together, Ai Group proposes the following approach: • all businesses to be exempt from the unfair dismissal laws and the unlawful termination laws for a "qualifying period of employment" of three months (or a longer reasonable period by agreement); • small businesses to be exempt from the unfair dismissal laws (but not the unlawful termination laws) from the conclusion of the "qualifying period of employment" until 12 months

To enable the Commission to dismiss unfair dismissal applications where they are invalid because of the small business exemption **(170CEB)**. In such circumstances, the Commission would not be required to conduct a hearing.	Supported	This measure complements the exemption for small business. It recognises that the cost of defending an unfair dismissal case impacts more heavily on smaller businesses given their fewer financial resources. It also recognises the fact that small businesses typically do not employ specialist human resource staff with knowledge of unfair dismissal proceedings.

3.0 Workplace Relations Amendment (Genuine Bargaining) Bill 2002

4.1 Union pattern bargaining strategies

The pattern bargaining strategies being pursued by unions in the construction and manufacturing industries are highly inappropriate and damaging. Currently, 69 per cent of all "enterprise" agreements apply in these sectors.[1]

The union strategies involve the following steps, each of which are described below:

Step One	Companies across major sectors of the industry are forced to have a common expiry date for their enterprise agreements;
Step Two	Uniform bargaining periods are established across the sector;
Step Three	A template agreement is created;
Step Four	Employers are coerced to accept the pattern outcome.

[1] 47% of all agreements apply in the construction sector and 22% of all agreements apply in the manufacturing sector. Source: Department of Workplace Relations and Small Business, Workplace Agreements Database.

4.1.1 Step One – Common expiry dates

Unfortunately, in the building and construction industry, the unions have already succeeded in lining up the expiry dates of "enterprise" agreements within most of the major sectors of the industry. This means that "enterprise" agreements within each of these sectors expire at a common time, which assists the unions in achieving a pattern outcome during the next bargaining round. The unions simply adopt the tactic of refusing to sign any enterprise agreement which does not have the required common expiry date.

In the manufacturing sector in 2000, the metal unions embarked upon a highly damaging and costly campaign to bring an end to enterprise bargaining in Victoria. **The campaign ultimately failed but the metal unions are currently planning a new national pattern bargaining push in early 2003. For the past two years they have been pursuing a common expiry date of 31 March 2003 and have succeeded in lining up the expiry dates of hundreds of agreements in various states on this date.**

4.1.2 Step Two - Establishing bargaining periods across the industry or sector

The Act permits industrial action to be taken in pursuit of an enterprise agreement, subject to the establishment of a bargaining period at the relevant enterprise and the party seeking to take industrial action giving a prescribed period of notice to the other negotiating party, of the specific industrial action to be taken.

Despite the fact that the Act emphasises that the above process relates to bargaining carried out at the enterprise level, the unions in the construction and manufacturing industries have devised a strategy which they argue gives them the ability to extend the right to take protected action to the industry level.

The unions have adopted the tactic of serving employers throughout the sector with bargaining notices in identical terms. Hundreds, or even thousands, of employers receive an identical notice at the same time, advising them that the relevant union is seeking to negotiate an "enterprise" agreement with each one of them.

4.1.3 Step Three – Creating a template agreement

The unions seek to create a template agreement in various ways. Their preferred approach is to seek agreement with a relevant employer association in the hope that members of that association will accept the agreement. If this is not possible, the unions typically look for a group of companies or a significant individual company that they can place under commercial pressure.

However, a "willing" employer negotiator is not a critical part of the unions' strategy. In the absence of a pattern agreement being reached with employers, the unions just draw up their own template "agreement" on the basis of what they believe they can force employers throughout the industry or sector to pay.

Tragically, in each round of bargaining in the construction sector, buoyed by the "success" of their strategy in previous rounds, the unions' claims are getting more and more excessive.

4.1.4 Step Four – Coercion of employers to accept the pattern outcome

Once the unions have developed their pattern agreement through the above three steps, they then typically seek to coerce employers to accept it. This coercion may take the form of:

- Organising industrial action against companies, which they argue is protected, because of the bargaining period established;
- Threatening industrial action against companies;
- In the construction and contract maintenance sectors, seeking to prevent companies from working on sites until they agree to the pattern outcome.

4.2 Victorian building industry dispute in 2000

The damaging nature of union pattern bargaining strategies is highlighted by the Victorian building industry dispute of early 2000. Construction unions pursued, through pattern bargaining, claims for excessive improvements to wages and conditions, the magnitude of which was impossible to justify at a time when building industry activity was declining. Key events relating to this dispute are summarised below.

36 hour week agreed upon on the Docklands site

On the strategically critical Colonial Stadium (Docklands) site, electrical contractors conceded a 36-hour week and a 10 hour-a-week limit on overtime. This flowed to all contractors on the site including several of the major building companies. The unions were able to apply enormous industrial pressure to the contractors on this site because:

- the agreements applying to the site had expired and the unions were free to pursue protected industrial action in support of their claims; and
- the contractors were under enormous commercial pressure to complete the project before the start of the 2000 AFL season.

Industrial action in relation to the renegotiation of the Victorian Building and Construction Industry Pattern Agreement

On 30 November 1999, the Victorian Building and Construction Industry Pattern Agreement expired. The Construction, Forestry, Mining and Energy Union's (CFMEU) claims included a 24 per cent wage increase over three years, a 36 hour week, full income protection, increased site allowances, increased superannuation contributions, increased redundancy benefits, protection against the impact of the GST and compensation for increased tolls.

During December 1999 and January 2000, the CFMEU served bargaining notices on approximately 3000 employers in the building and construction industry in Victoria.

In January and February 2000, approximately 3000 employers in the industry received notices of the unions' intention to take industrial action in pursuit of their claims. Industrial action was taken across the industry in early February 2000.

Termination of bargaining periods by Commissioner Merriman

On 18 February 2000, the MBAV made application to the Australian Industrial Relations Commission (AIRC), on behalf of approximately 200 employers, for the suspension or termination of bargaining periods. Following 11 days of hearings between 24 February and 17 March, on 22 March 2000 Commissioner Merriman decided to terminate 216 bargaining periods under s.170MW(3) of the Act and ordered that normal work resume on 24 March 2000[2]. The Commissioner directed the parties into conciliation without delay and advised the parties that if conciliation was unsuccessful then the matter would be arbitrated by a Full Bench of the Commission.

Agreement reached between Grocon and the unions

On 23 March 2000 (the day after C Merriman's decision), Grocon (the Grollo Group) reached agreement with the unions on the introduction of a 36 hour week.

Agreement reached between 11 employers and the unions

During late March 2000 and early April 2000, a group of 11 employers led by Multiplex were negotiating with the unions. On 4 April 2000, the group reached agreement with the unions on a package involving a 15 per cent wage rise over three years (plus a further 3 per cent in the fourth year or CPI whichever is greater) and the phasing in of a 36 hour week over four years. The 36 hour week is to be implemented through the granting to employees of an additional 13 days off per year (called Productivity Leisure Days or PLDs), phased-in as follows: Nil additional days in 2000; Nine additional days in 2001; Nine additional days in 2002; and 13 additional days in 2003.

Agreement flowed throughout the building and construction industry in Victoria via the Victorian Building and Construction Industry Pattern Agreement

On 11 April 2000, various other major construction companies which had been strongly opposing the 36 hour week, agreed to the arrangements negotiated with the group led by Multiplex, with little alteration. Shortly after this, the conciliation proceedings before Commissioner Merriman were wound up.

By mid-May 2000, the terms of a new Victorian Building and Construction Industry Pattern Agreement had been reached in negotiations between the CFMEU and the MBAV. The agreement expires on 30 November 2002 and it incorporates the PLDs and wage increases agreed upon by the group led by Multiplex.

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[2] Print S4379

Flow on continued via the Victorian Building Industry Agreement

The Victorian Building Industry Agreement (VBIA) applies throughout Victoria to on-site work on building and construction projects.

The VBIA expired on 30 March 2000 and, following the negotiation of the new Victorian Building and Construction Industry Pattern Agreement, a new VBIA was negotiated. The *Victorian Building Industry Agreement 2000-2005* incorporates the 36 hour week arrangements agreed upon by the group led by Multiplex.

Flow on potential in other states and to other sectors

In NSW, the construction unions have announced their intention to pursue a campaign in mid- to late-2002 to achieve a shorter working week. Similar attempts are being made by unions in other states to flow on the 36 hour week.

4.3 Campaign 2000 in the manufacturing industry in Victoria and the decision of Justice Munro of the AIRC

Given the unions' perception of the "success" of their pattern bargaining strategies in the building and construction industry, they endeavoured to apply the same strategies in the manufacturing industry in Victoria.

From 1998, the Australian Manufacturing Workers' Union (AMWU) and the Communications, Electrical and Plumbing Union (CEPU) began refusing to sign any agreement in the manufacturing industry in Victoria which did not expire on 30 June 2000. By early 2000, approximately 500 agreements in the manufacturing industry had this expiry date.

In November 1999, the unions scheduled state-wide stoppages to seek endorsement for their Campaign 2000 log of claims. In response, Ai Group obtained orders from the AIRC and the Federal Court requiring the unions to call off the stoppages. When the orders were ignored Ai Group pursued contempt of court actions against the AMWU, the CEPU, the AWU and three officials. Arising from those proceedings, three officials were found guilty of contempt and Craig Johnston, the Victorian State Secretary of the AMWU and Dean Mighell, the State Secretary of the CEPU were each fined $20,000.

Some of the unions' own literature about Campaign 2000 clearly stated that they intended to ignore Court and Commission orders if necessary to achieve their objectives.

On this point, in handing down his decision in the contempt proceedings, Justice Merkel of the Federal Court said:

> *The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes.....it also requires that parties comply with the orders made by the courts in determining those disputes.*

Following Ai Group's refusal to force a common outcome on its member companies, the unions embarked upon a campaign to force individual companies across the industry to capitulate.

From early 2000 the unions refused to meet with companies at the enterprise level and organised collective meetings of employers across various sectors. Despite threats of, and in some cases actual, industrial action, all but a very small number of employers refused to attend. After the sector meetings failed due to lack of attendance the unions tried to organise meetings across the whole industry. Despite their efforts and threats they could only convince a handful of companies, mainly in the contract maintenance and metals construction sector, to attend.

Identical bargaining notices were served on approximately 1500 employers and in late-August 2000, all of these employers received identical notices of a state-wide stoppage (which supposedly related to the negotiation of their enterprise agreements).

As soon as Ai Group became aware of the state-wide stoppage we made application to the Commission to suspend or terminate bargaining periods on behalf of a large number of employers. Despite this, the stoppage went ahead.

The proceedings before the Commission continued for several weeks. Twice the unions withdrew all of the relevant bargaining periods in an unsuccessful attempt to stop the case proceeding.

In a significant decision, on 16 October Justice Munro terminated bargaining periods for all of the applicant companies on the basis that the unions had *"not genuinely tried to reach agreement"* with the companies. This removed the unions' right to take protected industrial action.

In his decision, Justice Munro dealt at some length with the rights of parties in respect of pattern bargaining. Some key questions were dealt with:

- ***Is a union entitled to make common claims across an industry?***

  On this issue, Justice Munro held that:

  > *"A common set of demands for conditions of employment, or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a negotiating party is not genuinely trying to reach agreement with the counterpart party".*

and

"Industry-wide demands are often made by unions and sometimes pursued at national level. It is not the characteristic of the demand that may cause offence..... But advancement of such claims in a way that denies individual negotiating parties opportunity to concede, or to modify by agreement, cannot satisfy the test established by the Act".

- ***Is a union entitled to refuse to accept any outcome other than the one that it is pursuing across an industry and take industrial action in pursuit of that outcome?***

  On this point, Justice Munro held that a negotiating party's conduct must evidence *"a genuine try to reach an agreement with the opposing negotiating party to whom the industrial action or bargaining period is specific".*

  If a negotiating party is *"trying to reach agreement with all, or an entire class of negotiating parties in an industry - all or none"* then the negotiating party is *"not genuinely trying to reach agreement with any negotiating party in the industry or class".* However, in a particular case the issue is dependent upon matters of fact and degree.

- ***Is a union able to reach an agreement with an industry association and then take industrial action against companies in the industry to force them to incorporate the outcome in their enterprise agreements?***

On this issue, Justice Munro said that *"the advancement of claims in a way that effectively seeks agreement from or through entities that are not the negotiating party to whom industrial action or the relevant bargaining period is directed"* cannot satisfy the requirements of the Act.

- ***Is industrial action which is taken at a common time throughout an industry (eg. a State-wide stoppage) and organised by unions as part of a campaign in support of common claims, grounds for suspending or terminating bargaining periods?***

With reference to s.170MW(3) of the Act which enables the AIRC to suspend or terminate bargaining periods if industrial action is threatening to cause significant damage to an industry or an important part of it, Justice Munro said:

> *"It seems an inescapable conclusion that co-joint industrial action on one day against many negotiating parties in an industry sector magnifies the social and economic impact of the industrial action"*

Justice Munro appropriately concluded that protected action can only be taken if the parties have *"genuinely tried to reach agreement"* at the enterprise level. If a union is pursuing a pattern outcome and is refusing to accept any other outcome at enterprises throughout an industry or sector then the union is not genuinely trying to reach agreement at the enterprise level and therefore any action taken is not protected. Further, this constitutes a ground to have the bargaining period suspended or terminated.

4.4 Legislative amendments to give employers greater protection against damaging pattern bargaining campaigns

While the decision of Justice Munro provides greater clarity about the rights of parties to engage in protected action in pursuit of pattern bargaining, Ai Group believes that the Act needs to be amended to make it clear that protected industrial action only applies to the negotiation of enterprise agreements and not to pattern agreements pursued by unions across an industry or sector. Such approach would not prevent agreements which are consistent with an industry or sector pattern being certified by the Commission where such agreements are freely entered into by the parties to those agreements. However, it would prevent protected industrial action (which was introduced into the Act exclusively for enterprise bargaining), being used by unions to pursue industry and sector wide claims.

The approach taken in the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* is consistent with the decision of Justice Munro in the *Campaign 2000* case. It preserves the right of unions to make common claims across an industry but requires that such claims be genuinely negotiable at the enterprise level. It prevents unions taking protected industrial action in pursuit of non-negotiable pattern outcomes.

Ai Group strongly supports the Bill but proposes a minor amendment to avoid any doubt about the meaning of the term "industry" in s.170MW(2A)(a) and (b)(i). In many cases pattern bargaining campaigns are pursued against companies in

sectors of an industry. Therefore, Ai Group proposes that the term "industry" be replaced with the term "industry or sector of an industry" in s.170MW(2A)(a) and (b)(i).

4.5 Cooling-off periods

Ai Group strongly submits that the Act should enable the Commission to call for a cooling-off period.

Ai Group's September 1999 submission to the Senate Committee inquiring into the provisions of the *Workplace Relations Legislation (More Jobs, Better Pay) Bill 1999* was supported by statutory declarations from some 20 member companies. Many of these statutory declarations outlined serious dispute situations which had arisen and which would have been assisted by a cooling-off period.

In the *Campaign 2000* proceedings, Justice Munro said:

> *"it appears to me in most disputes to be a matter for welcome that the parties resort to what are termed cooling-off periods.....the term cooling-off period I don't think is known to the Act at this stage, although some have sought to have it introduced.....The course of Campaign 2000 litigation before the Commission in all its aspects indicates that the cooling-off periods have in particular instances served some useful purpose in reaching agreement in some instances or at least in allowing the parties to back off from what would otherwise have emerged as dug in positions..".*

In deciding to terminate the bargaining periods and order that no further bargaining periods be established for a six week period, Justice Munro said:

> *"The effect of that order and declaration is to attempt to force an end to the current phase of Campaign 2000 activity against the 33 employer applicants. Thereby, the order will allow an effective and unequivocal cooling-off period, free of bargaining periods until the end of November".*

The *Campaign 2000* proceedings before Justice Munro demonstrate that the Commission has the power to order a cooling-off period in limited circumstances. However, in that case, Ai Group made application to suspend or terminate bargaining periods on 23 August 2000. The bargaining periods were eventually terminated by Justice Munro on 16 October 2000 after lengthy hearings over the several weeks. This highlights the need for a fast and effective mechanism to be introduced into the Act to give the AIRC the power to order a cooling off period in appropriate circumstances.

The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* provides such a mechanism. The Bill appropriately leaves it to the Commission to determine whether or not a cooling-off period should be established to assist the resolution of a particular dispute.

4.6 Amendments to prevent unions delaying proceedings and frustrating the intentions of the Act

During the two significant disputes in 2000 referred to above – the Victorian building industry dispute and the *Campaign 2000* proceedings – deficiencies in the Act became apparent.

Both of these industry-wide disputes involved a large number of workplaces, all of which had been served with identical notices initiating bargaining periods. In the *Campaign 2000* proceedings, one of the manufacturing unions involved (the AMWU) served 1200-1500 bargaining notices on employers. Other manufacturing unions served hundreds of additional bargaining notices.

The process of identifying the specific bargaining case numbers relating to each of the bargaining notices served by each of the individual unions was exhaustive in both proceedings and contributed to the delays associated with having the bargaining periods terminated by the Commission.

Further, in the Campaign 2000 proceedings, twice the unions withdrew bargaining notices and then re-served them in an attempt to frustrate the proceedings. With regard to such tactics Justice Munro stated[3]:

> *"The timing of the beginning, ending and renewal of bargaining periods with employer negotiating parties is eloquent.*

[3] Print T1982, page 12.

It is a basis for an inference that the AMWU's ostensible cessation of bargaining periods has been facile……Within two working days of the report to the Commission about the cooling-off period, a majority of those employers were faced with new notices initiating bargaining periods".

Despite the Commission's strong criticisms of union tactics designed to frustrate the processes of the Commission, the current provisions of the Act dealing with suspension and termination of bargaining periods encourage such tactics.

To address this issue, Ai Group proposes that the Act be amended to enable applicants seeking suspension or termination of bargaining periods to simply identify the enterprises involved – not the specific bargaining periods established. It is proposed that the Commission have the power to suspend or terminate all bargaining periods relating to negotiations over certified agreements applicable to particular single businesses or parts (without the need to identify the specific bargaining case numbers relating to each relevant bargaining period). Ai Group also proposes that the Commission have the power to make an order that prevents negotiating parties initiating further bargaining periods in pursuit of such certified agreements for the period specified in the order. This approach would:

- Avoid the need for specific bargaining case numbers to be identified;
- Prevent unions simply serving other bargaining notices to establish new bargaining periods to replace suspended or terminated bargaining periods.

Under s.170MW(10) of the Act, the Commission currently has the power to order that a further bargaining period not be established for a specified period upon the termination of a specific bargaining period. However, in the abovementioned *Campaign 2000* proceedings before Justice Munro, the unions argued that the power in s.170MW(10) only relates to the termination of bargaining periods and that the Commission does not have the power to order that further bargaining periods not be established when bargaining periods are suspended. (NB. S.170MW(10) does not refer to suspension).

Ai Group does not agree with this view but if it is correct, then the Commission's power to suspend bargaining periods would be of little practical effect because a union could simply initiate other bargaining periods to overcome the suspension of the earlier ones. Ai Group's proposed amendments would clarify that unions are not able to frustrate the Commission's processes in the way that they argue they can.

The proposed s.170MWA in the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* addresses one of the problems which arose in the *Campaign 2000* proceedings before Justice Munro. That is, where a union withdraws a bargaining period to deprive the Commission of jurisdiction and then immediately establishes another bargaining period. Ai Group strongly supports the Bill but the other problems outlined above need to be addressed through appropriate legislative amendments.

Table 4.1 –Ai Group's position on the provisions of the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*

Proposed Amendment	Ai Group's Position	Basis of Ai Group's Position
To assist the Commission to consider whether a negotiating party is or is not genuinely trying to reach an agreement with other negotiating parties at the enterprise level. **(170MW(2A))**	Supported	Union pattern bargaining campaigns are causing significant loss and damage to Australian employers and are undermining the objectives of the Act. Several significant pattern bargaining campaigns are currently being planned by unions in the construction and manufacturing sectors. The Bill provides enhanced protection for employers targeted during such campaigns. Genuine enterprise bargaining occurs only when parties show their willingness to reach agreement at the enterprise level. The Bill would require the Commission to consider the intentions and conduct of parties during negotiations when considering applications made under s170MW for suspension or termination of a bargaining period. The Commission would be encouraged to consider whether the action of negotiating parties was focussed on reaching agreement at a particular enterprise, or on reaching an agreement across an industry or sector.

		The approach in the Bill draws heavily on the decision of the Justice Munro in the *Campaign 2000* case (Print T1982). This approach preserves the right of unions to make common claims across an industry but requires that such claims be genuinely negotiable at the enterprise level. It prevents unions taking protected industrial action in pursuit of a non-negotiable pattern outcome. Ai Group strongly supports the Bill but proposes a minor amendment to avoid any doubt about the meaning of the term "industry" in s.170MW(2A)(a) and (b)(i). In many cases pattern bargaining campaigns are pursued against companies in sectors of an industry. Therefore, Ai Group proposes that the term "industry" be replaced with the term "industry or sector of an industry" in s.170MW(2A)(a) and (b)(i).

To enable the Commission, in appropriate circumstances, to suspend a bargaining period to allow for a 'cooling-off' period **(170MWB)**	Supported	The *Campaign 2000* proceedings before Justice Munro highlighted the need for a fast and effective mechanism to be introduced into the Act to give the AIRC the power to order a cooling off period in appropriate circumstances. The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* provides such a mechanism. The Bill appropriately leaves it to the Commission to determine whether or not a cooling-off period should be established to assist the resolution of a particular dispute.
To allow the Commission to make orders to prevent the initiation of a new bargaining period, in appropriate circumstances, where a party has withdrawn a bargaining period. **(170MWA)**	Supported	The proposed s.170MWA in the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* addresses one of the problems which arose in the *Campaign 2000* proceedings before Justice Munro. That is, where a union withdraws a bargaining period to deprive the Commission of jurisdiction and then immediately establishes another bargaining period. Ai Group strongly supports the Bill.

		However, various other related problems have arisen which need to be addressed. The Act should be amended to enable applicants seeking suspension or termination of bargaining periods to simply identify the enterprises involved – not the specific bargaining periods established. During an industry-wide pattern bargaining campaign, the process of identifying the case numbers assigned to all of the thousands of individual bargaining notices served by unions is exhaustive and frustrates employer attempts to pursue suspension or termination of bargaining period. It is proposed that the Commission have the power to suspend or terminate <u>all bargaining periods</u> relating to negotiations over certified agreements <u>applicable to particular single businesses or parts</u> (without the need to identify the specific bargaining case numbers relating to each relevant bargaining period). The Commission should also have the power to make an order that prevents negotiating parties initiating further bargaining periods in pursuit of certified agreements for the period specified in the order. This approach would:

		• Avoid the need for specific bargaining case numbers to be identified; • Prevent unions simply serving other bargaining notices to establish new bargaining periods to replace suspended or terminated bargaining periods. S.170MW(10) of the Act should be amended to clarify that the Commission has the power to order that a further bargaining period not be established for a specified period upon the suspension of a bargaining period. (Note. S.170MW(10) does not refer to suspension and the unions have argued that the power in s.170MW(10) only relates to the termination of bargaining periods). Ai Group does not agree with the unions' interpretation of the Act but if it is correct, then the Commission's power to suspend bargaining periods would be of little practical effect because a union could simply initiate another bargaining period to overcome the suspension of an earlier one. Further, if this view is correct then s.170MWB of the Bill may prove to be ineffective because unions could simply initiate a new bargaining period and take protected action during the cooling-off period, despite the suspension of the bargaining period to which the cooling-off period relates.

		Ai Group's proposed amendments would clarify that unions are not able to frustrate the Commission's processes in the way that they argue they can.