Submission no: 8B

WORKPLACE RELATIONS AMENDMENT (BETTER BARGAINING) BILL 2003

WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2004

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

APRIL 2004

CONTENTS **Page**

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, automotive, printing, information technology, telecommunications, labour hire, and other industries.

Ai Group has had a strong and continuous involvement in the industrial relations system at the national, industry and enterprise level for over 130 years. Ai Group is well qualified to comment on the:

- *Workplace Relations Amendment (Better Bargaining) Bill 2003;* and the
- *Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004.*

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

It is not our intention to comment on all aspects of the Bills but rather to outline Ai Group's position on the significant legislative amendments proposed.

Heather Ridout
CHIEF EXECUTIVE

2.0 Workplace Relations (Better Bargaining) Bill 2003

The *Workplace Relations Amendment (Better Bargaining) Bill 2003* provides for:

- Protected action to only be available during the negotiation of an enterprise agreement – not during the life of an agreement;
- The Australian Industrial Relations Commission (AIRC) to order a cooling-off period during protracted industrial disputes;
- The suspension of bargaining periods where industrial action is threatening to cause significant harm to third parties;
- Protected action to only be available in respect of the pursuit of claims which pertain to the employment relationship;
- Protected action to only be available where it is pursued against one employer – not where it is pursued against two or more employers which are related corporations; and
- Protected action to only be available where it is pursued at the enterprise level – not where action is taken in a concerted manner across many enterprises.

All of the provisions of the Bill are very important and have substantial merit. It is essential that the Bill be passed without delay.

Protected action should only be available during the negotiation of an enterprise agreement – not during the life of an agreement

The Federal Court's *Emwest* decision *([2003] FCAFC 183)* threatens the integrity of Australia's enterprise bargaining system and exposes companies to claims being pursued during the life of their enterprise agreements. The Court has ruled that industrial action is only generally prohibited in respect of the matters specifically contained within a certified agreement, and not other matters.

The decision has created an unworkable bargaining regime. The following risks are ever-present until the decision is addressed through legislative change:

- The risk that a union will take protected industrial action during the life of an agreement over matters which were dropped as part of the enterprise bargain;
- The risk that a union will take protected industrial action during the life of an agreement over new claims which were not pursued when the enterprise agreement was reached;
- The risk that a dispute will arise in a workplace during the life of an agreement over an issue which was not dealt with in the company's enterprise agreement, and a union will organise protected action to further its position in the dispute.

While the effects of the *Emwest* decision can be overcome by inserted a very carefully drafted and comprehensive no extra claims commitment into certified agreements, unions typically refuse to accept the inclusion of such comprehensive no extra claims wording. The common form of no extra claims commitment which is in most enterprise agreements was held by the Federal Court to be

inadequate to prevent claims being pursued with industrial action during the life of an agreement about matters not specifically dealt with in the agreement.

A central component of any effective enterprise bargaining system is that during the life of an enterprise agreement there should be a period of industrial peace. This principle needs to be re-enshrined within the *Workplace Relations Act* given the Federal Court's *Emwest* decision which has interpreted s.170MN of the Act in a way that was clearly not intended by Parliament. In the original proceedings before Justice Kenny, her Honour conceded that the interpretation of the Act which she favoured was not the most obvious one.

The Bill addresses the problems caused by the *Emwest* decision in an appropriate way.

The Australian Industrial Relations Commission should be able to order a cooling-off period during protracted industrial disputes

Where protected industrial action is being taken during enterprise agreement negotiations, the Act should enable the Commission to suspend a bargaining period and establish a cooling-off period after hearing from the parties, if the Commission decides that a cooling-off period would be beneficial.

Justice Munro of the AIRC expressed support for cooling-off periods in his *Campaign 2000* decision (Print T1982) which is recognised in the *Workplace Relations Act* in a note inserted in s.170MW(2). 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 the 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 some instances or at least in allowing the parties to back off from what would otherwise have emerged as dug in positions."

The *Campaign 2000* proceedings 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 eight weeks before the bargaining periods were eventually terminated and after lengthy and complex AIRC hearings which continued over 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 Bill would provide the Commission with this power. Increasing the Commission's powers in the manner proposed would be sensible, practical and in the public interest.

The Cole Royal Commission supported cooling-off periods in Recommendation 11. However, the Bill's provisions would amend the Act in a more modest way than that proposed by Commissioner Cole for the construction industry. Commissioner Cole recommended that a compulsory cooling-off period apply after 14 days of industrial action.

The suspension of bargaining periods where industrial action is threatening to cause significant harm to third parties

The *Workplace Relations Act* enshrines a scheme whereby negotiating parties are entitled to inflict harm upon each other, within certain boundaries, in pursuit of their bargaining claims.

However, such actions should not be able to inflict significant harm upon third parties, without such third parties having access to a mechanism to argue for relief. The Bill provides such mechanism.

During a protracted industrial dispute, industrial action taking place at a workplace could lead to:

- The employees at other workplaces being stood down for lengthy periods and suffering extreme hardship;
- Other businesses not receiving critical supplies and therefore suffering significant damage and loss of contracts.

The Bill would not allow the Commission to intervene in all circumstances where harm is inflicted upon third parties, but rather where **significant** harm is inflicted upon such parties. This is appropriate and consistent with the approach taken within s.170MW(3)(b) of the Act which has been the subject of litigation in the High Court regarding the meaning of the term "significant". In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47 (31 August 2000),* Gleeson CJ, Gaudron and Hayne JJ said (at paragraph 28)

"a decision under s 170MW(3) that industrial action is 'threatening… to cause significant damage to the Australian economy or an important part of it' is not simply a matter of impression or value judgement. The presence of the words 'significant' and 'important' in s.170MW(3) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question." (Emphasis added).

Protected action should only be available in respect of the pursuit of claims which pertain to the employment relationship

The Bill would prevent industrial action being taken in pursuit of claims which do not pertain to the employment relationship. The legislative amendment proposed in the Bill is essential and is consistent with Recommendations 14 and 15 of the Cole Royal Commission.

In its *Electrolux* decision *([2002] FCAFC 1999)* the Full Federal Court extended union rights to take industrial action to matters which extend beyond the employment relationship. The decision threatens the integrity of Australia's enterprise bargaining system. If the decision stands, unions may be able to organise protected industrial action in respect of wide range of political and social causes. This would not be consistent with the objects of the *Workplace Relations Act.*

In May 2003, the High Court of Australia decided that it would hear an appeal by Ai Group against the *Electrolux* decision. The matter was heard in December 2003 and the decision is still reserved.

It is essential that protected action only be available if taken in support of a proposed agreement in which all claims pertain to the employer-employee relationship. This requirements needs to be clearly set out in relevant legislation.

Protected action should only be available where it is pursued at the enterprise level – not where action is taken in a concerted manner across many enterprises

During the Australian Manufacturing Workers Union's (AMWU) *Campaign 2000* and *Campaign 2003* in the manufacturing industry and in various construction industry matters, companies have been faced with industry-wide strikes which are purported to be organised in pursuit of enterprise agreements. Hundreds of bargaining periods are established at a common time, then hundreds of identical s.170MO protected action notices are forwarded to employers advising of a strike on the same date.

Clearly such union tactics are inconsistent with the objects of the *Workplace Relations Act* and are highly damaging to the community. However, there are few arguments which can currently be pursued regarding the unlawfulness of such tactics. On 12 June 2003, the AMWU organised an industry wide stoppage in Victoria involving some 700 employers who received s.170MO notices by the union. Proceedings in the AIRC before Justice Munro, in which Ai Group was represented by Mr Frank Parry SC and Mr Richard Clancy of Counsel, were not successful in achieving an order that the industrial action not occur (PR932959). Employers had very little notice of the stoppage so there was insufficient time to gather detailed evidence relating to the individual circumstances of the bargaining taking place at each of the companies. What was clear is that in a very large number of the workplaces which received the s.170MO notices there had been no communication between the union and the employer or the union and the employees of the company. The first time that many employees heard about the stoppage was when their employer queried them about why they had decided to go on strike.

In his decision of 13 June 2003 (which confirmed a decision given in transcript on 11 June), Justice Munro described the union's s.170MO notices and the situation which the manufacturing industry was confronted with in the following way:

> *[9] The particulars of this notice are as follows:*
>
> > *'The intended industrial action will commence at the beginning of each shift on Thursday, 12 June 2003. The nature of the protected action will be that there will be a 24 hour stoppage, that is, a complete withdrawal of labour, commencing at the beginning of each shift on Thursday, 12 June'.*
>
> *[10] In some instances, the response sheets indicate that employees have expressed some dissent from taking industrial action. Otherwise, generally, there is a mixture of evidence indicating that employees will be supporting the stoppage, and plant will be closed. I cannot purport to accurately set out the substance or even the preponderance of each comment by employees or the content of each response. The responses cover a variety of situations. Some employees indicate no intention to participate, some claimed to be ignorant of the stoppage, but probably will participate. A number are reported to have voted to adopt the intention to take the industrial action."*

Later in the decision, Justice Munro highlighted the risk to employees of a penalty under the Act being imposed on them due to the union's tactics in organising an industry-wide stoppage under the guise of enterprise bargaining:

> *"If industrial action is resorted to tomorrow at sites where there has been a perfunctory attempt to reach agreement, or there has been no proper attention to the s.170MO notice, or the like, that is evidence that goes to whether or not a s.170MW order should be made. The unions have a responsibility to and for their members in these matters. The union is the negotiating party. It has a*

responsibility to guide its members. To the extent that the members may be at risk in relation to 170MN, it is imperative that the union act to limit the exposure to a penalty that an employee may incur by taking industrial action in breach of that provision. Members and employees are at risk in such circumstances."

Three years earlier, in Justice Munro's *Campaign 2000* decision (Print T1982), the Commission rejected the proposition that industrial action taken in relation to separate bargaining periods but taken at a common time throughout an industry as part of a campaign in support of common claims, cannot be protected action under the *Workplace Relations Act*.

Unions such as the AMWU and Construction, Forestry Mining and Energy Union (CFMEU) facilitate their misuse of the protected action provisions of the Act to organise industry wide strikes by establishing common expiry dates for enterprise agreements across the industry. The unions typically refuse to sign enterprise agreements which do not expire on a common date. Once the expiry dates are aligned, these unions embark upon industry-wide campaigns which often involve the organisation of industry-wide strikes.

S.170MM needs to be amended in the manner proposed in the Bill to protect the community from the damaging union tactics described above. This would assist in ensuring that the objects of the *Workplace Relations Act* are achieved and that claims are pursued at the enterprise level – not the industry level. Such amendment will be highly important in 2006 when thousands of manufacturing and construction industry agreements expire at a common time.

Protected action should only be available where it is pursued against one employer – not where it is pursued against two or more employers which are related corporations

During *Campaign 2003* a further union tactic, which is inconsistent with the objects of the *Workplace Relations Act* and damaging to the community, became apparent. The AMWU sent a letter to the head offices of a large number of company groups seeking that the group of related companies enter into an agreement with the union over the following claims: protection of entitlements via the unions' NEST scheme; shorter working hours; a common expiry date of 31 March 2006; delegates rights and training; restrictions on casuals, contractors and labour hire; paid maternity / paternity leave; and a six per cent wage increase per annum. In many cases the company groups consisted of a large number of diverse operations each of which had their own enterprise agreements.

Industrial action should only be available at the enterprise level – not where action is pursued across many enterprises, including enterprises which are related corporations. The Bill addresses this issue in an appropriate way.

3.0 Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004

An objective of the *Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004* is to simplify the processes for making enterprise agreements. Ai Group supports this objective and supports the proposals in the Bill, with a few amendments as set out below.

We have not endeavoured to comment on all of the aspects of the Bill. For the most part, the Bill deals with procedural issues and the need for greater clarity regarding the operation of existing legislative provisions. The approach taken in the Bill is sensible and practical.

Terms of up to five years for certified agreements

ss.170LGA and170LT(10) of the Bill enable certified agreements to continue for up to five years - except for greenfields agreements under s.170LL.

Ai Group strongly supports the proposed extension in the maximum term for a certified agreement to five years. The existing three year term for certified agreements is overly restrictive and operates against the interests of both employers and employees in some circumstances. For example, in the construction industry major projects often have relatively long construction periods. For major

projects, a four or five year construction period is not uncommon. It is difficult to maintain a stable workplace relations environment on a project comprising multiple employers, over these lengthy periods. The existing three year limit on certified agreements can expose companies to claims for higher wages and conditions, backed up by protected industrial action, at a critical time during the construction of a project.

However, whilst we support the proposed extension in the maximum term for certified agreements we are concerned that the Bill would not enable greenfields agreements to continue beyond three years. Greenfields agreements are particularly relevant in the construction industry because agreements are often reached between employers and unions before any persons are employed on a project. The reaching of an industrial agreement at an early stage is an important element of risk management. Industrial disruption can be extremely costly once the project is underway.

The Bill should be amended to enable greenfields agreements to continue for up to five years in addition to the other forms of certified agreement referred to in the Bill. In addition, Ai Group can see no valid reason why the existing flexibility within s.170MC(1), which enables the term of a greenfields agreement to be extended, should be removed as proposed in item 12 of Schedule 2 of the Bill.

Amending the *Workplace Relations Act* to enable certified agreements to continue for five years would be consistent with international workplace relations developments. In December 2003, Ai Group's Director – National Industrial Relations, Stephen Smith, participated in a study tour of the United States to investigate bargaining developments. Union and employer bodies in the US all confirmed that five year terms are now very common for workplace agreements in that country. Such terms are widely supported by all parties in the US, given the greater certainty which they provide. Until recent years, most agreements in the US apparently did not continue for more than three years.