WORKPLACE RELATIONS AMENDMENT (TRANSITION TO FORWARD WITH FAIRNESS) BILL 2008

Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

29 February 2008

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Introduction

The transitional arrangements embodied in the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (the Bill) are generally a balanced and workable approach to implementing the first stage of the Government's workplace relations policy. The Bill was shaped by a very constructive consultation process, and Ai Group is pleased that a number of industry's concerns have been addressed.

Under the Bill, new workplace agreements will be subject to a no-disadvantage test. A workplace agreement passes the no disadvantage test if the Workplace Authority is satisfied that the agreement does not, on balance, result in a reduction in the employee's overall conditions of employment under the relevant award and other relevant instruments. The re-introduction of a global no-disadvantage test is a fair and reasonable step which has credibility within the community.

The Bill prevents new AWAs being made. In this regard Ai Group would prefer that a form of statutory individual agreement remain in Australia's workplace relations system, underpinned by a no disadvantage test. Ai Group believes that employees and employers should have the right to pursue the form of agreement which best suits their needs, whether a collective agreement, an individual agreement, an agreement with a union or one directly with employees.

Although employers would prefer AWAs to remain an option for agreement-making, the transitional arrangements for phasing out AWAs deal with the issues in a practical way. In particular, the ability for AWAs to remain in operation for their full term is a vital element of the transitional arrangements. It ensures parties to an AWA cannot dishonour the deal struck under the laws

as they existed at the time and, in many cases, around which business decisions were structured. To enable parties to opt out of AWAs within their nominal term, other than by agreement, would be akin to allowing repudiation of legally binding contracts and would create a huge commercial mess for business.

Under the transitional arrangements set out in the Bill, employers using AWAs will be able to enter into Individual Transitional Employment Agreements (ITEAs) up to the end of 2009. This is an important transitional step which affords employers and relevant employees the flexibility of choosing to make individual statutory agreements during the transition period, before the new award system becomes operational on 1 January 2010.

Progress on award modernisation is vital because of the strong link between the abolition of AWAs and the Government's plans for a more flexible award system. Flexible and modern awards are necessary so that a common law contract can replace an AWA in circumstances where an employer and employee want to enter into an individual agreement. All awards will be required to contain a Flexibility Clause to enable an employer and an individual employee to agree on arrangements to meet their needs.

It is hoped that the Award Modernisation Request which forms part of the Explanatory Memorandum to the Bill will be the breakthrough needed to succeed where so many previous attempts have failed to make substantial progress in streamlining and modernising Australia's award system.

Importantly, the Request makes it clear that the process must not increase costs for employers or reduce entitlements for employees.

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

Ai Group has had a strong and continuous involvement in the workplace relations system at the national, state, industry and enterprise level for nearly 140 years. Ai Group is well qualified to comment on the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*.

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

Schedule 1 - Workplace agreements and the no-disadvantage test

Schedule 1 of the Bill:

- Prevents new Australian Workplace Agreements (AWAs) being made;
- Creates a new form of individual agreement (an Individual Transitional Employment Agreement – ITEA) for employers who have been using AWAs;
- Abolishes the Fairness Test and the concept of "protected award conditions";
- Implements a new "no disadvantage test" for agreement making;
- Removes the ability for parties to unilaterally terminate collective agreements after expiry; and
- Removes the current restrictions on workplace agreements incorporating by reference the terms of awards and prior workplace agreements.

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

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 1 – Main amendments **Individual transitional employment agreements** An employer who had at least one employee engaged under an AWA as at **1 December 2007** may enter into Individual Transitional Employment Agreements (ITEAs) for: • New employees; and • Existing employees covered by an AWA. ITEAs cannot be entered into for existing employees who were not covered under an AWA as at 1 December 2007. The fact that a period of work of a casual employee has ended does not of itself bring an end to the employment relationship for the purposes of determining whether the employee was covered under an AWA as at 1 December 2007. An ITEA may be made before the employee commences employment. ***[s.326]***	**Supported, with amendment**	The words *"and had not previously been employed by the employer"* are too restrictive and should be deleted from s.326(2)(b)(i). ITEAs should be able to be made with new employees even if they had previously been employed by the employer at some earlier time. There is no logical reason why an ITEA should not be able to be made with a person employed (perhaps many years) previously. In the construction industry it is common for employees to be offered new individual statutory agreements at the commencement of each new project setting out the employee's specific entitlements and obligations relating to that project. A similar practice occurs in the labour hire industry and in other contract labour situations. The provision, as currently drafted, would prevent these practices and frustrate the operation of the AWA transitional arrangements for hundreds of employers. Preventing the offering of ITEAs to former employees could act as a barrier to the employment of such persons and could disadvantage them. Presumably, the rationale for preventing ITEAs being offered to persons employed previously is to prevent an employee being terminated and immediately re-employed in order that an ITEA can be made. To address this issue a provision along the lines of the following could be inserted, say as s.326(6): *"An employer must not terminate and re-engage an employee for the purposes of enabling an ITEA to be offered to the employee".*

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
The no-disadvantage test An ITEA passes the no-disadvantage test if: • It does not result on balance in a reduction in the overall terms and conditions of employment under any reference instrument; or • There is no reference instrument in relation to the employee. A collective agreement passes the no-disadvantage test if: • It does not result on balance in a reduction in the overall terms and conditions of employment of the employees under any reference instrument relating to one or more of the employees; or • There is no reference instrument in relation to any of the employees; or • The Workplace Authority Director is satisfied that because of exceptional circumstances, approval of the agreement would not be contrary to the public interest. An example of where the Director may be satisfied of the above is where the agreement is part of a reasonable strategy to deal with a short-term crisis in and to assist the revival of the business. The Director must publish reasons for the decision. "Reference instruments" are defined. ***[ss.346D, 346E and 352(1)(ab)]***	**Supported**	The re-introduction of a global no-disadvantage test is a fair and reasonable step which has credibility within the community. The new requirement to publish reasons is reasonable and will encourage transparency and consistency in decision making.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Agreements are to be assessed, for the purposes of the no-disadvantage test, as in existence or operation immediately after lodgement ***[s.346F]***	**Supported**	This is the logical time to assess an agreement for the purposes of the no-disadvantage test
Before a workplace agreement is lodged, an employer may apply to the Workplace Authority to determine that an award is a "designated award" in circumstances where there would otherwise be no "reference instrument" in relation to the employee/s. Designated awards must: • be award/s regulating terms and conditions of employment of employees engaged in the same kind of work as the work performed by the employee/s; and • in the opinion of the Workplace Authority, be appropriate for the purposes of the no-disadvantage test; and • must not be an enterprise award. ***[s.346G]***	**Supported**	These provisions are substantially the same as the existing provisions concerning the pre-lodgement designation of awards in the context of protected award conditions and the fairness test. The criteria for designating awards are appropriate. It is essential that an award only be designated if an appropriate award exists.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
After lodgement, the Workplace Authority Director must determine that an award is a designated award where: • For an ITEA – there is no relevant collective or general instrument; • For a collective agreement – there is no relevant general instrument in relation to an employee or class of employees; However, for an award to be designated, the Director must be satisfied that there is an award that meets the following requirements: • The award regulates the terms and conditions of employees engaged in the same kind of work as the employee/s under the workplace agreement; • The award is appropriate for the purpose of the no-disadvantage test; and • The award is not an enterprise award. ***[s.346H]***	**Supported**	The approach to determining when it will be appropriate to designate an award is appropriate. It is essential that an award only be designated where an appropriate award exists.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Matters to be taken into account when testing agreement In deciding whether a workplace agreement passes the no disadvantage test, the Workplace Authority must have regard to the work obligations of the employee/s under the workplace agreement. In deciding whether an agreement passes the no disadvantage test or deciding whether to determine that an award is a designated award, the Workplace Authority Director may inform him/herself in any way considered appropriate including (but not limited to) contacting: the employer; the employee/s; a bargaining agent (for assessment after lodgement); and for union collective agreements and union greenfields agreements – the union/s bound. ***[s.346J]***	**Supported**	These provisions are reasonable. Although there would be nothing to prevent the Director informing him/herself by contacting the parties specified even if these provisions were not contained within the Act, their express inclusion is worthwhile.
Agreements which operate from approval The following forms of agreement come into effect **seven days** after they are approved by the Workplace Authority as passing the no disadvantage test: • ITEAs for existing employees; and • Collective agreements and multiple-business agreements (other than greenfields agreements). ***[ss.346K, 346L and 347(1)***	**Supported**	It is appropriate that these forms of agreement operate from approval. The seven day period is workable as this allows sufficient time for the parties to be notified that the agreement has passed the no disadvantage test and will come into operation.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Where an agreement which operates from approval passes or does not pass the no disadvantage test Where an agreement which operates from approval passes the no-disadvantage test the Workplace Authority Director must notify: • the employer; • if the agreement is an ITEA, the employee covered by the ITEA; • if the agreement is a union collective agreement, the union/s bound by the agreement. The notice must state that the agreement comes into effect seven days after the date of issue of the notice. Where an agreement which operates from approval does not pass the no-disadvantage test the Workplace Authority Director must notify: • the employer; • if the agreement is an ITEA, the employee covered by the ITEA; • if the agreement is a union collective agreement, the union/s bound by the agreement. The notice must contain advice on how the agreement could be varied to pass the no disadvantage test. ***[s.346M]***	**Supported**	This process is appropriate.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Varying agreements which operate from approval which do not pass the no-disadvantage test The employer may lodge a variation of the agreement with the Workplace Authority. If the agreement as varied passes the no-disadvantage test, it comes into operation on the seventh day after issue of a notice from the Workplace Authority. ***[ss.346N, P, Q and R]***	**Supported, with amendment**	The Bill does not permit an employer to give an undertaking in respect of any of the types of agreement which operate from approval. Currently, the giving of an undertaking by the employer as a means of varying an agreement which does not pass the fairness test is available generally. Under the current legislation and the pre-WorkChoices legislation, the provision of undertakings has proved to be an effective way of remedying situations where an agreement does not pass the no-disadvantage or fairness test. Requiring employers to lodge a formal variation rather than give an undertaking is unnecessary (particularly for minor issues) and increases red tape.
Agreements which operate from lodgement The following forms of agreement come into effect **upon lodgment** with the Workplace Authority: • ITEAs for new employees; • Employer greenfields agreements; • Union greenfields agreements; and • Multiple-business greenfields agreements. ***[ss.346, 346T and 347(1)]***	**Supported**	It is appropriate that these forms of agreement operate from lodgement.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Where an agreement which operates from lodgement passes or does not pass the no disadvantage test Where an agreement which operates from lodgement passes the no-disadvantage test the Workplace Authority Director must notify: • the employer; • if the agreement is an ITEA, the employee covered by the ITEA; • if the agreement is a union collective agreement, the union/s bound by the agreement. Where an agreement which operates from lodgement does not pass the no-disadvantage test the Workplace Authority Director must notify: • the employer; • if the agreement is an ITEA, the employee covered by the ITEA; • if the agreement is a union collective agreement, the union/s bound by the agreement. The notice must contain advice on how the agreement could be varied to pass the no disadvantage test. ***[s.346U]***	**Supported**	This process is appropriate.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Varying agreements which operate from lodgement which do not pass the no-disadvantage test If the Workplace Authority Director decides that an agreement which operates from lodgement does not pass the no-disadvantage test and the agreement is in operation the employer may lodge a variation of the agreement with the Director (or give an undertaking in the case of an employer greenfields agreement). If the employer lodges a variation or undertaking within 30 days (beginning on the 7th day after the date of issue of the Workplace Authority's notice), the agreement continues to operate but the employees are entitled to any compensation. If the employer does not lodge a variation or undertaking within 30 days (beginning on the 7th day after the date of issue of the Workplace Authority's notice), the agreement ceases to operate and the employees are entitled to any compensation. (However, redundancy provisions continue to operate for a designated period in accordance with the provisions of s.346ZD). A workplace agreement which ceases to operate because it does not pass the no-disadvantage test can never operate again. ***[ss.346V, W, X, Y, Z, ZA, ZD, ZE and ZG]***	**Supported, with amendment**	The approval and variation process is appropriate with the exception of the limitation placed upon the giving of undertakings. The Bill does not permit an employer to give an undertaking in respect of any forms of agreements which operate from lodgement other than an employer greenfields agreement. Currently, the giving of an undertaking by the employer as a means of varying an agreement which does not pass the fairness test is available generally. Under the current legislation and the pre-WorkChoices legislation, the provision of undertakings has proved to be an effective way of remedying situations where an agreement does not pass the no-disadvantage or fairness test. Requiring employers to lodge a formal variation rather than give an undertaking is unnecessary (particularly for minor issues) and increases red tape.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Employment arrangements which apply if a workplace agreement ceases to operate because it doers not pass the no-disadvantage test If a workplace agreement ceases to operate because it does not pass the no-disadvantage test, the employer and the employee/s are taken to be bound by: • The instrument/s that, but for the agreement having come into operation, would have bound the employer and the employee/s; or • If there is no such instrument/s – the designated award. ***[ss.346ZB and ZC]***	**Supported, with amendment**	Designated awards should not be used as a means for extending coverage of federal awards into areas that are currently award-free. The policy rationale for providing that designated awards have ongoing effect where the agreement does not pass the no-disadvantage test is not clear. While this problem also exists under the current "fairness test" legislative provisions, the problem did not exist under the pre-WorkChoices provisions. The no-disadvantage test which existed before the introduction of the WorkChoices amendments also allowed for awards to be designated where appropriate, for the purposes of assessing whether an AWA passed the no-disadvantage test. However, the designated award had no ongoing application. There is no sound policy reason for designated awards under the Bill's provisions to have ongoing application.
An employer must not dismiss because agreement does not pass the no-disadvantage test An employer must not dismiss or threaten to dismiss an employee if the sole or dominant reason is that a workplace agreement does not pass the no-disadvantage test. (A maximum penalty applies of $33,000 for companies and $6,600 for individuals. In addition, compensation can be awarded to the employee). ***[ss.346ZJ and ZK]***	**Supported**	This level of penalty is largely consistent with other penalties under the Act.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Nominal expiry dates for ITEAs and agreements which pass the no-disadvantage test due to exceptional circumstances An ITEA must have a nominal expiry date of no later than 31 December 2009. Agreements which are held to pass the no disadvantage test because the Workplace Authority Director is satisfied that due to exceptional circumstances, approval of the agreement would not be contrary to the public interest, must have a nominal expiry date of no later than 2 years. An example of where the Director may be satisfied of this is where the agreement is part of a reasonable strategy to deal with a short-term crisis in and to assist the revival of the business. ***[ss.352 and 346D(3)]***	**Supported**	Although employers would prefer that ITEAs or a form of individual statutory agreement be permitted to have a longer nominal term, it is recognised that this requirement accords with the Government's policy to have its new national workplace relations system fully operational from 1 January 2010. Under the provisions of the Bill permits, ITEAs continue to operate after their nominal expiry date, until terminated or replaced. This is very important. A maximum nominal term of two years for agreements reached in the exceptional circumstances referred to in s.346D(3) is reasonable.
The concept of "protected award conditions" is repealed. ***[Repeal of s.354]***	**Supported**	This concept relates to the fairness test and is no longer necessary given the implementation of the no-disadvantage test.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Calling up content of other documents The restriction on calling-up other instruments in workplace agreements is removed. ***[Repeal of s.355]***	**Supported**	Section 355 of the Act imposes substantial restrictions on workplace agreements incorporating by reference the terms of awards and other industrial instruments. Incorporating by reference terms from the relevant award/s within a workplace agreement, if this is what the parties wish to do, will give the parties more certainty that their agreement meets the new "no disadvantage test". Many employers, employees and unions prefer to have a simpler workplace agreement and incorporate by reference terms from the relevant award/s, rather than being forced to draft a comprehensive agreement. Section 355 is an unnecessary restriction on drafting.
Unilateral termination of ITEAs ITEAs may be terminated unilaterally with 90 days written notice after the nominal expiry date has passed. ***[s.393]***	**Supported**	Allowing unilateral termination of ITEAs is appropriate. It is also reasonable given that when an ITEA is terminated, an employee may be covered by any otherwise applicable award or agreement (since the Bill would repeal s.399 of the Act).
Termination of collective agreements by the AIRC The AIRC can terminate a collective agreement on application by one of the parties if it is satisfied that it would not be contrary to the public interest to do so and if certain criteria are met. ***[ss.397A and 398]***	**Supported**	The criteria which the AIRC is required to apply in determining whether an agreement should be terminated are workable and appropriate.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Consequence of termination of agreement – application of other industrial instruments When a workplace agreement is terminated the employee/s becomes covered by the award and/or collective agreement that would have operated if the workplace agreement did not exist. Existing priority rules re. the operation of awards, workplace agreements etc remain in place. ***[Repeal of s.399]***	**Supported**	These provisions are workable.
Part 2 – Transitional matters **Transitional arrangements for existing AWAs** AWAs cannot be made after the commencement date. Existing AWAs (made before the commencement date and lodged before or within 14 days of the commencement date) remain in force during their term and after their nominal expiry date until terminated or replaced by another agreement. AWAs may be terminated under the terms of the pre-transition Act. Existing AWAs generally cannot be varied. ***[Schedule 7]***	**Supported**	The Bill prevents new AWAs being made. In this regard Ai Group would prefer that a form of statutory individual agreement remain in Australia's workplace relations system, underpinned by a no disadvantage test. Ai Group believes that employees and employers should have the right to pursue the form of agreement which best suits their needs, whether a collective agreement, an individual agreement, an agreement with a union or one directly with employees. Although employers would prefer AWAs to remain an option for agreement-making, the transitional arrangements for phasing out AWAs deal with the issues in a practical way. In particular, the ability for AWAs to remain in operation for their full term is a vital element of the transitional arrangements. It ensures parties to an AWA cannot dishonour the deal struck under the laws as they existed at the time and, in many cases, around which business decisions were structured. To enable parties to opt out of AWAs within their nominal term, other than by agreement, would be akin to allowing repudiation of legally binding contracts and would create a huge commercial mess for business.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Once the nominal expiry date has passed, an employee on an AWA can make and approve a collective agreement or a variation of one and can take part in a secret ballot for protected industrial action. ***[Schedule 7A]***	**Supported**	The ability for an employee on an AWA which has passed its nominal expiry date to make and approve a collective agreement or variation and take part in a secret ballot is reasonable.
Transitional arrangements for existing collective agreements Existing collective agreements remain in force during their term and after their nominal expiry date until terminated or replaced by another agreement. Collective agreements and variations made after the commencement date and/or lodged later than 14 days after the commencement date are subject to the new no disadvantage test. ***[Schedule 7B]***	**Supported**	These provisions are workable and appropriate.
Part 3 – Other amendments of the Workplace Relations Act 1996 **Right of entry** Right of entry arrangements for ITEAs are the same as for AWAs. ***[Items 145 to 148 in the Bill]***	**Supported**	In order to allow for an appropriate transition for employers using AWAs, it is important that eight of entry arrangements for ITEAs be the same as for AWAs.

Schedule 2 – Awards

Ai Group strongly supports the need to streamline and modernise the existing award system. The current award system is overly complex and unwieldy. As well as being simpler, a modern award system should incorporate the necessary flexibility to enable employers and employees to make arrangements to meet their needs and to improve productivity and flexibility. The need for flexibility of the new award system is all the more important given that individual statutory agreements will not be available.

It is important that the award modernisation process is not used to extend award coverage to employees who are traditionally award-free and that modern awards do not apply to high income employees, which is consistent with Government policy. These issues are reflected in the Award Modernisation Request, although not in the Bill.

Ai Group has concerns in a few areas about the provisions of Schedule 2 of the Bill. These concerns are set out in the table below.

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Items 6 and 7 in the Bill re. Superannuation and the repeal of s.527(5) Superannuation will remain an allowable award matter beyond the existing cut-off date of 30 June 2008.	**Supported but a consequential amendment is needed to another piece of legislation**	Ai Group supports the retention of superannuation as an allowable award matter indefinitely. Superannuation clauses in awards typically deal with several important matters including earnings bases, default funds and the period of time during which contributions are to be maintained when an employee is absent due to a work-related injury. It is essential that a related amendment be made the *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004* (relevant sections of which commence on 1 July 2008) to preserve award earnings bases for superannuation purposes.
Objects of award modernisation The objects of award modernisation are set out in the Bill. ***[s.576A]***	**Supported**	The objects are balanced and appropriate.
Commission's award modernisation function The Commission's award modernisation function is set out. ***[s.576B]***	**Supported**	The Commission's function is balanced and appropriate.

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Award modernisation request The award modernisation process must be carried out in accordance with a written request made to the President of the AIRC by the Minister. The Request must specify: • The award modernisation process that is to be carried out; • The time by which the award modernisation process must be completed, which must not be later than 2 years after the making of the request; and • Any other matters that the Minister considers appropriate. The Request may also: • Require the AIRC to prepare progress reports; • Specify matters (in addition to those referred to in the Bill) about which terms may be included in modern awards; • Require the AIRC to include terms about particular matters in a modern award; • Give direction to the Commission about how, or whether, the Commission is to deal with particular matters in a modern award. The Minister may vary an Award Modernisation Request, including to specify a later time (no more than 2 years after the variation) for the completion of the award modernisation process. ***[s.576C, D and F]***	**Supported, with amendment**	Ai Group is committed to making every effort to ensure that the award modernisation process is completed by 31 December 2009. However, the exercise will be extremely complex and time-consuming. Hundreds of federal and former state awards with diverse conditions need to be modernised. If a rigid timeframe is forced upon the AIRC, there is the potential for unfairness to employers, employees or both. In one sense, an ambitious timeframe may help drive the process. However, it is vital that the deadline does not overshadow the need for careful consideration of the contents of modern awards and for an open and consultative process. Ai Group submits that the requirement upon the Commission should be to complete the award modernisation process, **to the extent practicable**, within two years. Ai Group is concerned that under the provisions of the Bill the Minister of the day is given unrestricted rights to add to the "allowable award matters" and even to require the Commission to include terms about "non-allowable matters" in awards. It may be that this approach has been devised only for the period leading up to 31 December 2009 and only in the context of the existing known Award Modernisation Request and will be dispensed with in the Government's substantive workplace relations legislation. If this is the case, Ai Group's concerns are reduced. Ai Group proposes that the complete list of matters which are allowable in modern awards be set out in the legislation and that this list only be able to be varied by Parliament through legislative amendment.

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Procedure for carrying out award modernisation process As soon as practicable after receiving an Award Modernisation Request, the President must establish one or more Full Benches to carry out the award modernisation process requested. ***[s.576E]***	**Supported**	The process is workable.
Making and varying modern awards Modern awards are to be made by a Full Bench. The Commission may vary modern awards. ***[s.576G and H]***	**Supported, with amendment**	The Bill confers on the AIRC a power to make orders to vary a modern award provided the variation is consistent with the relevant Award Modernisation Request. The nature and scope of this power is unclear. No procedural mechanisms are provided, nor is any guidance given as to the circumstances in which it may be appropriate for the power to be exercised. Ai Group submits that further detail is needed. It may be that this approach has been devised only for the period leading up to 31 December 2009 and will be dispensed with in the Government's substantive workplace relations legislation. If this is the case, Ai Group's concerns are reduced. Ai Group is concerned that modern awards can apparently be varied by a single member of the Commission (see s.576H), with no appeal rights (see s.576ZA, as discussed below).

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Terms that may be dealt with by modern awards Various matters which modern awards may deal with are set out. ***[ss.576J, K, L, M, N, R, Q, R, S]***	**Supported, with amendment**	Ai Group is concerned at the potential for unions to use the award modernisation process to pursue widespread improvements in existing minimum standards given the ability under the Award Modernisation Request for modern awards to "build on" NES entitlements (see clause 90 of the Request on page 80 of the Explanatory Memorandum). This could increase inflationary pressures and decrease the competitiveness of Australian industry. Also as set out above, Ai Group is concerned that under the provisions of the Bill the Minister of the day is given unrestricted rights to add to the "allowable award matters" and even to require the Commission to include terms about "non-allowable matters" in awards. Ai Group proposes that the complete list of matters which are allowable in modern awards be set out in the legislation and that this list only be able to be varied by Parliament through legislative amendment. Ai Group also proposes that a list of non-allowable award matters be included dealing with, for example, redundancy pay for employers with less than 15 employees. Although "leave" is an allowable award matter (proposed s 576J(h)), the Award Modernisation Request provides that terms about long service leave are not to be included in a modern award. It is appreciated that the Request itself is outside the scope of the inquiry as are the proposed National Employment Standards (NES) which are a closely related aspect of the proposed legislative changes. Under the proposed NES, existing long service leave entitlements would be preserved pending the development of a uniform national long service leave entitlement, in consultation with the States and Territories. Ai Group submits that terms about long service

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		leave should able to be included in modern awards until the uniform long service leave entitlement is established. Ai Group intends setting out its arguments in support of its position in the submission which it makes to the Government in relation to the NES Exposure Draft.
Terms that contain State-based differences All state-based differences in award terms and conditions are to be removed within 5 years. ***[s.576T]***	**Opposed**	There are huge differences between pay rates and award conditions in different States. S.576T of the Bill could substantially disadvantage many employees or employers or both. The provision could also create very significant hurdles for the award modernisation process. There is no valid reason why minimum wage rates and conditions should always be the same in every state and territory. The AIRC should have the discretion to decide whether state-based differences in wages and conditions are appropriate.
Who is bound be modern awards Modern awards are to specify which employers and employees are bound (including classes of employers and employees) and also may specify that particular registered organisations are bound. ***[ss.576U and V]***	**Supported**	These provisions are workable and appropriate.

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Modern awards and variation orders are final A modern award or an order varying a modern award: • Is final and conclusive; and • Must not be challenged, appealed against, reviewed, quashed or called into question in any court; and • Is not subject to prohibition, mandamus or injunction in any court on any account. ***[s.574ZA]***	**Opposed**	New section 576ZA applies privative provisions to award modernisation and replicates the existing provisions in s.574 of the Act which provides in similar terms as regards awards of the Commission and related orders. Such a privative provision could lead to unfairness and confusion in application of the law. There has been much litigation about a similar provision in s.179 of the Industrial Relations Act 1996 (NSW) and the law is inconclusive as to the effect of such a clause. It is appropriate that Full Bench decisions of Commission involving discretion should not be subject to contest. It is however a different matter to deprive a party the right to challenge a decision that is made beyond the power of the Commission, or to deprive a party of the right to claim that the Commission has refused to act in accordance with its duties. For many years these rights have been available to parties in the industrial jurisdiction and an examination of decided case law will demonstrate that these rights have been used in many cases where the Commission was exceeding or misunderstanding its powers. The current s.574 and the proposed section 576ZA deprive parties of what should be a basic democratic right to ensure that an organ of Government is not wrongly exceeding its powers or refusing to carry out its duties. To try to remove such rights is contrary to democratic principles and will create legal disputation as to the application of these provisions. S.576ZA should be removed from the Bill and s.574 should be amended to allow excess of jurisdiction or refusal to exercise jurisdiction to be the subject of legal proceedings.

Provisions of Schedule 2 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The proposed s.576ZA is of even greater concern, given s.576H of the Bill. Ai Group is concerned that modern awards can apparently be varied by a single member of the Commission, with no appeal rights.
Item 13 – Definition of "award" The definition of "award" in the Act does not include a modern award.	**Conditionally supported**	There are numerous provisions of the Act which relate to awards and will need to relate to both modern awards and other awards once modern awards come into operation on 1 January 2009. It is assumed that this issue will be addressed in the Government's substantive workplace relations legislation.
Item 29 in the Bill re. Facilitative provisions Ai Group proposes that paragraph 521(2) of the existing Workplace Relations Act be deleted.	**Additional provision needed in the Bill**	Paragraph 521(2) of the *Workplace Relations Act* was introduced as part of the WorkChoices reforms and opposed by Ai Group at the time. The provision ousts the operation of facilitative provisions which allow agreement to be reached with the majority of employees and then for the minority of employees to be required to adhere to the agreed arrangement. Such provisions are very common in respect of the implementation of 12 hour shifts and other hours of work arrangements. (For example, see paragraph 6.1.4(c) of the Metals Award and 22.7.7 of the *Telecommunications Services Industry Award 2002*). Employers need to be able to implement consistent shift arrangements across their businesses where processes (eg. production lines) require such consistency.

Schedule 3 – Functions of the Australian Fair Pay Commission

Under the provisions of the Bill the Australian Fair Pay Commission's wage review powers would be confined to annual minimum wage reviews.

Given the Government's decision to abolish the Fair Pay Commission, the provisions of Schedule 3 are workable.

Schedule 4 – Repeal of provisions of Workplace Relations Fact Sheet

Ai Group supports Schedule 4.

In lieu of the requirement to issue the *Workplace Relations Fact Sheet*, the Government intends requiring employers to issue a *Fair Work Information Statement* to new employees from 1 January 2010. This requirement is one of the 10 National Employment Standards contained within the Exposure Draft which has been released for public comment.

The removal of the requirement to issue the *Workplace Relations Fact Sheet* will reduce the regulatory burden on industry while consultation occurs regarding the content of the *Fair Work Information Statement*.

Schedule 5 – Transitional arrangements for existing pre-reform Federal Agreements

The Bill enables pre-reform federal agreements to be extended or varied (ie. those filed with the Australian Industrial Relations Commission (AIRC) before 27 March 2006 when the WorkChoices legislation came into effect and subsequently approved). The following conditions apply:

- Applications are to be made to the AIRC;
- The expiry date can be extended to a date not later than three years after the AIRC issues the order extending or varying the agreement;
- The terms of the agreement can be varied;
- All parties bound by the agreement must genuinely agree to the extension or variation;
- A valid majority of employees must approve the extension or variation;
- None of the parties can have organised or engaged in industrial action, or threatened to, on or after 13 February 2008 (ie. the date the Bill was introduced into Parliament);
- None of the parties can have applied for a protected action ballot in relation to proposed industrial action;
- If the terms of the certified agreement are varied, the Commission is required to apply a no-disadvantage test. The no disadvantage test is to be assessed against the relevant transitional award (including wage rates), together with relevant federal and state laws.

The ability for the AIRC to vary or extend these agreements in the circumstances provided is worthwhile and practical. Numerous pre-reform federal agreements remain in operation. In fact, hundreds were made in the weeks leading up to the

implementation of the WorkChoices legislation. The provisions of Schedule 5 of the Bill will avoid the parties to pre-reform federal agreements being required to enter into a "transitional" collective agreement" and then later an agreement under the Government's new workplace relations system which will be fully operational from 1 January 2010. This would involve complexity and cost and add to the regulatory burden on industry.

Allowing pre-reform federal agreements to be extended for up to three years from the date of the order recognises the need for business certainty and the considerable resources which may be invested in renegotiating a collective agreement.

This mechanism is likely to be attractive to some companies with pre-WorkChoices certified agreements because they will be able to avoid the Australian Fair Pay and Conditions Standard applying to their agreement-covered employees for another three years and continue to apply their pre-WorkChoices arrangements for leave and other matters dealt with by the Standard. Unions are also likely to be attracted to this mechanism because any "prohibited content" in the pre-reform federal agreement can remain.

Ai Group supports Schedule 5 of the Bill but proposes that the Schedule be amended to also allow Preserved State Agreements (PSAs) to be extended, subject to the same conditions as pre-reform federal agreements. A note submitted by OneSteel (an Ai Group member) is set out in the ***Annexure***. The note explains why this amendment is important for its business.

Schedule 6 – Notional agreements preserving state awards

Ai Group supports the provisions of Schedule 6.

Currently Notional Agreements Preserving State Awards (NAPSAs) expire on 26 March 2009. Without legislative change employees covered by NAPSAs will lose all of their "award" entitlements on this date.

The Bill extends the expiry date of NAPSAs until the end of 31 December 2009 or any later date prescribed by the regulations. This is fair and practical. By the end of 2009 it is envisaged that modern awards will be in place which cover employees currently covered by NAPSAs. It is noteworthy that the Award Modernisation Request which forms part of the Explanatory Memorandum to the Bill requires that the Commission give priority to modernising awards in industries and occupations with high numbers of NAPSAs. (See clause 20 of the Award Modernisation Request on page 79 of the Explanatory Memorandum).

Schedule 7 – Transitionally registered associations

Ai Group supports the provisions of Schedule 7.

Currently, transitionally registered associations (TRAs) lose their registration on 27 March 2009. The Bill extends this date to 31 December 2009 or such later date as prescribed by the regulations. There is merit in maintaining the registration of TRAs until the new workplace relations system is fully operational, and the ongoing provisions relating to registered associations are in place.

Annexure

Friday, 29 February 2008

Issue: Preserved State Agreements

OneSteel is the largest manufacturer of steel long products and is the leading metals distribution company in Australia. OneSteel has over 200 operational sites in Australia and New Zealand, more than 30,000 customers and employs approximately 10 000 people.

OneSteel has 25 existing collective instruments made prior to February 2006 which currently apply to its employees. Of these 5 are preserved state agreements.

The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* would insert a new clause 2A of Schedule 7 to the *Workplace Relations Act 1996*.

The proposed clause 2A would allow the Australian Industrial Relations Commission to make an order that extends the nominal expiry date of a pre-reform certified agreement or varies the terms of the agreement.

The introduction of WorkChoices legislation and it's coverage of constitutional corporation resulted in consent industrial instruments 'transferring' to the federal system. It is OneSteel's position that consent preserved state agreements should be afforded the status under any proposed transitional arrangement as pre reform agreements.

In view of the above OneSteel would request that consideration be given to make amendments to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* which would allow the Australian Industrial Relations Commission to make an order that extends the nominal expiry date of a preserved state agreements.