INQUIRY INTO WORKPLACE AGREEMENTS

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

AUGUST 2005

Contents

1.0 Introduction

The Australian Industry Group (Ai Group) welcomes the opportunity to express its views about workplace-agreement making to the Senate Employment, Workplace Relations and Education Committee.

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

Ai Group has had a strong and continuous involvement in the workplace relations system at the national, industry and enterprise level for over 130 years.

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

Heather Ridout
CHIEF EXECUTIVE

2.0 The Importance of Enterprise Bargaining

Enterprise bargaining has been extremely important for Australian companies and has led to greater efficiency, better workplace relationships and improved productivity and performance. The enterprise focus has assisted companies to transform and effectively compete in global markets. There has been a significant amount of change for companies to contend with as businesses have reshaped, downsized and restructured so as to survive the rigors of competition. The process has been essential although in some cases difficult. The overall outcome, however, has been greater efficiency, better workplaces and improved productivity and performance. Undoubtedly enterprise bargaining has contributed to the productivity growth which has been a feature of the Australian economy through much of the past 12 years.

For employees, enterprise bargaining has also been very important. It has delivered significant real wage increases – far in excess of inflation.

Despite the successes, there is a need to re-invigorate the enterprise bargaining system and breathe new life into it.

3.0 The Case for Reforming Australia's Workplace Relations System

There is undoubtedly a very persuasive case for further reform to Australia's workplace relations system, including the enterprise bargaining laws. The case centres around:

1. Our existing overly prescriptive regulatory framework;
2. The impacts of globalisation and the rapid rise of China and India;
3. Australia's inadequate productivity performance;
4. Demographic challenges; and
5. Changes taking place in Australian society.

Our Existing Overly Prescriptive Regulatory Framework

Australia's existing workplace relations framework is highly complex and riddled with over-prescription. There are six separate workplace relations systems – the federal and five state systems. There are more than 2200 federal awards and further 2000 state awards. In addition to the awards, there is a breathtaking array of intertwined and inconsistent state and federal employment laws. Companies operating across state and territory boundaries need to grapple with:

- The *Workplace Relations Act* and Regulations;

- Broad state and territory industrial relations Acts, together with many other specific pieces of legislation dealing with leave and other entitlements;
- Occupational Health and Safety Acts in each state and territory, together with associated regulations, codes of practice and numerous detailed Australian Standards called up in the legislation;
- Workers' compensation legislation in each state and territory;
- Anti-discrimination Acts in every state and territory;
- The Federal *Sex Discrimination Act*, *Racial Discrimination Act* and *Disability Discrimination Act*, plus the *Age Discrimination Act* which was recently enacted despite the fact that age discrimination legislation exists in every state and territory; and
- Training legislation in every state and territory.

The situation would not be quite so bad if the legislation was consistent across the different state and federal jurisdictions but it is not.

Australia needs a simple and flexible workplace relations system that enables companies to work with their employees to implement work arrangements which suit the needs of their enterprise. At the same time the system needs to be fair and efficient and not compromise the harmony which has been a feature of modern workplaces.

The Impacts of Globalisation and the Rapid Rise of China and India

The rapid industrialisation of China and India presents mammoth challenges for Australian industry. Well over a third of the world's population lives in these two countries which are industrialising at a phenomenal rate.

Over the past two hundred years many countries have "taken-off" and experienced rapid and sustained economic growth, but never on this scale before. Two giants, both well over 60 times Australia's population are unleashing an economic force that is changing the structure of world production, injecting new sources of demand and challenging the established economic order.

In a few short years, China has moved a very long way down the path of transforming itself into a global manufacturing giant. It currently enjoys huge cost advantages over developed countries and these advantages are likely to remain for many years to come.

China is setting the world price for manufactured goods. Australia must meet this price or our industries will fail, our economy will slow and our choices as a nation will be diminished.

Largely as a result of the growth of Chinese manufacturing, some $6 billion have been wiped off Australia's manufactured export values over the past three years. In addition, imports have taken an increased share of our markets.

The challenge that China represents to Australia's manufacturers is similar to what India represents to Australia's services sector.

India is rapidly becoming a global giant in the services sector – particularly in the information and communication technologies (ICT) sector. It is relatively easy to outsource ICT services overseas, far easier than it is for example to establish a manufacturing plant.

Massive offshoring of telecommunications services to India has already occurred in other parts of the world.

India is not just focusing on low value added products and services. India's success in the telecommunications market has been built on having very good technology and a large supply of well-educated, English speaking workers.

Unlike Australia's ageing workforce, the workforce in India is young. The median age of a person in India is 24 years, compared with 36 in Australia. Fifty four per cent of the population in India (i.e. 555 million people) are under the age of 22.

It is not all doom and gloom. The industrialisation of China and India present as many opportunities for Australian industry as threats. However, China and India are not hampered by the over-regulation of employment which exists in Australia. It important that Australia's workplace relations system not impede companies in their need to remain highly adaptable and flexible.

Australia as a medium-sized, open economy is not going to have much influence over the global forces which will play out over the years ahead. Its success, though, will depend on its adaptability and flexibility.

Australia's Inadequate Productivity Performance

A key to Australia's ability to meet the challenges ahead is through greater productivity. Unfortunately, in this regard the recent news is not good and, despite the great strides we have made since the mid-1990s in boosting our productivity, over the past few years these gains seem to have stalled.

While economists debate the statistics and what they mean, it is evident that there is growing concern in Australia about our recent sub-standard productivity performance and what should be done to address it.

The productivity outlook is not good and this adds to the case for workplace and other reforms to drive productivity improvements.

The solution for Australia is not to tackle the challenges with a low wage strategy. We do not have a comparative advantage in low wage labour. The solution for Australia is to confront the challenges with high productivity.

Demographic Challenges

In addition to the challenges presented by globalisation, demographic forces will create significant challenges over the years ahead.

Australia's population is ageing at a rapid rate. Currently there are about 5 times as many people of traditional working age as there are those over 65. In 40 years time, the Federal Government projects that there will be 40 people over 65 for every 100

people of traditional working age. Unless something very significant is done soon, there will be an enormous burden on the workforce of 2040[1].

The problems associated with Australia's ageing population are compounded by an inadequate fertility rate.

To meet these demographic challenges it is essential that we increase the rate of participation of Australians in the workforce. Again, workplace relations reform has an important role to play in removing unnecessary labour market rigidities and barriers which discourage participation in the workforce.

Changes Taking Place in Australian Society

The forces of globalisation and demography described above necessitate that further workplace relations reform be implemented.

Quite apart from these issues, employees themselves are demanding change. The workplace has become far more diverse and employers face growing pressures to accommodate the requirements and desires of employees.

There is pressure on employers to have flexible working conditions to suit individual situations. Women and men with responsibilities to care for young children; people with caring responsibilities towards aged relatives; students of all ages, people wishing to phase into retirement; and persons with disabilities – all have boosted the demand for unorthodox employment arrangements.

[1] 2002-03 Budget Paper No. 5 – Intergenerational Report – Part II – Australia's Long-term Demographic and Economic Prospects

Australia's existing workplace relations framework is increasingly a barrier inhibiting the variability and adaptability demanded by our workforce and by society more broadly.

4.0 The Importance of Fairness

Australia's workplace relations system needs to be productive, efficient and flexible. It also needs to be fair.

Fairness has many different aspects. Minimum wages and conditions need to be fair. At the same time, fairness requires consideration of those employees who risk losing their jobs if companies fail to survive in a fiercely competitive global environment. Fairness also requires that the needs of the unemployed be taken into account.

Fairness does not require complexity. In fact fairness is impeded by complexity. Fairness is best ensured by a system which is easily understood so that both employers and employees know what they need to do.

Unions and other opponents of workplace relations reform often argue that the legislative changes over the past decade have led to unfairness in the form of greater income inequality and that further reform with exacerbate this problem. However, ABS statistics released on 4 August 2005 challenge such arguments. The ABS report *Household Income and Income Distribution,* lends strong support to the claim that household income did not become more unequal over the nine years from 1994-05. The report reveals a remarkable stability of measures of inequality over this period. If anything the distribution of income has become less unequal.

5.0 The Importance of Preserving Choice Regarding the Form of Agreement

There are various options for agreement-making recognizes under the *Workplace Relations Act 1996*, all of which are important and need to be preserved.

The right of employers to manage their businesses needs to be preserved. This includes the right of an employer to choose what form of agreement is appropriate for its business - an individual or collective one, an agreement with a union or without one, a registered agreement or an unregistered agreement – and to seek to negotiate that form of agreement with its employees.

Similarly, unions have the right to pursue their preferred agreement making strategy and have the right to strike in pursuit of a collective agreement.

No party should be forced by the law to have a particular form of agreement, or coerced or discriminated against if they do not have a particular form (other than through the taking of protected industrial action). The following provisions of the *Workplace Relations Act* are relevant regarding this issue:

- S170NC prevents a person coercing another person to make a certified agreement;
- S170WG prevents a person applying duress to an employer or an employee in connection with an AWA;
- S170CK makes it unlawful to terminate an employee's employment because he or she has refused to sign an AWA.

Further, s.174 of the amended *Building and Construction Industry Improvement Bill 2005* outlaws "discrimination" by one person against another person on the basis that the second person has a particular type of industrial instrument (eg. a certified agreement as opposed to an AWA, or vice versa).

6.0 The Need to Restore the Role of Enterprise Bargaining as a Significant Driver of Productivity Improvements

Enterprise bargaining has been extremely important and has led to greater efficiency, better workplace relationships and improved productivity and performance. Despite the successes, there is a need to re-invigorate the enterprise bargaining system and restore its role as a significant driver of productivity improvements.

Many employers have stopped using the enterprise bargaining process as a tool to drive workplace change, in part because of strong union opposition to any new measures to improve productivity being incorporated within enterprise agreements. This, in turn, has led to enterprise agreement negotiations in many workplaces focusing almost exclusively on union claims rather than the need for ongoing productivity and efficiency improvements to the detriment of industry's competitiveness.

The solution is to re-invigorate the bargaining process.

As set out in Section 7.0 below, there is significant merit in the idea of codifying the legislative requirement that parties *"genuinely try to reach agreement"* before protected industrial action is able to be taken. To address the widespread current

problem in the manufacturing and construction industries of unions refusing to negotiate on any new measures to improve productivity, efficiency or flexibility, Ai Group proposes that the following indicator be incorporated within the Act for the purposes of the *"genuinely try to each agreement"* requirement:

> *"Demonstrating a preparedness to negotiate an agreement which takes into account the need for ongoing productivity and efficiency improvements at the relevant enterprise."*

Ai Group's proposal is consistent with the approach which the Industrial Relations Commission of NSW has implemented. The Commission has issued Principles for the Approval of Enterprise Agreements which parties seeking registration of an enterprise agreement are required to demonstrate compliance with. Principle 5.2 states that:

> *"In negotiations for a proposed enterprise agreement, the parties will consider matters such as workplace reform, productivity and efficiency".*

The Australian Industrial Relations Commission (AIRC) has long recognized the importance of continuous productivity improvement. In its April 1991 National Wage Decision, the Commission said:

> *"Productivity growth is by far the most important source of long-term improvement in the standard of living; and the objective of increasing it is widely supported by the parties and interveners in these proceedings"*[2].

[2] National Wage Decision, April 1991, p.15.

Several years later, in its April 1997 National Wage Decision, similar views were expressed, as follows:

> *"We take it to be a matter of consensus that productivity is a major determinant of the average real wages which the economy yields; and we fully accept this assessment. In the long term, productivity is almost certain to emerge as the principal cause of changes in living standards achieved in different countries"*[3]

As highlighted by the Commission, productivity growth is the primary factor which drives improved living standards and such growth is vital to enable Australian firms to compete in intensely competitive global markets.

Reforms need to be introduced the refocus the enterprise bargaining system upon the need for productivity improvement.

7.0 The Requirement to "Genuinely Try to Reach Agreement" and the Importance of Preserving a Voluntary Bargaining System

In order for industrial action to be protected, s.170MP of the Act requires that the parties "genuinely try to reach agreement". Further, if one of the negotiating parties has not "genuinely tried to reach agreement" an application can be pursued in the AIRC under s.170MW(2) of the Act to have the bargaining period suspended or terminated.

Both the *Workplace Relations Amendment Bill 2000*, which failed to pass the Senate, and the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*, which was passed by the Senate in a heavily amended form, sought to codify

[3] National Wage Decision, April 1997, p.162.

the requirement that parties "genuinely try to reach agreement" as a mechanism to outlaw industrial action being taken in pursuit of pattern bargaining[4].

Further, the *Building and Construction Industry Improvement Bill 2003* codifies such requirement in s.62 of the Bill, where a list of indicators of "genuinely trying to reach agreement" is set out

There is significant merit in the idea of codifying the requirement that "parties genuinely try to reach agreement". Appropriate codification would not present any barriers to effective agreement-making or enterprise efficiency. Appropriate codification would simply place fair and reasonable limits on the rights of parties to take protected industrial action. Industrial action should only be permitted if the party wishing to take the industrial action has "genuinely tried to reach agreement" with the other negotiating parties.

Ai Group supports the indicators in s.62 of the *Building and Construction Industry Improvement Bill 2003* being adopted generally within the *Workplace Relations Act*, with the inclusion of some additional indicators as set out below.

To better ensure that enterprise bargaining negotiations are focused on the relevant enterprise, the following indicators should be added to the list:

- *Negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by*

[4] In negotiations between the Federal Government and the Australian Democrats, the codification proposal set out in the *Workplace Relations Amendment (Genuine Bargaining) Bill* 2002 was not proceeded with. Instead, the following note was inserted into s.170MW(2)(c) of the *Workplace Relations Act*: *"The issue of whether or not a negotiating party is genuinely trying to reach agreement with the other negotiating parties was considered by Justice Munro in Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Print T1982".*

agreement between the employer and its employees at the workplace or enterprise level;

- *Not engaging in "pattern bargaining" (to be defined)*[5]*;*
- *Demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the relevant enterprise; and*
- *Demonstrating a preparedness to negotiate an agreement with an expiry date which takes into account the individual circumstances of the relevant enterprise.*

Also, as set out in Section 6.0 above, to address the widespread current problem in the manufacturing and construction industries of unions refusing to negotiate on any new measures to improve productivity, efficiency or flexibility, the following indicator should be added:

- *Demonstrating a preparedness to negotiate an agreement which takes into account the need for ongoing productivity and efficiency improvements at the relevant enterprise.*

Further, to deal with the inappropriate claims relating to hidden interests during bargaining, the following additional indicator should be added:

- *Disclosing to the employer and to the employees who would be bound by the proposed agreement, in writing, any direct or indirect financial benefit that the organisation may derive from any term sought in the proposed agreement.*

[5] In a March 2005 submission entitled *Making the Australian Economy Work Better – Workplace Relations* Ai Group proposed a definition of pattern bargaining.

Further, to assist in preventing misleading and deceptive conduct being engaged in by a negotiating party during bargaining, the following indicator is appropriate:

- *Not engaging in misleading and deceptive conduct during the negotiations.*

It should be noted that Ai Group is not proposing that there be a mandatory bargaining system, or that the Commission's *Asahi* principle[6] be overturned. Ai Group is simply proposing that parties who wish to bargain should comply with some reasonable requirements before gaining access to protected industrial action.

Union Compulsory Bargaining Proposal

At an Ai Group Conference on 23 August 2005, ACTU Secretary, Greg Combet, proposed that a bargaining system be introduced into Australia based upon some elements of the bargaining systems in place in the US and the UK. The announcement attracted significant publicity.

As Ai Group understands Mr Combet's proposal, in workplaces where more than 50 per cent of employees voted in favour of a collective agreement, such an agreement would be required to be negotiated and individual agreements (ie. AWAs) would be prohibited.

Ai Group is opposed to Mr Combet's proposal for the following reasons:

[6] The principle was determined by a five member Full Bench of the AIRC in the *Asahi* case in 1994 (Print L9800) and has continued to apply since that time.

- Employers should have the right to pursue the form of agreement which best suits the circumstances of their enterprise - collective agreements, individual agreements, agreements with unions or those directly with employees. Similarly, unions have the right to pursue their preferred agreement making strategy and have the right to strike in pursuit of a collective agreement. Neither party should be forced by the law to have a particular form of agreement.

- Employers and employees should be free to enter into any legitimate form of enterprise agreement at any time, provided that the parties to the agreement have voted to accept the terms of the agreement and that the agreement meets the "no disadvantage test" and the various other requirements of the Act. There is no logical reason why an employer and an employee should be prevented from entering into an AWA if both parties genuinely support such an agreement being made, even if a current certified agreement is in operation covering the relevant employee (eg. an individual employee may wish to reach agreement with his or her employer on more flexible hours of work or leave arrangements than are provided for under the certified agreement to enable the employee to better balance work and family responsibilities).

- Mr Combet's proposal appears to be a compulsory bargaining model. (The compulsory element appears to apply once over 50 per cent of employees express support for a collective agreement). Compulsory bargaining models were examined in detail several years ago and rejected by the AIRC. In the *Asahi* case in 1994 the AIRC concluded that such a system was not appropriate for Australian circumstances:

    - Firstly, the Commission focused upon the meaning of the word "negotiate" and said that "*an agreement cannot be reached with a person who does not want to agree and negotiations for an agreement cannot take place with a person who does not want to negotiate'; and*

- Secondly, the AIRC pointed to the award safety net that is in place for those not covered by an agreement.

- The ACTU's proposal adopts some elements of the bargaining systems in place in the US and UK, however, a flaw in the proposal is that other important elements of those systems have not been adopted. For example, unions in Australia have very broad representational and entry rights regardless of whether or not the majority of employees in a workplace are union members. This is not the case in the US and the UK. A summary of the US and UK bargaining systems is **attached**.

8.0 The Scope and Coverage of Agreements

A Department of Employment and Workplace Relations (DEWR) report which was tabled in Parliament on 30 November 2004, entitled *Agreement making in Australia under the Workplace Relations Act 2002 and 2003*, covers developments in agreement making from 1 January 2002 to 31 December 2003.

In all industry sectors, agreement making continued to expand, whilst the reliance of awards as the primary means of determining wages and conditions continued to decline. The following statistics are pertinent:

- At 31 December 2003, 13,419 certified agreements were current covering 1,612,600 employees
- In 1990, the number of employees who relied primarily on awards was 68 per cent, which declined to 23 per cent in 2000 and 20 per cent in 2002.

- At the end of 2003, the total number of AWAs approved reached 424,000. Over 200,000 were approved during 2002 and 2003.
- In 2002 and 2003, the annual growth rate in AWAs approved was 35 per cent, the vast majority of these being in the private sector.[7]

The number of certified agreements which are comprehensive and operate to the exclusion of all previous awards and agreements appears to be increasing. According to DEWR statistics:

- In 2001 and 2002, 1013 comprehensive agreements were certified covering 301,100 employees, representing 7 per cent of certified agreements;
- In 2002 and 2003, 1139 comprehensive agreements were certified covering 445,100 employees, representing 8 per cent of certified agreements[8].

The DEWR's *Trends in Federal Enterprise Bargaining* report for the March Quarter 2005 shows that as at 31 March 2005 there were 15,836 current Federal certified agreements covering 1,621,200 employees.

7 *Agreement making in Australia under the Workplace Relations Act 2002 and 2003* , DEWR, pp. xvi and xvii.
8 Ibid, p.25.

9.0 Bargaining Outcomes - Women, Youth and Casual Employees

Women

The participation of women in the workforce has escalated over the years as the following statistics show[9]:

1911	18.2%
1971	26.7%
1994	52.2%
2004	55.6%

Women are not disadvantaged by Australia's enterprise bargaining system, despite union claims to the contrary. Wage outcomes for women and men covered by certified agreements are very similar, as set out below[10]:

	Average Annualised Wage Increase	
	2002	***2003***
Women	3.7%	4.1%
Men	3.8%	4.1%

[9] RR Maddock and IW McLean (eds.), *The Australian Economy in. the Long Run*, Cambridge University Press, 1987); EA Boehm, *Twentieth Century Economic Development in Australia*, Longman Cheshire, 1993; and Australian Bureau of Statistics,*Australian Social Trends 2005*, ABS 4102.0, 2005.

[10] *Agreement making in Australia under the Workplace Relations Act 2002 and 2003* , DEWR, p.43.

Youth

Wage outcomes for young people covered by certified agreements are lower than for older workers, which is likely to reflect the fact that there is a concentration of young employees in industries with relatively low wage outcomes such as accommodation, cafes and restaurants and retail trade. The following statistics are relevant:

Average Annualised Wage Increase[11]

	2002	***2003***
Under 21 years	3.2%	3.4%
21 years and older	3.9%	4.1%

There has been some recent public debate regarding the issue of whether young people have less capacity to bargain over wages and conditions than older workers. It needs to be recognised that Generation Xers and Ys are the most educated generations in history. They have ready access to technology and information and they value their independence[12]. As Professor Wyn of the Australian Youth Research Centre recently said: *"In an uncertain environment the post 70's generation have learned to be self reliant, to see careers as a personal journey, to seek balance in their lives, and to be flexible. They are also very focused on themselves"*[13].

11 Ibid, p.47.

12 *New Generations at Work: Bridging the Gap*, Mark McCrindle, Social Researcher, McCrindle Research Pty Ltd – a paper presented at Ai Group's National PIR Conference, Canberra, 10 May 2005.

13 Article written by Professor Wyn for the *Sydney Morning Herald*, 18 June 2004 - as cited by McCrindle (see note 11).

Casual Employees

The nature and extent of casual employment is the subject of continuing debate. The percentage of the workforce employed as casuals has increased from 22% in 1993 to 26% in 2003[14]. This is mainly due to changes for men. The proportion of men who were casual increased by over a third in the decade.

The recently released ABS report *Australian Social Trends 2005* sheds light upon the nature of casual employment and the motivations for choosing this form of employment. It is often argued by unions that the rise in casual employment results in decreased job security and poorer wages and conditions for employees. The fact is that many casuals have long term and continuous jobs, with 57% of casuals being with their employer for over 12 months in 2003.

Many industries in which casual employees form the majority of the workforce are seasonal or dominated by lower skilled jobs (such as the hospitality, agriculture and forestry industries; and clerical, sales and service workers). This is indicative of business requirements as well as employee preferences, as this extract from *Australian Social Trends* highlights:

> *"Employers in these industries may need a workforce which is flexible to cover the seasonal nature of the job, or the daily variations in the workload (such as more staff needed at mealtimes in cafes and restaurants). These types of jobs attract younger workers as they offer the opportunity to gain experience and the flexibility to combine work with study. Women are also attracted to these types of jobs in order to combine work and family responsibilities".*[15]

[14] Australian Bureau of Statistics, *Australian Social Trends 2005*, ABS 4102.0, 2005

[15] Ibid

Unions continually bemoan the rise in casual employment, and yet concurrently push for more prescription in the conditions of ongoing employment, including through enterprise bargaining.

To prevent further casualisation of the Australian workforce, the answer is to remove prescription associated with ongoing employment through reforms to the workplace relations system.

10.0 Bargaining Outcomes – Assisting Employees to Achieve a Better Work and Family Balance

Over recent years there has been a substantial uptake of family friendly initiatives in all forms of agreements.

Every day in thousands of workplaces employers and employees reach agreement on arrangements to assist employees to balance their work and family responsibilities. These agreements are more often than not in the form of informal ad hoc arrangements to suit the particular circumstances at hand. A common example is where an employer allows an employee to leave early one afternoon to deal with a family issue which has arisen.

It is obviously very difficult to measure the number of informal agreements which are reached in Australian workplaces every day on work / family balance matters. However, no-one could seriously argue that such number is not extremely large.

Family friendly provisions are also very common in formal certified agreements and Australian Workplace Agreements.

The report *Agreement Making in Australia under the Workplace Relations Act 2002 and 2003* paints a positive picture in relation to the incorporation of family friendly provisions in agreements. The following statistics from the report are relevant:

- 44 per cent of certified agreements covering 87 per cent of employees contained at least one family friendly provision and provisions which assist employees to balance their work and family responsibilities were more prevalent;
- Over 70 per cent of AWAs contained at least one provisions relating to either family friendly leave or family friendly flexible work arrangements. Of these arrangements, more than half had three or more such provisions [16].

The quantity and nature of family friendly provisions in agreements varies from industry to industry. For instance, construction had the lowest incidence of family friendly provisions, along with manufacturing and other male dominated sectors, whilst industries with the highest occurrence of family friendly provisions were those with female dominated employment, such as education and health and community services [17].

[16] Ibid, pg 58

[17] *Agreement Making in Australia under the Workplace Relations Act 2002 and 2003,* DEWR.

11.0 The Government's Workplace Relations Reform Plans

On 26 May 2005, the Federal Government announced the following reforms to Australia's agreement making system:

- All collective and individual agreements will be approved on lodgement with the Office of the Employment Advocate (OEA);
- The *Australian Fair Pay and Conditions Standard* comprising five legislated minimum conditions (ie. the relevant award rate/s, annual leave, personal leave, parental leave and a maximum number of ordinary working hours) will become the test for all agreements, replacing the "no disadvantage test";
- The maximum term for agreements will be extended to five years.

Ai Group supports the direction of these reforms but it is premature to analyse the impact of the Government's reform plans until the details have been released.

Attachment

Summary of the US and UK Bargaining Laws

USA

In the US, employers and unions have a mutual legal obligation to bargain collectively under the *National Labor Relations Act*[18]. This imposes a duty on the parties to:

- meet at reasonable times
- confer in "good faith" with respect to:
    - the terms and conditions of employment, or the negotiation of an agreement; and
    - executing a written contract incorporating agreements reached.

A fundamental aspect of "good faith" obligations is the intent of the parties to reach agreement and conduct bargaining with an open mind[19]. Parties must exchange ideas, enter into dialogue and meet sufficiently regularly to progress bargaining to settlement or impasse.

[18] National Labor Relations Act ss. 8(a)(5), 8(b)(3)

[19] Decisions and regulations of the National Labor Relations Board greatly supplement and define the provisions of the Act. Collective bargaining is governed not only by this federal act, but also by state legislation, administrative agency regulations, and judicial decisions. In areas where federal and state law overlap, state laws are pre-empted.

However, section 8(d) of the Act states that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession". Hence the distinction is made between establishing procedural guidelines on good faith bargaining, and forcing parties to negotiate.[20]

Union Recognition

The obligation of an employer to meet and confer with a trade union is linked to the degree of union recognition within a workplace. Unions can apply to the National Labor Relations Board (NLRB) for a petition for certification to become part of the bargaining and this must be supported by a substantial number of employees. Additionally, this support must be pooled from a majority of those employees who are likely to be included in a bargaining unit.

Once a union establishes majority status in a bargaining unit, it has the authority to act exclusively for all employees in relation to collective bargaining. The employer is required to recognize it and bargain with it.

Consequences of a Breach in Good Faith

If a party believes that the other party is not bargaining in good faith, the party may file a charge of unfair labour practices with the NLRB, which will lead to a hearing if it deems the charge to be legitimate. Findings and recommendations are then made, which are open to appeal by either party. If the Board deems unfair labour practices to have occurred, it may issue an order requiring the offending party to "cease and desist" from their practices and to take appropriate affirmative action.

[20] Basic Guide to the National Labor Relations Act: General Principles of Law under the Statute and Procedures of the National Labor Relations Board http://www.nlrb.gov/nlrb/shared_files/brochures/basicguide.pdf

The NLRB has limited power to prevent and remedy unfair labour practices, by either employers or unions[21]. The NLRB can only intervene in disputes and enterprises whose operations affect "commerce". In effect this limits intervention to enterprises or disputes which affect "trade, traffic, transportation, or communication within states or which crosses state or territory borders…".

Of the total Unfair Labor charges filed each year (about 30,000), approximately one-third are found to have merit of which over 90% are settled[22].

Allegations of a breach in good faith are associated more with the negative publicity, than stringent penalties[23].

United Kingdom

In a similar vein to the US model, the UK system requires trade unions to have reasonable level of support amongst the workers before they are able to represent them in the negotiations of agreements. Under the UK *Employment Relations Act* 1999, parties are encouraged in the first instance, to reach voluntary agreement on recognised bargaining units. In this regard, a union may make a written request to the employer seeking recognition in collective bargaining procedures[24]. If such a request is accepted, the union is then entitled to conduct collective bargaining on behalf of the bargaining unit.

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21 The NLRB gets its authority from Congress by way of the National Labor Relations Act. The power of Congress to regulate labor-management relations is limited by the commerce clause of the United States Constitution.

22 National Labor Relations Board http://www.nlrb.gov/nlrb/press/facts.asp

23 Basic Guide to the National Labor Relations Act: General Principles of Law under the Statute and Procedures of the National Labor Relations Board http://www.nlrb.gov/nlrb/shared_files/brochures/basicguide.pdf

24 The employer must employ at least 21 workers - UK Employment Relations Act 1999, Schedule 1 Paragraph 7(1)

However, the employer has the capacity to refuse this request and, in this case, the Central Arbitration Committee (CAC) must determine whether the union has reasonable support amongst the workers, based upon:

- Whether members of the union (or unions) constitute at least 10% of the workers in the relevant bargaining unit; and
- Whether a majority of the workers in the bargaining unit are in favour of recognizing the union for collective bargaining[25].

If this majority is attained, and the CAC is satisfied that the bargaining unit is appropriate, it must issue a declaration as to the validity of union representation in bargaining.

The CAC also has the power to hold a secret ballot to determine the level of union recognition. Permission to represent workers in bargaining will only be granted when the union receives majority support in the ballot where at least 40% of those eligible to vote, support recognition.[26]

Method of Collective Bargaining

To assist the parties reach agreement, the CAC may impose a method of collective bargaining at the end of the agreement period. This has effect "as if it were contained in a legally enforceable contract made by the parties"[27]. However, parties may agree in writing that only certain aspects of CAC's proposals apply, and in this case, the written agreement shall have effect as a legally enforceable contract made by the parties.

[25] UK Employment Relations Act 1999, Schedule 1, Paragraph 36(1)
[26] Ibid, Schedule 1, Paragraph 29(3)
[27] Ibid, Schedule 1, Paragraph 31(4)

If one party believes the other has failed to comply with a bargaining method imposed by the CAC or agreed upon, they can apply to the relevant Court but "specific performance shall be the only remedy available"[28]. As such, there is no statutory authority which specifies a third party can intervene in negotiations and specify the terms of an agreement.

[28] Ibid, ss 31(6) and 63